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## August 2017 Update

Welcome to this month's update - where we discuss the latest legislation and guidance. In this Edition, we report on:

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- Tribunal Fees – Supreme Court rules that they are unlawful.
- Voluntary Overtime – should this be taken into account in holiday pay?
- Is suspension a neutral act?

### **Tribunal Fees – Supreme Court rules that they are unlawful.**

Employment Tribunal fees have been highly controversial, since their introduction in 2013. Many view them as unfair, especially as the number of tribunal claims have dropped dramatically since their introduction.

Unison, has challenged the fees regime and has suggested that it is a barrier to access justice. Unison's challenge has been ongoing for some time, which was finally decided upon by the Supreme Court on 26 July 2017.

The Supreme Court has ruled that the Government acted unlawfully and unconstitutionally when introducing tribunal fees. The Court also find that the introduction of the fees regime was indirectly discriminatory on grounds of sex as statistically, more women than men would bring tribunal claims.

As a result, the Government will now have to halt the fees regime and compensate those who have incurred costs in bringing tribunal claims.

In addition, the Tribunal will be staying applications by people who want to reinstate claims that were dismissed or struck out for non-payment of fees. This will be until the Ministry of Justice has decided how to handle them.

**Employers:** be more careful that disciplinary and grievance procedures are followed correctly after the lifting of fees, as applications can now make claims on line without incurring a fee.

**Contact us:** if you need advice and assistance with performance and/or disciplinary issues.

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### **Voluntary Overtime – should this be taken into account in holiday pay?**

The Employment Appeal Tribunal has just issued its decision on a case dealing with whether voluntary overtime should be treated as forming part of a worker's normal pay for the purpose of calculating holiday pay.

In this case the employees volunteered to perform additional duties which under their contracts of employment they were not required to do.

The question was should this fall within the principle of 'normal remuneration' for the purposes of calculating what a weeks pay is for holiday pay amounts.

This now means that as well as compulsory and guaranteed overtime needing to be taken into account when calculating what is the right amount of pay for a day's holiday pay, employers should include voluntary overtime which is regular.

Voluntary overtime which is not regular may perhaps not be included. The reference period for calculating holiday pay amounts is usually 12 weeks but may be different depending on the commission, bonus or overtime payments.

**Employers:** in essence, the impact of this decision is that a worker should not be worse off financially for taking holidays, as to do so might deter the worker for taking annual leave.

**Contact us:** we can assist with assessing holiday pay calculations.

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## Suspension – Is it a neutral act?

The High Court held that suspension of a teacher amounted to a breach of the implied term of mutual trust and confidence.

Suspension may not be a neutral act, at least in the context of a qualified professional in a vocation, such as a teacher. A knee-jerk reaction must be avoided and that suspension must not be the default position.

In this case, the reason given for the suspension was not the protection of children, but to "allow the investigation to be conducted fairly"<sup>2</sup>.

The Court found that suspension was adopted as the default position, it was a knee-jerk reaction and amounted to a breach of contract. This was not undermined by a resignation in friendly terms.

**Employers:** it is often difficult to decide whether to suspend an employee in some circumstances. Make sure that the suspension is for good reasons.

**Contact us:** we can assist with investigations and disciplinary procedures.

**For more information or assistance Email:** [enquiries@employmentlawsupport.co.uk](mailto:enquiries@employmentlawsupport.co.uk)



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Employment Law Support    Principal: Caroline Robertson  
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