



WORKMATTERS
The natural choice for human resources

NEWSMATTERS

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WELCOME TO THE SECOND NEWSLETTER FOR 2016

Our newsletter is issued to you quarterly to ensure that you can be kept up to date with employment issues. We offer helpful hints on how to handle situations within the workplace, but never be afraid to give us a call for both guidance and support. All newsletters are on the website www.workmattershr.co.uk ensuring easy access to current information just click on the newsletter you wish to view.

This Quarter the focus is on the changes in law which will affect your business during the next quarter.

- We focus on changes to statutory payments.
- We summarise the awards made by Tribunals in 2015 and highlight a recent case.

We think you'll find the articles interesting. Please call us on 01442 870742 to discuss any of these articles and see how we can help you

and your business more effectively in the field of Human Resources. Alternatively have a look at our website www.workmattershr.co.uk and email us from there or on carolinebrode@gmail.com.

If you would prefer not to receive any future newsletters from Work Matters (HR) Ltd, please reply to this email with 'unsubscribe' in the title and we will remove you from our list - thank you.

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STATUTORY PAYMENT FOR MATERNITY, ADOPTION AND PATERNITY AND SICK PAY. THERE IS NO CHANGE TO THE RATES FOR 16/17.



- Statutory sick pay (SSP). The rate of pay will be £88.45 p.w.
- Statutory maternity pay. 90% of the woman's average weekly earnings (AWE) for the first six weeks of the maternity pay period followed by the lower of 90% of average weekly earnings or £139.58 p.w. for the remainder.
- Statutory adoption pay. Where the child is placed for adoption 90% of AWE for the first six weeks of the adoption pay period, followed by the lower of 90% of AWE or £139.58 p.w.
- Ordinary statutory paternity pay. The lower of 90% of AWE or £139.58 p.w.

Employers who qualify for the small employers' rate of reimbursement can recover 103% of the payments of the SMP, OSPP, ASPP and SAP that they pay out.

EMPLOYMENT LAW UPDATE

National Minimum Wage and National Living Wage

The Low Pay Commission, the body that advises the government on setting the National Minimum Wage, has released its suggested increases for this year. If the recommendations are accepted by the government the rate for workers aged 21 and over will rise by 3 per cent to £6.70 an hour; the rate for workers aged 18-20 will increase by 3.3 per cent to £5.30; workers aged 16-17 will see a rise of 2.2 per cent to £3.87; and apprentices' minimums go up by 2.6 per cent to £2.80. Confirmation of the new increases took effect from **1 October 2015**.

New regulations for the National Minimum Wage

The National Minimum Wage (NMW) is the minimum pay per hour most workers are entitled to by law. The rate will depend on a worker's age and if they are an apprentice. Any changes to the rate are normally introduced in October each year new rates as stated above came into force in October 2016. The regulations for these are:

Key points

- Most workers over school leave age will be entitled to receive the NMW.
- The NMW rate is reviewed annually by the Low Pay Commission.
- The minimum rate depends on the age of the worker.
- HM Revenue & Customs (HRMC) can take employers to court for not paying the NMW.
- There are a number of exemptions to those who receive the NMW. These do not relate to the size of the business, sector, job or region.
- The compulsory **National Living Wage** is the national rate set for people aged 25 and over.

- The NMW rates for those aged under 25 change on 1 October every year whilst the NLW rate for those aged 25 and over will change every year on 1 April.

Exemptions

There are a number of people who are not entitled to the NMW.

- Self-employed people.
- Volunteers or voluntary workers.
- Company directors.
- Family members, or people who live in the family home of the employer who undertake household tasks.

All other workers including pieceworkers, home workers, agency workers, commission workers, part-time workers and casual workers must receive at least the NMW.

Agricultural Wages

Agricultural and horticultural workers in England employed after 1st October 2013 must be paid the appropriate NMW rate.

Workers who were already employed before 1 October 2013 will still be entitled to the same terms and conditions set under their contract of employment; this may include overtime rates, agricultural wages, sick pay or dog allowance. DEFRA will continue to enforce complaints made by workers in respect of underpayments or non-compliance with terms and conditions of an Agricultural Wages Order before 1 October 2013 for up to six years after the breach occurred.

For agricultural workers in Scotland there is no change, and in Wales workers must be paid at least the Agricultural Minimum Wage, or the NMW if that's higher.

Family member exemption

For this exemption to apply, workers must either be a member of the employer's family, or live in the employers' family home.

Either the worker is a **member** of the employer's family and:

- resides in the family home of the employer.
- shares in the tasks and activities of the family.

