Employment Newsletter

September 2019

BACKHOUSE JONES

Driver CPC training deadline looms – Are you prepared?

If a lorry, bus or coach driver has not completed the required training by 9 September 2019, it will be illegal for them to drive professionally and if they do so, both the driver and operator of the vehicle could be fined up to £1,000.

All professional drivers must do 35 hours of periodic training every 5 years to keep their Driver Certificate of Professional Competence (CPC). If a driver misses the deadline, they must ensure they complete the 35 hours of training before they drive professionally.

Drivers can check how much training they have done on the GOV.UK website – www.gov.uk/check-your-driver-cpc-periodic-training-hours. Employers can also use this service to check their employee's record by first asking the employee to log on and create a temporary password.

We recommend that employers identify the drivers who have not yet completed the required training and invite these drivers to a meeting to discuss the training requirements. Operators must ensure that their drivers are aware that failure to complete 35 hours of periodic training by 9 September 2019 would mean that it would be illegal for them to continue to drive professionally and therefore could result in termination of their employment.

The holiday pay saga

Workers are entitled to receive normal pay whilst on holiday

Following on from the case of Flowers v East of England Ambulance Trust (full article can be found here www.backhousejones.co.uk/wp-content/uploads/2019/07/Employment-Newsletter-July-2019.pdf, The Court of Appeal has recently clarified that voluntary overtime should be included in holiday pay if it extends for a sufficient period on a regular or recurring basis. Clearly this leaves scope to interpret what is meant by "regular or recurring basis" but it is further evidence of the courts desire to make sure that employees are not left out of pocket when taking annual leave.

The Court of Appeal also confirmed that allowances relating to the professional and personal status of workers should also be included if they are regularly included in their pay (for example a length of service or loyalty bonus). Payments that cover ancillary costs incurred by the worker, such as mileage expenses don't have to be included.

In summary, workers are entitled to receive normal remuneration when they go on holiday.

Clarification on calculating term time pay for part-time workers

The ongoing saga of changes and fluctuations in the holiday pay continues with the recent decision of the Court of Appeal held in *The Harpur Trust v Brazel* case that holiday entitlement for 'part-year' workers should not be calculated on a pro rata basis at 12.07% of annual pay under the Working Time Regulations.

The case involved a music teacher who was permanently employed by the Trust. She worked during term-time only, on irregular

hours (around 32) per week. It was decided by the EAT and upheld by the Court of Appeal that

this employee was entitled to have holidays calculated on a 12-week average of hours worked, making, on her hours, holiday pay around 17.5% of annual pay, rather than 12.07% for staff working a whole year (based on 5.6/46.4 weeks). The key in this case was the fact that this individual worked irregular hours but again supplements the need to get the issue of holiday pay sorted rather than leave scope for a claim to be presented.

This is an important case particularly in the PCV sector where operators need workers who will work term time only to accommodate the needs of their school contracts. We recommend that you seek guidance and our employment team are available on 01254 828300.

Millions of working days are lost due to work related stress, depression and anxiety each year

Stress, depression and anxiety was cited for 44% if all work-related ill health cases and 57% of all working days lost due to ill health.

The main factors causing work-related stress, depression or anxiety were stated as: workload pressures (including tight deadlines); too much responsibility; and lack of managerial support.

In the PSV and the HGV sectors, it is critical that operators are attuned to the mental health of their employees and aware of the pressures they are put under at work and at home. They should also be looking out for tiredness and changes in behaviour and seek advice from a medical professional if in doubt. We also advise operators to review their employment contracts to ensure they contain the provisions to allow for this.

Should I stay or should I go? - Does a breach of the immigration rules render the employment contract unenforceable?

Summary

In the recent case of Ivy Okedina v Judith Chikale, the Court of Appeal held that the defence of illegality, due to the expiry of an employee's leave to remain in the UK, could not be relied upon by the employer to defeat contractual claims arising out of the contract of employment.

The Facts

Both of the parties in this case were Malawian nationals. The Defendant brought the Claimant to the UK in July 2013 for her as a live-in as a domestic worker. The Claimant had a six-month domestic visa and once this expired, the Defendant applied for it to be extended on the false basis that the Claimant was a family member. In any event, this application was refused. The Defendant told the Claimant that the necessary steps were being taken to extend her visa and the Claimant was unaware

that she did not in fact have the right to remain in the UK.

The Claimant was required to work 7 days a week, for long hours and for low pay. In June 2015, she asked for more money and was summarily dismissed. The Claimant brought a number of claims in the Employment Tribunal (ET) which were categorised as "contractual" as they arose out of the contract of employment.

The Defendant argued that she had a defence of illegality on the basis that the employment contract was illegal, or illegally performed, due to the Claimant no longer having leave to remain and therefore the contractual claims were unenforceable.

Decision

The Employment Tribunal, and subsequently the Employment Appeal Tribunal (EAT), held that the illegality defence could not apply as the Claimant did not knowingly participate in any illegal performance of her contract and the Claimant succeeded in her contractual claims. The Defendant therefore appealed to the Court of Appeal however this was dismissed on the same grounds.

Commentary

This case does not mean that employers are prevented from dismissing employees whose right to remain or work in the UK expires. This was an unusual case in that the employee was unaware that she had no leave to remain in the UK due to the actions of her employer. More commonly, an individual will be aware that they have overstayed their leave to remain in the UK and in these cases, it would be much more straightforward to establish the defence of illegality.

The case reminds us of the importance of monitoring and auditing employee's right to work documentation. To not do so and be found to be employing a working who does not have leave to remain, risks a civil penalty (fine) of up to £20,000 for each illegal worker being imposed.

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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