



**MS Rubric,**  
solicitors

Employment Law

# NEWS

Quarterly Newsletter

Summer 2018



## Hello,

welcome to the Summer edition. I hope you are all enjoying this wonderful weather. There have been some significant cases over the last few months, most notably the ground breaking decision regarding sleep-in payments and National Minimum Wage.

Over the last 6 months there has been a 90% increase in employees bringing employment tribunal claims since the fees have been removed. As a result, employers have been reviewing their policies and it is vitally important that line managers are properly trained to deal with grievances, disciplinaries, sickness absence and performance management.

Since GDPR has come into force, I have been very busy conducting GDPR compliance audits and providing a report to ensure that companies are compliant with the regulations. If you would like further assistance in ensuring that your company is meeting the new regulations, then please give me a call on **01454 800008**.

**Sylvia Chan**  
Employment Law Solicitor

## Sleep-in Payments

On Friday 13th July 2018, the Court of Appeal overturned the Employment Appeal Tribunal original decision in the Mencap case. In a ground breaking decision, the Court of Appeal has found that it is only time spent awake and working during a sleep-in that counts as working time for National Minimum Wage purposes. The care sector will be hugely relieved as they avoid the prospect of a £400 million back pay bill, for now, in light of the Court of Appeal's decision.

### The Court of Appeal's Reasons

The Court of Appeal found that the Low Pay Commission recommendations were of key importance to the appeal and considered them extensively in reaching their conclusion.

The Court accepted that it was clear the drafting of the legislation was such that there are two separate kinds of time work – actual work and availability for work under Regulation 32. Regulation 32 states:

*“(1) Time work includes hours when a worker is available, and required to be available, at or near a place of work for the purposes of working unless the worker is at home.*

*(2) In paragraph (1), hours when a worker is “available” only includes hours when the worker is awake for the purposes of working, even if a worker by arrangement sleeps at or near a place of work and the employer provides suitable facilities for sleeping.”*

The Court found the “self-evident intention of the relevant provisions is to deal comprehensively with the position of sleep-in workers”. In cases where “the essence of the arrangement is that the worker is expected to sleep” the Court decided it was not necessary to consider whether someone who is sleeping is actually working rather than being simply available for work. This is an essential point that means that previous cases such as Whittlestone, Esparon and the Mencap EAT decision were incorrectly decided.

## Sleep-in Payments (continued)

The Court considered a case where there are slack periods in work to be quite different to one where the arrangement is that the worker is expected to sleep.

The Court highlighted the: *“basic artificiality of describing someone as “working” – still more, as actually working – during a shift when it is positively expected that they will spend substantially the whole time asleep.”*

Live-in care providers who have structured their arrangements using Daily Average Agreements, relying on the Walton case, will take significant comfort from this aspect of the decision. Notably, this affects any sleep-in veterinary nurses that sleep-in on your practice premises.

**For more information please contact Sylvia Chan as the cases are fact sensitive.**

## Sickness absence management

We are often asked about how to manage sickness absence. A robust sickness absence management process would consist of:

### Return to work interviews

Return to work interviews should be conducted. Topics to discuss with the employee are:

- *Medication taken and any side effects of the medication that might affect their ability to work.*
- *Whether the employee’s doctor approved their return to work and recommended any workplace support.*
- *What help the employee feels they may benefit from.*
- *Concerns about outstanding workplace issues, such as workplace relationships, outstanding grievances, complaints, etc.*

### Recurring absences

If sickness absence is recurring, see if there is a particular pattern or any underlying issues:

- *Consult the company’s absence management policy (we recommend all employers have a policy in place)*
- *Consider if the employee may have an underlying medical condition.*
- *Initiate an open discussion with the employee.*

- *Consider requesting their doctor’s opinion.*

### Support mechanisms for prolonged or recurring absence

Exploring what sort of workplace support may be appropriate includes:

