

Employment update

Welcome back from the summer break. In this Alert, we look at overtime payments for part time staff and the vexed question of what happens to holiday entitlement whilst an employee is off on long term sick leave.

Do you have to pay your part-time employees overtime?

A recent case has looked at whether the Metropolitan Police Authority was in breach of equal pay legislation by having a policy under which no employee received overtime pay. 86% of the full time staff employed by the Authority were male and 96% of the part time staff were female. Both full time and part time staff frequently worked overtime.

The case concerned a part time Inspector who was employed to work 32 hours a week. Her full time colleagues worked 40 hours a week. The Inspector argued that when she worked 40 hours a week she received pay for 32 hours whereas her full time colleagues were paid for the full 40 hours. As an Inspector, she did not have a choice whether or not to work overtime; she was required to work as and when directed.

The Authority argued that the pay scheme arose from collective bargaining but the Court found that this was not sufficient to justify the overtime arrangements. The Court agreed with Inspector's argument that the pay scheme fell foul of the equal pay legislation and held that the Authority must pay its part time staff overtime up to the number of paid hours worked by their full time colleagues, in this case, 40 hours a week.

Many employers employ both part and full time staff and in these post recession days paid overtime is becoming increasingly rare. Employers will need to revisit their pay schemes in the light of this case. If a scheme has no paid overtime provision for part timers and the resulting inequality is tainted by sex (meaning that more women than men work part time), the scheme is likely to be unlawful. An employer may seek to justify the arrangement but this will not be an easy argument to run.

The case did not consider what would happen if full time staff were paid overtime, perhaps to a set number of hours. It follows however that, if this was the case, part time staff should be entitled to paid overtime up to the number of hours full time staff are paid for.

Employers will also need to guard against tipping the balance too far in favour of part timers. If full time staff are not paid overtime and there is no limit on the overtime paid to part time staff, an employer could face a claim from a full-timer. An employer could face a scenario where a part-timer would be paid in full for 45 hours work, whereas the full timer would only be paid for 40 hours if he worked for 45 hours. To avoid such a problem, employers should put a limit on the overtime payments made to part timers and ensure that the same limit (in terms of overall hours worked) is applied to full timers.

Holidays and sickness – what to do with accrued holiday entitlement when an employee is off sick for a whole year?

This is a topic we have looked at in the past. The Employment Appeal Tribunal has now confirmed that statutory holiday (5.6 weeks per year) can be carried forward to the following holiday year where an employee has been off sick for the entire holiday year. Such accrued leave can be paid in lieu on termination of employment. The employee does not have to request the holiday during the relevant year nor request that the accrued leave be carried forward. This decision is contrary to express provisions in the Working Time Regulations. The Government is aware of the issue and is currently reviewing the Regulations. We hope to have at least a draft copy of the revised Regulations by the end of the year.

This is clearly a 'hot topic' as a similar case is being considered by the European Court of Justice (ECJ). The Advocate General has given a non binding opinion that Member States can restrict the life of carried forward holiday. It is suggested that holiday accrued during sick leave can only be carried forward for 18 months or it will be forfeited.

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