August is traditionally a quiet month for legal developments as Parliament and the Senior Courts' judges are on their summer holidays. Nevertheless, employment law developments continue. This month our pick of the latest developments and how they might impact your business are:

1. Holiday Pay for term-time only workers not subject to pro rata reduction
2. Whistleblowing: expanding protection to anticipated protected disclosures
3. Data Protection
   a. GDPR: Employer in Greece fined €150,000 for incorrectly relying on 'consent' to process employee data
   b. Data Subject Access Requests: time limits
4. Constructive unfair dismissal: the importance of getting your pleadings right
5. Cycle to work schemes & cycling inspired management tips
1. Holiday Pay for term-time only workers not subject to pro rata reduction

Under the Working Time Regulations 1998 (WTR) every worker is entitled to 5.6 weeks' annual leave. A week's leave should allow workers to be away from work for a week. It should be the same amount of time as the working week: if a worker does a five day week, he or she is entitled to 28 days' leave; if he or she does a three day week, the entitlement is 17 days' leave.

This is quite straightforward. Less straightforward is determining the entitlement of workers with less traditional working patterns.

Working out holiday entitlement for term time only workers, casual and zero hour workers can often prove to be an administrative headache both in terms of working out the amount of leave and how much holiday pay is actually due. For those workers with no normal working hours (and those with normal working hours whose pay varies according to the amount of work done or when work is done), under the WTR and section 224 of the Employment Rights Act 1996 (ERA), holiday pay must be calculated on the basis of the average weekly pay received in the preceding 12 weeks immediately before payment is made.

As a shortcut and to avoid the administrative burden of carrying out that averaging exercise,
some employers have instead adopted a practice of working out holiday pay by calculating it as pay equivalent to 12.07% of annualised hours. This is supported by the 'Your questions answered' section of the Holidays and Holiday Pay ACAS Guidance which states that 5.6 weeks is equivalent to 12.07% of hours worked over a year for a full time worker.

Last year, the Employment Appeal Tribunal (EAT) decided that this approach of calculating holiday pay for variable hour, term-time workers based on a calculation of 12.07% of annualised hours is incorrect. A worker who works irregular hours throughout each week of the year is entitled to holiday pay calculated under the WTR and section 224 of ERA, which is based on average earnings over the 12-week period immediately preceding the taking of the leave. Holiday pay is therefore based on an average week's pay over that period.

The EAT’s decision in the case of Brazel v The Harpur Trust (UNISON intervening), has now been considered by the Court of Appeal.

A quick recap of the factual scenario

In this case, Mrs Brazel worked as a part-time music teacher at a school. She worked during term time under a zero-hours contract, under which her weekly hours fluctuated, and she was required to take her holiday during school holidays. Her contract stated that she had the right to 5.6 weeks' annual leave, in line with the WTR. She was paid her accrued holiday pay three times per year, in April, August and December. The school calculated her entitlement to holiday pay as 12.07% of the hours worked in the preceding term relying on the Acas guidance. Mrs Brazel brought a claim for underpayment of holiday pay as paying 12.07% of hours worked was not the same as paying the normal rate of pay averaged over the 12 weeks prior to holiday being taken as required by the WTR.

The Court of Appeal's judgment

Before the Court of Appeal, the employer's principal argument was that it was necessary to reduce Mrs Brazel's holiday entitlement to reflect the fact that she worked for only part of the year.

The Court acknowledged that the pro rata principle applies in the case of part-time workers (those who work throughout the year but for only part of the week). For full-year part-time workers, the pro rata principle operates by relieving the worker from having to work on the particular days in the weeks that they would have worked otherwise. Accordingly for an individual who works three days a week through the year, 5.6 weeks equates to 17 days.
Despite acknowledging that the pro rata principle is general in its application, the Court of Appeal went on to conclude that the pro rata principle does not apply in the case of part-year workers, i.e. those working under permanent contracts but who do not work throughout the whole year.

The Working Time Directive (WTD) and European case law requires only that workers accrue entitlement to paid annual leave in proportion to the time that they work - therefore applying a pro-rata principle to part-year workers. However, this accrual approach is not mandatory and the Court of Appeal held the UK WTR are more favourable to such workers and do not apply the pro rata principle to them.

According to the Court of Appeal, if part-year workers are on permanent contracts, it is not unreasonable to treat that as a sufficient basis for fixing the quantum of holiday entitlement, irrespective of the number of hours, days or weeks that the workers might in fact have to perform under the contract. The actual days from which they would be relieved, and the amount of their holiday pay, must reflect their actual working pattern during the weeks they are in work.

