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Employment Matters

Employees Working Abroad: Factors Supporting a Connection With Great Britain Giving Entitlement To Bring an Employment Tribunal Claim

As you will be aware, even if an employee does not work for a UK employer or is not usually based in the UK, they could still have statutory employment rights under English law and be entitled to bring a claim in the Employment Tribunal. For example, employees who work abroad for a British employer for the purposes of a business carried on in Great Britain (e.g., foreign correspondent for a UK newspaper), or who work abroad in an extra-territorial British enclave (e.g., on a British military base), or have "equally strong connections with Great Britain and British employment law" could have statutory employment rights in the UK.

In another case on this point (*Jeffery v The British Council*), a British Council employee working in Bangladesh was allowed to bring an employment claim in the UK, after resigning. The following factors were considered relevant: the employer organisation, employee's citizenship and recruitment were all UK based; his contract was governed by English law and provided for a notional UK income tax deduction; he was entitled to a Civil Service Pension; and the employer organisation played an important role in the UK.

What Should Employers Do Next?

Be conscious that, even though employees are working abroad, statutory claims (including in relation to discrimination and dismissal) may still be brought before UK Employment Tribunals—particularly when some (or all) of the above factors are present.

Voluntary Overtime Pay May Count in Statutory Holiday Pay Calculation

In *Brettle v Dudley Metropolitan Borough Council*, the Employment Tribunal decided that voluntary overtime pay might need to be included when calculating basic annual leave pay (being pay in respect of the first four weeks of leave), depending on the circumstances. Whether it should be included or not depends on whether the voluntary overtime pay is deemed to be 'normal pay'. The regularity and frequency of the voluntary overtime are the key factors.

By way of example, one individual worked regular Saturdays and was paid overtime for that which was considered normal pay. Another only received overtime in major emergencies and on other odd occasions; as a result that pay was not considered normal pay. Although technically non-binding, the decision is in keeping with binding decisions in the area, which look to the factual circumstances, rather than employing a one-size fits all approach.

What Should Employers Do Next?

The law regarding holiday pay calculation is continually evolving. What we know presently is that the first four weeks of holiday pay should include any commission, bonuses and overtime directly and intrinsically linked to the work that the worker is required to do. The above case, whilst only a non-binding Employment Tribunal decision, suggests that the holiday pay position is not yet settled. Employers should also now have regard to the regularity and frequency employees have worked voluntary overtime when calculating statutory holiday pay.

Care Home Fined £15,000 for Sensitive Personal Information Leak

Regular readers will note that *Employment Matters* often features developments in the area of data privacy enforcement and powers relating to breaches of information rights. In another example of data privacy infringement, following an investigation by the Information Commissioner's Office, a Northern Irish care home has been fined £15,000. The breach that triggered the investigation occurred after an employee at the Whitehead Nursing Group care home had taken an unencrypted work laptop home, which was then stolen during a burglary. The laptop had details of residents' birth dates and health records and disciplinary and sickness records for staff. The investigation uncovered other systemic failings in the care home's data protection. The fine is proportional to the size of the organisation (up to £500,000 being possible), and there were a number of mitigating factors.

What Should Employers Do Next?

Ensure that a robust data protection policy is not only in place, but being complied with by all those with access to sensitive material. Whilst fines to date have been relatively modest, it is clear that the Information Commissioner is prepared to use its powers, which are significant for serious breaches by large organisations.

Pay Protection Can Be Reasonable Adjustment

The claimant in *G4S Cash Solutions (UK) Ltd v Powell* had been an automated teller machine engineer for G4S Cash Solutions (UK) Ltd (GCSU) before developing a back problem, which made him unable to perform that physically demanding role. He had a "disability" as defined under the Equality Act, meaning that GCSU had a duty to make reasonable adjustments to his role. GCSU created a new "key runner" role which he was still able to perform. His salary was maintained at its previous level. He believed his contract had been varied by agreement on beginning the new role.

Later GCSU told him it was discontinuing the role and he would have the option to take on an alternative role from the GCSU vacancies list or be dismissed on medical grounds. However, GCSU then decided to keep the key runner role, but with a 10% decrease in salary, which was offered to the claimant. He refused, was dismissed and then brought a claim.

On appeal, the Employment Appeal Tribunal decided that although the claimant's contract had not been varied at the time of his role change, his original salary was protected as a reasonable adjustment and pay protection should be treated by the employer like any other form of reasonable adjustment.

What Should Employers Do Next?

The need to make reasonable adjustments is often tricky to apply in practice. Factors likely to be considered relevant in determining whether an adjustment is "reasonable" include: how effective any particular step is in avoiding the disadvantage, how practical it is to implement, how much it costs, the size of the employer organisation and its resources, and how available additional financial support is. Tribunals have shown that they are prepared to be creative and extend the meaning of reasonableness to protect the level of salary. However, typically the employer will be in the best position to decide whether an adjustment would be reasonable, and the Tribunals are aware that some provision must be made for that. Employers should consider each case of reasonable adjustments on a case-by-case basis.

Deliberate Delay Designed To Damage Third Parties May Prevent Otherwise Available Remedies

In *Legends Live Ltd v Harrison*, the claimant, who ran a musical tribute show, decided to set a deadline for compliance with a non-compete clause in the contract of the defendant (a former employee) to maximise the negative impact on its rival musical tribute show. The defendant was due to commence work for the rival tribute show two days after that deadline. In the absence of a satisfactory explanation, the claimant's delay in seeking an injunction was inferred as deliberately timed to cause loss to its rival show, and as such, the otherwise available injunction was refused. The duration of the delay is less important than the reasons for which it occurred.

What Should Employers Do Next?

Legal advice on tactical decisions to delay enforcing provisions in employment contracts should be sought. Very often in the enforcement of post-termination restrictions, in particular non-compete provisions, a delay by the claimant can be fatal to the chances of successfully obtaining an injunction. However this case highlights that the Courts will place some weight on the reasons for the delay, and will not support claimants who are trying to obtain a competitive advantage by delaying.

For more information about these issues or if you would like to discuss an employment-related matter, please contact: Christopher Hitchins at +44 (0) 20 7776 7663 or Sarah Bull at +44 (0) 20 7770 5222.

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