EMPLOYMENT LAW
NEWSLETTER

Welcome to our latest employment law newsletter. We have been spoilt for choice as to what to cover in this edition, as there have been several recent important and/or interesting cases. However, we have chosen to update you on recent Supreme Court decisions in relation to holiday pay and criminal sanctions for CV fraud.

We also consider ACAS's recently issued guidance on suspensions as well as shine a further spotlight on employment contract changes introduced in April 2020 as we are unfortunately still seeing contracts that have not been updated.

We hope you enjoy the read.

HOLIDAY PAY FOLLOWING HARPER TRUST V BRAZEL

The law

For those employers who use zero hour contracts to engage part-year workers on a permanent basis the decision of Harpur Trust v Brazel is highly relevant to you, and not one to ignore. It highlights the need to ensure you are not underpaying those workers when it comes to calculating holiday pay, which is never an easy task! If you are, you risk those workers bringing a claim, like Mrs Brazel.

The Law

A worker's statutory holiday entitlement is set out within the Working Time Regulations 1998. These confirm that a worker is entitled to a total of 5.6 weeks **paid** holiday each year. This can be inclusive of bank holidays.

The Employment Rights Act 1996 sets out how a week's pay should be calculated. For those with no normal working hours or "atypical workers" this is calculated by reference to the worker's average weekly earnings over a "prescribed period". Prior to April 2020 the "prescribed period" was 12 weeks. It is now 52 weeks, or the full period of the worker's engagement if they have less than 52 weeks service.

For the purpose of these calculations employers should ignore any week where no remuneration is due, which means in certain circumstances they may have to go back further than 52 weeks, subject to a cap of 104 weeks. This is particularly relevant in the present instance. We will call these the "ERA calculations".

The Facts

Mrs Brazel worked as a music teacher for the Harpur Trust. She started working for them in 2002. She worked under a permanent employment contract that did not guarantee any minimum or set hours. Mrs Brazel would work differing hours each week, school term time only, depending on the demand for music lessons. She was only paid for the hours worked. Her employment contract confirmed her entitlement to 5.6 weeks paid leave each year, to be taken in tranches at the end of each term.

When it came to calculating holiday pay prior to September 2011 Harpur Trust used the ERA calculations. This, however, changed in September 2011 when Harpur Trust adopted then ACAS guidance (since updated). From that point they calculated her entitlement taking 12.07% of the hours worked during the term in question and then multiplying that figure by Mrs Brazel's hourly rate of pay.

The 12.07% calculation relates to the fact that 5.6 weeks is effectively 12.07% of 46.4 weeks (52 weeks minus 5.6 weeks holiday).

The effect of this change was that from September 2011 Mrs Brazel received less by way of holiday pay than before; the ERA calculations being more favourable and effectively resulting in her receiving 17.5% of her annual earnings as holiday pay.

Mrs Brazel instigated tribunal proceedings, which Harpur Trust contested. They argued that those who work less than the "standard" 46.4 weeks a year should have their statutory entitlement to holiday pay pro-rated. In Harpur Trust's case their school year varied between 32 and 35 weeks. They asserted that to do otherwise unfairly rewards those who work fewer weeks of the year. The Employment Tribunal agreed with Harpur Trust and in January 2017 Mrs Brazel's claim was dismissed.

Mrs Brazel successfully appealed this decision, with Harpur Trust then pursuing further appeals. Both the Court of Appeal, and subsequently the Supreme court, have upheld Mrs Brazel's claim.

Whilst it was recognised that for part-year workers the ERA calculations may put them in a more favourable position compared to full-year workers when it comes to holiday pay entitlement, this was not considered sufficient reason by itself to depart from the ERA calculations. After all they are based on a statutory framework as set out in the Employment Rights Act 1996.

Next steps for employers

If you have permanent staff members who only work part of the year, you need to consider whether they are affected by the Supreme Court's decision in this case. You will want to ensure that, going forward, all future holiday pay entitlement is calculated using the ERA calculations, if not already.

