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Time-over on holiday underpayments

In the much anticipated ruling in Bear Scotland Ltd v Fulton, the EAT has decided that non-guaranteed overtime is to be taken into account when determining a worker's holiday pay. This decision is likely to have significant consequences for employers and up to 5 million workers could be entitled to compensation. However, the EAT has limited the financial impact of the decision by giving a controversial new interpretation of 'series' of deductions'. Bayo Randle studies the decision in-depth and highlights some of its wider implications.

The background

The appeals in this matter related to claims brought against three separate employers: Bear Scotland Ltd, Hertel (UK) Ltd ('Hertel') and AMEC Group Ltd ('Amec'). The principal issue was the question of whether employers were required to include 'non-guaranteed' overtime payments in their holiday pay calculations. Non-guaranteed overtime payments are payments in respect of work that workers must perform upon request, but which employers are not obliged to provide.

The scope of article 7: non-guaranteed overtime as holiday pay

The key factor in determining whether non-guaranteed overtime payments were to be included in the calculation of holiday pay was the scope of Art 7 Working Time Directive ('the Directive'), which was transposed into national law by Reg. 13 Working Time Regulations 1998 ('the Regulations'). Art 7 states that 'every worker is entitled to paid annual leave of at least four weeks'.

Langstaff J pointed out that the scope of the term 'paid annual leave' was previously addressed by the Court of Justice of the European Union ('CJEU') in *British Airways plc v Williams*, *Lock v British Gas Trading Ltd* and earlier cases. According to the CJEU, the reference to 'paid annual leave' within Art 7 meant that the worker must receive their 'normal remuneration' throughout this period.

Langstaff J concluded that normal remuneration or pay was that which was 'normally received' and to be normal, it must be received for a sufficient period of time. Where the pattern of work was settled (as in this case), it would be straightforward to identify the pay as normal. Where the pattern was not settled, an average taken over a reference period determined by the member state would be appropriate for determining whether the pay was normal.

It was also accepted that, pursuant to CJEU guidance, any pay that was linked intrinsically or directly to the work that a worker was required to do, would be taken into account in the calculation of normal remuneration.

In light of the above, Langstaff J accepted that the tribunal was entitled to decide that the workers were paid overtime with sufficient regularity and that the overtime was intrinsically or directly linked to the workers' tasks. Therefore, the overtime payments, and non-guaranteed overtime generally, constituted normal pay and were to be taken into account when calculating holiday pay.

Furthermore, it was decided that other payments meeting the above requirements included the taxable elements of workers' allowances in respect of time spent travelling to and from work.

Despite the appellants' contrary arguments, Langstaff J also found that, applying the '*Marleasing* principle', words could be read in to the Regulations to achieve compliance with Art 7 of the Directive without going against the grain of the legislation.

The series of deductions issue

Perhaps the most significant and controversial aspect of this decision is the limited extent to which employers will be required to account for past deductions in respect of overtime.

Pursuant to s. 23 Employment Rights Act 1996, a tribunal would generally only have jurisdiction to hear claims brought within three months of the payment from which the deduction was made. However, where there have been a 'series' of deductions, the tribunal will have jurisdiction to hear all claims in the series.

Langstaff J concluded that a 'series' had two principal requirements in this context: (1) a 'sufficient factual link' between the subject matter and (2) 'a sufficient temporal link'; in other words a sufficient frequency of repetition.

He accepted that there was a sufficient factual link between deductions in respect of overtime. However, he concluded that, understood in the legislative context, a period of any more than three months between deductions was too long to satisfy the temporal link.

This aspect of the decision could have a wide - ranging impact on how tribunal's address unlawful deductions in general. In particular, the 'legislative context' that Langstaff J refers to, in setting the three-month limit between deductions, is the three-month limitation period that applies to all unlawful deductions. It would not therefore be surprising if Langstaff J's bar on linking deductions in respect of overtime, separated by more than three months, were applied more broadly in future.

Other wider implications

This decision is likely to have significant consequences for employers. As mentioned above, up to 5 million workers could be entitled to compensation, albeit limited by the fact that very few will be able to take advantage of any significant series of deductions.

Notably, Langstaff J indicated that any leave taken beyond the first four weeks of annual leave (the 'qualifying leave' period) would represent either additional leave pursuant to Reg. 13A of the Regulations or further contractual leave. The consequences of this are that workers cannot include such later periods of leave within a series of deductions or declare the later periods of leave, or parts of the later periods, to be qualifying leave in order to bring the claims within the tribunal's jurisdiction. Furthermore, it is unlikely that many workers will have two or more qualifying leave periods within three months of each other. This will be a relief for employers concerned about the prospect of having to pay out large sums to their workers in respect of historic overtime deductions.

Nevertheless, since overtime is typically paid at a higher rate than fixed contractual hours, this decision should encourage those businesses that rely heavily on overtime to make changes to their modes of operation. For example, by increasing staffing levels or the fixed contractual hours of its workers and/or hiring temporary staff to fill the gaps when the extra work is needed. Such action would reduce the financial burden of holiday pay requirements on these employers.

Conclusion

In respect of the Hertel and Amec appeals, permission to appeal has been granted, so it may be too early to declare a victor. Nonetheless, employers would be well advised to set aside resources to fund the possible litany of claims arising from this decision, which may well go

beyond deductions in respect of unpaid overtime and are likely to be union supported. Notably, the Business Secretary, Vince Cable, has announced the formation of a taskforce to assess the impact of the ruling and limit the impact on business; so businesses can take comfort from the fact that the current government is still on their side.

Cases referred to:

Bear Scotland Ltd v Fulton [2014] UKEAT 0047/13/0411
British Airways plc v Williams [2012] 1 C.M.L.R. 23
Lock v British Gas Trading Ltd [2014] ICR 813
Marleasing v La Comercial Internacional de Alimentaciòn SA (1992) 1 CMLR 305

Legislation referred to:

Working Time Directive (Directive 2003/88/EC)
Working Time Regulations 1998 (SI 1998/1833)
Employment Rights Act 1996

Bayo Randle advises on all aspects of employment law and appears on behalf of claimants and respondents in preliminary, one-day and multi-day employment tribunal hearings. For more information on his latest case highlights or Devereux's leading employment team, please contact our practice managers on 020 7353 7534 or email clerks@devchambers.co.uk.
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