HRML
HR AND EMPLOYMENT LAW SPECIALISTS

Human Resources
Employment Law
Project Support

Employment Law
Update

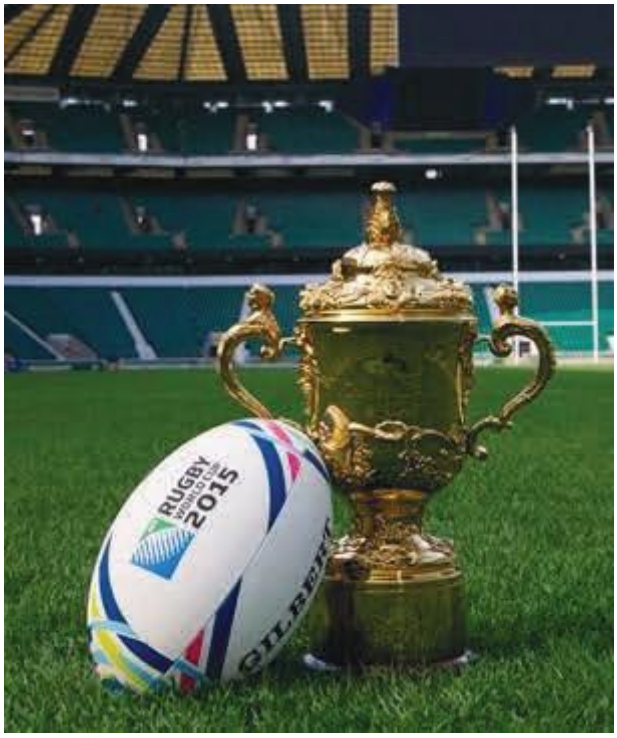
October 2015

The HRML Rugby Edition

Employment Law Update October 2015

In the run up to the General Election in May, the pace of employment legislation slowed down and now we wait to see what the Conservative Government want to do about a number of pressing issues including Zero Hours Contracts and how exactly to calculate holiday pay if you need to include payments such as overtime, commission etc. In the meantime, they have set out their plans for the **National Living Wage** (NLW) of £7.20 to be introduced from April 2016 for workers aged 25 and above. The adult National Minimum Wage (NMW) rate is currently £6.50. It will increase to £6.70 from October 2015. From April 2016 the premium will come into effect on top of the NMW, taking the National Living Wage to £7.20. The NMW will continue to apply for those aged 24 and below, with the premium added on top for more experienced workers taking the total hourly rate to the National Living Wage.

Cardiff Castle



Facebook

Once again employees are reminded to be cautious in what they post and employers are reminded to check they have a robust social media policy following the outcome of *British Waterways Board v Smith*. Mr Smith was dismissed for gross misconduct relating to comments he had posted on Facebook 2 years previously; it had been brought to light as part of an ongoing grievance investigation. Not only did his employer have a robust policy that stated any activity that could embarrass or discredit his employer could result in action being taken but the employee's privacy settings allowed his comments to be viewed publically and this was particularly damaging to his defence. Had the settings been more private, it would have been more difficult to argue that his actions had caused such embarrassment for his employer.

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For more detailed advice and clarity you are advised to seek further advice from HRML.

Calculating Holiday Pay

Following recent rulings around what payments should be included within holiday pay, the legal process has "caught up" with the spirit of the law and the Leicester Employment Tribunal amended the wording of the Working Time Directive 1998 to include an extra subsection to make them comply with the Working Time Directive. The subsection provides that the holiday pay of a worker whose pay normally includes commission should be varied to reflect the amount of work done i.e. to take account of commission.

This matter is not yet at an end as there is no definitive answer yet as to how long the reference period needs to be to calculate the "average" amount of pay but given that employees can make an unlawful deduction of wages claim for unpaid holiday in circumstances where their pay does vary because of overtime or other "regular" payments, we would suggest you speak to one of our employment law experts to see if this ruling could affect you.

Can ignorance be a defence?

In *E Ivor Hughes Education Foundation v Morris* the employee claimed that his former employer had failed to consult properly during a large scale (20 or more) redundancy process. The employer ran a school with declining numbers and they decided in February 2013 that if numbers did not improve by April 2013, they may have to consider closing the school. Numbers did not improve and in April they decided to close the school and issued all employees with notice of redundancy. At the Employment Appeals Tribunal, they argued that they were unaware that they should have commenced consultation in February and the Judge commented on their "reckless failure" to take legal action. This is a reminder that ignorance is not a defence and that whenever you are contemplating business change, be it redundancies or changing terms and conditions, there is likely to be a legal framework and obligations to follow. So this is a timely reminder of the importance of speaking to one of our employment law experts during the early planning phase to ensure that you don't inadvertently fall foul of the law.