However, you will also want to consider whether, like Mrs Brazel, those individuals may also have a claim for any prior underpayments. This would be a claim for what we call unlawful deduction from wages and can go back a maximum of two years, subject to certain criteria being met. If you are concerned anyone you have engaged could have such a claim it is important you take early independent legal advice. We can provide any guidance needed.

WHY IT'S NEVER ADVISED TO LIE ON YOUR CV!

Unfortunately, as an employer from time to time you may have come across an embellished CV. Indeed Yougov research in 2017 (which followed Mr Andrewes' incarceration) found that one in ten people admitted to having lied on their CVs!

The case of R v Andrewes demonstrates the potential consequences that could arise when an individual lies on their CV to gain employment.

The Facts

In 2004, Mr Andrewes applied for, and was appointed, Chief Executive Officer at St Margaret's Hospice in Taunton. The advertisement for the role stated that a first-class degree and ten years management experience, with three years in a senior position, were "essential" requirements of a potential candidate. Furthermore, an MBA and five years' experience in a senior position were "desirable".

When Mr Andrewes applied for the role, he essentially falsified all his educational qualifications, and either falsified or greatly inflated his employment history. Amongst his fraudulent assertations, Mr Andrewes claimed to have a first-class degree from Bristol University, an Advanced Diploma in Management Accounting, an MBA in Management Science from Edinburgh University, and to have held the positions of Managing Director and Chief Executive in various organisations.

During his employment with St Margaret's Hospice, Mr Andrewes also fraudulently claimed to have obtained a PhD from Plymouth University. Thereafter, he insisted colleagues referred to him as "Dr Andrewes".

Whilst remaining CEO of St Margaret's Hospice, Mr Andrewes also applied for, and was appointed as, Non-Executive Director, and later Chair, of Torbay NHS Care Trust, and Chair of the Royal Cornwall NHS Hospital Trust. Again, he obtained these appointments using falsified credentials, despite declaring in each application that he was providing complete and correct information.

Mr Andrewes' dishonesty caught up with him in 2015 when the truth began to emerge, and each of his roles were eventually terminated.

The Judgment

In a Crown Court trial in January 2017, Mr Andrewes plead guilty to one count of obtaining a pecuniary advantage by deception under s.16 Theft Act 1968 (the legislation at the time when Mr Andrewes first lied on his CV) and two counts of fraud under s.1 Fraud Act 2006.

During the trial, the Court heard how Mr Andrewes had lied his way to securing numerous positions of responsibility, where the requirements for honesty and integrity were paramount. It was clear Mr Andrewes would not have been offered these roles if the truth about his credentials had been known. However, an interesting point to note is that the Court also heard how Mr Andrewes frequently received strong or outstanding appraisals for the work he conducted. Furthermore, a witness from St Margaret's Hospice attested that they never entertained any doubts about Mr Andrewes' ability to carry out his role, and he helped the Hospice make significant process during his time there.

Ultimately, Mr Andrewes was sentenced in March 2017 to two years imprisonment.

At a subsequent confiscation hearing, the Court heard how Mr Andrewes' total net income earned as a result of his CV fraud was £643,602.91, yet the actual amount available to recover from him £96,737.24 (around 15% of the total income he benefitted from). A Confiscation Order was made for Mr Andrewes to repay pro-rata £96,737.24 to St Margaret's Hospice, the Torbay NHS Care Trust and the Royal Cornwall NHS Hospital Trust.

Mr Andrewes appealed this decision, arguing that he should not have to repay anything. Interestingly, the Prosecution did not agree with the Court's initial decision either, arguing that Mr Andrewes should repay his entire net earnings for the period 2004 to 2015. The Court of Appeal allowed Mr Andrewes' appeal, citing that repaying 15% of his net earnings was disproportionate, thereby he should not have to repay anything. Using s.6(5) Proceeds of Crime Act 2002 as authority, the Court reasoned that whilst Mr Andrewes received financial benefit from his crimes, in exchange he provided a full and valuable service to the organisations which was sufficient in terms of remedy to restore the financial benefit received. If the Court of Appeal confiscated Mr Andrewes' income this would amount to 'double recovery', which goes beyond confiscation and looks to penalise him.

