Employment Newsletter

January 2019

BACKHOUSE JONES

Holiday Pay Developments

The EU Court of Justice (CJEU) in the case of, *Hein v Albert Holzkamm GmbH & Co*, issued a Judgment that suggests pay received for overtime work need not be considered when calculating holiday payments, save where that worker is contractually required to work overtime.

The case, as always, is fact sensitive and must be considered in context, however, it is a development that will be welcomed by many employers facing the struggling of balancing holiday pay calculations correctly.

Unless the contract of employment obliges the worker to work overtime on a largely regular and predictable basis, and the corresponding pay constitutes a significant element of the total remuneration that the worker receives for his professional activity, then pay received for overtime need not be taken into account.

The Facts

Mr Hein was employed as a concrete worker by Holzkamm on short term work for a total of 26 weeks in 2015. In 2015 and 2016, he took 30 days annual leave which he had accrued during his employment.

Having regard to Mr Hein's period of short term working during 2015, Holzkamm calculated the amount of remuneration on the basis of a gross hourly wage that was lower than his normal hourly wage in accordance with Federal German law. However, Mr Hein believed that periods of short term working during the reference period (the weeks prior to leave upon which average pay is calculated) cannot have the effect of reducing entitlement to remuneration for annual leave.

Comments and Implications

The case before the CJEU was one involving Mr Hein's mandatory, rather than voluntary, overtime. The CJEU's comments about overtime pay has naturally cast some uncertainty over some recent decisions from the Employment Appeal Tribunal, which are still binding in the UK. One of which being *Flowers v East of England Ambulance Trust*, which has been appealed further and it is therefore likely that the implications of Mr Hein's case will have to be considered at some point in the New Year.

If we leave the EU in March 2019 with a transition period, it is possible that the Court of Appeal will refer the case to the CJEU for a ruling specifically on the issue of voluntary overtime. If this is the case, the law on this issue could remain uncertain for at least another two years while we wait for a ruling on voluntary overtime.

The Judgment also addresses the issue of holiday entitlement for those on short-time work, ruling that whilst periods of short-time

working may reduce that minimum period of leave to less than four weeks, which is the minimum required by the EU directive, it does not reduce the amount of pay due when leave is taken.

We can only watch this space, but this latest decision suggests guidance of what to include and what not to include in the calculation of holiday pay, when the trend of late has been widening the scope of what should be included.

Temporary Workers

During the busy festive period, many industries will look to employ temporary staff to fulfil the demands of the businesses. However, it is important to be abundantly clear and direct with the temporary staff from the outset, to ensure you or your business does not end up falling short in relation to any employment law pitfalls.

Before employing temporary staff, employers should ensure that they nail their colours to their mast in respect of what prospective temporary employees (temps) should expect from employment with them. A common temptation is to be vague in order to entice prospective employees. However, this can come back around to bite if certain terms are not made clear to the temp and ultimately, there are performance failures as a result of the employer's ambiguity. A clear discussion should be had with temps and all terms should be confirmed to them in an appropriate offer letter and temporary contract.

Getting the employment status accurate in the temporary contract of employment, as obvious as it seems, is pivotal in getting what you want out of temps. Whether employers choose to make arrangements based on the temp becoming a worker or an employee is a matter for the employer, however it must be reflective of the actual arrangement and made clear in the contract to avoid any confusion. An employee works under a contract of employment and is obliged to carry out their responsibilities and employers are obliged to provide certain rights to that employee, whereas a worker tends to be employed on a more casual basis.

Perhaps the simplest, yet most important provision of the contract, is to include a provision that makes it unquestionably clear that the contract by its very nature is temporary and a permanent position is not guaranteed. It would be helpful to give an indication as to how long the temporary contract shall last (e.g. until the end of January). If the contract is for a fixed term such as the example given, and it becomes apparent that there will be work beyond the fixed term, employers should ensure that the contract is extended, of course with the agreement of the temp, in a timely manner to avoid wasting time, money and resources recruiting another worker/employee.

