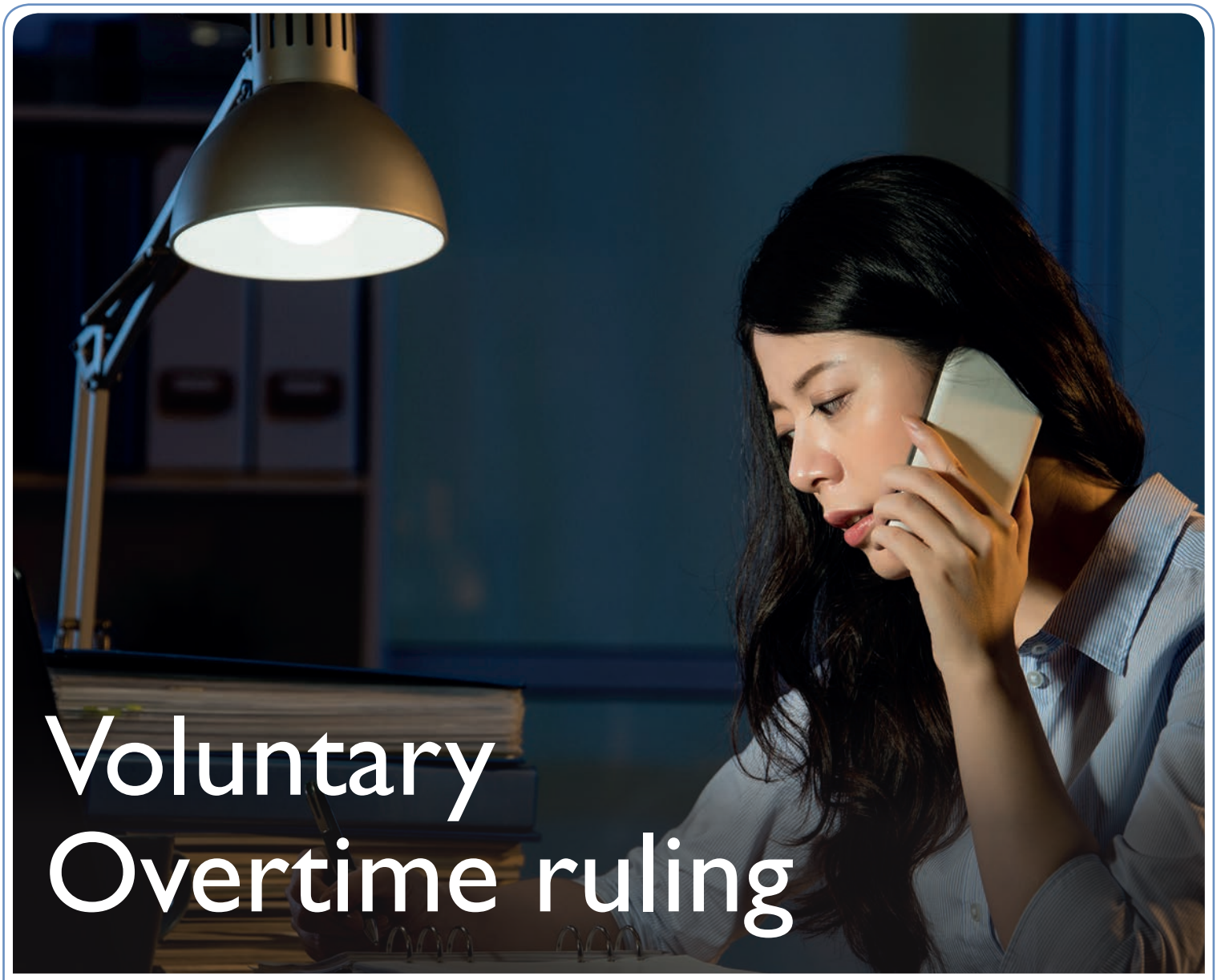
Employment &BusinessBrief

July 2019



# Voluntary Overtime ruling

A recent ruling on the voluntary overtime pay for ambulance workers could have wider implications in the future for other employees in both the public and private sector.