The Court accepted that this approach would lead to odd results in the "extreme" cases, but simply said that general results sometimes do produce anomalies. In principle you could have a permanent employee who worked only one week of the year, for which he or she earned, say, £1,000 a week, and who would then be entitled to 5.6 weeks annual leave, for which they would receive £5,600!

Lessons for employers

The simple point is that the express provisions for calculating holiday pay for workers with variable hours contained in the WTR cannot be overridden by capping annual holiday pay at 12.07% of annualised hours for ease of calculation.

Any employers who have continued, since the EAT judgment in this case, to use, for 'part-year workers' on 'permanent' contracts, the approach recommended by Acas for casual workers of applying 12.07% of annual pay, will need to review the way in which they calculate holiday pay and the terms of any relevant contracts.

Much trickier questions arise for employers who currently use the 12.07% approach to pay holiday to their zero-hours staff with permanent contracts as a result of this judgment. Employers need to consider their potential exposure and take detailed advice on potential options. They may also want to ensure zero-hours workers on permanent contracts are not used for only very short concentrated periods in a given holiday year, to avoid the sort of
extreme example which the Court of Appeal gave.

From 6 April 2020, the **Employment Rights (Employment Particulars and Paid Annual Leave) (Amendment) Regulations 2018** increased the reference period for calculating holiday pay from 12 to 52 weeks (or the number of complete weeks for which the worker has been employed if fewer than 52). While this will help simplify holiday pay calculations for workers with irregular working hours who work throughout the year, it does not address the issue raised in Harpur Trust v Brazel.

The effect of the judgment is to create a distinction between part-time workers and part-year workers as defined by the Court. This raises issues about whether it's correct to apply a different approach where that approach is solely dependent on when a non-full time worker on a permanent contract works.

A further appeal to the Supreme Court seems highly likely and would be welcomed. We may have to wait some time for clarification.

Also following this judgment, on 21 August, the Government removed references to the holiday pay calculator from its guidance on calculating holiday pay for workers without fixed hours or pay simply stating it has been removed "while the service is under review".

### 2. Whistleblowing: expanding protection to anticipated protected disclosures

Under the whistleblowing statutory provisions, a worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has "made a protected disclosure". Similarly, a dismissal of an employee will be automatically unfair if the sole or principal reason for the dismissal was that they "made a protected disclosure".

As the statutory provisions refer to the individual having "made a protected disclosure", can the individual rely on the statutory protection as a result of the employer becoming aware that the individual is "considering making" a protected disclosure as opposed to actually making one? This is the novel question the employment tribunal (ET) was asked to consider in **Bilsbrough v Berry Marketing Services Ltd** to which it answered - Yes, they can.

### What happened in this case?

Mr Bilsbrough came across a potential data security issue and reported it directly to a senior
technical director rather than through his line manager. His line-manager later admonished him for by-passing her and for not "engaging his brain" to respect the chain of command. Angry over receiving this reprimand, he vowed to a colleague that he would 'take the company down' by reporting it for data protection violations. He then went about researching how to report a matter as a formal complaint to the Information Commissioner Office (ICO) - though he never did make a disclosure. The incident then blew over.

A few weeks later, Mr Bilsbrough's colleague learned he was to be promoted over her. Unhappy, the colleague informed their line manager about Mr Bilsbrough's threat to bring down the company by making a disclosure to the ICO. Mr Bilsbrough was immediately suspended by the line manager and following a fair disciplinary process, he was dismissed. Mr Bilsbrough brought claims for detriment (being suspended) and for automatic unfair dismissal.

**The detriment claim**

The ET found that the reason the employee had been suspended was largely because his line manager believed that he had been considering making a protected disclosure directly to the ICO as well as his threat to bring down the company. Accordingly, Mr Bilsbrough's intention to make a protected disclosure materially influenced the line manager's decision to suspend him.

On their face, the statutory protected disclosure provisions only provide the right for workers not to be subjected to any detriment on the ground that the worker has made a protected disclosure. But, could Mr Bilsbrough claim protection from detriment because his employer believed he was taking preparatory steps towards making a protected disclosure as opposed to having actually made such a protected disclosure?

The ET agreed with the employee that the whistleblowing provisions had to be read purposively in a way which went beyond the precise words used. Protection should be extended to workers who suffered because they were considering making a protected disclosure, or were expected to make a protected disclosure in the future. The ET stated that without the law extending that far, whistleblowers would not be adequately protected: "if a person cannot consider making a disclosure without the risk of sanction, even if that consideration leads to a decision not to make a disclosure, then there will be a chilling effect on the making of protective disclosures".

Accordingly, the ET found the relevant statutory provisions should be read as a worker has the right not to be subjected to any detriment on the ground that he has made or considered making a protected disclosure and that he may not be dismissed for that reason.