Mindfulness need to be given to the drafting of the clause concerning flexibility around working hours. Your temps ideally should be available to work at short notice to cover shifts to accommodate your business needs and the contract and any verbal conversations had with the temp should make this clear.

There is a handful of main key requirements which must be satisfied when it comes to temporary workers/employees. The first being the provision of basic working and

employment conditions for assigned temporary workers that are no less favourable than if they had been recruited directly by the hirer. This includes remuneration, paid holiday, working hours, overtime, maternity and anti-discrimination provisions. We would suggest however, that it would be reasonable to set out in the contract that such holidays accrued cannot be taken within a set time period, as maximum flexibility should be safeguarded over the busy weeks/months.

Temporary workers must also be given equal access to employment, collective facilities and vocational training. Failure to comply with these requirements can result in penalties against the employer so it is important that temporary workers are treated in line with the above.

The Government has a Plan

Having a plan is often seen as being the first step to a success, of which can either be big or small. It could be the simple act of taking out that January gym membership ready for the post-Christmas fitness drive, or it could be that complex but achievable business growth plan of which will aid in seeing your profits soar. Either way, we can all agree it is rather an important thing to have if your end goal is success.

With this in mind, it is my pleasure to inform you that the government has a plan. A plan for Brexit success you ask? A plan for the UK to win the 2019 Eurovision song contest perhaps? In these cases, I must disappoint you and inform you that the government has released its 'Good Work Plan'. The plan is unfortunately not one of which will guarantee your business the route to success and riches, it does however pave the way for the Government's intention to keep up with the rapidly changing world of work and the challenges which our modern economy brings.

The Good Work Plan has been made as a result of the Taylor review. The review looked at modern employments practices and staffing structures and made suggestions on changes which needed to be made to bring employment practices up to date, the review further focussed on the 'gig economy' (shifts in cultural and business environments).

In the Good Work Plan, the government has set and intention to act on 52 out the 53 recommendations made in Taylor's report. The biggest surprise of the plan could be the fact that the government do not intend to revisit the issue relating to the difference between the National Insurance Contributions of employees and the self-employed. This is coupled with the fact that the government intend to go even go further than Taylor recommends in certain areas.

It should be noted that the 'Good Work Plan' is, as per its name, only a plan and isn't a change in the law on employment status (at least not yet). The government have announced that there will be further consultations (four in fact).

As part of the Good Work Plan, the government intends to go further than Taylor's recommendations by:-

- Introducing 'day one rights' for workers in the gig-economy (including sick pay and holiday entitlement);
- Introducing a right to request a more stable contract for all workers, including zero hour workers (although what this will mean in practice remains to be seen);
- Introducing a new right to a payslip for all workers (including casual and zero-hour workers);
- Providing help for workers to enforce their rights in relation to sickness and holiday leave and pay; and
- Defining 'working time' for gig-economy workers to ensure they know when they will be paid.

The aim of the plan and governments view on UK the changing UK economy is to ensure that our employment law and practices keep up with the rapid rise of technologies and the impact on the world of work.

In addition, the government have set out other intentions, not so linked to the gig-economy but still part of Taylor's recommendations, which include: -

- Introducing a 'naming and shaming' scheme for employers who don't pay tribunal awards;
- Making sure new and expectant mothers know their rights;
- Launching a new campaign to encourage working parents to share childcare through shared Parental Leave;
- Asking the Low Pay Commission to consider introducing a higher rate of the national minimum wage for works on zero-hour contracts;
- Making the government accountable for good quality work as well as quantity of jobs – which is a key ambition of the UK's Industrial Strategy, a long-term plan to ensure Britain is fit for the future;
- Taking further action to ensure unpaid interns are not doing the job of a worker.

The future consolations will clearly delay the actual impact of any of Taylors recommended changes in light of the current focus on Brexit. This however isn't something to be dismayed about given the fact that the changes would bring a large-scale overhaul to our current employment law practices and is certainly worth the time to make sure any changes are the right ones. For further information read the government's press release.

FOR ALL RELATED ENQUIRIES, PLEASE CONTACT OUR EMPLOYMENT TEAM ON 01254 828300

Please note: This publication does not constitute legal advice

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