



Legal update — June 2017

Employment and pensions Three-month gap breaks series of deductions for holiday pay

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The Supreme Court may have recently refused permission for British Gas to appeal against the Court of Appeal's ruling in *British Gas Trading Ltd v Lock* and anor that the calculation of holiday pay should include results-based commission, but that doesn't spell the end for holiday pay-related issues.

The Employment Appeal Tribunal (EAT) has just confirmed in *Fulton and anor v Bear Scotland Ltd* that a gap of more than three months between non-payments or underpayments of wages breaks the series of deductions for the purpose of bringing an unlawful deduction from wages claim. This means that employees wishing to bring such a claim in respect of unpaid holiday pay will not be able to claim for periods once the series of deductions has been broken. It is also important to remember that, under the Deduction from Wages (Limitation) Regulations 2014 there is now a two year backstop on claims for holiday pay.

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 held that it was not permissible to depart from an earlier decision in the same set of proceedings.

However, we haven't heard the last word on holiday pay. Ambiguity remains, as to the correct reference period on which a calculation of holiday pay should be based. When the CJEU 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. We recommend that you seek advice to determine whether your organisation is exposed to risk and how to mitigate that risk.

Published by
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In previous litigation on the matter, the EAT held in *Bear Scotland* that non-guaranteed overtime should be included in holiday pay calculations. The EAT 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 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.

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