Or the worker **resides** in the family home of the employer, and:

- is not a member of that family, but it treated as such (in regards to the provision of living accommodation, meals and the sharing of tasks and leisure activities)
- is neither liable to any deductions, nor to make any payment to the employer, or any other person, as respects the provision of the living accommodation or meals.
- if the work had been done by a member of the employer's family, it would not be treated as work.

Non-payment of the NMW

It is against the law for employers to pay workers less than the National Minimum Wage or to falsify payment records.

If an employer doesn't pay the correct rate, a worker should talk to their employer and try to resolve the issue informally first. If this doesn't work a worker may make a formal grievance to their employer.

A worker can make a complaint to HMRC who will investigate the complaint. If HMRC find that an employer hasn't paid at least the National Minimum Wage, they can send a notice of arrears plus a penalty for not paying the correct rate of pay to the worker.

The National Living Wage

A compulsory National Living Wage is due to be introduced on **1st April 2016** for all working people aged 25 and over, and will be set at **£7.20** per hour. The current National Minimum Wage for those under the age of 25 will continue to apply.

Who will be entitled to the National Living Wage?

Generally all those who are covered by the National Minimum Wage, and are 25 years old and over, will be covered by the National Living Wage these include:

- employees
- most workers and agency workers
- casual labourers
- agricultural workers
- apprentices who are aged 25 and over.

Penalties for failure to comply

With the introduction of the National Living Wage the penalty for non-payment will be 200% of the amount owed, unless the arrears are paid within 14 days.

The maximum fine for non-payment will be **£20,000** per worker. However, employers who fail to pay will be banned from being a company director for up to 15 years.

The Low Pay Commission

The Low Pay Commission which currently recommends the level of the minimum wage will recommend any future rises to the National Living Wage rate.

The Living Wage

The new National Living Wage is different from the Living Wage, which is an hourly rate of pay and updated annually. The Living Wage is set independently by the **Living Wage Foundation** and is calculated according to the basic cost of living in the UK. Employers choose to pay the Living Wage on a voluntary basis.

Redundancy Pay and Tribunal Awards

The maximum amount of statutory redundancy pay and the limit on the amount employment tribunals can award for unfair dismissal increase from 6 April 2016, under new legislation.

Employers that dismiss employees for redundancy must pay those with two years' service an amount based on the employee's weekly pay, length of service and age.

The weekly pay is subject to a maximum amount. From 6 April 2016, this is £479, increasing from £475. This means that the top award of statutory redundancy pay also increases from £14,250 to £14,370.

The maximum compensatory award for unfair dismissal is also increasing to £78,962 from the current £78,335.

The rise in the unfair dismissal award applies where the effective date of termination is on or after 6 April 2016.



Recent case law of interest and the highest awards made in 2015

Employers can be held responsible for crimes committed by staff at work, the supreme court has ruled in a case involving a Morrisons customer who was subjected to a violent, racist assault.

The unanimous judgment by the UK's highest court confirms the far-reaching consequences of the principle of "**vicarious liability**" – where someone is held liable for another's acts – and may make it easier for aggrieved customers to sue businesses in future.

The supreme court case developed out of a row on a Morrisons petrol station forecourt in Small Heath, Birmingham, in March 2008. The customer, Ahmed Mohamud, of Somali descent, had checked the air pressure in his tyres and then asked at the kiosk whether he could print off a document from a USB stick.

Amjid Khan, the Morrisons employee, refused and ordered Mohamud to drive away using “foul, racist and threatening language”. Khan followed Mohamud outside, pulled open the car’s passenger door and punched the customer in the head.

Mohamud got out of his car but was knocked to the floor by Khan and repeatedly kicked. A Morrisons supervisor intervened and tried to prevent Khan from continuing the attack.

Mohamud launched a claim for compensation against Morrisons. He has since died from an unrelated illness, but his family continued with the claim. Both the high court and court of appeal declared that Morrisons was not responsible, on the grounds that there was not a sufficiently close connection between what Khan was employed to do and his conduct in attacking Mohamud.

But the supreme court judgment disagrees with that conclusion, saying it was wrong to “to regard Mr Khan as having metaphorically taken off his uniform the moment he stepped out from behind the counter”.

When Khan followed Mohamud to his car and told him “not to come back to the petrol station”, he had been giving an “order” and “purporting to act about his employer’s business”, said the supreme court justice, Lord Toulson.

“It was a gross abuse of [Khan’s] position, but it was in connection with the business in which he was employed to serve customers,” Lord Toulson added. “His employers entrusted him with that position and it is just that, as between them and the claimant, they should be held responsible for their employee’s abuse of it.

