
Hewitsons' Employment
LEGAL UPDATE

February 2018
Vol.20 No.2

# What's New

**Court of Appeal holds that employer did not have constructive knowledge of employee's disability**

The Court of Appeal has upheld the Employment Tribunal's (ET) decision in *Donelien v Liberata* that an employer did not have constructive knowledge of an employee's disability and therefore had no duty to make reasonable adjustments.

Miss Donelien was employed by Liberata as a court officer. Miss Donelien took several long periods of sick leave, giving different explanations for her illness, including stress, viral infections and high blood pressure. She often did not inform her employer that she was ill and would not be coming into work. Miss Donelien was referred to Occupational Health, who held that she did not have a disability and that her problems were 'managerial not medical'. The periods of sickness continued as did Miss Donelien's failure to comply with the notification procedures for her sickness absence. Liberata brought disciplinary proceedings against Miss Donelien, following which she was dismissed.

Miss Donelien brought an ET claim against Liberata. Part of her claim was that she was disabled and that her employer had failed to make reasonable adjustments to accommodate her disability.

The ET held that Liberata had not discriminated against Miss Donelien by not making reasonable adjustments to accommodate her disability because it did not know, and could not be expected to know, that she was disabled. It held that Liberata had taken steps to ascertain the nature of Miss Donelien's illness and could not have been expected to do more in the circumstances. The Employment Appeal Tribunal (EAT) upheld this decision.

Miss Donelien then appealed to the Court of Appeal. The Court of Appeal upheld the EAT's decision and rejected the appeal. It held that this was not a case where the employer had just 'rubber stamped' the medical report. Liberata had held return to work meetings with Miss Donelien to try to understand the nature of her illness, and received correspondence from Miss Donelien's GP. Liberata had not just relied on the Occupational Health report. Liberata had however been given unclear information and Mrs Donelien had also been unhelpful in respect of their enquiries which had made it very difficult for Liberata to establish the position. As a result of this, the Court held that Liberata could not reasonably be expected to have known that Miss Donelien was disabled, and that it could not have been expected to do more to establish whether she was disabled.

**Time worker spent on stand-by at home held to be working time**

The European Court of Justice (ECJ) has held in *Ville de Nivelles v Matzak* that time a firefighter spent on stand-by at home was 'working time'.

Mr Matzak was a firefighter employed by Ville de Nivelles in Belgium. He had to be on stand-by during the evenings and at the weekend for one in every four weeks. This stand-by time was unpaid and he had to be able to report to the fire station within no more than eight minutes after receiving a call, if necessary. This impacted where Mr Matzak could live, as he had to ensure his home was within eight minutes from the fire station. Mr Matzak brought a claim against his employer, arguing that he should be paid for the time he spent on stand-by duty. The majority of his claim was upheld at first instance. On appeal by his employer, a number of questions were referred to the ECJ for a preliminary ruling, one of which was whether the EU Working Time Directive prevented stand-by time at home from being treated as 'working time'.

It has previously been held that when a worker is required to be physically present and available at a place determined by the employer, this must be regarded as 'working time'. However, when a worker must be contactable, but not physically present in a particular place, this is not 'working time'. The ECJ held that in this case as Mr Matzak did not just have to be contactable during stand-by time, but also had to be able to arrive at his workplace within eight minutes, his employer was imposing an obligation for Mr Matzak to be physically present at his home. This limited his ability to have social and personal interests during stand-by time, and, as a result, should be regarded as 'working time'.

## WHAT TO LOOK OUT FOR

**New rules on taxation of termination payments**

The government is bringing in a series of reforms to the taxation and National Insurance treatment of termination payments.

Currently if an employee receives a non-contractual termination payment in lieu of notice (PILON), the first £30,000 of this can be paid without deductions for tax and National Insurance. However, any contractual payments in lieu of notice, for example, where there is a PILON clause contained in the employee's contract of employment, will be subject to tax and National Insurance contributions.

From 6 April 2018, all PILONs will be treated as earnings and therefore taxable as such. This means that regardless of whether there is a PILON clause in the contract, when payments in lieu of notice are made the amount equivalent to the employee's basic pay will be subject to tax and National Insurance contributions.

The new rules will not include statutory redundancy payments (or contractual redundancy payments to the extent that they do not exceed statutory redundancy payments) and these payments will still be covered by the £30,000 tax free threshold.

**Consultation on changes to employment law**

The government has announced that it intends to implement many of the recommendations contained in the Independent Taylor Review, through its Good Work Plan. The Review was published last year after having investigated modern employment practices. It contained 53 recommendations and the government intends to act on 52 of them. The reforms will provide

new rights for millions of flexible workers and improve conditions for those in the gig economy.

The reforms include ensuring workers know their holiday and sick pay entitlements from day one, naming and shaming employers who fail to pay Employment Tribunal awards, ensuring new and expectant mothers know their workplace rights and giving all workers the right to demand more stable contacts and a pay slip.

Full information is available here.

**New compensation limits and minimum awards in force from 6 April 2018**

The compensation limits and minimum awards payable under employment legislation will increase from 6 April 2018. The new limits and minimum awards will only apply where the appropriate date for the cause of action falls on or after 6 April 2018. For any appropriate dates prior to 6 April 2018, the old limits and awards will apply. The new limits will be:

- The limit on the compensatory award for unfair dismissal will increase from £80,541 to £83,682
- The limit on a week's pay for the purposes of calculating statutory redundancy payments and the basic award for unfair dismissal will increase from £489 to £508
- The limit on guarantee pay will increase from £27 per day to £28 per day
- The minimum basic award in cases where a dismissal by virtue of health and safety, employee representative, trade union or occupational pension trustee reasons will increase from £5,970 to £6,203.

For more information on any of the items raised in this update please contact Nick Hall by clicking here.


Follow

Follow