The ET awarded £2,500 for injured feelings in relation to the unlawful detriment claim.
**Automatic unfair dismissal**

Mr Bilsbrough failed in his automatically unfair dismissal claim, as the ET was satisfied that the reason for dismissal was not wholly or principally because he had made a protected disclosure or considered making one. He was dismissed because he had threatened to harm the company when he became angry with his line manager. That threat was separate to researching how to make a disclosure and gave the employer legitimate cause for concern as to how he would behave in the future if he became angry with his manager.

**Lessons for employers**

1. This judgment potentially extends the boundaries of the whistleblowing protection in order to shield from detrimental treatment not only employees who have made protected disclosures, but in some cases those who are merely considering or preparing to do so. Although only a non-binding first-instance judgment, this decision is carefully reasoned and likely to be followed in future cases.

2. This judgment is also a useful illustration of the differing causal connection tests for dismissal and detriment claims. The reason for dismissal must be the sole or principal reason for dismissal. Whereas for a detriment claim, it only needs to be established that the decision maker was 'materially influenced' by the perceived intention to make a protected disclosure, a much lower hurdle.

**3. Data protection**

**GDPR: Employer in Greece fined €150,000 for incorrectly relying on 'consent' to process employee data**

At the end of May 2018, the EU General Data Protection Regulation (GDPR) together with the new Data Protection Act 2018 came into force introducing a raft of important changes to the data protection regime. One of the key changes for employers is the stricter and more detailed conditions for the use of consent.

The GDPR sets a very high threshold for valid consent. To be valid, consent must be freely given, specific, informed and unambiguous. Using 'consent' as the legal basis for processing personal data in the context of an employment contract is highly unlikely to meet this threshold due to the imbalance of power between employers and their employees, the need for consent to be specific, an employee has to genuinely have the right to withdraw their consent and that
withdrawal process has to be as easy as the process of giving consent in the first place.

The GDPR identifies a limited number of other legal bases, including processing that is necessary 'for the purposes of the legitimate interests pursued by the controller' and processing necessary for 'compliance with a legal obligation'. These will be the better options in an employment context.

We now have the first reported European enforcement action under the GDPR in an employment context for the incorrect use of 'consent' as the basis of processing employee personal information.

The Hellenic Data Protection Authority (DPA) (Greece) has imposed a fine of €150,000 (0.36% of the employer’s net annual turnover for 2017-2018) and ordered corrective measures on an employer in Greece who required employees to provide consent to the processing of their personal data as a term of their contracts of employment.

The Hellenic DPA found:

- 'Consent' an inappropriate legal basis for processing

  The employer had unlawfully processed employee personal data, since 'consent' was an inappropriate legal basis for processing. The processing of personal data was intended to carry out acts directly linked to the performance of employment contracts. The Hellenic DPA stressed that "consent of data subjects in the context of employment relations cannot be regarded as freely given due to the clear imbalance between the parties".

- Importance of identification of the appropriate legal basis

  Compliance with a legal obligation to which the controller is subject and the legitimate interest in the smooth and effective operation of the company, could each be an appropriate legal basis for processing. But neither was the basis identified by the employer. The identification and choice of the appropriate legal basis under the GDPR is closely related both with the principle of fair and transparent processing and the principle of purpose limitation. The controller must not only choose the appropriate legal basis before initiating the processing, but also inform the data subject about its use, as the choice of each legal basis has a legal effect on the application of the rights of data subjects.

Lesson for employers
This is of course a decision of the Hellenic DPA, but it is early confirmation that an employer who relies on 'consent' as the lawful basis for processing in the context of employment relations under the GDPR is at risk of enforcement measures. Even though an employer may have a valid reason for processing employees' information, doing so on an incorrect basis will be a breach of the GDPR risking a significant fine from the relevant supervisory authority.

This Greek determination is in accordance with the UK’s Information Commissioner’s Office (ICO) detailed guidance on 'consent', from which the clear message is that consent will rarely be appropriate in the employment context where there is an imbalance of power between the controller and the data subject. The detailed consent guidance states that, if for any reason a controller cannot offer people a genuine choice over how the controller uses their data, consent will not be the appropriate basis for processing.

**Data Subject Access Requests: time limits**

As data controllers, employers are bound by the rights of data subjects, such as employees, including the right of access to personal data concerning them. It is common for current or former employees to submit data subject access requests (referred to as DSARs or SARs) to their employers, asking for personal data the employer holds about them.

Under Article 12 GDPR, a data controller must respond to a DSAR "without undue delay and in any event within one month of receipt of the request". This can be extended by a further two months if the request is complex or a number of requests have been made by the data subject.