“Mr Khan’s motive is irrelevant. It looks obvious that he was motivated by personal racism rather than a desire to benefit his employer’s business, but that is neither here nor there.”

It remains the case that there must be a sufficiently close connection between an employee’s wrongdoing and the employment such that it is fair to hold the employer liable.

While employment tribunal fees have drastically reduced the number of cases and typical awards for claimants are generally four-figure sums, tribunal decisions still occasionally cost employers dear.

The following six-figure employment tribunal awards that employers were ordered to pay in 2015, with a total compensation amounting to £2.5 million.

1. Large award for caste discrimination claimant

In *Tirkey v Chandok and another*, a claimant who brought a ground breaking caste discrimination case was awarded a total of **£266,537**.

2. Employees dismissed after raising commission concerns

In *Gilmore and others v Vodafone Ltd*, five salespeople who were dismissed after complaining about how their commission worked were awarded **£264,349**.

3. Mismanagement of sick leave was disability discrimination

Median employment tribunal awards 2014/15

Sex discrimination: £13,500

Disability discrimination: £8,646

Race discrimination: £8,025

Age discrimination: £7,500

Unfair dismissal: £6,955

Sexual orientation discrimination: £6,000

Religious discrimination: £1,080

In *Turner v DHL Services Ltd and another*, the claimant was awarded **£257,127** over his employer’s lack of support when he went off sick as a result of work-related stress.

4. Redundancy of mother of disabled child

In *J v H Ltd*, the employer was required to pay out **£251,460** to the mother of a disabled child over the way in which her redundancy was handled.

5. Dismissal of employee with acute anxiety

In *Marcelin v Hewlett Packard Ltd*, a claimant who was disciplined for, among other things, his refusal to consent to the release of a medical report was awarded **£239,913** for disability discrimination.

6. Large award for senior NHS whistleblower

In *Sardari and another v South Devon Healthcare NHS Foundation Trust and another*, the employment tribunal found that a senior NHS manager who raised concerns about an alleged biased recruitment process was subjected to a detriment for making a protected disclosure. She was awarded **£228,778**.

7. Deceased London Underground worker in large payout

In *O’Sullivan v London Underground Ltd*, a deceased London Underground worker was awarded **£223,869** for disability discrimination. In the event of a successful claimant’s death, the tribunal award goes to the claimant’s estate.

8. Disability discrimination against ME sufferer

In *A v S*, an employee with chronic fatigue syndrome (ME) was able to show that the way in which a move to a new role and her subsequent absences were handled was discriminatory. Her compensation totalled **£192,656**.

9. Financial officer dismissed after accounting disclosure

In *Nishioka v C&S Shops Ltd*, a financial officer who was suspended and summarily dismissed after raising accounting concerns was awarded **£184,741** in a tribunal.

10. Employer admits constructive dismissal

In *Asare-Brown v Mortgage 27 Ltd*, an employer that admitted that it constructively dismissed a web designer after non-payment of wages was required to pay **£130,702**.

11. NHS worker awarded compensation for disability discrimination

In *Waddingham v NHS Business Services Authority*, the employment tribunal held that an NHS trust committed disability discrimination against an employee having cancer treatment who was required to undergo a competitive interview process during a redeployment exercise. The employee was awarded **£115,056**.



Helpful Point

Review Your Holiday Policies (as advised by ACAS)

Calculating holiday pay

In addition to current legislation, a number of recent court judgments should be considered when calculating holiday pay.

This means that the rules employers and workers follow to calculate holiday pay may need to be updated.

Key points:

- Guaranteed and normal non-guaranteed overtime should be considered when calculating a worker's statutory holiday pay entitlement but there is currently no definitive case law that suggests voluntary overtime needs to be taken into account.
- Commission should be factored into statutory holiday pay calculations.
- Work-related travel may need to be factored into statutory holiday pay calculations.
- A worker's entitlement to holiday pay will continue to accrue during sick leave.
- There are different rules for calculating holiday pay depending on the working patterns involved.

- Workers must take their statutory paid annual leave allowance and can only be 'paid in lieu' for this when their employment ends.

Guaranteed overtime

Guaranteed overtime is where the employer is obliged by the contract to offer and pay for agreed overtime. Following a judgment in 2004, guaranteed overtime must be included within the calculation of holiday pay.

Non-guaranteed overtime

Non-guaranteed overtime is where there is no obligation by the employer to offer overtime but if they do then the worker is obliged by the contract to work overtime. On 4th November 2014 the Employment Appeal Tribunal made a ruling in the case of *Bear Scotland v Fulton* which covers how holiday pay should be calculated when non-guaranteed overtime is worked.

The judgment has clarified that:

- Workers should have their normal non-guaranteed overtime taken into account when they are being paid annual leave.

