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Legal update ——— July 2017

Employment Holidays

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Looking forward to getting some sand between your toes?! As the holiday season fast approaches we thought it was worth a quick look at some recent decisions on the topic.

Farewell to Lock

The Supreme Court has put paid to further litigation in the case of *British Gas Trading Ltd v Lock and anor* by refusing British Gas leave to appeal. This means that the Court of Appeal's decision that the Working Time Regulations 1998 (the WTR) should be interpreted in line with the Working Time Directive (WTD) to include results-based commission in statutory holiday pay remains the final word on the matter.

Employers who have not been including commission payments in holiday pay calculations will now run the very real risk of having a succession of unlawful deductions from wages claims brought against them. One consolation will be that, under the Deduction from Wages (Limitation) Regulations 2014, there is now a two year backstop on claims for holiday pay which are made on or after 1 July 2015.

What about voluntary overtime?

Voluntary overtime is still a bit of a grey area. Employers need to be aware that tribunals will deem that it forms part of a worker's normal remuneration if a settled pattern has developed enabling it to be labelled "normal" pay. At first instance the tribunal in *Bear Scotland Ltd v Fulton* and others found that overtime that workers could refuse on reasonable grounds should be included in the calculation of holiday pay (the EAT did not subsequently comment on this finding).

Brettle and ors v Dudley Metropolitan Borough Council, an Employment Tribunal case from last year, dealt with purely voluntary overtime. A group of 56 workers employed within a directorate that carried out housing repairs for the Council claimed that they had not received the correct rate of statutory holiday pay. They argued that they should have received additional sums in respect of voluntary overtime, call-out payments and mileage and standby allowances.

The Tribunal concluded that the allowances should be included in most of the claimants' statutory holiday pay. The claimants were paid in such a manner, and with sufficient regularity, for the payments to be considered part of their normal remuneration. It's worth noting that, as this is only a tribunal decision, it's non-binding. However, it follows the reasoning in Bear Scotland that payments received as part of "normal remuneration" should be included in any holiday pay calculation.

How should such payments be calculated?

Ambiguity remains, as to the correct reference period on which a calculation of holiday pay should be based. When the European Court of Justice (ECJ) heard the case of *Lock* it ruled that holiday pay must correspond to the worker's "normal remuneration" and that this was a matter for the national courts to work out by taking an average over a reference period that it "considered to be representative". Rather unhelpfully for employers the issue of the practicalities of how such payments should be calculated still remains to be determined. It is likely that, in the meantime, tribunals will approach the issue on a case by case basis.

Source: Fotolia

Three-month gap breaks series of deductions for holiday pay

The EAT held in the *Bear Scotland* case that non-guaranteed overtime should be included in holiday pay calculations. It also held that where bringing an unlawful deduction from wages claim under section 13 of the Employment Rights Act 1996, a gap of more than three

Published by
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months between any two deductions in the chain breaks the series of deductions. The case was then remitted back to the Tribunal to determine what constituted a series of deductions.

The Tribunal, considering itself bound by the EAT's decision, excluded as time barred all claims or parts of claims where a period of more than three months had elapsed between successive non or underpayments of holiday pay. The claimants appealed, seeking to argue that the EAT's decision in this respect might not be binding, but that if it was the effect of the decision was to create a strong presumption, rather than a binding rule that where the series of deductions is broken by a gap of three months or more the claim is time barred. The EAT, on considering the matter again, has recently held that it was not permissible to seek to use a later appeal in the same case to seek to depart from an earlier decision in the same litigation.

What happens if an individual is prevented from taking holiday?

The issue of what happens if an individual has been prevented from taking holiday because they are mistakenly regarded as being self-employed rather than a worker has been considered recently by the Advocate General in *The Sash Window Workshop Ltd and anor v King*. In an Opinion which will have potentially serious ramifications for employers, the Advocate General has concluded that workers are entitled to carry over leave when they are unable to take it for reasons beyond their control.

Mr King worked for the Sash Window Workshop Ltd as a commission-only salesman for thirteen years. In 2008 he was offered a contract of employment but he turned it down. During the time he worked he was never paid for holidays and, on termination of his contract aged 65, he submitted a claim for age discrimination and unpaid holiday pay.

