

Voluntary Overtime and Holiday Pay

Following a spate of decisions over the last few years from the Employment Appeal Tribunal (EAT) and European courts on calculating holiday pay for those who work overtime, we have been waiting for a final decision in *White & Others v Dudley Metropolitan Borough Council* on how this applies to voluntary overtime (rather than guaranteed and non-guaranteed arrangements). A binding decision has now been made by the EAT that payments for voluntary overtime should be included in holiday pay if they are regular enough to constitute “normal pay”.

So what does this mean?

In this case, the Employment Tribunal (ET) accepted that staff at Dudley Metropolitan Borough Council could “drop on and off the rotas to suit themselves whether day by day, week by week, month by month or permanently” and additional work was “almost entirely at the whim of the employee, with no right to enforce work on the part of the employer”. This would therefore support a situation where working overtime was entirely at the employees’ choice. However, the ET concluded that the council workers’ overtime payments were sufficiently regular to constitute “normal pay” and therefore referring to previous case

law, confirmed that “normal pay” must be included in holiday pay.

As this decision is binding, *from now on any employer who has employees working overtime on a voluntary basis where the pattern of overtime work extends for a sufficient period of time on a recurring basis, must include overtime pay in holiday pay for a minimum of 20 days of the employee’s annual leave (including bank holidays).*

[for] employees working overtime... [employers] must include overtime pay in holiday pay for a minimum of 20 days of the employee’s annual leave...

Unhelpfully however, the tribunals have not provided a definition of what is a sufficient period of time and regularity and have said that each case will have to be decided individually on its own facts. Our advice would be that employers should apply the principle that employees and workers should receive the same pay while they are on annual leave as they normally receive while they are at work. This means that most employees who work



overtime more than just sporadically would be entitled to holiday pay taking into consideration overtime; this should prevent any claims. Most payroll software will be able to calculate holiday pay on this basis but holiday pay in this instance is calculated by taking the normal weekly working hours multiplied by the worker’s average hourly rate over the preceding 12 weeks taking account of any overtime.

Employers may also face claims for backdated holiday pay. The Deduction from Wages (Limitation) Regulations 2014 means that a claim for backdated deductions for holiday pay are subject to a two year cap. This means that the period that any claim can cover will be limited to a maximum of 2 years.

Call Anita Wynne on 01438 747 747 for more information on this and how to implement this change.



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LEGAL NEWS

Employment Tribunals – Free for All?

With the Supreme Court ruling that Employment Tribunal fees are unlawful, and employees can once again make tribunal claims at no personal cost, the business world is asking what impact will this have on employers and businesses in the UK?

The introduction of the Fees Order in July 2013 meant that would-be claimants could no longer bring claims against employers, or ex-employers, for free. The fees totalled £390 to take a simple claim through to tribunal hearing and over £1,200 for more complex cases, payable by the claimant. The purpose of the fees was to redistribute some of the high costs associated with operating tribunals from the taxpayer to those actually using the service, and to deter vexatious or 'time-wasting' claims which had little merit.

The impact was a 70% long-term reduction in claims being brought in Employment Tribunals. Great news for employers. But following claims from Unions that those mostly affected were low-paid women, being 'priced out of justice', Unison have succeeded in their legal challenge to the Fees Order through the Supreme Court. The Government has immediately stopped charging fees and has confirmed it will refund fees to employees paid by employees since July 2013.

Barbulescu v Romania

Mr Barbulescu, an engineer and Romanian national, used his business Yahoo Messenger account to send and receive personal messages from his brother and his fiancée, including messages of a private and personal nature regarding his health and his sex life.

His employer discovered this activity by monitoring his internet usage and used transcripts printed from both his business and personal Yahoo Messenger accounts during the disciplinary proceedings. Personal use of the messaging service was a breach of his employment contract

But what are the implications for employers in respect of this decision?

Law firms and HR professionals are expecting a number of impacts including an immediate increase in the volume of tribunal claims in several key categories:

◆ **Discrimination claims brought by employees with less than 2 years' service** – whilst the high fees for discrimination claims have been a barrier for many employees who cannot bring claims for Unfair Dismissal, we are now likely to see more employees with less than 2 years' service making claims with a discrimination argument.

◆ **Low value claims** – the former high volume/low value claims for things like unlawful deduction of wages, failure to provide a written contract of employment, etc., have diminished under the Fees Order. We expect to see the number of these claims rising again.

◆ **Claims for recent dismissals** – any recent dismissals where employers may have taken a risk due to fees making a claim less likely, may end up back on the table.