The Prosecution appealed this decision, taking this matter to the Supreme Court. Judgment was given on 18th August 2022 where the Supreme Court decided they would not allow Mr Andrewes to profit from his crimes. The organisations he worked for sought to engage an individual of honesty and integrity, which Mr Andrewes was not.

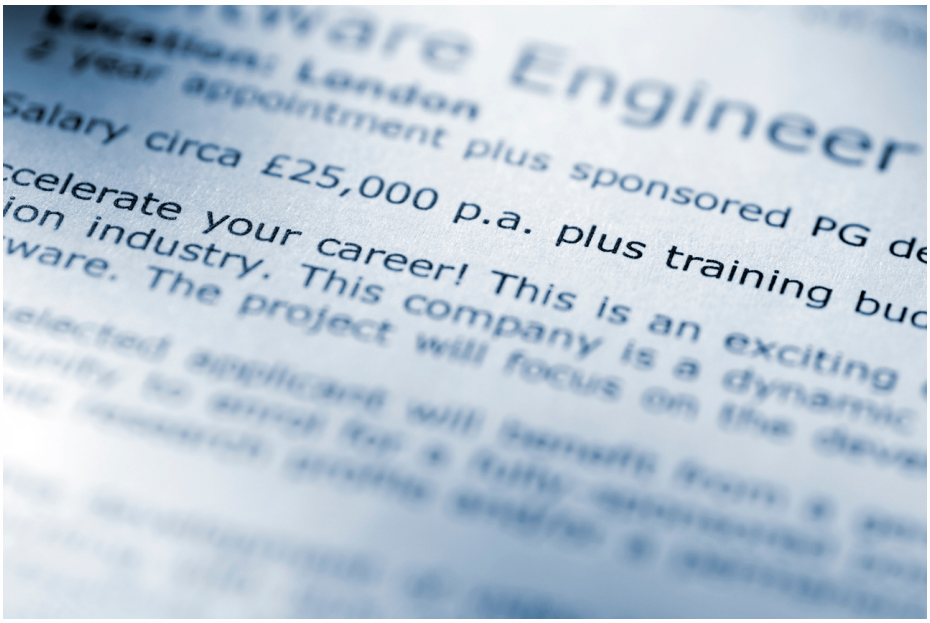
The Supreme Court decided the correct approach was to confiscate the difference between the higher earnings Mr Andrewes received due to his CV fraud, and the lower earnings he would have received if he had not committed CV fraud (calculated using his income prior to the fraud). They reasoned that this approach takes away the "profit" made. The Supreme Court calculated that Mr Andrewes "profited" to the sum of £244,569 from lying on his CV, but since the actual amount available to recover from him was only £96,737.24, they restored the original Confiscation Order which ordered Mr Andrewes to repay £96,737.24.

Interestingly, as an aside the Supreme Court commented that where an individual lies about having necessary qualifications or licences which are specifically required to do that job, for example the requirement for HGV drivers to have a Driver Certificate of Professional Competence, this renders the performance of those services without these credentials illegal. In these situations, the Court may confiscate all income earned by that individual in connection with the offence.

This is a serious example of the effects that falsifying credentials within a CV or job application can have. The gravity of the judgment is reflective of the fact that Mr Andrewes secured various senior, highly paid positions as a result of his fraud. In any event, falsifying credentials is a severe matter and can amount to gross misconduct and result in dismissal.

Points to note for Employers

Employers should ensure job adverts are accurate and reflective of the role they are advertising. Where certain qualifications and / or experience are necessary for the role, employers should clearly communicate these requirements, as well as confirming that checks may be made to verify the individual's claims. It is highly recommended that any job offer in that instance is made conditional on receiving satisfactory reference and qualification checks. Employers are reminded that they should comply with their obligations under the Data Protection Act 2018 whilst undertaking checks on candidates.



