HEWITSONS

Hewitsons Employment

LEGAL UPDATE

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What's New

Holiday Pay

The Employment Appeal Tribunal (EAT) in *Flowers & others v East of England Ambulance Trust*, held that voluntary overtime received over a sufficient period of time can be included for the purposes of calculating holiday pay.

In this case Mr Flowers and his colleagues were employed by the Trust as part of the ambulance service. Whilst employed in these roles, Mr Flowers and his colleagues regularly undertook overtime, some of which was contractually required, for example, continuing to care for a patient or deal with an emergency call once their shift had finished. The employees could however also undertake voluntary overtime, but were not obliged to do so.

Mr Flowers and his colleagues made claims to the Employment Tribunal for unlawful deductions from wages on the basis that the calculation of their holiday entitlement should have included voluntary overtime not just the compulsory overtime. The Trust argued that voluntary overtime should not be included in the calculation of holiday pay because there was no contractual obligation for the employees to undertake such overtime.

In the first instance, the Employment Tribunal (ET) agreed with the Trust and found that voluntary overtime did not form part of an employee's normal remuneration. The ET's view was that the overtime was purely voluntary due to the fact that the employees were not required by their contract to undertake it.

On appeal, the EAT upheld the appeal and found that the voluntary overtime should have been included when calculating the employees' holiday pay. It held that it would be untenable for an employee's agreement to carry out specified hours of voluntary overtime for reward not to give rise to contractual obligations. The definition of pay cannot be confined to basic pay, excluding overtime, because normal interpretation deems overtime as part of pay and so the EAT's view was that in these circumstances this applied to both voluntary and compulsory overtime. Further, proper interpretation of the Trust's contract included voluntary overtime as part of the calculation of normal remuneration. Therefore, voluntary overtime received over a sufficient period of time should be included as normal remuneration for the purposes of holiday pay.

Discrimination on the grounds of philosophical belief

The EAT in *Gray v Mulberry Co (Design) Ltd* held that belief in copyright over an individual's creative work was not a philosophical belief under the Equality Act 2010.

Ms Gray began working for Mulberry, a well known design company on 28 January 2015. Mulberry sought to protect its intellectual property rights and required all employees to sign a contract of employment which included various intellectual property clauses. Ms Gray refused to sign the contract on the basis that she believed that these restrictions would interfere with her ability to undertake artistic activities outside of work. Mulberry explained to Ms Gray that the scope of the contract was limited to activities relating only to Mulberry's business, and made amendments to the contract to try to address Ms Gray's concerns. However, when Ms Gray still refused to sign the contract Mulberry dismissed her with notice.

Ms Gray issued proceedings in the employment tribunal claiming discrimination (direct and indirect) on the grounds of her philosophical beliefs. At the ET, Ms Gray claimed that her belief that the 'statutory human or moral right to own the copyright and moral rights of her own creative works and output' amounted to a philosophical belief.

In the first instance, the ET rejected Ms Gray's claims. Whilst it found that Ms Gray's belief was genuinely held, it held that it did not meet the level of cogency, seriousness, cohesion or importance required to evoke protection under the Equality Act.

Ms Gray appealed and the EAT dismissed the appeal, finding that the ET correctly concluded that the belief lacked sufficient cogency to qualify as a 'philosophical belief'.

Unfair Dismissal

The Court of Appeal (CA) in the case of *Patel v Folkestone Nursing Home Ltd*, has held that that there was no dismissal where an employee had exercised his contractual right to appeal and was reinstated, and so was not able pursue a claim for unfair dismissal.

Mr Patel was employed as a healthcare assistant in Folkestone Nursing Home. Mr Patel was subject to disciplinary proceedings following allegations of sleeping on duty and for falsifying residents' records, following which he was dismissed for gross misconduct. The Nursing Homes' disciplinary procedures were contractual and Mr Patel appealed in accordance with those procedures. The Nursing Home upheld Mr Patel's appeal and found that Mr Patel should be reinstated. The outcome letter stated that it had been decided that Mr Patel was not guilty of sleeping on duty; however, failed to refer to the allegation that he falsified records. For this reason, despite the Nursing Home contacting Mr Patel to arrange for him to return to work, Mr Patel did not return to work and treated himself as being dismissed.

Mr Patel issued proceedings for unfair dismissal. The question for the ET was whether at the time Mr Patel issued his claim, there was a 'live dismissal', or whether the dismissal had been overturned by the successful appeal and invitation to return to work.

In the first instance the ET held that there was a live dismissal at the time Mr Patel issued proceedings because the employer's letter was unsatisfactory in dealing with the allegations of falsification and the effect this had on Mr Patel.

The Nursing Home appealed and the EAT held that, as a result of the employer's letter, Mr Patel

was not dismissed at the time the proceedings were issued. Mr Patel appealed, arguing that the EAT was wrong to state that that the success of the contractual appeal automatically revived his contract.

The CA dismissed Mr Patel's appeal. In the CA's view, a reasonable person in the shoes of the employee and employer would accept that the employment relationship had been restored in the circumstances. It was irrelevant that Mr Patel had other motivations for appealing; because in exercising his contractual right to appeal, he took the risk that if reinstated any proposed or pending unfair dismissal claim would be defeated. However, the CA accepted that a case could be made that the Nursing Home's letter confirming the outcome of appeal was unsatisfactory, and that there was an argument that this resulted in the employee being constructively dismissed. Both parties were therefore invited to make written submissions in this regard.

WHAT TO LOOK OUT FOR

NHS workers and students to trial the EU Settlement Scheme

As we reported in last month's Employment Legal update, in June the Home Office released further details about the steps that EU citizens and their families will need to take to apply for the new immigration status of "settled status" in accordance with the transitional arrangements following the UK's exit from the EU.

The Home Office has now announced that a pilot for the new EU Settlement Scheme online application process will begin on 28 August 2018, during which the online application process will be tested by up to 4,000 EU members of staff and students from various NHS Trusts and universities in North East England. It is intended that the pilot will help the Home Office test and improve the proposed application process before it is rolled out further. Applicants will follow the standard application process, providing proof of identity, proof of UK address and must declare any criminal convictions and if successful they will receive 'settled status'.