TAYLOR WALTON SOLICITORS

# NeTWork

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## Employment Law Update

This month we talk about:

- Government issues new holiday pay guidance after "alarming" lack of awareness revealed
- Dismissal related to TUPE transfer- *Hare Wines Ltd v Kaur*
- Company Car fuel rates increase
- Working Time Regulations: Record Keeping obligations
- Brexit and GDPR: Using personal data after Brexit
- Direct Discrimination based on employer's belief - *Gan Menachem Hendon v De Groen*
- Tribunal Award Limits Increase

### Government issues new holiday pay guidance after "alarming" lack of awareness revealed

The Department for Business, Energy and Industrial Strategy (BEIS) has published guidance and an online calculator on how to calculate holiday pay for workers whose hours or pay are not fixed. The guidance, which is not binding, complements pre-existing government guidance on holiday entitlements for the majority of workers.

BEIS has also published data from a recent poll. The poll surveyed 2,154 UK workers, 320 of whom were atypical workers, about their perceptions and understanding of holiday pay entitlement. 84% were employed on full or part-time permanent contracts.

There was generally good knowledge among the participants that they were entitled to holiday pay, although less knew specifically how it is accrued and which types of workers receive it. 75% of participants believed that all workers (other than the self-employed) were entitled to holiday pay. This figure was slightly lower among atypical workers, at 69%. According to the data, 35% thought that only those in permanent roles are entitled to holiday pay.

A BEIS spokesperson said, "We want to see more businesses getting holiday pay right for their workers, helping to maintain a fair working environment for all. The onus is on you, as a responsible employer, to check your workers are receiving the correct amount".

During March and April 2019, Taylor Walton will be running free workshops considering issues relating to atypical workers and employment status. To book a place, please contact us on 01582 390568 or email us on events@taylorwalton.co.uk.

### *Dismissal related to TUPE transfer- Hare Wines Ltd v Kaur*

In this case, the Court of Appeal considered whether a tribunal had been entitled to find that a dismissal was for the sole or principal reason of a TUPE transfer, when it had also found that the transferee did not want the employee because of a poor working relationship

The claimant, Mrs Kaur, worked as a cashier in a wine wholesale business which, over the course of her employment, was run by several different corporate entities. In 2014, the business again transferred to another entity, Hare Wines Ltd (HW). This was a relevant transfer for TUPE purposes. Mrs Kaur's employment was terminated on the day of the transfer and she subsequently claimed automatically unfair dismissal on the basis that the reason for her dismissal was the transfer.

HW asserted that Mrs Kaur had objected to the transfer because of a difficult working relationship with a colleague (C), who was due to become a director of HW. However, the tribunal held that Mrs Kaur had not objected and that the real reason for the dismissal was that HW did not want her because it anticipated ongoing difficulties in her relationship with C. The tribunal concluded that this meant that the sole or principal reason for the dismissal was the transfer and so the dismissal was automatically unfair under regulation 7(1) of TUPE..

HW unsuccessfully appealed to the EAT and the Court of Appeal. HW argued that the tribunal's finding as to the real reason for dismissal was not a reason that was consequent on the TUPE transfer. The court disagreed. Once it was found that Mrs Kaur had not objected to the transfer, the central question was whether she had been dismissed because of her relationship with C, and the proximity of the transfer was coincidental; or because HW did not want her, the reason for that being that she did not get on with C. It was for the tribunal to determine which of those was the sole or principal reason for the dismissal and it had been entitled to prefer the latter to the former. The court highlighted two relevant factors. Firstly, dismissal had been on the day of the transfer which, while not conclusive, was strong evidence in Mrs Kaur's favour . Secondly, the poor relationship between her and C had endured for some time without the transferor seeking to terminate her employment.

This case does not alter existing case law but is a helpful illustration of the interplay between arguably competing reasons for dismissal in a TUPE scenario.

Taylor Walton are currently running free workshops aimed at HR professional which will provide an update on recent developments relating to TUPE. You can book you place to attend this seminar by contacting us on 01582 390568 or email us on events@taylorwalton.co.uk.

## *Company Car fuel rates increase*

Employers who base their Company car fuel rates on the government advisory rates should be aware of the changes that have taken place with effect from 1 March 2019. Company car advisory fuel rates apply where employers reimburse employees for business travel in their Company cars or to require employees to repay the cost of fuel used for private travel in a Company car. The new rates are as follows:

| Engine Size | Rate (per mile) |
|---|---|
| 1400cc or less | 11p for petrol and 7p for LPG |
| 1401cc to 2000cc | 14p for petrol and 8p for LPG |
| Over 2000cc | 21p for petrol and 13p for LPG |
| 1600cc or less | 10p for diesel |
| 1601cc to 2000cc | 11p for diesel |
| Over 2000cc | 13p for diesel |

The figures above show a decrease from those in place from 1 March 2018 in most cases. Employers should note that if the rate paid per mile of business travel is no higher than the advisory rate then HMRC will accept that there is no taxable profit and no Class 1 NICs liability.

Employer's using these government advisory rates should ensure that their policies and handbooks are updated accordingly.