- Anybody making a claim must have had an underpayment for holiday pay that has taken place within three months of lodging an employment tribunal claim.

- If a claim involves a series of underpayments, any claims for the earlier underpayments will fail if there has been a break of more than three months between those underpayments.
- Only the 4 weeks' annual leave entitlement under the original Working Time Directive are covered by this judgment, rather than the full 5.6 weeks' leave provided by the Regulations as they operate in Great Britain.

This judgment may have an impact in situations where non-guaranteed overtime is carried out by workers on a regular or consistent basis.

It is unlikely to have an impact in situations where non-guaranteed overtime is either already factored into holiday pay, or possibly where this overtime is only used on genuinely one-off occasions.

Helpful Point continued...

Limit on a claim for an underpayment

The introduction of The Deduction from Wages (Limitation) Regulations 2014 means that when making a claim for backdated deductions from wages for holiday pay, a two year cap will be placed on all claims that are brought on or after 1st July 2015. This means that the period that the claim can cover will be limited to a maximum of 2 years.

Voluntary Overtime

Voluntary overtime is where the employer asks the worker to work overtime and the worker is free to turn down the request as there is no contractual obligation on either side to offer or refuse overtime. The question of voluntary overtime has not been directly considered by any recent judgments, so there is currently no definitive case law to suggest that voluntary overtime needs to be taken into account when calculating holiday pay.

Commission

Commission is usually an amount of money a worker receives as a result of making sales and can make up some or all of their earnings.

Commission must be factored into holiday payments for the 4 weeks of statutory annual leave required under European law. There is no requirement to do this for the additional 1.6 weeks of statutory annual leave provided under UK law, or for any additional contractual annual leave allowance. This was confirmed on 22 May 2014 when the European Court of Justice heard the case of *Lock v British Gas Trading Ltd*.

The *Lock v British Gas Trading Ltd* case was referred back to the UK Employment Tribunal to consider how commission is calculated into holiday pay for that particular case. A preliminary hearing was held in February 2015 questioning whether the Working Time Regulations themselves could be read in line with the European judgment. The Employment Tribunal judgment, which was also confirmed by the Employment Appeal Tribunal on 22

February 2016, said that it could be. However, this ruling may still be subject to a further appeal.

This means that at present, there is no definitive legal answer about how such holiday pay calculations must be made, or how/if claims can be backdated.

Work-related travel

Work-related travel can have a number of different meanings but for most employment matters, this will usually mean any travel that is made for work purposes that is not a part of a workers commute to their usual place of work. On 4 November 2014 the Employment Appeal Tribunal issued a judgment in a case joined to *Bear Scotland v Fulton* which covers how holiday pay should be calculated in relation to work-related travel.



Where payments are made for time spent travelling to and from work as part of a worker's normal pay, these may need to be considered when calculating holiday pay.

Holiday pay and sickness

When a worker takes paid or unpaid sick leave, their annual leave will continue to accrue. If a worker is unable to take their annual leave in their current leave year because of sickness,

they should be allowed to carry that annual leave over until they are able to take it, or they may choose to specify a period where they are sick but still wish to be paid annual leave at their usual annual leave rate.

Calculating holiday pay for different working patterns

No matter the working pattern, a worker should still receive holiday pay based on a 'week's normal remuneration'. This usually means their weekly wage but may include allowances or similar payments. Some of these payments might include the situations described earlier on this page, such as commission.

- For workers with fixed working hours - If a worker's working hours do not vary, holiday pay would be a week's normal remuneration.
- For workers with no normal working hours - If a worker has no normal working hours then their holiday pay would still be a week's normal remuneration but the week's pay is usually calculated by working out the average pay received over the previous 12 weeks in which they were paid.
- For shift workers - If a worker works shifts then a week's holiday pay is usually calculated by working out the average number of hours worked in the previous 12 weeks at their average hourly rate.

Payment in lieu of holidays

While workers are in employment, 5.6 weeks of their annual leave (this is the amount all UK workers are statutorily entitled to) must be taken and cannot be 'paid off'. Anything above the statutory allowance may be paid in lieu but this would depend on the terms of the contract.

When a worker's employment is terminated, all outstanding holiday pay that has been accrued but not taken (including the statutory allowance) must be paid.



Thank you for taking the time to read our Newsletter which I hope you found informative An e-newsletter will be sent on a quarterly basis to help keep you up to date with current legislation changes, as well as giving you some helpful hints and tips to help your business run smoothly.

In the meantime please contact us if we can be of service to you or your company.

Have an enjoyable quarter and we look forward to issuing you with our next newsletter in the early part of July 2016.