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HR LEGAL BRIEFING

September 2003

A number of high profile cases have been decided recently in relation to the Working Time Regulations 1998 ("WTRs"). We report on two this month, the first relating to the issue of a "week's pay" during any period of holiday and the second concerning the practice of including holiday pay as part of a "rolled up" hourly rate.

News items include an outline of trends in Employment Tribunal litigation, reports of a possible increase in annual leave and a review of the recently published ACAS guidance on redundancy handling.

CASES

A week's pay

In the case of **Bamsey & Others v Albon Engineering** Ltd, the Employment Appeals Tribunal (EAT) had to consider whether a worker who was contracted to work basic hours of 39 hours a week but actually worked an average of 58 hours a week (including overtime), was entitled to receive a sum relating to overtime payments as part of his holiday pay. The WTRs state that a worker should receive a week's pay for each week of leave and this is calculated, for workers with no "normal working hours", by reference to average weekly remuneration, including overtime pay, for the previous 12 working weeks. What is the position, however, for employees with normal working hours? Does overtime form part of normal working hours?

The EAT accepted Mr Bamsey's argument that the WTRs should be construed in a way which is consistent with the EC Working Time Directive. The purpose of the Directive, it was agreed, was to ensure that workers on annual leave are paid at a rate comparable to that which they normally receive. However, the EAT considered that the Regulations could not be construed in such a way on this occasion, since the WTRs confirmed unambiguously that normal working hours were basic contractual hours and did not include overtime.

Comment

It seems the WTRs do not properly implement the Directive in respect of holiday pay and one possible outcome of this case is that public sector workers may try to rely upon the direct effect of the Directive in the public sector, to support an argument that holiday pay should include an element of overtime pay.

Rolled up holiday pay

In our HR Legal Briefing of May 2003, we reported a Scottish Court of Session decision which ruled that it was unlawful under the provisions of the WTRs for employers to pay workers' holiday by "rolling up" holiday entitlement into normal hourly rates instead of paying workers as and when leave is taken.

The EAT's decision in **Marshalls Clay Products Ltd -v- Caulfield & Others** has reversed the position, holding that such roll up provisions are not unlawful.

Comment

It is recommended that the rolled up element of pay representing holiday entitlement should be clear from the contract, and thus expressly agreed by the parties. Also, employers should keep records of holiday taken and take reasonably practical steps to ensure that workers take their holiday entitlement during each holiday year.

NEWS

Tribunal trends

The latest statistics published in the annual report of the Employment Tribunals Service show that the number of Employment Tribunal applications has dropped by over 10 per cent. for the second year running. The number of costs awards rose dramatically for the third year in succession, reflecting greater willingness on the part of Tribunals to make awards. Approximately 70 per cent. of costs awards made last year were in favour of employers. However, the costs awards remain quite low, at an average of £1,524.

Directors' pay

A recent quarterly review of FTSE 350 top pay awards shows that although bonus payments rose sharply, salary movements for FTSE 100 lead executives were comparatively subdued in the first quarter of 2003. This trend looks set to continue given the high profile resistance to excessive directors' pay at the annual general meetings of many listed companies this year.

Increased holiday?

In August there were reports that statutory minimum annual leave could be increased in the future as part of a Government deal to enable it to keep existing maximum working week opt-out provisions. Currently the WTRs provide that the maximum working week should be 48 hours, but that workers may enter into written opt-out agreements dis-applying this limit.

The UK is the only EU Member State to have provided such an opt-out arrangement under its legislation implementing the Working Time Directive. The opt-out was originally intended to be a temporary provision and the Government is now coming under pressure from Europe to get rid of it. Employers can currently include bank holidays (of which there are normally eight a year) within this entitlement. Press reports suggest that an increase in annual holiday entitlement, by way of excluding public holidays from the statutory entitlement, may be offered to the European Commission by the Government in return for being able to retain the opt-out.

Redundancy handling

At the end of last year, the UK Advisory, Conciliation and Arbitration Service (ACAS) published guidance for employers, trade unions and employee representatives on how best to handle redundancies. It is not a statutory Code of Practice, and it has no legal effect. However, the concern is that Employment Tribunals will take the guidance into account when deciding the fairness of economic terminations.

A number of the recommendations contained in the guidance might be perceived by employers as setting new standards for employers to achieve (and imposing greater burdens). For example, ACAS recommends that:

- All employers should establish a formal redundancy policy. In our experience, it is still fairly exceptional for an employer to have implemented a written redundancy policy.

- All employers, regardless of size, should consult with appropriate trade unions or employee representatives about proposed redundancies, no matter how many employees may lose

their jobs. Employers generally do not consult on a collective basis with employees, unless the statutory obligation to do so is triggered (ie there is a proposal to dismiss 20 or more employees at one establishment within a period of 90 days or less).

- Employers should consider offering employers a right of appeal against their selection for redundancy. Again, this is not standard practice at the moment.

We recommend that any readers considering a down-sizing programme review the guidance before finalising their plans. It is available at the ACAS website: http://www.acas.org.uk.

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