◆ **Historic cases** – whilst the Supreme Court ruling did not touch on this, it is anticipated that employees who were deterred from bringing claims because they could not afford

the fee, and whose claims are now out of time, will seek to persuade tribunals that extensions are fair and just, given that the ruling is that fees have always been unlawful. Watch this space for further updates on this point.

Whether we see a 70% increase in tribunal claims, reverting to pre-fees' levels, remains to be seen. But employers should seek to protect themselves where possible. To minimise the risk of low value claims employers should be ensuring they have a good foundation of contractual documents and policies in place to meet basic legal compliance. Make sure sound processes and procedures are followed when dealing with employee relations' matters and seek advice from your HR provider to ensure you are prepared for the new (old) risk of Employment Tribunals.

For further advice, please call Andrew Hall on 01438 747747.

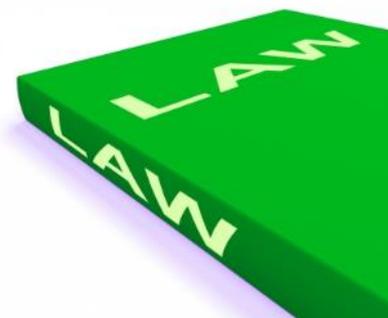


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with the company and he was subsequently dismissed.

The Romanian national courts originally upheld the employer's decision to dismiss, ruling that the monitoring was a proportionate step to verify that the employee was carrying out their professional tasks during working hours. The employer had policies clearly stating that personal internet use was strictly forbidden and which warned of the possibility of surveillance.

However, in a surprise decision, the European Court of Human Rights

(ECHR) overruled this and concluded that Mr Barbulescu's right to privacy under Article 8 of the European Convention of Human Rights had been breached by his employer. It is not possible to appeal such a ruling from the ECHR.

Employers should be aware that they may be at risk of unlawful processing of personal data and legal action by their employees due to monitoring of electronic communications, especially in respect of sensitive personal data. A review of IT policy and procedure is recommended to minimise potential exposure.

The Embodiment of our Values

Nine months ago, the Beststart team were having an animated brainstorming session about how the company could celebrate its 10th Anniversary on 14th September. As well as discussing a range of ideas to thank our loyal clients and partners, without whom we wouldn't be where we are, and for celebrating internally, we all agreed we would like to do something to support others.

Further brainstorming sessions followed as clearly there are many good causes that are close to the hearts of our team. Eventually, we decided to support a young, talented athlete to realise their dreams. Setting up a successful business had been the dream of both Anita and Daf, and the team felt it would be a fitting celebration to help someone else reach theirs. Following discussions with SportsAid, a charity which provides financial support and recognition to the country's brightest sporting prospects, 16 year old heptathlete, Pippa Earley was selected.

The team felt that Pippa embodied Beststart HR's values and capabilities – *passionate in our attitude, have an ability to approach challenges openly and flexibly, and above all else, possess a desire to reach our full potential.*

Since working with Pippa, she has had tremendous success as those who follow us already on Twitter and LinkedIn will know. She was selected to represent England in the Commonwealth Youth Games in Bermuda where she came fourth in the 70m hurdles. She has then competed in the South of England Championships where she came first in both long jump and hurdles; the Nationals where she achieved a new British record in the U17 Women's 80m Hurdles with 10.98 seconds – the first person to go under 11 seconds without wind assistance; and finally, in the Schools Games National Finals, she won the gold in the U17 Women's 80m Hurdles in 10.94 seconds – what a fabulous way to end the season.

As well as celebrating her fantastic achievements on the track, we wanted to get to know the Pippa behind the success and so we recently interviewed her:

When did you start athletics?

When I was younger, I was into gymnastics and competed at a high level. However, when I was 12 years old, I broke my finger in practice and couldn't compete, so to maintain my fitness I started doing some athletics. For a while I did both but I soon realised that my passion was for athletics. I always enjoyed many of the disciplines and so after competing in the Heptathlon in the English Schools Championship a few years ago, I decided to become a Heptathlete.



Who are your role-models?

Allyson Felix and Kendra Harrison. Allyson is an American track and field sprinter who competes in the 100 metres, 200 metres, and 400 metres. Kendra is an American hurdler. She represented the United States at the 2015 World Championships in Athletics and the 2016 IAAF World Indoor Championships.

How many days/hours do you have to train per week?