- *Considering what workplace adaptations may be required to suit the employee’s limitations.*
- *Proposing a phased return to work plan, based on the employee’s capabilities and limitations.*
- *Considering amending the employee’s duties whilst on a phased return to work.*
- *Identifying an alternative suitable role, if required.*
- *Arranging regular one-to-one reviews.*

**With our monthly HR support package, we are available at all times to discuss absence management with you.**

**We will also put in place your absence management policy which we strongly recommend.**

## What we’ve been up to...



**South West Business Showcase – 16 May 2018**

In May 2018 I attended the South West Business Showcase held at Ashton Gate with the Moore Scarrott Partnership. This show is the biggest business exhibition in the South West comprising over 270 exhibitors and attracting 3,500 delegates. This was a wonderful opportunity to meet local businesses and I very much look forward to seeing you at the next event.

## KEY CASES FOR 2018

### EU SETTLEMENT SCHEME

The government has published details of the new EU Settlement Scheme which will allow EU citizens and their family members to apply for UK immigration status to protect their position in the UK post-Brexit.

<https://www.gov.uk/government/news/home-office-publishes-details-of-settlement-scheme-for-eu-citizens>

### DISABILITY DISCRIMINATION

*DL Insurance Services Ltd v O'Connor*

Case Outcome: The employer was found guilty of discrimination arising from disability by the EAT (Employment Appeal Tribunal). In this case the employer's decision to issue a warning to a disabled employee, and to stop paying company sick pay, after she had accumulated 60 days' sickness absence in a 12 month period was discrimination as the employer had failed to objectively justify its actions. Critically, in this case, the disciplining manager had not spoken to the line manager about the impact of the absences and the employer had not referred the employee to occupational health before issuing the warning. The lack of evidence meant the employer was not able to show that the warning was a proportionate means of achieving its stated legitimate aims of ensuring adequate attendance levels and seeking to improve attendance. As an employer it is essential to have evidence to show objective justification for your decision.

### MISCONDUCT DISMISSALS

*Quintiles Commercial UK Ltd v Barongo*

Case Outcome: The EAT has held that a dismissal without prior warnings for serious misconduct, but not gross misconduct, is not necessarily unfair.

Although in most cases such a dismissal will fall outside the band of reasonable responses and be unfair, the EAT pointed out that there was no rule that this must be the case and the tribunal should have considered all the circumstances, including the Acas code and the employer's disciplinary procedure.

### DATA PROTECTION ACT 2018

The Data Protection Act 2018, which sits alongside GDPR, received Royal Assent on 23 May 2018. This Act makes provisions for how data protection law applies in the UK and extends the enforcement powers of the Information Commissioner's Office (ICO) that are not contained in GDPR.

The ICO has also begun consultation on its draft regulatory action policy, which sets out how it intends to use its enforcement powers. It includes statutory guidance on how the ICO will serve assessment or information notices and apply fines and the criteria that the ICO will consider in the event of a breach or potential breach; including:

- its nature and seriousness
- the types of personal data and number of individuals affected
- the costs of mitigating any risk, issue or harm.

Under the draft policy self-reporting is encouraged and will be taken into account when enforcement action is being considered.

### RIGHT TO WORK

*Afzal v East London Pizza Ltd t/a Domino's Pizza*

Case Outcome: Employers are required to carry out checks to ensure that their employees have the right to work in the UK. The EAT has held that an employee who was dismissed for failing to provide evidence of his continued right to work in the UK after his time-limited right to work came to an end, should have been given the right to appeal against his dismissal.



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- residential and agricultural property sales and purchases;
- GDPR audit and advice on compliance;
- employment law and HR (including a fixed fee HR retainer providing cost efficient HR support).

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**MS Rubric,**  
specialist legal and HR services for veterinary practices.

MS Rubric is a modern firm of solicitors. As part of the Moore Scarrott Group, the leading veterinary advisers in the UK, we have many years of experience advising veterinary practice owners. We therefore have a deep understanding of the veterinary sector and the business issues that you face.

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