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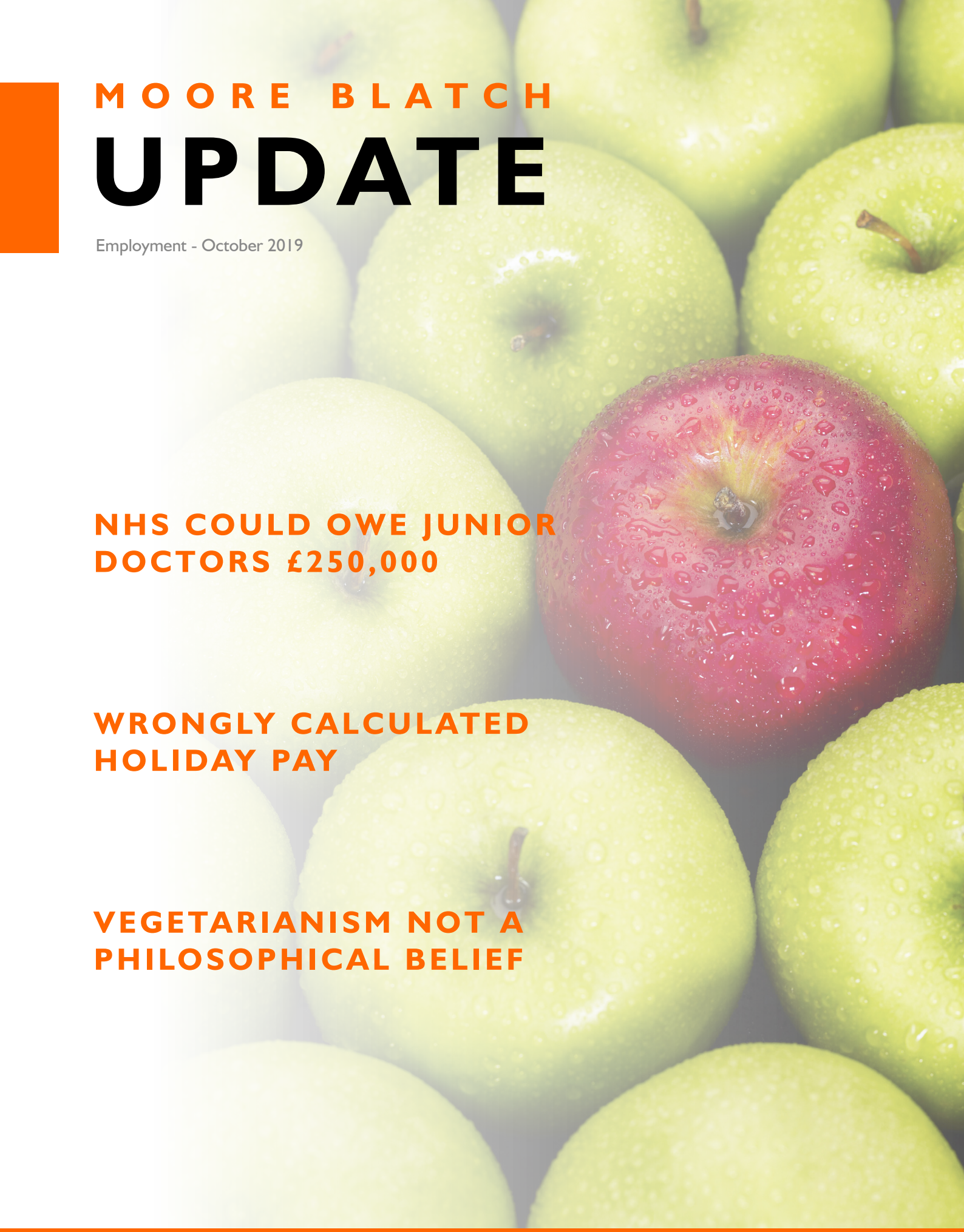
UPDATE

Employment - October 2019



NHS COULD OWE JUNIOR DOCTORS £250,000

WRONGLY CALCULATED HOLIDAY PAY

VEGETARIANISM NOT A PHILOSOPHICAL BELIEF

WELCOME TO OCTOBER'S EMPLOYMENT LAW UPDATE

In this issue we cover the latest proposed protections for zero hours workers, how junior doctors could find themselves owed £250,000, and an important ruling on how holiday pay should be calculated for part year workers.