**But from when do you count the one month period?**

This month the ICO has updated its position on how to calculate the time limit for responding to a DSAR.

Previously, the ICO's guidance said that the one month time limit should be calculated from the day after the DSAR was received until the corresponding calendar date in the next month. This meant that if the DSAR was received on 1 October, the response deadline would be 2 November.

The "time from" date has now been changed. The time limit should now be calculated from the day the request is received (whether it is a working day or not) until the corresponding calendar date in the next month. Therefore, if the DSAR was received on 1 October, the data controller should respond by 1 November.
If it is not possible to meet the deadline because the following month is shorter (and there is no corresponding calendar date), the response must be provided by the last day of the following month. For example, if a DSAR is received on 31 October, you have until 30 November to comply with it as there is no equivalent date in November. However if the corresponding date falls on a weekend or a public holiday, the deadline for the response will be the next working day after the public holiday or weekend.

The position has changed following the European Data Protection Board belatedly adopting a 2004 decision from the Court of Justice of the European Union on the rules applicable to time periods set out in acts of the Council of the European Union and the European Commission (Maatschap Toeters and M.C. Verberk v Productschap Vee en Vlees).

Following this amended position, data controllers should review and update their DSAR procedures to ensure continued compliance with their data protection obligations.

4. Constructive unfair dismissal: the importance of getting your pleadings right

Pleadings are the means by which each party states the limits of its case. Accordingly, if you plead your case too narrowly it can lock you out from changing your arguments later - if a point is not pleaded, it is not in your defence.

The EAT in Upton-Hansen Architects Ltd v Gyftaki, reminds employers of the dangers of insufficient pleading.

What happened in this case?

Ms Gyftaki had run out of annual leave. There was genuine confusion about whether Ms Gyftaki had been granted additional leave until late the night before she was due to travel due to an urgent family matter when her leave request was refused. Because of the late notice, she travelled anyway.

The employer suspended her in a way later found by the tribunal to amount to a breach of the implied term of trust and confidence. Ms Gyftaki resigned in response to her suspension and claimed she had been constructively unfairly dismissed. In the employer's response to the claim for constructive unfair dismissal set out in the ET3 form, the employer simply denied constructive dismissal, but then only saying, "Save as expressly admitted, all the claimant's claims are denied in their entirety".
Where a claim is for unfair constructive dismissal, an employer can choose to resist the claim purely on the basis that there was no constructive dismissal at all, the burden being on the claimant to show that there was a constructive dismissal. The employer can also choose to argue in the alternative, that if there were such a constructive dismissal, it was nevertheless fair stating the potentially fair reason relied upon, for example misconduct or capability.

In this case, the respondent had not pleaded such an alternative case. On appeal, the EAT considered the question: As the claimant succeeded in establishing she had been constructively dismissed, did the employer need to assert and prove a potentially fair reason for dismissal, to successfully defend her constructive dismissal case?

The EAT said - Yes. A generic denial does not serve to positively identify what, if anything, the employer's defence is in the event that constructive dismissal is found. The response set out in the ET3 in this case, disputed whether there had been a constructive dismissal but it did not assert that, if dismissal was found, it was nevertheless fair, nor what the fair reason for dismissal would in that case be.

**Lessons for employers**

When responding to an employment tribunal claim it is critical to understand what you are trying to achieve. Before sitting down to complete an ET3 response form, pause for thought and consider any alternative arguments that are needed to ensure you can run your full defence.

**5. Cycle to work schemes & cycling inspired management tips**

This summer, the Department for Transport has published updated guidance confirming that employers may now offer cycling equipment above the £1,000 limit allowed under most salary sacrifice cycle-to-work schemes, by running the scheme through a Financial Conduct Authority approved third-party provider - [Cycle to work scheme implementation guidance for employers](#).

As 8th August was this year’s Cycle to Work Day and following on from the recent conclusion of this year’s Tour de France, we leave you this month with some Le Tour De France inspired management tips:

1. Motivate your staff by making the highest performers wear bright and gaudy special outfits. To go the extra kilometre, decorate their workstation to match.
2. Support leaders by having their direct reports carry their water and food for them all day
3. Engage said direct reports by giving them catchy labels such as 'domestiques' or 'servants'. Promote the best to 'super servants'.

4. Wellbeing - make sure your staff on the frontline have all they need in terms of nutrition, food, 'medicine' and massages to keep going. No matter what physical or mental trauma they have suffered.

5. Respect your competitors. When they suffer an unfortunate issue that sets them back (such as an 'industrial' or a 'commercial') hold back until they catch up. Unless you are at the point of the financial year when you can call it 'racing'. Then it's *allez allez!*

(Special thanks to our cycling colleague, Simon Stephen, for these "inspirational" management tips)

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