At first instance the tribunal held that Mr King was a worker and was therefore entitled to bring a complaint for unpaid holiday pay, including pay for holiday not taken in previous years, claimed as a series of unlawful deductions from wages. On appeal the EAT agreed that Mr King could claim that holiday was carried over in circumstances where he was prevented by reasons beyond his control from taking annual leave. However, it held that the tribunal had made no findings on whether Mr King had been restricted by reasons beyond his control from taking annual leave and remitted the question back to the tribunal.

Earlier this year the Court of Appeal referred the case to the ECJ. It asked whether an individual has to take unpaid leave before being able to prove they are entitled to pay for it under the Working Time Regulations. It also asked whether a worker who doesn't take the leave they are entitled to can carry it over when they are prevented from exercising their right to such leave. Finally it asked, if there is a right to carry over leave, was this right an indefinite right or just for a limited period (as in sickness absence cases).

The Advocate General's Opinion is of particular significance to the gig economy where, on a number of different occasions, the label of self-employed contractor has been found to conceal an individual's true status as a worker. Employers who find that those they have always regarded as self-employed contractors actually have worker status will now potentially be faced with a significant financial liability for unpaid holiday pay.

In the meantime it is not a foregone conclusion that the ECJ will agree with the Advocate General's Opinion. The issue will not be finally resolved until the ECJ has handed down its decision.

Payments for untaken holiday on termination

In *Hartley and others v King Edward VI College* the Supreme Court held that an employer was wrong to deduct 1/260 of an employee's annual salary, rather than 1/365, when its employees went on strike. Although this case deals with the withholding of pay in a strike situation it is of relevance to holiday pay calculations on termination of employment.

The claimants were teachers employed by the college. Their employment contracts made a distinction between directed time (when the teachers were required to be in school) and undirected time (when additional tasks such as marking and preparing lessons were carried out). The claimants went on strike for one day and the college deducted one day's pay from their wages calculated at a daily rate of 1/260 of their annual salary.

If employees are on strike the employer does not have to pay them for periods during which they are not working. If the contract specifies normal working hours and pay is calculated by the hour, then the deduction will be determined by reference to the hours lost. However, if the employees are paid a salary then this is deemed to accrue from day to day, on a calendar day basis by virtue of section 2 of the Apportionment Act 1870. The teachers argued that, by virtue of the Act, their salary accrued day to day at an equal daily rate and the deduction should have been based on a rate of 1/365.

There was nothing in the teachers' contracts which stipulated that their salary should be apportioned in any way other than on a calendar day basis. The Supreme Court held that, as the claimants were working on annual contracts (i.e. permanent rolling contracts) and as the work done by them was not limited to work done from Monday to Friday, it did not make sense to

calculate a day's pay based on 1/260 of annual salary. The most sensible approach in apportioning the claimants' annual salary on a day-to-day basis was by treating each day as 1/365 of annual salary.

The Court acknowledged that the provisions of the Apportionment Act can be excluded in "any case in which it is or shall be expressly stipulated that no apportionment shall take place". The decision in *Hartley* makes it clear that, under the Act, contracts of employment can set out the days for which salary accrues and that such a clause will override the default position.

Many employment contracts will already specify the value of a day's untaken holiday in the provisions dealing with the calculation of untaken holiday pay on termination. It's worth employers reviewing their contracts and considering the inclusion of such a clause so that the calculation is based on 1/260 of an employee's salary for each untaken day of the entitlement rather than on 1/365 of annual salary.

Summary

So, before the holiday season starts there are a few practical pointers to take from the cases discussed above:

- Commission payments must be included in holiday pay calculations;
- Voluntary overtime will be deemed to form party of a worker's normal remuneration if a settled pattern has developed enabling it to be labelled "normal" pay;
- A gap of more than three months between non-payment or underpayment of wages breaks the series of deductions for the purpose of bringing an unlawful deduction from wages claim;
- Review the status of your self-employed consultants. If they are found to have worker status, and there has been a failure to provide adequate facility for them to take leave, you will lay yourself open to claims for unpaid holiday;
- Review your contracts and consider excluding the operation of the Apportionment Act by inserting your own holiday entitlement calculation provisions.

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