Another piece of exciting news is that the employment team celebrated a wedding this month. We would like to take this opportunity to congratulate our very own Stephanie Bowen on her recent marriage. Stephanie has changed her name to Stephanie Clark.

As always, our legal expert team are here to answer any queries you may have.

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EMPLOYMENT BREAKFAST WORKSHOPS

Why inclusion & diversity makes commercial sense

Join us at one of our Employment workshops in Southampton or London for an interactive workshop on the topic of inclusion and diversity. The workshops will include a special focus on:

- Unconscious bias in the workplace
- How unconscious bias may expose employers to risks
- How you can take steps to navigate those risks

We are delighted to be joined by our guest speaker, Sasha Scott - Director, Inclusive Group, a leading expert on diversity, unconscious bias and inclusivity in the workplace.

For more information and to register for either workshop, please click here.

QUICK NEWS: POTENTIAL NEW PROTECTION FOR ZERO-HOUR WORKERS

A government consultation which ends this month could mean that workers' actual hours are written into their contracts and that last-minute shift cancellations are compensated for.

The level of compensation awarded could be calculated according to: how much the worker would have earned from the hours or shift; their national minimum wage (NMW) rate multiplied by the number of hours cancelled; and/or a set multiple of their NMW rate.

Under the proposed rules, workers would be entitled to "reasonable" notice of their work hours with employers being penalised if they fail to do this. However, what constitutes "reasonable" is not yet clear.

The consultation is part of the Government's "Good Work Plan" to overhaul UK workers' rights and tackle issues relating to flexible working.

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QUICK NEWS: CRACKDOWN ON 'GAGGING CLAUSES'

New laws banning the use of non-disclosure agreements (NDAs) in cases relating to sexual harassment, racial discrimination and assault are set to be introduced by the Government. NDAs related to these cases will be legally void.

The Government accepts that "many businesses use non-disclosure agreements and other confidentiality agreements for legitimate business reasons, such as to protect confidential information". However, Business Minister Kelly Tonhurst said that the government will not tolerate the use of NDAs to "silence victims to stop them speaking out."

The new legislation will also ensure individuals are entitled to receive independent legal advice about the limitations of a contract.

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QUICK NEWS: NHS COULD OWE JUNIOR DOCTORS £250,000

The Court of Appeal has found that NHS Trust's monitoring of working hours and rest breaks was flawed, and junior doctors could be owed £250,000 in back pay.

Under their contracts, junior doctors are entitled to a 30-minute break every four hours, or to be paid double if these breaks aren't taken. The appeal considered the NHS Trust's failing to ensure that this was enforced.

In calculating doctors' breaks, data from advanced rotas were used, rather than actual recordings of shift patterns. This method was found to be "irrational" and a breach of contract.

This decision sets a binding precedent which could have considerable implications for the NHS, as these contracts are used widely across the whole organisation.

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TESCO MANAGER UNFAIRLY DISMISSED

An ex-Tesco manager, who said she was "left in the dark" about changes to her role and subsequently suspended for not accepting those changes, has won her case for unfair dismissal.

Ms Escott was informed her role would be renamed "stock and admin manager" with only minor changes to her duties and responsibilities. Ms Escott then asked for further information, especially regarding the changes and whether they could be considered "minor".

It eventually transpired that the role change would mean the inclusion of 93% of an old compliance role and increased managerial responsibilities, which Ms Escott did not consider minor. Despite several meetings, Ms Escott's questions remained unanswered and she was eventually hospitalised due to anxiety-related symptoms aggravated by the proposed change.

