



## Hewitsons' Employment LEGAL UPDATE

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### **Should voluntary overtime be included in the calculation of holiday pay?**

In the recent case of *Dudley Metropolitan Borough Council v Willetts*, the Employment Appeal Tribunal (EAT) considered whether voluntary elements of work (including voluntary overtime) should be included in the calculation of an employee's holiday pay.

Dudley Metropolitan Borough Council employed Quick Response Operatives. These employees were electricians, plumbers, roofers and other similar professions who, alongside their day jobs, undertook entirely voluntary overtime not specified within their contracts of employment. Such voluntary overtime attracted overtime pay in addition to standby and callout allowances. Such voluntary payments were excluded from the employees' holiday pay. As a result, a group of 56 employees claimed that they had not received the correct rate of statutory holiday pay, contending that their holiday pay should take into account the voluntary payments.

Relying on the test that "normal pay" is that which is "normally received", the original Employment Tribunal (ET) held that overtime pay and allowances should be included in the employees' statutory holiday pay for the four weeks' minimum leave required by the Working Time Directive. The ET held that such voluntary payments were made in such a manner and with sufficient regularity to be considered part of the employees' normal remuneration. Were this not the case, the ET noted that a worker who received regular overtime payments may be deterred from taking annual leave.

The Council appealed to the EAT, contending that for voluntary tasks overtime payments should not be classed as normal remuneration as there was no intrinsic link between the payment and the performance of tasks required under the employees' contracts of employment.

Dismissing the appeal, the EAT held that voluntary overtime, on-call allowances and out of hours payments could count towards holiday pay. For a payment to count as "normal", the EAT held that it must have been paid over a sufficient period of time on a regular or recurring basis, even if only one week per month. This is a question of fact and degree for the ET. The EAT found a clear link between the payments and the performance of the tasks required under the employees' contracts of employment as, once those shifts or standby periods began, the employees were in no different position from any other employee who is required by his or her contract to work overtime, be on standby or attend callouts.

The EAT remitted the case back to the original ET to consider remedy.

## **Extent of an employer's responsibility for an employee's psychiatric illness**

In the case of *BAE Systems (Operations) Ltd v Konczak*, the Court of Appeal (CA) considered how to assess compensation in cases where an employer's unlawful act, albeit in conjunction with other factors, causes an employee psychiatric harm.

Ms Konczak was employed by BAE Systems (Operations) Ltd (BAE) within the liaison team. Following allegations from Ms Konczak that she had been subjected to bullying and harassment, in January 2005 Ms Konczak was moved from the liaison team to the commercial team at a different location. Just over a year later, Ms Konczak's line manager, Mr Dent, suggested she return to the liaison team. Ms Konczak was not happy as the move meant she would be working alongside colleagues whom she alleged bullied and harassed her. Ms Konczak therefore did not believe her earlier complaints had been taken seriously.

Following a meeting at which Ms Konczak had broken down in tears, Mr Dent suggested to her that women take things more emotionally than men, while men tend to forget things and move on. Ms Konczak was signed off with work-related stress, never returned and was subsequently dismissed. Ms Konczak filed various claims in the Employment Tribunal (ET), including in respect of Mr Dent's comment and her dismissal.

Eventually after numerous hearings, an Employment Tribunal (ET) ruled that Mr Dent's comments were discriminatory on the grounds of sex and upheld Ms Konczak's other claims, awarding compensation of £318,629.66. BAE appealed and the case reached the CA.

Rejecting BAE's appeal, the CA held that, in cases where psychiatric injury is alleged to have been caused by an employer's wrongdoing, a tribunal needs to examine (with the benefit of expert medical opinion) whether it is possible to identify a particular part of the suffering which was caused by the employer. In Ms Konczak's case the CA held that the ET was entitled to accept one of the medical expert's views that Mr Dent's comments had been the final straw that had pushed Ms Konczak over the edge into mental illness. As a result, whilst Ms Konczak's injury had been caused by multiple factors, it was not divisible and the employer was liable to pay the compensation in full.

## **WHAT TO LOOK OUT FOR**

### **EHRC's strategy to reduce gender, ethnicity and disability pay gaps**

Citing that there are "huge economic benefits to decreasing pay gaps", on 15th August 2017 the Equality and Human Rights Commission (EHRC) published a report, "*Fair opportunities for all: A strategy to reduce pay gaps in Britain*", setting out suggested changes with the aim of reducing gender, ethnicity and disability pay gaps.

The report outlines 6 key recommendations relating to the action that it believes the Government and employers should be taking to reduce such pay gaps. The recommendations are to:

1. unlock the earning potential of education by addressing differences in subject and career choices, educational attainment and access to apprenticeships;
2. improve work opportunities for everyone, no matter who they are or where they live;
3. offer flexibility in all jobs at all levels;
4. encourage men and women to share childcare responsibilities;
5. reduce prejudice and bias in recruitment, promotion and pay decisions; and
6. report on progress in reducing pay gaps.

For further details on what the EHRC believe that the Government and employers should be doing, a copy of the report can be viewed [here](#).

### **Transsexual employees at work - ACAS guidance**

Following a study by the Institute for Employment Studies which suggested transsexual employees were not receiving sufficient support from managers at work, ACAS has issued new gender reassignment guidance to assist employers.

The guidance suggests a number of measures, including the introduction of clear policies on dealing with non-binary genders at work, the provision of diversity and equal opportunities training for line managers and the use of LGBT champions to raise awareness of transsexual issues at work.

The new ACAS guidance can be viewed [here](#).

For more information please contact Nick Hall on 01604 463375 or [click here](#) to email Nick.



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