Holiday Pay: voluntary overtime under the spotlight

As anticipated in our last Employment Edit, the Northern Ireland Court of Appeal ("NICA") has determined that voluntary overtime worked on a sufficiently regular basis can, in principle, be included in holiday pay calculations *(Patterson v Castlereagh Borough Council)*.

What was decided?

The question before the NICA was whether the EU Working Time Directive requires voluntary overtime (that is overtime which the employer is not obliged to offer and which, if offered, the employee is free to refuse) to be taken into account when calculating holiday pay. The first instance Tribunal had interpreted the decision of the Employment Appeal Tribunal in *Bear Scotland v Fulton* as being restricted to compulsory, non-guaranteed overtime. It, therefore, found there was no requirement under the Directive for voluntary overtime to be included in holiday pay calculations.

Before the NICA on 17 June 2015, Counsel for the Borough Council conceded that there was nothing in principle (whether in the *Bear Scotland* judgment or otherwise) to prevent the inclusion of voluntary overtime in holiday pay calculations. Relying on that concession, the NICA concluded that:

- there was nothing, in principle, preventing voluntary overtime from being included in holiday pay calculations in respect of the four weeks' leave entitlement under the EU Working Time Directive; and
- there was no reason to distinguish between compulsory and voluntary overtime when considering holiday pay calculations - this will come as little surprise given the number of commentators who have already highlighted the lack of legal basis, under EU law, for such a distinction.

In reaching its conclusion, the Court endorsed a number of EU concepts which have emerged in this developing line of case law including:

- confirmation that workers should receive their "normal remuneration" during periods of leave; and
- that a "sufficiently representative reference period" should be used to determine what constitutes "normal remuneration".

What uncertainties remain?

The judgment left a number of key questions unanswered.

For example, the Court decided that it should be for individual tribunals to decide, as a question of fact, whether any voluntary overtime is "normally carried out by the worker" and whether it carries with it an "appropriately permanent feature" so as to form part of their "normal hours" (and so be included in the calculation of their holiday pay). This reinforces the principle laid down in the other key holiday pay cases (*Lock* and *Bear Scotland*) that payments need only be included if they are paid on a sufficiently regular basis.

The question of whether the voluntary overtime in *Patterson* was sufficiently regular was referred back to the tribunal for further evidence and consideration.

In addition, aside from its endorsement of the concept, the NICA did not offer any guidance on what would constitute a "sufficiently representative reference period" when determining how to calculate the holiday pay.

Does this decision take us any further forward?

What is clear from this decision is that the validity of distinguishing between compulsory and voluntary overtime is eroding.

Whilst this decision is only binding in Northern Ireland, it will have persuasive effect in courts and tribunals in England, Wales and Scotland and, in the absence of other binding cases on this point, we can expect it to be relied on by employees and trade unions to bolster any claims relating to voluntary overtime.

However, given the remaining areas of uncertainty, we anticipate that many employers, even within Northern Ireland, will hold fire on changing holiday pay calculations to include voluntary overtime in the hope that more definitive case law will emerge.

For a variety of reasons (including the non-binding nature of this decision and the concession made by Counsel), this decision is unlikely to have the same immediate impact as the EAT's decision in *Bear Scotland* or the upcoming appeal to the EAT (and beyond?) of the *Lock* case. Nevertheless this is still an

important step in the ongoing holiday pay saga and puts more pressure on employers to consider changing the way in which they structure their overtime and/or calculate their workers' holiday pay.

Most employers in Great Britain are eagerly watching the clock tick down to 1 July, when the two year cap on unlawful deductions claims come into force. However, the holiday pay question remains a very live issue for employers to grapple with.

Contact

The Burges Salmon employment team has been advising a large number of employers on how to approach this difficult issue.

For more information on how we can help you assess your legal and financial risk or for specific advice on this issue, please contact Roger Bull or get in touch with your usual Burges Salmon contact.

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