On her return to work, and with her questions still unanswered, Ms Escott was given four options:

1) accept the new role;
2) look for another job internally;
3) step down;
4) resign.

Ms Escott refused the role and was subsequently suspended for non-compliance with a reasonable management request. She raised another grievance whilst suspended regarding the poor manner in which the company dealt with her suspension. Eventually Ms Escott felt she had no choice but to resign from her position.

The tribunal found that suspending Ms Escott and not answering her questions destroyed her trust and confidence in the working relationship. Her claim for constructive unfair dismissal was upheld.

If you are making any changes to roles within your company or organisation and would like specialist legal advice, please don't hesitate to contact us.

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SUPERVISOR ORDERED TO PAY COMPENSATION

In an "unusual" move, a tribunal has ruled that a supervisor (as opposed to the employer) should pay a Claimant compensation.

During a car journey, the supervisor made several racist remarks to the Claimant. The Claimant then told his manager what had happened, saying that as he considered the supervisor a racist, he didn't feel comfortable working with him again.

As the supervisor wasn't suspended or relocated during the disciplinary process, the Claimant raised a grievance. The employer confirmed that the Claimant wouldn't have to work with the supervisor again. However, the Claimant started to see the supervisor "all the time" at work.

The initial complaints were brought against both the employer and the supervisor, but complaints against the employer were dismissed when the Claimant accepted that the employer had taken all reasonable steps to prevent the supervisor from making racist comments.

However, in what is described as an "unusual" move, the tribunal went on to consider who really was to blame for the racial harassment suffered by the Claimant, and found that it was to be the individual supervisor.

If you would like to ensure you have appropriate policies and training in place that will prohibit this type of behaviour, we are happy to help.

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WRONGLY CALCULATED HOLIDAY PAY

Harpur Trust v Brazel [2019]

It is usual for part-time staff who work a full year to have their holiday pay pro-rated, but in a recent decision by the Court of Appeal a different calculation should be applied to staff who only work part of the year (e.g. term-time workers). In Harpur Trust v Brazel, the judge held that staff who only work part of the year should instead have their holiday pay calculated using their average earnings over 12-week period.

The Claimant in this case was a music teacher and permanent employee at Bedford Girls' School, working during term-time only under a zero-hours contract.

Under the Working Time Regulations 1998, all workers (including part-time workers) have a right to a minimum of 5.6 weeks' annual leave. Workers are entitled to be paid a weeks pay in respect of each week of annual leave. As in this case, difficulties can arise where a worker does not have normal working hours.

A common approach, and indeed the one recommended by ACAS, is that a worker accrues holiday entitlement at the rate of 12.07% of the hours worked. The rationale for this calculation being that a standard working year is 46.4 weeks (52 weeks less the statutory 5.6 weeks annual leave). 5.6 weeks is 12.07% of 46.4 weeks.

The school changed the way they paid the Claimants holiday pay so that it complied with the method recommended by ACAS (set out above). The Claimant received holiday pay in three payments during the year. The payments were made at the end of each term and calculated as one third of 12.07% of her earnings for the relevant term.

The Claimant argued that this method bore no relation the calculation established by the working time regulations and subsequently put her in a worse position financially. She asserted that in accordance with section 224 of the Employment Rights Act 1996, her holiday pay should be calculated using her average earnings for the 12-week period immediately before any annual leave taken. This calculation provided that she should be paid holiday pay worth 17.5% of her earnings rather than 12.07%.

In her claim for unlawful deduction of wages, the employment tribunal ruled that the school was using the correct method (12.07%) to calculate her pay. However, the Employment Appeal Tribunal and COA disagreed and held that the working time regulations does not require leave for workers such as the Claimant to be reduced pro rata. This is despite full-time workers potentially being disadvantaged compared to their part-time worker colleagues. There is nothing in the working time regulations to say that a full-time worker must not be at a disadvantage when compared to a part-time worker.

LEGAL OPINION

This case is an important development in the law of holiday pay which continues to evolve in line with modern working practices.

