SQUIRE PATTON BOGGS

Holiday Pay – The Latest Position

3 December 2015

All eyes will shortly be focussed on the Employment Appeal Tribunal (EAT) as it looks again at holiday pay on 8 and 9 December in ***British Gas v Lock***.

Followers of this case will recall that British Gas is arguing that: (i) the Leicester Employment Tribunal was wrong to decide that ***Bear Scotland***, a case about overtime, had any bearing on how holiday pay should be calculated in a case about commission; and (ii) the EAT in ***Bear Scotland*** was wrong to conclude that the Working Time Regulations 1998 could be interpreted in such a way as to give effect to EU law requirements regarding the calculation of holiday pay.

We will of course be following the outcome of this appeal and will keep you updated. Two things seem more or less certain – we won't see the decision for some months and when we do, one way or the other, it will be appealed again. Those hoping for some definitive settling of the law are likely to be disappointed.

In the meantime you may be interested in our recent experiences on the holiday pay front to give you a flavour for: (i) how tribunals are dealing with holiday pay claims; and (ii) how other employers are tackling the holiday pay issue.

How are tribunals dealing with holiday pay claims?

A number of our clients have been defending claims in the Employment Tribunal for alleged underpayments of holiday pay.

Whilst all claims in Scotland seem to have been stayed pending the outcome in ***Lock***, tribunals south of the border have been trying to move claims along a little by listing them for preliminary hearings. This means that claimants have been obliged to provide further particulars of their cases (e.g. which specific holiday days are being claimed for, when they were taken, what they were paid and what elements of pay were not included that they claim should have been). In many cases this has been good news for employers, as it has successfully flushed out many of those claims that are out of time (and should therefore be struck out), where the employee simply cannot recall his holiday position in detail enough (though the tribunal can then look to the employer to do some of the leg-work in filling in the blanks or verifying the details), or where there is a clear 3-month break in the series of alleged deductions. It has also served to highlight to both parties just how small most individual holiday pay claims actually are, and hence why most of these claims are brought collectively by members, not employees acting by themselves. Of course, numbers will vary, but take a basic salary of £30,000 and supplemental overtime or commission earnings of another 20%, so £6,000 for the year or £115 per week.

Apply that to the 4 week WTD minimum holiday period and you get £460 before tax, or £320 net in circumstances where the tribunal issue fee (which you are by no means certain to get back) is £160.

Where claimants have provided particulars of their claim, some (but not all) English tribunals have been prepared to agree to a stay of proceedings until next Spring, presumably on the basis that by then we might have some further guidance from the EAT. How much further it will take us is another matter, especially if there are immediate signs of a further appeal. The English tribunals are hoping in this way to have reduced the size of the log jam in cases all going forward at the same time if developments in ***Lock*** or elsewhere give them a green light.

How are employers tackling the holiday pay issue?

This is the question we posed in our recent Holiday Pay Survey of clients and contacts across a wide sample of sectors and company sizes. The results provided some interesting statistics:

- Of all our respondents, a full 73% have yet to take any steps to amend their holiday pay calculations. Claims by trade unions that employers are being "left behind" because they have not changed their approach to the calculation of holiday pay (and so are allegedly sticking out more overtly as prospective targets for union-backed legal and/or industrial action) may perhaps therefore be taken with a pinch of salt.
- Of the 27% who have changed their holiday pay arrangements, only a small majority (less than 60%) have unionised workforces.
- Where changes to holiday pay include use of a reference period, the period invariably picked by respondents to the survey has been 12 weeks (although we are aware of some businesses that are looking to implement a 12-month period). That is even though that period has yet to be enshrined in law, and even though those responses came from sectors as diverse as construction, aviation, retail and banking. Employee numbers in those businesses ranged from less than 100 to over 45,000. It therefore appears that for all the uncertainties and injustices both ways which such a reference period can generate (and despite the enormous spread of overtime and commission schemes in use over that population) 12 weeks will likely be the default position for voluntary holiday pay agreements. What period any eventual legislation either requires or allows is a separate question. We think it likely to include an element of flexibility for the employer, but whether this can be applied differently to different categories of employee within the same employer remains to be seen.

- Where our respondents have reached agreements with their workforces about alterations to holiday pay calculations, these have all been forward-looking. None of our respondents refer to any accommodation being reached in relation to any notional arrears.
- The principal factors leading to changes in those 27% of employers were (i) awareness of the case law (i.e. the perceived inevitability of having to do something at some stage) followed by (ii) union/employee pressure (though of the 73% who had made no change, only one admitted to receipt of a tribunal claim), and (iii) brand/reputational factors.
- Where changes have been made, half had applied them to the full UK 5.6 week holiday entitlement. About a quarter of respondents had limited the changes to the Working Time Directive four week minimum and a further quarter did not specify which.
- Of those cases where changes had not been made, nearly 85% of employers had also taken no steps to amend their commission/overtime structures to minimise the scope for employee claims.

So in other words, whether or not it is generally best, doing nothing does seem to be a common employer response to the holiday pay question. This is further supported by the outcome from our recent Holiday Pay Dinner in London (see attached blog). There are good objective reasons to support such a stance at this point, including in particular the absence of Government guidance, the uncertain direction (in matters of detail, at any rate) of the case law, the relatively limited number of unions willing to undertake the colossal logistical exercise of collective tribunal claims and the often marginal economics of bringing a claim as an individual worker.

Squire Patton Boggs has a Holiday Pay Taskforce comprising experts from each of our UK offices. If you have any questions relating to holiday pay or need help with any current or pending claims, please speak to your usual contact or one of the following:

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We would like to take this opportunity to thank those organisations that took the time to respond to our Holiday Pay Survey.