Employment Newsletter

June 2019

BACKHOUSE JONES

CJEU: Must employers record Working Time?

In the case of Federacion de Servicios de Comisiones Obreras (CCOO) v Deutsche Bank SAE, the European Court of Justice ruled that employers must keep records of hours worked in order to fulfil its obligations under the Working Time Directive.

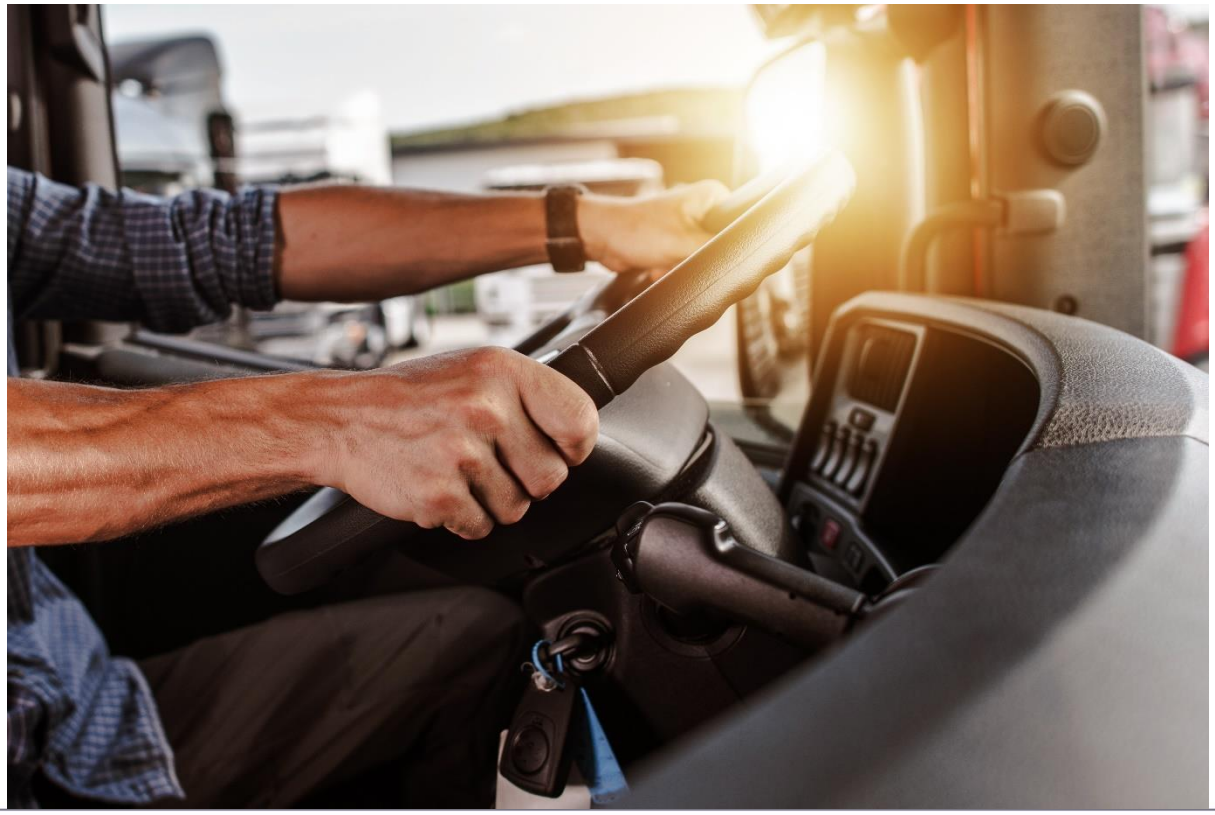
The Facts

The CCOO (a Spanish trade union) brought a group action before the National High Court in Spain against Deutsche Bank in relation to the lack of a system for recording the time worked each day by the workers employed by Deutsche Bank. During the class action proceedings, CCOO requested a preliminary ruling and sought a declaration from the CJEU that the bank was under an obligation to record the actual daily working time of its workers.

The Court decided that if there was no requirement for employers to keep records, it would be impossible to determine "objectively and reliably, either the number of hours worked by the worker or when that work was done".

The Court further went on to say that it would be excessively difficult, if not impossible in practice, for workers to ensure their compliance with the rights conferred on them by the Working Time Directive, with a view to actually benefitting from the limitation on weekly working time, as well as minimum daily and weekly rest periods provided for by that directive.

The above judgment means that, in order to properly transfer the Working Time Directive into national law, a member state must require employers to keep records of hours worked. It appears that the Working Time Regulations have therefore not properly transposed the EU Directive into UK law. The Government will have to amend the Working Time Regulations to avoid the risk of claims against them for failure to transpose the Directive. This is of course if EU law continues to remain in force in the UK!



Commentary

As the employer, you should be keeping a record of all your employee's Working Time. Tachographs may be used as a means of recording Working Time and are often used to record most of the work in relation to drivers, however it is always important that the correct mode is selected to record the activities accurately. In some circumstances, such as warehouse work, you will be required to keep other types of records in addition to the tachograph records.

As you will be aware, HGV and PCV drivers are only subject to the provisions in the WTR 1998 relating to paid holiday and health checks for night workers and does not extend the provisions on breaks and rest periods to mobile workers in this sector. Drivers are primarily regulated by the Road Transport (Working Time) Directive 2002 and the Drivers Hours Regulation, the rules of which you will no doubt be familiar with.

Interestingly to note, the European Parliament has adopted its first reading position on the European Commission's proposal for a new regulation which seeks to amend the 2002 Working Time Directive on minimum requirements on maximum daily and weekly driving times, minimum breaks and daily and weekly rest periods. Keep an eye out on our future newsletters which will cover any developments in relation to this proposed amendment.

