



February 2016 Update

Welcome to this month's edition of Employment Law update - where we discuss the latest legislation and guidance.

Sunday Trading

The government has decided to move ahead with its plan to loosen the restriction on Sunday trading hours in England and Wales, despite opposition.

At the moment, large shops in England and Wales (ie those with over 280 square metres of floor space) are allowed to open for only six hours on a Sunday, between 10 am and 4 pm.

The government is proposing to allow councils to extend those hours, so retailers can have the flexibility to compete for trade. Councils will also be able to restrict the longer hours to certain zones, such as high streets and city centres, although there are fears that the additional hours will benefit large chains to the detriment of independent high street stores.

An additional proposal is to make it easier for those who work on a Sunday to opt out of doing so. At the moment, all employees can opt out of Sunday working by providing three months' notice. Under the new proposal, the required period of notice to opt out would be reduced to one month.

Employers: It remains to be seen whether the proposals will become law, given the strong likelihood of cross-party opposition in Parliament.

Contact us if you need any help with zero hours or part-time contracts

Employee fails to prove lower bonus was 'irrational and perverse'

How much discretion does an employer really have when deciding the level of a bonus?

In the recent case of *Patural v DB Services*, a derivatives trader's contract of employment stated he was entitled to be considered for a discretionary bonus.

The factors taken into account when determining the level of bonus, such as the bank's overall performance and Patural's individual contribution, were described in his contract and in the staff handbook. Both gave the employer a wide discretion - it could look at any number of factors it considered relevant. However, his contract also stated that his pay would be treated in a "manner broadly consistent" with his peers.

He received a bonus of €1,275,685 which he considered too low as it only amounted to around 1 per cent of the profits he had generated, whereas two of his colleagues received bonuses that were a much higher percentage of their profits. He claimed this was a breach of contract, that the employer had acted perversely and irrationally in setting his level of award, and had breached the implied duty of mutual trust and confidence.

The High Court dismissed the claim. The colleagues' bonuses, referred to by Patural, were higher because their contracts provided a clear formula for their payment, unlike Patural's whose level of bonus was at the bank's discretion. The reason for the set formula was explained by various circumstances that applied at the time each of the colleagues had been hired, when there was a pressing need to incentivise and retain their services. The court held this was a sound reason for the different bonus structure.

Employers: This case is a reminder that where a contract expressly states that an employer has discretion to decide on the amount of a bonus, it is very difficult for an employee to challenge the level of the bonus awarded.

An employee will only succeed if they can show the level of bonus was irrational or perverse and it requires an overwhelming case to persuade a court to make such a finding.

Contact us if you need help with drafting bonus clauses in Employment Contracts

Latest Ruling on Holiday Pay and Commission

In November 2012, in the case of British Gas Trading v Lock, an Employment Tribunal (ET) referred Mr Lock's case to the European Court of Justice (ECJ) to determine whether holiday pay should include an add on of results-based commission. In May 2014, the ECJ confirmed it does.

The case then went back to the ET, which concluded in March 2015 that the Working Time Regulations should be interpreted so as to include non-guaranteed overtime in the calculation of holiday pay.

British Gas appealed to the Employment Appeals Tribunal against the tribunal's decision in Mr Lock's case but was unsuccessful, however, we are waiting to see if British Gas appeals to the Court of Appeal.

Employers: we are waiting for clarity on whether commission payments should be added into the calculation for holiday pay.

We would advise that employers should adopt a "wait and see" approach to commission-based holiday pay, especially as there remains some other outstanding questions such as the correct period to calculate holiday pay in. Although one point that is clear is that only the four weeks of paid annual leave entitlement deriving from the Working Time Regulations will be affected by this and not if an employee receives any extra holiday entitlement.

Contact us if you need help with holiday pay calculations

For more information or assistance Email: enquiries@employmentlawsupport.co.uk



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