The Court of Appeal recently ruled in favour of ambulance crews whose contracts included both mandatory and non-guaranteed overtime when emergency shifts overran and voluntary overtime which is agreed in advance.

The ruling made by the Employment Appeal Tribunal in Flowers and others East of England Ambulance Service NHS Trust, which was then upheld by the Court of Appeal means voluntary overtime should also be taken into account when calculating holiday pay. This will help prevent staff from losing out significantly on pay when they take a holiday.

Where overtime (whether voluntary or otherwise) is regular, it does imply that the employee relies on these payments and therefore the loss of them results in a disincentive to take annual leave. This could then mean that the employer is in breach of Working Time regulations. It is therefore very important for employers to be vigilant when calculating holiday pay and to ensure that overtime should be monitored. Employers should be fully aware of who is doing what, avoiding the risk of claims for breaching Working Time regulations in the future.

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# Orchestral related hearing loss

In April the Court of Appeal found in favour of a viola player claiming compensation for hearing loss against the Royal Opera House. The claim was unusual, in that it involved a sudden onset injury known as "acoustic shock", rather than gradual hearing damage over a period of time. However, there were important findings of general relevance across the entertainment industry.

The High Court said "however laudable the aim to maintain the highest artistic standards it cannot compromise the standard of care which the ROH as an employer has to protect the health & safety of its employees". This included complying with the Control of Noise at Work Regulations 2005 in particular reg 7(3) which required the orchestra pit to be designated as a "hearing protection zone". However, the Court of Appeal accepted the artistic requirements of the work (in this case Wagner's Ring cycle) meant it was not "reasonably practicable" to require musicians to wear hearing protection at all times, as this would impede the quality of their performance

The case was eventually won under Reg 6, which requires noise exposure to be eliminated at source, subject to "reasonably practicability". There was "damning" evidence that noise exposure to the viola players could have been reduced by simply positioning them further from the brass section. This should have been identified in the risk assessment under Reg 5. Instead the risk assessment did not reflect the actual orchestra layout or include the expected noise exposure levels.

Traditionally noise induced hearing loss has been associated with heavy industry. However, the 2005 Regulations have applied to the music and entertainment industry since April 2008.

Employers should always remember the primary duty is to eliminate noise at source where possible. They should review their noise risk assessments and check them against the requirements of Reg 5. Accurate exposure data is essential. Sophisticated monitoring technology is available, such as earplugs containing miniature microphones. Employers must ensure correct usage under Reg 8 - recently IOSH referred to a study of 100 offshore workers in which three quarters were using their hearing protection incorrectly, much reducing effectiveness. A proactive approach should reduce claims and absences and increase wellbeing. Compliance advice is available at http://www.hse.gov.uk/noise including a "myth buster" on the music and entertainment sectors.

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# Employers must accurately record staff breaks

The Court of Justice of the European Union has ruled that employers must accurately measure the length of time that their staff work. This means employers need to make sure they have in place a sufficiently adequate system which records the exact number of hours so that if needed, they can provide proof to their employees that their rights have not been breached. This will also provide evidence to authorities and national courts who enforce those rights.

The case was brought by Spanish Trade Unions. Under Spanish law employers only have to keep a record of overtime hours worked by each worker at the end of each month. These records were found to be inaccurate and 54% of time worked was not recorded.

In the UK under Regulation 9 of the Working Time Regulations 1998, employers already have to keep records to show that workers are not working in excess of 48 hours per week and that rules around night work are complied with however, they do not have to record information which shows that daily and weekly rest periods are met. It is this latter point that this ruling is now likely to impact on.

The UK has one of the longest average working weeks in the European Union. Working Time rules were introduced as part of Health and Safety laws in the UK to try to reduce a culture of excessive working. Employers should also make an effort to discourage this type of culture in their own workplace as it is unlikely to lead to greater productivity in the longer term. It is important to help employees to achieve a better work/life balance however it is not known yet if the UK Government will change current employment laws if the UK leaves the EU and what the impact of that may be in the future.

