



## Employment Law update January 2018

### What were the most influential employment rulings of 2017?

We summarise the most influential employment decisions in 2017:

#### **Employment tribunal fees abolished**

The abolition of tribunal fees will change the landscape for employers in respect of employment tribunal claims. On 14 December 2017, statistics published by the Ministry of Justice for July to September 2017 showed a 64 % increase in single applicant claims since the abolition of fees. As well as new claims, employers may have to defend old claims that were struck out because the claimant did not pay the fee or was deterred from bringing their claim because of the fees. It will be decided case by case whether such claims can be brought 'out of time'.

#### **Backdated pay for untaken holiday**

The European Court of Justice (ECJ) ruled that an employee who had established 'worker' status was entitled to pay for both unpaid holiday he had taken and holiday he did not take because he thought it would be unpaid.

Unlike holiday, which carries over during sick leave and can be lost after a certain period, the ECJ found that there was no time limit on the untaken leave that had accrued because the company failed to provide the worker with his right to paid holiday. The ruling meant that he could claim untaken leave for his 13 years' engagement. The Court of Appeal will now decide whether the ECJ judgment is consistent with UK law and therefore no ruling is yet in place, but watch this space for further judgment.

#### **Worker status in the gig economy**

The Employment Appeal Tribunal (EAT) upheld the employment tribunal's 2016 decision that Uber drivers were 'workers' and not self-employed. Uber's request to leapfrog its appeal to the Supreme Court was refused and a Court of Appeal hearing is expected. Other gig economy cases followed the same trend, namely the Court of Appeal ruling in *Pimlico Plumbers v Smith*, in addition to several employment tribunal decisions that couriers at CitySprint, Excel and Addison Lee were workers. It is for employers to ascertain the true employment status of their workforce, regardless of what the parties agree. Engaging staff on a self-employed basis when in reality they are 'workers' means they are entitled to the national minimum wage, paid holiday and pension auto-enrolment. The Supreme Court will hear *Pimlico Plumbers'* high-profile appeal on 20 February 2018.

#### **Voluntary overtime to be included in holiday pay**

The EAT has found that regular voluntary overtime should be included when calculating holiday pay. Consequently, guaranteed compulsory, non-guaranteed compulsory and voluntary overtime must all be included in holiday pay. For voluntary overtime, the test is whether the 'pattern of work' extends



for a sufficient period of time on a regular and/or recurring basis to justify the description 'normal'. This ruling only applies to the four weeks' leave guaranteed under EU law, not the additional 1.6 weeks' under UK law or any other contractual leave.

### **Enhanced shared parental pay for fathers**

Should shared parental pay (ShPP) be enhanced for fathers on shared parental leave (SPL) if maternity pay is enhanced for mothers on maternity leave? The answer was yes in a recent case where a father successfully argued that enhanced maternity pay for his female colleagues and no enhanced ShPP for him constituted direct sex discrimination.

The case is being appealed and if upheld, employers will need to treat ShPP and maternity pay equally and enhance (or not enhance) both.

## **Managing Stress at Work**

If an employee reports that they are suffering from work-related stress the employer should immediately conduct a risk assessment to evaluate the stressors that the employee is exposed to at work. If the risk assessment identifies areas where stress is evident, the employer should work with employees to agree realistic and practical ways to tackle it. This can be managed in an action plan that identifies the following:

- The problem or stressor
- The way in which it becomes apparent (how it can be identified)
- Any proposed solution
- Changes that need to occur to make the solution viable
- Action dates and individual accountability (where appropriate)
- A review date

While identifying work-related risks and taking preventative measures should help minimise stress for most staff, it may still affect some team members due to issues inside or outside of the workplace. Managers should be prepared to help and support a team member experiencing stress. Where a manager thinks a team member may be experiencing stress, they should approach the matter because without talking to the team member, it is impossible to know what is affecting them. Organisations should encourage staff to talk to their manager if they think they are becoming unwell. Creating a working environment that proactively supports staff who become unwell will make it easier for staff to tell their manager if they are experiencing stress.

If an employee approaches their manager to advise they are experiencing stress, the manager should:

- Arrange to have a private conversation
- Give time to the employee – be patient and allow time to talk
- Remain focused on what they say, seeking out solutions



- Be open minded about the likely cause of the stress
- Suggest potential solutions

## How should employers deal with accusations of sexual harassment?

The recent flood of accusations of sexual harassment against senior figures is forcing businesses to examine the processes they have in place to deal with such a complaint.

So what steps should employers take:

- Be proactive in encouraging openness and communication. Having an open culture in the workplace is important for supporting good working practices as well as helping minor issues come to the surface. It also acts as a fundamental way to discourage inappropriate behaviour and secrecy.
- Ensure there are clear policies in place to respond to a sexual harassment case. Who is responsible and what expertise do they have? Who is going to have the initial conversation with the employee making an accusation and do they have the skills to cope?
- Watertight investigations are critical. There are many risks associated with mishandled investigations; for example, the potential for investigation conclusions to be challenged; claims of bias leading to employment tribunals and the long-term effects on staff morale, and the work environment.
- Any allegation needs to be treated seriously in the first instance. There should, for example, be an onus on the person facing an accusation to engage in the process, and not have the option to refuse any participation.
- Investigations need to be formal in terms of how they are organised, carried out and reported on, and they need to be proportionate with the alleged offence.
- Training in fair decision-making can be needed among panel members involved in the investigations and resolving situations.
- The response also needs to be seen as even-handed. If an alleged perpetrator of sexual harassment is found guilty, it's important that a department can ensure sanctions are consistent.

## QUESTION AND ANSWER CORNER

**Q:** *An employee has come forward to say that they witnessed another employee take stock from the warehouse but they have told us that they want us to treat this information in the strictest confidence and that they do not want to provide a statement or get involved as they are worried about any possible reprisals. There is stock missing but we have no other evidence that points to this employee. What can we do?*

**A:** This is a common problem faced by employers and it would be advisable to meet with the witness and be as frank as possible over potential involvement and explain that it may not be possible to



treat this in confidence. As part of the investigation process, witness statements need to be obtained and later on in the disciplinary process those investigation notes will need to be shared with the accused employee so that they may have opportunity to present any relevant background information.

In some, rare, circumstances it can be possible to anonymise witness statements, for example if an individual fears genuine repercussions, such as a fear of attack or intimidation. However, in order to maintain confidentiality you would need to establish that it was absolutely necessary and, in addition, you should keep the original version but remove any details that might identify the individual prior to disclosure. Any amended version that is presented should then contain as much detail as possible of the event. You should also seek to corroborate the information as much as possible and verify the character of the witness and the relationship with the person being accused. Alternatively you may wish to set this employee up using other methods as it is likely if they stole stock once they will do it again.

**Q:** *Three months ago a candidate accepted our offer of a senior post in our organisation. This week, two days after starting work with us, she has now informed us that she is pregnant (she said nothing at the interview) and in a relatively short time she will be taking maternity leave. This is extremely inconvenient for the organisation. Is there anything that we can do?*

**A:** Unfortunately not, as taking any action to dismiss the individual or retract the job offer would be discrimination.

You were required to appoint the best person for the job, on the basis of merit. If she was the best candidate and you had rejected her application because she was pregnant then this would have been direct discrimination.

In the circumstances you describe, you must treat this employee in exactly the same way as you would any other employee.

**If you have a particular question that you would like answered email [training@scottishwholesale.co.uk](mailto:training@scottishwholesale.co.uk) or call 0800 9995 121 and we will publish next month – all names will be removed to ensure confidentiality.**