Collective Consultation and Redundancy

Back in May 2013, and a result of the fallout following the collapse of Woolworths, the Employment Appeals Tribunal decided in a landmark ruling to insist that the employer collectively consults if there was likely to be more than 20 redundancies in more than one "establishment". This allowed workers in stores with less than 20 employees to claim compensation for failure to consult and has meant that employers must be very cautious if they are making more than 20 redundancies in a 90 day period across the whole organisation in different geographical locations/entities. The case was referred to the European Court of Justice to gain clarity and they have held that "establishment" does mean an individual workplace or entity to which the worker is assigned and that Woolworths was right to consider each store separately. This is not the end of the process as it now needs to go back to the UK Court of Appeal who will reverse the EAT decision and take us back to the status quo – although until then, the revised version is still the law.

Does a worker accrue annual leave whilst on long term sick?

It has been law for some time that employees on sick leave continue to accrue annual leave whilst off sick but the recent case at the Employment Appeal Tribunal of *Plumb v Duncan Print Group* has clarified how far back annual leave can accrue. Mr Plumb was off sick between April 2010 and February 2014 when his employment terminated and although the employer paid leave accrued in the current leave year, they refused to pay leave for the previous 3 years. The EAT held that an employee on sick leave may choose to take holiday whilst on sick leave, he does not have to and can take the leave at a later date i.e. when he returns to work and it can be carried over to the next leave year, just like leave accrued during maternity leave. However, this carry over is not indefinite and the EAT decided that an employee must take their annual leave within 18 months of the end of the relevant leave year. On this basis, Mr Plumb was entitled to receive payment in lieu of untaken annual leave for 2012 but not 2010 or 2011.

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Is Type 2 Diabetes a disability?

Under the Equality Act a person is disabled (and therefore protected) if they have a "long term physical, mental or psychological impairment which has a substantial and adverse impact on day to day activities" and whenever you are looking at someone with a potential health problem, it is important to keep this definition in mind. In a recent Employment Appeal Tribunal, they considered whether Type 2 diabetes was covered in *Metroline Travel Ltd v Stoute*. Despite an earlier tribunal ruling that without a controlled diet, the employee would have suffered effects from diabetes, the EAT said that merely abstaining from certain foods was not a controlled diet and was not therefore "treatment" and as such was not a disability under the Equality Act. It should be highlighted that not all diabetes sufferers would fall within this bracket and it should not be a generalised approach but raises the interesting point that just because it is a clinically recognised condition, does not mean it is covered.

And here's the rugby bit….!

Major sporting events, such as the Rugby World Cup, can boost morale, but can also lead to increased absenteeism. Research suggests that one in five employees admit to taking a "sickie" during a major sporting event, employers need to decide how to deal with the problem.

Employers should have a clear absence policy including the provision that simply not turning up to work without following the notification procedure will be considered misconduct. Employers should also remind employees that holiday requests will be dealt with in the usual manner, and that their usual rules around alcohol apply (so an employee attending work still "the worse for wear" after their home team's win, may still find themselves the subject of a disciplinary hearing).

Of course, if an employer would like to be proactive and raise morale, they may choose to show matches or allow a more flexible approach to working hours, if appropriate. Consider if you have employees from other nations who may wish to be allowed to watch their team's game as well.

What constitutes working time?

The Court of Justice of the European Union (CJEU) has ruled that for those with no fixed place of work the time spent travelling between home and the first and last place of work should count towards working time, but this does not necessarily entitle them to extra pay. The ruling related to a Spanish case (*Federacion de Servicios Privados v Tyco Intergrated Security)* brought by a group of mobile engineers who were employed to install and maintain security equipment on customer premises. The Court decided that the additional travel time should constitute working time for the purposes of the Working Time Directive (WTD) which is concerned with the organisation of working time including average weekly working time, rest periods and rest breaks. This does mean that employers need to ensure that if average weekly working hours are likely to regularly exceed 48 hours, they should consider either requesting employees to "opt out" of the 48 hour limit or reduce their scheduled "working time" accordingly but it does not mean the extra time must be paid. In addition, under the UK's National Minimum Wage Act and Regulations, the general position is that travel time between home and a place of work is excluded from the obligation to pay the NMW, including for mobile workers and this has also been backed up by case law. Employer should also consider whether there is any impact on their employees' entitlement to an 11 hour rest period between shifts.

Statutory payments and limits:

⇒ The standard rate (for workers aged 21 and over) will increase to £6.70 per hour

⇒ The rate for workers aged 18 to 20 will increase to £5.30 per hour

⇒ The young workers rate (for workers above compulsory school age but under 18) has also remained unchanged at £3.87 per hour

⇒ The rate for certain apprentices (those in their first year or aged under 19) will increase to £3.30 per hour.

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