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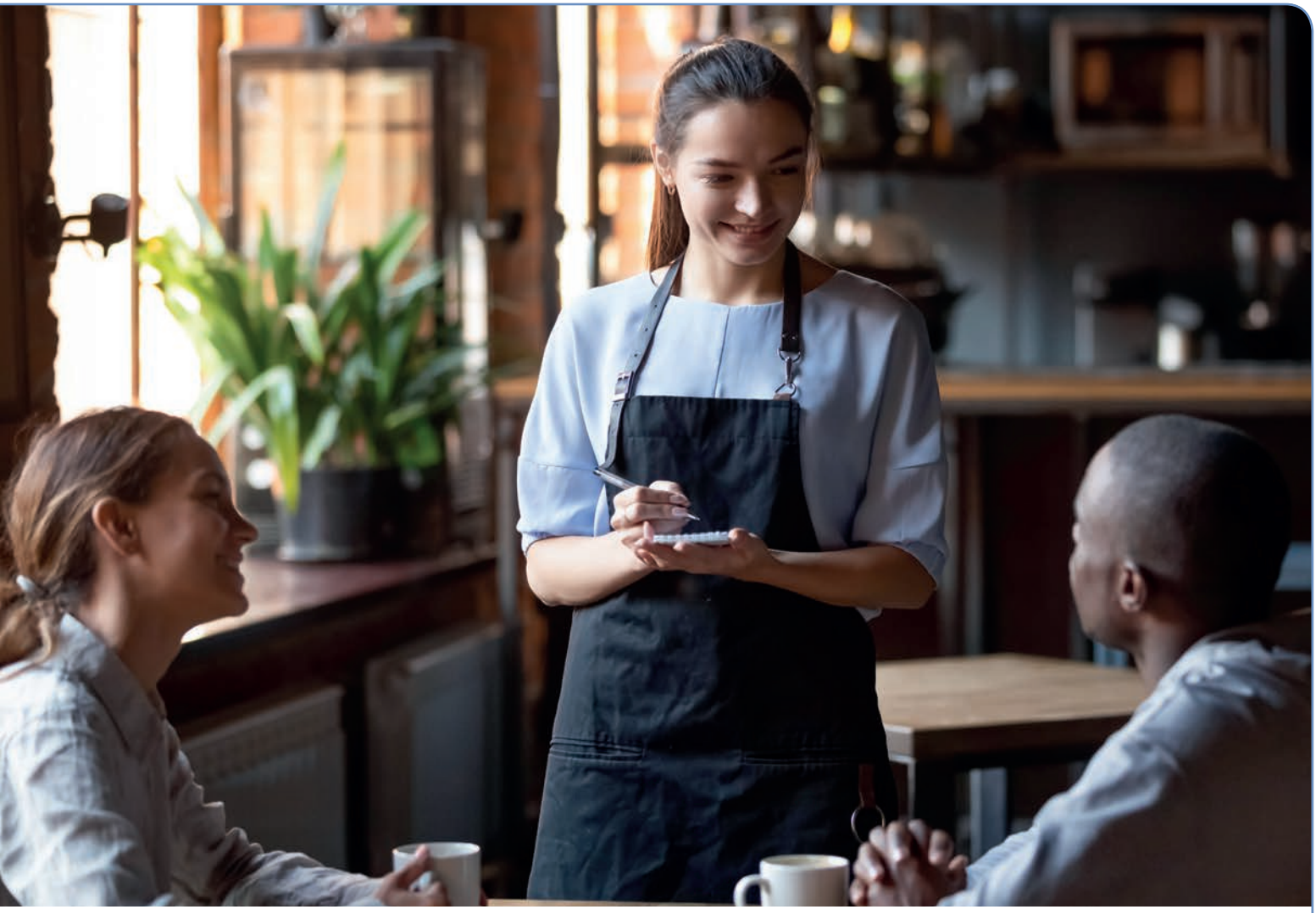

# Deductions from wages

**In the news recently there have been reports that some well-known restaurant chains such as Wahaca here in the UK have been taking money from their servers' wages or tips to cover the cost of customer walkouts.**

There were numerous examples given in news reports however when challenged, the companies involved have said that they will no longer do this unless the manager suspects the server was complicit in the none payment of the bill.

