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## September 2018 Update

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

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In this month's edition, we report on:

- Should Voluntary Overtime be Included in Holiday Pay?
- Employee Resignations? Are They Unambiguous?
- Unfair Dismissal – Is it Safe to Dismiss an Employee Right up to 2 Years' Service?

### Should Voluntary Overtime be Included in Holiday Pay?

The holiday season may be ending, but holiday pay remains a key topic. In *Flowers v East of England Ambulance Trust*, the Employment Appeal Tribunal (EAT) considered whether voluntary overtime should be included in holiday pay. Employees should be paid their 'normal pay' including regular overtime when they take holiday. But is voluntary overtime 'normal' pay?

In this case, sometimes the ambulance workers did 'non-guaranteed' overtime at the end of a shift, to finish a task such as caring for a patient. They could also choose to work voluntary overtime if it was offered but didn't have to accept it. Holiday pay was based on average earnings on the 12 weeks prior to their holiday. The employer didn't include any overtime in holiday pay calculations.

The employment tribunal found holiday pay should include the non-guaranteed overtime, because it was a contractual obligation, but voluntary overtime could be excluded as it wasn't contractual and not 'normal remuneration'.

The Employment Appeals Tribunal (EAT) disagreed and said both types of overtime should be included in the calculation.

**Employers:** The important point was whether overtime payments had been made over a sufficient period, on a regular basis.

**Contact us:** We can advise on the calculation of holiday pay.

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### **Employee Resignations? Are They Unambiguous?**

The Employment Appeal Tribunal (EAT) found them not necessarily so, in *East Kent Hospitals University NHS Foundation Trust v Levy*.

The Employee was an Administrative Assistant in the trust's records department and received a conditional offer of a job role in the radiology department. She sent a letter to her manager giving her resignation with one months' notice, as per her contract.

The conditional offer for the new position was subsequently withdrawn and the employee tried to retract her notice of resignation. Her employer then refused to retract it and terminated the employee's employment with them.

The employer argued that the words in the letter giving notice were unambiguous. This argument was rejected by the tribunal, as the letter could have been either a notice of intended transfer or a notice of termination.

The employment tribunal found she had been unfairly dismissed. The employer appealed but without success. The EAT held that once the offer of a new position had been withdrawn, the employee was seeking to withdraw her notice of departure from her admin role. However, the employer was of the view that the employee's position should come to an end.

**Employers:** This serves as a reminder to ensure clarity whenever an employee resigns or offers to give notice to resign. Find out why they are resigning, the notice they are giving and when the employment will end.

**Contact us:** We can assist with issues that arise on exiting an employee from a business.

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## Unfair Dismissal – Is it Safe to Dismiss an Employee Right Up to 2 Years' Service?

Normally, an employer gives notice to terminate a contract of employment. If an employer dismisses without notice, Section 97(2) of the Employment Rights Act 1996, allows an employee to add their statutory notice onto their continuous employment. What happens if an employee is dismissed without notice for gross misconduct one week before 2 years' service? Can they add on their statutory notice period of one week to extend their effective date of termination over the 2 years?

This is what happened to Ms Wileman who was dismissed for gross misconduct from Lancaster & Duke two days before the two-year anniversary of her employment. The employer didn't follow any procedure and the employee claimed unfair dismissal, trying to add on her statutory notice period of one week to reach 2 years. The employment tribunal allowed this and deemed it unfair dismissal.

The EAT disagreed, saying the tribunal had failed to consider another section of the same Act, section 86(6), which allows an employer to dismiss without notice for conduct reasons, such as gross misconduct situations. If the employer could dismiss without notice, then the employee could not add on the statutory notice to change her termination date.

If the Tribunal found she was guilty of gross misconduct, then her original termination date must stand, if not she could add on the extra weeks notice and bring a claim.

**Employers:** This case is a reminder to take care with dismissals which are very close to the two-year qualifying period, in case it is found not to be gross misconduct.

**Contact us:** We can help with disciplinary and grievance procedures.

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

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Business Forum

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