Although this decision only applies to workers on permanent contracts, employers should be aware of the possibility of part-year workers raising the issue of their holiday pay (and possibly bringing claims for unpaid holiday back pay). We anticipate that there will be further claims by part-year employees which will expand the scope of this decision to beyond persons working in schools.

It could potentially lead to casual workers on temporary or casual contracts to try and use the same argument that their holiday pay should not be subject to the 12.07% cap.

We would advise employers to consider whether they are vulnerable to such a claim, especially if the 12.07% approach to pay holiday for their zero hours staff with permanent contracts is used.

Our legal expert team can guide you through this incredibly complex area of law so that you do not fall foul of the strict regulatory requirements. Please do not hesitate to get in touch.

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EMPLOYER CLAIM RESPONSE TOO GENERIC

Upton-Hansen Architects v Gyftaki

This case is a timely reminder that the onus is on employers to prove that there was a potentially fair reason to dismiss an employee.

This case concerns Ms Gyftaki, who requested annual leave in addition to her contractual holiday entitlement which she had already used. Confusion arose as to whether or not Ms Gyftaki has been granted this additional leave. Her request for additional leave was eventually refused late at night before she was due to travel. The notice was so late, Ms Gyftaki went ahead with her travels.

Her employer consequently suspended her, so Ms Gyftaki resigned and submitted a compliant to the tribunal complaining that she had been constructively dismissed.

In response, her employer denied the claim, only stating that "Save as expressly admitted, all the Claimant's claims are denied in their entirety".

The employers "generic denial" was not sufficient to identify what the employer's case was if constructive dismissal was found. Accordingly, the employer's appeal (that the tribunal erred in deciding that there was no potentially fair reason) was dismissed.

LEGAL OPINION

This is a reminder that a response to a claim needs to deal with the issues in dispute in sufficient detail in order for the matter to be properly considered by the tribunal. Employers need to be aware that the burden of proof is on them to show that there was a potentially fair reason to dismiss.

There are usually time deadlines as to when responses need to be lodged, so if you are defending any claim, make sure to contact us as soon as possible if you need expert legal advice to prepare effective responses. This can ensure you are in the strongest position to defend any claim.

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VEGETARIANISM NOT A PHILOSOPHICAL BELIEF

Conisbee v Crossley Farms Ltd and others

In an intriguing case, the Tribunal considered whether vegetarianism is a belief, and therefore a protected characteristic, or a 'lifestyle choice'.

Mr Conisbee, the claimant, resigned after being told off for not ironing his shirt. As he'd only been employed for five months, he didn't have the requisite period of employment to bring an unfair dismissal claim. Instead, he claimed he had suffered discrimination on the grounds of religion and belief due to his vegetarianism. Mr Conisbee claimed he'd been ridiculed for not eating meat, and that his colleagues had given him food contaminated with meat based products.

Although Mr Conisbee's employer agreed that he had a genuine belief in his vegetarianism, they argued that being vegetarian is not a protected characteristic. It was also argued that it was never intended for lifestyle choices such as vegetarianism or veganism to fall within the remit of protected characteristics.

The Employment Tribunal agreed with the Employer. Interestingly though, the judge contrasted vegetarianism to veganism and the fact that vegans have a clear belief that killing and eating animals is contrary to a civilised society and against climate control. This indicated that a claim for veganism as a belief is more likely to succeed.

LEGAL OPINION

Although we don't know the facts of the alleged discrimination, the concept of someone suffering discrimination for not eating meat is intriguing, not least as we were unlikely to have seen a claim like this a few years ago before veganism enjoyed the popularity it does today.

The Tribunal's decision in this case seems highly sensible as finding in favour of Mr Conisbee could open the floodgates to similar 'lifestyle' claims. It is worth noting that the outcome may have been different had Mr Conisbee had the requisite 2+ years of service as he may have been able to successfully argue constructive dismissal on the basis that mutual trust and confidence had broken down. This, then, serves as a reminder to employers of the importance of promoting an inclusive working environment.

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