TAYLOR WALTON SOLICITORS

Welcome to NeTWork, your Employment Law Newsletter from Taylor Walton Solicitors

Special NeTWork Update

3 October 2014

Time off to accompany a pregnant woman to ante-natal appointments

From 1 October 2014 employees and agency workers will have a right to take unpaid time off to accompany a pregnant woman with whom they have a "qualifying relationship" to up to two antenatal appointments. It is expected that this new right will be used by partners of pregnant women wishing to attend the normal scans offered during pregnancy.

The right will apply to the baby's father, the mother's spouse or civil partner, a partner in an "enduring relationship" with the mother and the intended parents of a child in a surrogacy arrangement. Employees are eligible to exercise the right from the first day of their employment whereas agency workers will have to complete the 12 week qualifying period before being eligible to take time off.

Employees or agency workers who opt to exercise their right can take up to 6 and a half hours off work on two separate occasions. Employers will be permitted to request that the employee or agency worker provides a signed declaration stating that they are in a qualifying relationship with the pregnant woman and that the purpose of the time off is to attend an ante-natal appointment which has been made upon the advice of a midwife, nurse or medical practitioner.

Statutory holiday pay should include a sum in respect of commission

Lock v British Gas Trading

In this recent case, the European Court of Justice (ECJ) considered questions relating to holiday pay referred to it by the employment tribunal.

Mr Lock is an employee of British Gas. In his role as a sales consultant he receives a basic salary plus commission. The commission that he earns makes up 60% of his total remuneration and is paid several weeks after a sale is concluded. Mr Lock was on holiday between 19 December 2011 and 3 January 2012. During this time he did not make any sales and he suffered a reduced income in the months that followed as a result.

Mr Lock brought a claim in the employment tribunal arguing that his reduced income amounted to a breach of the Working Time Regulations 1998 (WTR) which provides that workers are entitled to be paid "a week's pay" for each week of leave. "A week's pay" is calculated under the Employment Rights Act 1996 and existing case law on this point suggested that workers who earn a basic salary plus commission are only entitled to holiday pay based on their basic salary unless the commission payments are "intrinsically linked" to the performance of the workers tasks.

The tribunal referred the matter to the ECJ to determine whether the Working Time Directive (which the WTR implements in the UK) requires member states to ensure that a worker is paid in respect of periods of annual leave by reference to the commission payments that he would have received had he not taken leave and, if so, how should the sum be calculated.

The ECJ decided that the Working Time Directive requires member states to ensure that workers whose remuneration consists of basic salary plus commission receive "normal remuneration" during periods of annual leave.

The ECJ commented that a reduction in a worker's remuneration that is liable to deter him from exercising his right to take annual leave is contrary to the objective pursued by the Working Time Directive. The ECJ felt that the commission payments received by Mr Lock were directly and intrinsically linked to the performance of his duties and that commission must be taken into account when calculating his statutory holiday pay. The ECJ commented that the amounts due during any period of holiday should focus on the average commission earned over a reference period. It was suggested by the Advocate General in the opinion released prior to the ECJ decision that an appropriate reference period would be 12 months.

The case will now return to the employment tribunal who will consider whether the WTR and the Employment Rights Act 1996 can be interpreted in line with the ECJ's comments.

Employers will need to be aware of changes in this area, particularly in view of the fact that employees can raise holiday pay issues under the legislation relating to unlawful deductions. This means that employees may be able to claim that a "series of deductions" has been made over a significant period of time. Furthermore, whilst this case related to commission payments, the ECJ's insistence in this case that workers should receive their "normal remuneration" raises questions about whether other types of payments should be taken into account such as overtime, payments related to time spent on call and bonus payments.

Is obesity a disability?

FOA, acting on behalf of Karsten Kaltoft v Kommunernes Landsforening, acting on behalf of the Municipality of Billund

The Advocate General (AG) has recently given his opinion on whether there is a free-standing prohibition on discrimination on the grounds of obesity and whether obesity can be classified as a disability under the Equal Treatment Framework Directive (implemented in the UK by the Equality Act 2010).

