NEWS FROM THE HR TEAM

Uncertainty for the Care Sector for sleep-in employment

The Supreme Court has granted permission for an appeal in the legal case considering whether or not care workers who work "sleep-in" shifts are entitled to the national minimum wage.

In July 2018, the Court of Appeal ruled that care workers who sleep overnight at a client's home are not entitled to the minimum wage while they are sleeping.

In its judgment of two similar cases in the care sector – Royal Mencap Society v Claire Tomlinson-Blake and John Shannon v Jaikisham and Prithee Rampersad – the appeal judges found that employees who stay at a disabled, elderly or vulnerable person's house overnight are only entitled to the minimum wage while they are carrying out their duties – not for the full duration of their sleep-in shift.

In last summer's judgment, Lord Justice Nicholas Underhill said: "Sleepers-in… are to be characterised for the purpose of the regulations as available for work… rather than actually working… and so fall within the terms of the sleep-in exception.

More than 600 care support workers employed by the Alternative Futures Group have recently voted to take strike action over cuts to their pay for sleep-in shifts. Unison says they are facing a significant reduction in their wages and stand to lose as much as £15 for each sleep-in shift and more than £2,000 a year

BBi Group News

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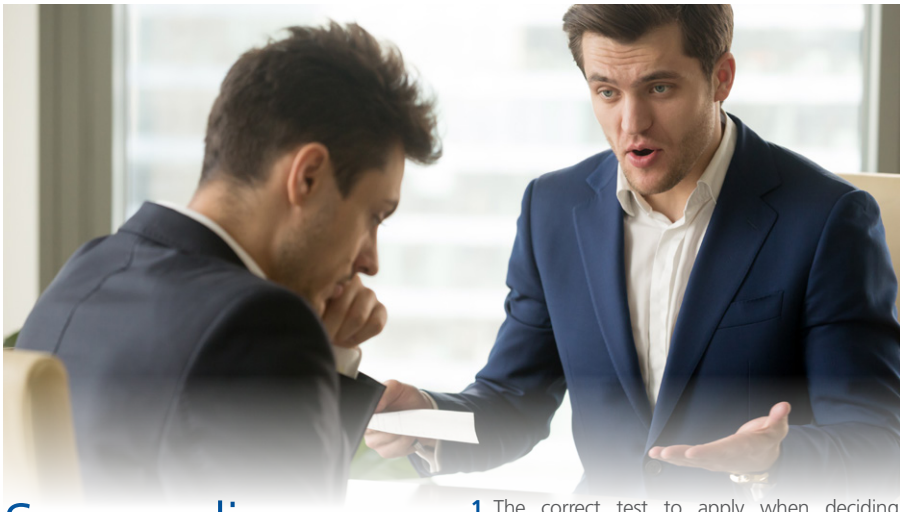

Suspending employees or breaching implied terms of employment?

When an employee is faced with disciplinary proceedings, particularly where these relate to conduct, it is a common reaction for the employer to look to suspend that employee.

Suspension is often carried out as an automatic response in every situation, with little or no thought being given to reasoning behind the suspension. However, this step should only be taken for a legitimate reason, for example; to preserve evidence, to protect the integrity of the disciplinary investigation or to protect other employees.

A 2017 High Court judgment raised the risk of such an approach being taken by ruling that taking such steps as a "knee-jerk reaction" is likely to be a breach of the implied term of trust and confidence that exists in all employment relationships, so giving rise to a claim by the employee of breach of contract or constructive dismissal.

In the recent Court of Appeal judgment, in the case of London Borough of Lambeth v Agoreyo, the following tests were applied when considering if suspension was a 'knee jerk' reaction or a justified action;

1. The correct test to apply when deciding whether to suspend an employee is not whether suspension is "necessary" but instead if there is "reasonable and proper cause" to suspend the individual in the circumstances;

2. That an act of suspension can constitute a breach of the implied term of trust and confidence and so give rise to a claim, however this is not automatically the case. Instead whether there is a breach should be looked at on a case by case basis, applying the above test; and

3. That whether a suspension of an employee is a 'neutral' act is not a relevant (or useful) question to ask. Instead the key issue is whether or not the employer was justified in suspending the employee on the particular facts.

