EdwinCoe LLP

GUIDE

Holiday Pay Issues

It is probably not a surprise to many who have been following the issue that this is the fourth update we have prepared on the calculation of holiday pay over the last 12 months.

The main issues have concerned whether or not commission and overtime should be taken into account when an employer is calculating how much to pay a worker for a period of holiday and we set out below the current position and the most recent developments.

Impact of Commission

In the judgments of a string of cases from the European Court of Justice (ECJ) concerning workers and their holiday pay, the case of British Gas v Lock confirmed that a worker's holiday pay must be calculated to compensate him for the loss of any commission as a result of being on holiday.

In the *Lock* case, a sales consultant for British Gas was paid a basic salary plus commission on a monthly basis. The commission fluctuated depending on his sales but in general made up about 60% of his wages. When he was on holiday, he was only paid his basic salary. He therefore brought a claim asserting that his holiday pay should be calculated using basic pay plus commission he would have earned had he not been on holiday.

The tribunal referred the case to the ECJ to ask whether:

- the individual should be entitled to commission pay whilst on annual leave; and
- if so, how this should be calculated.

The ECJ held that Mr Lock's holiday pay should include a sum to reflect the fact that he effectively lost commission by taking holiday. The reasoning of the ECJ was that if a worker was not remunerated in this way, they would be deterred from taking annual leave which would be incompatible with the Working Time Directive. The ECJ left open the question of how that 'lost' commission should be calculated and remitted the case back to the Employment Tribunal which will have to decide whether national law in the UK can be interpreted in the way that the ECJ has directed and if so, how the 'loss' of commission whilst on holiday should be calculated.

Overtime

The decision of the Employment Tribunal in *Neal v Freightliner Limited* made employers sit up and take note because in that case the Tribunal decided that holiday pay should be calculated to include remuneration for normal working hours including any voluntary overtime.

The rationale for this decision was that the European Court of Justice (ECJ) determined in the case of *British Airways Plc v Williams* (which was not concerned with overtime) that holiday pay should include any remuneration 'intrinsically linked' to the performance of the task which the worker was required to carry out.

On the basis of that, the ECJ determined in *Williams* that a pilot's holiday pay should include their flight supplements. In *Neal v Freightliner Limited* the Employment Tribunal considered that when doing voluntary overtime, the employee was doing the same job that they did during their core hours and therefore, the remuneration for voluntary overtime was 'intrinsically linked' to the performance of the task. The *Neal v Freightliner Limited* decision was a first instance decision but it was appealed to the EAT and was conjoined with a number of other cases addressing similar questions known as the Bear Scotland appeals.

Impact of Employment Appeal Tribunal decision in the joint appeals known as the Bear Scotland decision

The Employment Appeal Tribunal (EAT) in the *Bear Scotland* decision did not deal with the question of voluntary overtime because the case of *Neal v Freightliner Limited* settled before being heard by the EAT.

The EAT did however consider the question of non-guaranteed overtime, which is overtime that is not guaranteed but, where it is required by the employer, the employee is obliged to work it. This is in contrast to voluntary overtime where an employee is allowed to turn down any offer for overtime.

The EAT determined that holiday pay should include a payment to represent the loss of any non-guaranteed overtime usually worked for the four weeks annual leave taken under the Working Time Directive. The EAT said that a worker is entitled to receive 'normal' pay whilst on holiday. 'Normal' pay is that which is paid for the task the worker is required to carry out and which is made for a sufficient period of time to qualify as 'normal'. This is easy to establish where the pattern of work is settled, for example, where an employee works a set amount of non-guaranteed overtime every week, but where hours of overtime undertaken fluctuate from week-to-week or where there are peak periods of overtime (like Christmas in the retail sector), 'normal' would have to be considered over a reference period. The EAT however gave no guidance as to what that reference period should be and that is a matter which remains to be determined, probably on a case-by-case basis.

As noted, the EAT did not expressly determine whether voluntary time should be included in holiday pay as well as non-guaranteed overtime and the Bear Scotland case seems for the moment to have shut the door on such claims, referring as it did to normal pay for tasks which are *required* to be carried out by the employer (thus excluding voluntary overtime where there is no requirement as such). Further cases on that point however are anticipated.

Backdated Claims

The unexpected impact of the Bear Scotland EAT Judgment came in connection with the EAT's decision on whether or not backdated claims can be made by workers in respect of an underpayment of holiday in the past. The fear was that if there had been a long period of underpayment for holiday because it did not include non-guaranteed overtime, workers could bring claims dating back to 1998 when the Working Time Regulations came into effect or when the worker started working for the employer, whichever was the later. This raised the prospect of enormous backdated claims for a series of unlawful deductions of wages.

The EAT determined that where there is a 'gap' in holiday taken by an employee of three months or more, that breaks the 'series' of deductions. This greatly curtailed the possibility of substantial backdated claims but left open the question of whether or not such backdated claims could be brought in the County Court as a breach of contract claim going back at least six years.

Immediately following the decision the Government announced that it was setting up a task force to consider the impact of the Bear Scotland decision and having done so (in a very short period of time), it has proposed the introduction of The Deduction from Wages (Limitation) Regulations 2014. These Regulations will apply to any claim presented on or after 1 July 2015 and provide for the following:

- unlawful deductions claims cannot go back more than two years before the date of the lodging of a claim with the Employment Tribunal (subject to some exceptions for maternity pay etc.); and
- the right to paid holiday under the Working Time Regulations does not confer a contractual right to that paid holiday.

On the face of it, these Regulations prevent claims being brought in the County Court and limit backdated claims to two years but as ever, that is not the end of the story. There is much academic debate about the lawfulness of the Regulations which may be challenged by way of a Judicial Review and the question of County Court contractual backdated claims is still the subject of debate, certainly before 1 July 2015.

If you would like any further information about how this guide could impact you, or any other employment issue, please contact Linky Trott.

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