The AG considered these questions in relation to the case of *FOA, acting on behalf of Karsten Kaltoft v Kommunernes Landsforening, acting on behalf of the Municipality of Billund.* Mr Kaltoft worked as a child-minder for the Municipality of Billund in Denmark until he was dismissed in November 2010 after 15 years of service. During his employment Mr Kaltoft had a BMI of 54 (considered to be severely obese according to the World Health Organisation). Mr Kaltoft claimed that he had been dismissed because of his obesity and brought discrimination proceedings in a Danish District Court. The Danish District Court asked the ECJ for guidance on the questions referred to above.

The AG stated that whilst there was no free standing right not to be discriminated against on the grounds of obesity, obesity may amount to a disability under the Directive. The AG commented that obesity may amount to a disability in circumstances where it "hinders a person's full and effective participation in professional life on an equal basis with other workers.

The Employment Appeals Tribunal reached a similar conclusion to the AG when considering whether obese workers are protected from disability discrimination. In Walker v Sita Information Networking Computing Limited, the EAT held that obesity does not of itself render a claimant disabled but that effects of obesity might make it more likely that a claimant has impairments which are capable of amounting to a disability (for example, diabetes or mobility problems).

The AG's recent opinion (which is likely to be followed by the ECJ in its upcoming decision) demonstrates that employers must stay alert to the fact that an employee may be regarded as disabled in these circumstances and consideration may need to be given to matters such as making reasonable adjustments.

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Employer's failure to pay male employee enhanced additional paternity pay was not discriminatory

Shuter v Ford Motor Company Ltd

An employment tribunal has rejected a male employee's claim that his employer's failure to pay enhanced additional paternity pay amounted to direct and indirect sex discrimination

Mr Shuter is employed by Ford Motor Company Ltd (Ford). His wife is employed by Essex County Council. Following the birth of their son on 25 December 2012, Mrs Shuter returned to work from maternity leave on 15 July 2013. Mr Shuter took additional paternity leave (APL) between 15 July and 6 December 2013.

Ford pays employees on maternity leave up to 52 weeks full basic pay. Whilst Ford pays the 2 weeks' ordinary paternity leave at full basic pay, it pays those employees taking APL at the statutory rate.

Mr Shuter brought tribunal proceedings arguing that Ford's failure to pay enhanced additional paternity pay equivalent to its enhanced maternity pay was direct and indirect sex discrimination. He argued that he had lost approximately £18,000 as a result.

In relation to the claim for direct discrimination, the Tribunal rejected the employee's claims on the basis that it was not appropriate to compare himself to a female employee on maternity leave. The correct comparator was a female applicant for APL (such as a female spouse or civil partner) and the tribunal was satisfied that such an applicant would have been treated the same in these circumstances. With regard to indirect discrimination, the tribunal considered that the employer's policy of paying women full basic pay when on maternity leave was a proportionate means of achieving the legitimate aim of recruiting and retaining women in a male dominated workforce.

The issues raised in this case are likely to relevant to many employers in the coming months given that provisions relating to shared parental leave will come into force in April 2015.

The Children's and Families Act provides that parents will be able to share statutory leave after a child is born or placed for adoption. Subject to satisfying eligibility criteria, parents will be able to share 50 weeks of the leave and 37 weeks of the statutory pay. The draft regulations are complicated and businesses will need to make policy decisions about matters similar to the ones raised in this case and set up internal processes to deal with proposals made by employees intending to take the new shared parental leave.

Taylor Walton is providing free employment workshops on the issue of shared parental leave designed to assist and prepare businesses for the upcoming changes. Details

If you have any questions about these or other employment issues please call Heather Cowley (Partner & Head of Employment Law Department) on 01582 731161. Alternatively you can contact Heather via email at heather.cowley@taylorwalton.co.uk

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