Our top tips when suspending an employee

While this case does not offer a dramatic change in the direction of the law, it does clarify the position for employers when it comes to suspending employees and offers a view which is more employer friendly than that originally taken by the High Court.

Employers should take time to look at the circumstances on a case by case basis and examine whether suspending the employee would be reasonable taking into account all of the available evidence. For example, considering:

- why is suspension necessary? What purpose is the employer looking to achieve by suspending the employee, for example protection of evidence or other employees;

- whether any, less onerous, alternatives are possible (such as the individual working from home, having access restricted to certain information or being temporarily redeployed);

- what evidence is available – are the allegations being made against an employee credible? A full judgment on the facts obviously will not be made until the conclusion of the disciplinary proceedings, however the employer should at least carry out some preliminary investigations prior to suspending the employee and be confident there is some evidence to back up the allegations; and

- what effect the suspension may have on the employee. For example will suspension likely have a material impact on the employee's reputation, either internally or externally?

For further guidance please contact us.

Injury to feelings awards and uplift for failure to follow ACAS code

The case of Base Childrenswear Ltd v Otshudi, highlights how an injury to feelings award can be made in the middle of the range available even where it relates to only a one-off act of racial harassment.

The EAT held that the Vento bands, which are the bands for determining injury to feelings awards, were not prescriptive and any injury to feelings claim is fact sensitive. It is therefore important to consider the seriousness and the harm caused by each act of discrimination and determine the level appropriate based on that harm.

Interestingly, the Employment Tribunal also made an uplift in compensation of 25% in respect of the employer's failure to follow the ACAS code in respect of a grievance raised by the Claimant following the termination of his employment. The ACAS code does not expressly state that it applies to grievances from former employees and this is the first case which suggests that it does. In light of this case, it would be advisable for all employers to always follow the ACAS code in respect of post-termination grievances, in the same way as they would with any other grievance.

Discrimination arising out of disability

In the recent case of Baldeh v Churches Housing Association of Dudley and District Ltd, the Employment Appeal Tribunal ("EAT") considered whether an employer had discriminated against an employee on the grounds of his disability where the employer was not aware of the disability at the time of the dismissal but potentially became aware during the course to the appeal.

The Claimant was dismissed by her employer at the end of her probation period, following concerns about her performance. The Claimant appealed against her dismissal and, at the appeal hearing, disclosed that she suffered from depression which affected her behaviour. The appeal was unsuccessful and she subsequently bought a claim for discrimination. The EAT acknowledged that, whilst there were other grounds for dismissal which did not arise from the Claimant's disability, there was sufficient 'material influence' to support a discrimination claim. Therefore, the effects of the Claimant's depression, which caused the performance issues, should have been considered when deciding the appeal. In addition, the EAT held that the Company had or should reasonably have had knowledge of the disability during the appeal and, therefore, it was insufficient to rely on the fact that they did not have knowledge at the time the initial decision was made to dismiss.

The appeal hearing is an integral part of the decision to dismiss. Employers must take into account any information which comes to light during that appeal process. The presence of other grounds for dismissal will not defeat a disability discrimination claim, in circumstances where the something arising out of a disability had a material influence on the decision to dismiss. Employers should, therefore, tread carefully when new information comes to light at any stage in the process.

EMPLOYEE WAS UNFAIRLY DISMISSED AFTER ANNOUNCING PREGNANCY THREE WEEKS INTO NEW JOB

A pregnant office worker whose dignity was "violated" as a result of a "hostile, humiliating and offensive" work environment has won tribunal claims for unfair dismissal and pregnancy discrimination.

The East London Employment Tribunal ruled that Eilise Walker was subjected to unfavourable treatment by her employer, Arco Environmental, and was made to feel "intimidated and degraded" because of the perceived inconvenience her pregnancy would cause the business.

The tribunal heard the firm's managing director, Ron Heyfron, conceded he "probably did panic about the HR issues" he perceived the pregnancy would cause, and employment judge Bernice Elgot held the respondent was "in a situation where none of the senior managers had dealt with maternity arrangements before".