I have to train around 24 hours per week which I squeeze in at the weekends and after school. As I do the Heptathlon I have to train on each discipline: Monday, it is long jump and strength and conditioning; Tues-

day, I do throwing – javelin and shot followed by running in preparation for the 400 metres; Wednesday is hurdles which is my favourite; Thursdays, I am in the gym doing weights, strength and conditioning; Saturday is hurdles and sprints; and finally Sunday is high jump. I sometimes supplement this with a gym session at lunch time.

What is your favourite fitness exercise?

As hurdles is my favourite discipline, my favourite training is the hurdle drills I do with my hurdles coach Lloyd Cowan.

What do you intend to use your sponsorship money for?

I intend to put it towards being able to go abroad this winter for warm weather training with my coach. I wasn't able to go last year but it is excellent preparation for the season and so I hope it will make a difference as I move up to compete in the juniors next year.

If you couldn't be an athlete, what would you want to be when you leave school?

I would like to be a coach – I have coached some girls at my school on a Thursday lunch time and loved it.

When you are not training, what do you like to do to relax?

I actually enjoy watching athletics on the television as you can learn a lot about technique from watching others.

We know you have to eat a healthy diet but what is your guilty pleasure?

I love flapjacks, especially the Graze lemon drizzle flap jacks, which I have as a treat.

What three words would your friends at school use to describe you?

Funny, happy and sporty!

Follow Pippa's progress on Beststart HR's LinkedIn and Twitter account @BeststartHR.

Performance Management and Coaching Case Study

Background

Sarah had worked as a standalone Account Manager for a large pharmaceutical company for 18 months and had an excellent knowledge in her area of expertise. She consistently met and exceeded her sales targets and had built up a good relationship with her customers.

In the Spring, the accounts teams were restructured under the leadership of a new Regional Manager and as a result Sarah found herself paired with another Accounts Manager. After several months, the relationship began to breakdown between the 2 Account Managers as Sarah became frustrated with her colleague Tracey's performance and felt that this was impacting the overall sales for their area.

The Line Manager began to meet with the 2 individuals to try and identify what the underlying issues were but as a result, Sarah went off sick with stress, specifying that she could not continue to work with Tracey. Another restructure took place and Sarah returned to work. She again began to alienate the team members around her and would be outspoken at team meetings resulting in other members feeling frustrated and afraid to speak

up. The Line Manager contacted Beststart Human Resources seeking advice on how to resolve this issue.

Our Involvement

Following an initial consultation it was identified that whilst Sarah was passionate about her role and the company, she lacked awareness of how her style and ambition was impacting other members of the team. It was suggested that Sarah undertook a 360 feedback exercise to enable her to receive feedback on how others perceived her.

An initial discussion took place with Sarah to explain that this was a personal development tool and also to explore whether there were other areas Sarah wished to receive feedback on. A set of quantitative and qualitative questions were agreed and an electronic, anonymous survey was sent out to her peers and Line Manager. A meeting was then set up to provide Sarah with the feedback in a constructive manner.

Whilst the feedback demonstrated an appreciation of Sarah's technical skills, the feedback themes were consistent. Sarah was described as somebody who 'did not suffer fools gladly'; 'lacked empathy'; and 'belittled team members' ideas' in meetings.

As a result of this feedback, a series of 6 individual coaching sessions were arranged with Sarah to give her the tools to manage her frustrations better; to listen to her colleagues; and to find ways to consider ideas from others' perspectives. She was given exercises to undertake between sessions and reviews were conducted to monitor how she had handled scenarios, putting in to practice the skills she had agreed to adopt.



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Outcome

Sarah's behaviour began to change and a further 360 feedback questionnaire 9 months later reflected the changes she had put in to place.

Sarah has recently been promoted to Regional Account Manager and now has a team of 3 Managers working for her. Her team's sales remain the highest in the country.

DON'T KEEP US A SECRET

Beststart's aim is to always provide you with the best possible advice and support you can depend on to ensure you achieve your right outcome.

Since 2007, we have helped hundreds of organisations with their HR. We are proud that despite not tying clients into onerous and long contracts, once an organisation becomes a Beststart client, it chooses to remain a Beststart client. We hope this reflects not only the quality of our work but the trust and confidence we engender by dealing with the most challenging and sensitive issues within our clients' organisations.

Our business has been built on word of mouth, and in a digital age where many claim to be an expert, personal recommendation and referral carries even greater weight. If you know someone at a client, supplier or acquaintance who increasingly seems to be mentioning their staff for whatever reason – change, absenteeism, disagreements, performance issues, retention, etc.– please let them know we would be happy to have a friendly chat and explore where even small changes might help iron out their people challenges.

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