Employment Law Newsletter – Summer 2018

In this issue ...

The Summer break means that very little happens in August, so we hope you enjoy this issue and we will see you in September.

Should voluntary overtime be included in holiday pay?

In principle, yes. As we head off for our well-earned summer breaks, the Employment Appeal Tribunal (EAT) has taken its latest step towards settling what we should pay people when they take leave. In Flowers and others v East of England Ambulance Trust, it decided that voluntary overtime, when it is sufficiently regular and settled, must be included in the calculation of holiday pay for ambulance workers. The overarching principle is that holiday pay should correspond to a worker's normal pay. Excluding payments for voluntary work would offend that principle.

If you offer voluntary overtime, you should consider whether your workers' pattern is sufficiently regular and settled to form part of their holiday calculation. The court didn't guide us on the meaning of the term but the Employment Rights Act 1996 uses a reference period of the last 12 working weeks to calculate pay where necessary, so that is a good starting point. But be prepared to use a different period if that would be more representative.

What are the legal implications of moving offices?

As part of the proposed merger of Asda and Sainsbury's, it has been reported that Sainsbury's Head Office in London may close to make way for a larger joint headquarters in Leeds. What

should you consider when moving a large number of staff?

Is it a redundancy? An employee is redundant if you dismiss them because you have stopped operating in the place where you employed them. If you propose to dismiss 20 or more employees by reason of redundancy within 90 days at one establishment, you must notify the Department for Business, Energy and Industrial Strategy. You must also inform and consult trade union or elected staff representatives.

This collective consultation process must commence at least 30 days (if 20 to 99 employees are potentially redundant), or at least 45 days (if 100 or more) before the first dismissal takes effect. Relocation will be one alternative to redundancy.

What does the contract say? An employee's place of work should be noted in their contract of employment. A mobility clause may give you discretion to alter this to a new location, but courts tend to interpret such clauses narrowly. If relying on it, consult about the proposed move, give plenty of notice and consider helping with relocation expenses.

Persuasion Relocating existing staff is good for business. However, it may be disruptive and expensive for employees. Employees prefer eating carrots to being beaten with sticks so, in addition to relocation expenses, consider offering a financial incentive to persuade people to move with you. It should be cheaper than making redundancy payments and the expense of recruiting and training new staff. It will also avoid time-consuming and costly legal wrangles.

What if they refuse to move? You can make them redundant or enforce your mobility clause to force them to move. Think carefully before using the second option because paying a grumpy employee who doesn't want to be there or dismissing someone for refusing a reasonable management instruction will not help employee relations.

How should you respond if a reference reveals an applicant's poor attendance record?

In South Warwickshire NHS Foundation Trust v Lee and others the Employment Appeal Tribunal (EAT) found that it was discriminatory to withdraw a job offer in part because of a reference that focussed on an applicant's health problems and sickness absence. It is unlawful to treat someone less favourably because of something 'arising in consequence' of his or her disability where the prospective employer knows, or could reasonably be expected to know, that they had a disability.

What you should do

Speak to the referee rather than just relying on a written response

Discuss the reference with the applicant.

Seek medical advice.

Consider what adjustments you can reasonably make to help the applicant do the job.

Sleep-in care workers are not entitled to the national minimum wage while they are sleeping

Employers in the care sector have faced substantial back payments because of court rulings that sleep-in workers do not have to be awake and working to be entitled to the national minimum wage. In Royal Mencap Society v Tomlinson-Blake; Shannon v Rampersad and another t/a Clifton House Residential Home, the Court of Appeal examined the case of a care support worker in residential accommodation. She was paid the national minimum wage for day shifts, but she also worked sleep-in shifts from 10pm to 7am. For those she got a flat rate of £2.50 plus one hour's pay to reflect the possibility that she might have to get up to carry out some duties.

In a decision that provides long overdue clarity for the sector, the court decided that sleep-in workers should be treated as available for work when asleep and not actually working. The only time that counts for national minimum wage purposes is time during which the sleep-in worker was required to be awake for the purpose of working.

HMRC will need to rethink its social care compliance scheme, which was set up to allow care-sector employers to volunteer back payments to sleep-in staff who had been underpaid.

Given the importance of the issue, the decision may be challenged so that it can be considered by the Supreme court. Watch this space…

If you dismiss an employee who cannot show their right to work in the UK, should you allow them to appeal?

Yes, said the Court of Appeal in Afzal v East London Pizza Ltd t/a Dominos Pizza. Dominos dismissed Mr Afzal, who had time limited leave to work in the UK, because he could not show that he had the right to work in the UK or that he had applied in time to extend his leave. He had applied late, but Dominos had been unable to open the attachment to his e-mail that demonstrated it. An appeal would have remedied the problem and allowed Dominos to reinstate Mr Afzal.

It is difficult to balance apparently competing obligations of immigration and employment. If you get the employment process wrong, you may face claims of unfair dismissal and/or race discrimination. They can be expensive, stressful and damage your reputation. However, you are liable to prosecution and a civil penalty of up to £20,000 for each worker who has no right to work. So how do you navigate this tightrope?

What you should do

Where an employee has not presented sufficient evidence that he or she is entitled to work in the UK, you should conduct a thorough investigation before making any decision to dismiss.

Consider allowing the employee further time to demonstrate their right to work in the UK.

Liaise with the employee's immigration solicitor if the employee insists that they have an application outstanding.

Allow the employee to appeal against the decision; a reasonable but mistaken belief that that an employee cannot work in the UK will be insufficient to make a dismissal fair if they have been prevented from appealing.

Make your own enquiries through the Employment Checking Service.

If you would like to discuss these or any other issues facing your organisation please speak to your usual contact at Watershed or Keith Morgan on +44 161 703 5611

watershedhr.com