While there has been public outrage at this taking place, it is actually down to the detail of the employment contract and what that specifies the employer can or can't do and this is not unusual.

The law is clear that employers cannot make deductions from pay unless this is specified in their employment contract; allowed by statute or which they have the written consent of the employee. The deduction cannot however reduce pay below the National Minimum wage, even if the employee has agreed to the terms of the contract, unless it is for something which the contract says they are liable for such as a shortfall in their till.

Employers cannot take more than 10% from your gross pay each period to cover any shortfalls however if you were to leave your job, they can take the full amount owed from your final pay.

Other deductions which can be taken and which reduce pay below the NMW include:

- Tax or National Insurance
- Loan repayment or advance of wages
- Repayment of an accidental overpayment of wages
- Buying shares or options in the business
- Accommodation provided by the employer
- Pension contributions

Perhaps the restaurants in this instance should have learned from the example by the restaurant chain Hawksmoor who tweeted they hoped the customer who had accidentally been served their most expensive bottle of wine at £4,500 enjoyed the mistake. The restaurant chain received global publicity for their generous nature, not only towards the customer but also the hapless member of staff who was not going to be fired or made to pay for it.

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# Rights for Minority Shareholders

## As a minority shareholder in a business how do you protect your rights especially if there is a disagreement with other shareholders?

It is important to have a shareholder agreement in place and this should specifically cover how minority shareholders will be protected if a range of issues arise. This should include a provision for a minority shareholder's shares to be purchased by the remaining shareholders and also for a fair price, in the event that a disagreement is too great to resolve.

If there is no shareholder agreement in place the Companies Act 2006 does offer some protection. Any shareholder can (with or without a shareholder agreement) petition the Court for Unfair Prejudice pursuant to Section 994 of the Companies Act 2006.

It is important to demonstrate that the conduct which has been complained of must be causing prejudice or harm and it must be unfair. This could include failure to pay dividends, failure to disclose accounting information, exclusion from management and serious mismanagement and diverting business to another company where the minority has no shareholding.

For a successful ruling, it needs to be demonstrated that there is an adverse effect on the minority shareholder/s and that this isn't in accordance with the Articles of Association and the powers that shareholders have given to the Board of Directors. Typically, a Court may require the company not to do the act/s complained of, require them to do an act/s they have not done or provide for the purchase of shares from the shareholder/s.

The Court does however have other powers as well which could include authorising civil proceedings on behalf of a company and regulating the conduct of the company's affairs in the future.

Before taking any action, it is important to take legal advice to discuss the options open to you.

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## CONTACT

If you would like any additional information on any of the subjects discussed in this newsletter please do not hesitate to contact us.


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# Quick reference section

Statutory minimum notice periods:
An employer must give at least:

- One week's notice to an employee who has been employed for one month or more, but less than two years.
- One week's notice for each complete year of service for those employed for more than two years.
- Once an employee has more than 12 year's service, the notice period does not extend beyond 12 weeks.

National Minimum Wage

| | April 2018 | April 2019 |
|---|---|---|
| Apprentices | £3.70 | £3.90 |
| 16-17 | £4.20 | £4.35 |
| 18-20 | £5.90 | £6.15 |
| 21-24 | £7.38 | £7.70 |
| 25+ | £7.83 | £8.21 |

Statutory Sick Pay (from April 2019)
Per week £94.25

Statutory Shared Parental/Maternity/ Paternity/Adoption Pay
(basic rate) (from April 2019) £148.68

Statutory Holiday
5.6 weeks for a full time employee.
This can include bank and public holidays.

Redundancy Calculation

- 0.5 week's pay for each full year of service when age is less than 22.
- 1 week's pay for each full year of service where age during year is 22 or above, but less than 41.
- 1.5 week's pay for each full year of service where age during year is 41 and over.

Calculation is capped at 20 years. Maximum week's pay is capped under the Statutory Scheme for dismissals after 6th April 2018 at £508.00 and after 6th April 2019 at £525.00.