If an employer discovers that an employee has lied about their credentials to obtain a role we always recommend early legal advice is taken. Even if the individual has less than two years' service following a formal disciplinary process prior to dismissal may still be prudent. It will also be important to carry out a fair and appropriate investigation to verify concerns.

This is, of course, ignoring for the moment the potential criminal sanctions an individual may also find themselves subject to depending on the facts!

Lightfoots can assist employers by advising on correct disciplinary procedures and decisions, helping minimise the risk of potential claims.

SUSPENSIONS – NEW ACAS GUIDANCE

In September ACAS published new guidance on staff suspensions which can be viewed here.

An employee can be suspended as part of a disciplinary or grievance investigation process or on medical grounds. It is, however, important to ensure any suspension is truly appropriate in all the circumstances.

If a member of staff is unreasonably suspended this can amount to a serious breach of the employer's implied duty of mutual trust and confidence, leaving the employer at risk of potential claims including constructive unfair dismissal.

The ACAS guidance provides that you should carefully consider matters before suspending someone, based on the information known at the time. As an employer you should consider both the wellbeing of the individual, if suspended, and the risk to the business. It may be the risks to the business of not suspending the individual are greater. However, it is also always important to consider and rule out any alternatives to suspension first. The decision to suspend should not be an automatic or kneejerk reaction.

For example, as part of any grievance investigation process could the staff member be moved to a different team or office until investigations are concluded? If there are health and safety concerns, are they any alternative duties/roles the individual could undertake to alleviate the immediate risk pending further professional advice?

If any temporary changes other than suspension are implemented discuss with the individual concerned how this will be explained to colleagues. This, of course, does not prevent you considering suspension again in the event of developments during the investigation process.

If you do have to suspend someone, consider the potential impact this will have on them, their wellbeing and mental health. It is important that you:

- Be clear on, and explain the reason for the suspension, and that it is a precautionary step;
- Assure them their suspension, pending any further disciplinary or grievance investigation, does not imply that you have already made a decision on any misconduct allegations raised;
- Keep in regular contact with the individual and provide regular updates;
- Keep the suspension as short as possible. Make sure any necessary investigations are conducted at a reasonable speed;
- Discuss what their colleagues will be advised about their absence; and
- Give the individual a point of contact if they have any concerns.

If in doubt as to whether a suspension would be appropriate legal advice should always be sought.

EMPLOYMENT CONTRACTS – A REMINDER TO CHECK YOUR TEMPLATES.

Back in April 2020 we issued an update regarding legislative changes introduced impacting the contents of employment contracts and which can be viewed here. In particular it introduced additional information that employers should now be including in a worker's statement of terms/employment contract for new recruits joining on or after 6 April 2020. These changes also mean that the statement of terms/employment contract must now be provided no later than the first day of employment.

Unfortunately, we are still seeing a number of contracts that have not been updated. If you last had your employment contracts reviewed pre-April 2020 then we highly recommend you get them updated as early as possible and in good time before any further recruitment campaign. Please do not hesitate to contact us for a no-obligation quote today.

HOW CAN WE HELP?

We can help you with any employment law needs, but we thought it would be useful to summarise how we can help you if you come across any issues or needs relating to the content of this newsletter so please do get in touch with us if that's the case (contact details below):

1. Answering any questions you may have regarding holiday entitlement, holiday pay, and applicable calculations;
2. Providing guidance on staff suspensions, disciplinary and grievance processes; and
3. Updating your employment contracts to ensure they comply with current legal requirements.

Contact Us

Louise Nunn
Solicitor/ Head of Employment Law
01844 268 316
lnunn@lightfoots.co.uk

Charlotte Coles
Trainee Solicitor
01844 268 341
ccoles@lightfoots.co.uk