When should you suspend an employee during a disciplinary investigation?

When faced with a disciplinary complaint against an employee, an employers first reaction is often to take what may be perceived as the fair approach and suspend the employee until an investigation has been carried out. However, this may not be the safest way to proceed.

Suspension would be appropriate if the allegations against the employee involve gross misconduct, where if they were upheld, the employer would be entitled to dismiss the employee without notice.

Also, an employer would be justified in suspending an employee where there has been a breakdown in the relationship between the employee and employer, and the employer has lost trust in the employee.

The risks involved in automatically suspending employees subject to disciplinary proceedings as a "knee-jerk reaction", without giving sufficient thought to the matter has been highlighted in a recent Court of Appeal case *Lambeth B C v Agoreyo.*

In that case a teacher was suspended following several alleged incidents with children in her class. She resigned the same day and the Court of Appeal overturned the High Court's decision to find that there was no breach of the implied term of mutual trust and confidence.

Suspending an employee will not automatically give rise to a claim and the case clarifies the test employers should apply when deciding to suspend.

The Court of Appeal confirmed that the test that an employee can only be suspended lawfully where there is "reasonable and proper cause" to do so". The CA went on to emphasise that suspension must be assessed on a case by case basis: it is highly fact-sensitive question as to whether an employer has reasonable and proper cause to suspend. The Court's decision certainly should not be read as permitting a "suspend first and ask questions later" approach to workplace investigations, and suspension should not be a default response to misconduct allegations against an employee. A careful balancing act should be conducted, considering the needs of the investigation (such as independence) and the interests of the employee.

For example, employers should consider:

1. What initial evidence is available in relation to the allegations?
2. Is the suspension necessary?
3. Is there another, less extreme way of achieving the same objective?
4. What effect the suspension may have on the employee?

An employer that has considered all the above is less likely to be at risk of allegations of having made a knee-jerk reaction, and breached trust and confidence in their employment relationships.

If suspension is unlawful, it can give rise to a constructive dismissal if the employee resigns and can also make the employer liable for any psychiatric harm which arises from the suspension. The Courts recognise that being suspended from work can have a severe reputational and psychological impact on an employee.

Shared Parental Leave and Sex Discrimination

The Court of Appeal held that it would not be discriminatory to pay men on shared parental leave less than an enhanced rate paid to women on maternity leave.

The Facts

In the case of *Ali v Capita Customer Management Ltd* and *Chief Constable of Leicestershire v Hextall,* two appeals which were heard together by the Court of Appeal, it was decided that it was not discriminatory for employers to pay men more than the statutory minimum parental leave pay when women were paid more than the minimum for maternity leave. Various claims were put forwards by both Claimants, including in relation to direct discrimination, indirect discrimination and Equal Pay.

Mr Ali made complaints of direct and indirect sex discrimination and victimisation. He complained that as a male employee, he was entitled to only two weeks paid leave following the birth of his child in April 2016, whereas a female Telefonica transferred employee, would be entitled 14 weeks pay following the birth of her child. He accepted there was a material difference in circumstances/justified special treatment of a female employee for the first two weeks of that leave because of compulsory maternity leave, which is related to her biological/physiological condition and recovery following childbirth, for that 2 week period the comparator was in a position unique to women who have given birth. However, for the following 12 weeks when Mr Ali wanted to take leave with pay to care for his newborn daughter he was deterred from doing so as he was told by his employer that he would receive statutory pay only for that leave.

In relation to the second case, Mr Hextall claimed indirect sex discrimination under provisions in the Respondent Police Force in that the only option for men taking leave after

the birth of their child is shared parental leave at the statutory rate, whereas women have the option of taking maternity leave on full pay. Accordingly, both Claimant's were heard in the Employment Tribunal, and subsequently appealed and dealt with by the Court of Appeal.

All appeals were therefore dismissed.

Commentary

In order to successfully bring a direct discrimination claim, a claimant must show that they have been treated less favourably than a real or hypothetical comparator. However, there is an exception to a comparison between employees for "special treatment afforded to a woman in connection with pregnancy or childbirth". This exception was construed by the Court to be wide enough to include enhanced maternity pay.

Additionally, the Pregnant Workers Directive requires a minimum of 14 weeks leave, and it was held that this was not enough to change the position after 14 weeks as "the predominant purpose of such leave is not childcare but other matters exclusive to the birth mother resulting from pregnancy and childbirth and not shared by the husband or partner". Therefore, men on parental leave and women on maternity leave are therefore not in comparable positions for the purposes of the Equality Act 2010 and any such discrimination claim brought before the tribunal in this respect would fail, as a man on parental leave could not use the woman on maternity leave as a real comparator or a hypothetical comparator for that matter.

In relation to the equal pay claims, although a contractual difference in shared parental leave pay between men and enhanced maternity pay for women can be properly categorised as an equal pay claim and that the clause in a contract providing women with a higher level of pay is more favourable to women than men. However, The Equality Act 2010 makes it clear that any sex equality clause implied into contracts of employment do not apply where discrimination is specifically excluded elsewhere in the Act.

Schedule 7, paragraph 2 of the Equality Act 2010 provides that "a sex equality clause does not have effect in relation to terms of work affording special treatment to women in connection with pregnancy or childbirth" which the Court of Appeal held was wide enough to include enhanced maternity pay. In short, there is no claim for equal pay in these circumstances as it is specifically excluded by the Equality Act. Similarly, the Equality Act therefore excludes indirect discrimination by virtue of paragraph 2 of schedule 7 above.

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