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Employment Law

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Voluntary overtime and holiday pay

The Court of Appeal in *East of England Ambulance Service NHS Trust v Flowers* has held that payments for voluntary overtime should be factored into the calculation of holiday pay where the payments for voluntary overtime were part of "normal remuneration".

Previous case law, notably the decision of the Employment Appeal Tribunal ("EAT") in *Dudley MBC v Willetts*, had established that whether voluntary overtime amounted to normal remuneration, and therefore should be factored in when calculating the amount of holiday pay owing, depended on whether it was worked with sufficient regularity to become normal. The Court in *Flowers* approved the decision in *Willetts.*

Although the law on holiday pay is now clear, the practical application remains a difficult problem for employers. Firstly, the requirement to factor in overtime or commission payments when calculating holiday pay only applies to the four weeks' of holiday derived from regulation 13 of the Working Time Regulations 1998 and not the additional 1.6 weeks' holiday derived from regulation 13A or any additional contractual holiday entitlement. In addition, employers need to assess whether an employee is receiving additional pay, such as overtime payments or commission, with sufficient regularity that they form part of normal pay. As this may differ between employees, it leaves employers with difficult decisions as to how to administer the payment of holiday pay.

Flawed disciplinary process leads to finding of discrimination

The Employment Appeal Tribunal (EAT) in *Tywyn Primary School v Aplin* has held that a gay head teacher was unfairly constructively dismissed and had been discriminated against because of his sexual orientation following a flawed disciplinary process.

Mr Aplin, a primary school head teacher met two 17-year-old boys on Grindr (an app that requires users to certify they are over 18) and the three of them had had sex. A local authority investigation concluded that no criminal offence had been committed and that no child protection issues were involved. The school conducted their own disciplinary investigation into whether Mr Aplin's conduct had brought the school into disrepute, whether his conduct outside work had undermined his ability to fulfil his role and whether it displayed so gross an error of judgement as to undermine the school's confidence in him.

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The investigating officer produced an investigation report which the employment tribunal subsequently criticised as Mr Gordon, the investigating officer, considered that child protection issues were involved. Various procedural failings followed, including Mr Gordon advising the disciplinary panel, tailoring his report to include only information that supported his view and sharing papers with the panel that had not been shared with Mr Aplin. Prior to the school's disciplinary process being completed, Mr Aplin resigned and brought claims for constructive unfair dismissal and sexual orientation discrimination in the Employment Tribunal.

The Employment Tribunal held that both the failings in the disciplinary process and the procedural flaws at the appeal stage were breaches of the implied term of mutual trust and confidence. They further found that there was sufficient evidence for an inference of sexual orientation discrimination to be drawn in respect of Mr Gordon.

On appeal, the EAT upheld the tribunal's finding that there were sufficient facts from which discrimination could be inferred on the part of Mr Gordon. Mr Gordon had been unable to give any alternative explanation for his conduct, which led to the finding of discrimination being upheld.

This case is a reminder to employers that in the majority of disciplinary cases an employee should be granted full access to the evidence that is to be considered during a disciplinary hearing. It also highlights that where there is no alternative explanation given for unreasonable conduct, employers and individuals are at risk of successful discrimination claims being made against them.

Increase to injury to feelings awards

For claims presented on or after 6 April 2019, injury to feelings awards made to individuals who have succeeded with discrimination or whistleblowing claims will increase.

When making an injury to feelings award an employment tribunal considers which of three bands the case falls within (lower, middle or upper), which will depend on the seriousness of the discrimination or detriment the individual has suffered, and then make an award within the appropriate band. The bands, known as the *Vento* bands, are now as follows:

- Lower band: £900 - £8,800
- Middle band: £8,800 - £26,300
- Upper band: £26,300 - £44,000

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No causal link between written warning and disability meant discrimination claim failed

A common form of disability discrimination complaint is one for discrimination arising from disability. This is where an employer treats an employee unfavourably because of "something arising in consequence of" the employee's disability and the employer cannot show that the treatment was justified as a proportionate means of achieving a legitimate aim.

There is often an argument as to whether the "something arising" relied on by a claimant is actually "in consequence of" the employee's disability. The courts and tribunals have generally taken a broad view when considering this question e.g. the connection might involve several links and need not be the immediate cause of the "something". This approach is consistent with the EHRC Code which states that "*the consequences of a disability include anything which is the result, effect or outcome of a disabled person's disability*."

In *iForce Ltd v Wood,* Ms Wood's disability was osteoarthritis which worsened in cold, damp weather. iForce changed its working practices in 2016 which meant that Ms Wood would have to move between benches whilst working rather than remain at one bench. Ms Wood refused to work at certain benches which were nearest to loadings doors as she believed they were colder and damper and would exacerbate her arthritis. iForce investigated the benches in question and found that there was no material difference in temperature or humidity at these benches compared with the others. iForce found Ms Wood's refusal to obey instructions unreasonable and gave her a written warning.

Ms Wood pursued a claim of discrimination arising from disability. She alleged the "something arising" was her belief that working on certain benches would exacerbate her condition. Although Ms Wood's claim succeeded before the employment tribunal, the decision was overturned on appeal. The Employment Appeal Tribunal held that there was no causal link between the claimant's disability and her false belief. A key distinction was drawn between the belief that cold and damp conditions would exacerbate her disability and the mistaken belief that certain benches were actually colder and damper.

This case highlights the value to employers of making evidence-based decisions. The investigation into the warehouse conditions enabled the employer to conclude that the new working method would not exacerbate Ms Wood's disability and, therefore, that it was a reasonable request to ask her to adopt the new working methods.

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What must be in an employment contract?

From 6 April 2020, legislation will come into force implementing aspects of the government's Good Work Plan. The changes will require employers to provide written statements of employment particulars, often this is done by issuing employment contracts, to employees and workers on or before the first day of employment.

The information that must be included within the statement of employment particulars is also being extended in scope with, among others, the following additional particulars being required: the days of the week the worker is required to work, whether the working hours may be variable and how any variation will be determined; any paid leave to which the worker is entitled; details of all remuneration and benefits; terms relating to any probationary period; and any training entitlement provided including whether any training is mandatory and/or must be paid for by the worker.

If you wish to check whether your employment documentation is up to date and to ensure you are prepared for the upcoming changes, take advantage of Actons' free contract and handbook review - click here for more information.

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