## Working Time Regulations: Record Keeping obligations

An opinion published by the Advocate General in the European Court of Justice in February includes comments about the extent of an employer's record keeping obligations under the Working Time Directive (currently implemented by the Working Time Regulations 1998 in the UK).

In the case of CCOO v Deutsche Bank SAE , a group action which sought a declaration that the bank was under an obligation to record actual hours worked by staff, the Advocate General gave the opinion that in order to comply with duties under the Working Time Directive, national law must require employers to keep records of actual time worked by workers. In this case, Deutsche Bank had been keeping a record of absences for full working days (including sick leave, annual leave etc.) but not the actual hours worked during each day. The Advocate General's opinion was that although this obligation is not expressly set out in the Directive, it is fundamental to the attainment of the objectives which the Directive pursues "and to the enjoyment of rights which it confers on individuals". In other words, this would be the only way to give true effect to the limits on working time under the Directive.

Although the opinion of the Advocate General is not binding on the ECJ, it is usually followed and will give an indication as to how the law is to be interpreted in the future. How this potential clarification of the law will work in practice for employers with business structures that don't involve "clock-in/clock-out" methods of recording is yet to be seen.

## Brexit and GDPR: Using personal data after Brexit

The Department for Business, Energy & Industrial Strategy (BEIS) has published new guidance this month on possible changes that may arise for data controllers and data processors should the UK leave the EU either with or without a deal.

The guidance suggests that if the UK leaves the EU with a deal then the implementation period will mean there will be no immediate changes. The EU would assess the UK as soon as possible in order to confirm that its practices are adequate to continue to allow free flow of personal data in accordance with GDPR.

If the UK leaves the EU without a deal, again there will be no immediate change as the GDPR would continue to be part of UK law and businesses would continue to be able to send personal data from the UK to the EU due to the "unprecedented degree of alignment" between the UK and EU's data protection regimes. However as there will be no adequacy decision in place by 29 March 2019, the way the EU sends personal data to the UK is likely to change, at least until an adequacy decision is reached.

The guidance makes clear that either way, the most important thing for businesses at the current time is to make sure they are GDPR compliant and are following all ICO guidelines with regards to safeguards to be put in place to ensure your data flow is not disrupted by Brexit. Businesses should ensure that they are aware of the potential risk areas in their business where data is transferred to or from the EU. The guidance recommends that professional advice is taken if you are unsure how Brexit may affect your business.

## Direct Discrimination based on employer's belief - *Gan Menachem Hendon v De Groen*

Can a direct discrimination claim founded on an allegation of less favourable treatment by the employer for the sole reason of the employer's own beliefs succeed? The EAT has confirmed that it cannot in the case of Gan Menachem Hendon v De Groen.

You may recall the case of Lee v Ashers Baking Company in which the Supreme Court held that a bakery's refusal to create a cake with the words "Support gay marriage" due to their Christian beliefs did not amount to unlawful associative direct discrimination.

The bakers, the Supreme Court held, would have refused to supply a cake with this message to anyone and did not specifically refuse this customer because of his sexual orientation. The current case has now applied this principle in an employment context.

In this case, the Claimant was a Jewish teacher who worked in a Jewish nursery which was run according to ultra-orthodox Chabad principles. It was revealed to a director of the respondent in an event outside work that the Claimant lived with her boyfriend. Some parents of the nursery complained to the nursery about the Claimant teaching their children because living with a partner out of wedlock was against their beliefs. The Claimant was called to a meeting and asked to say she no longer lived with her boyfriend so the parents could be told this. She refused to lie. The Claimant was dismissed two days later after a disciplinary hearing.

The Claimant brought claims against the respondent for direct discrimination due to religious belief and/or sex, indirect discrimination on the grounds of religious belief and harassment on the grounds of sex. The ET upheld the Claimant's claims and the employer appealed.

The EAT decided that the tribunal was wrong to conclude that the Equality Act 2010 prohibits less favourable treatment by an employer on the basis of its own religion or belief in particular as this contradicted the reasoning in Lee v Ashers Baking Company. In particular that the purpose of discrimination law is to protect the person with the protected characteristic from less favourable treatment, not to protect a person without the protected characteristic from less favourable treatment because of another person with the protected characteristic. In addition, when put against a comparator, there will never be any difference in treatment because the person with religion or belief will treat all people the same due to their religion or belief.

This case is a useful demonstration of how the principles in the bakery case referred to above apply in an employment context.

## *Tribunal Award Limits Increase*

From 6 April 2019 the Tribunal compensation limits will be increasing as follows;

- Maximum amount of a week's pay has increased to £525 (from £508) - this is used to calculate a statutory redundancy payment or the unfair dismissal basic award and various other awards.
- The limit on the amount of unfair dismissal compensatory award has increased to £86,444 (from £83,682). Although this is subject to a limit of 52 weeks actual pay if this is less than the statutory figure
- The minimum amount of unfair dismissal basic award for trade union, health and safety, working time representative, pension scheme trustee and employee representative dismissals has increased to £6,408 (from £6,203)
- The maximum basic award for unfair dismissal will be increased to £15,750 (from £15,240).

The increases made reflect the increase in the RPI of 3.3% from September 2017 to September 2018.

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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