SQUIRE PATTON BOGGS

Scottish EAT Confirms Holiday Pay Claims Time Barred Where More Than Three Month Gap Exists

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You may be thinking "but didn't we know that already?". And you would be right, but the latest decision in the *Bear Scotland* litigation has, hopefully, now put that point to bed.

The Scottish Employment Appeal Tribunal (EAT) in *Fulton & anor v Bear Scotland Ltd* has dismissed an appeal by workers seeking to overturn an earlier EAT decision in the same case, in which it was held that unlawful deduction from wages claims for the underpayment of holiday pay are time barred where there has been a gap of more than three months between alleged underpayments. This latest decision is good news for employers and means that many claims for historical underpayment of holiday pay will continue to be found out of time.

By way of a reminder, there are two ways in which workers can seek to recover unpaid statutory holiday pay in an Employment Tribunal: by bringing a holiday pay claim under regulation 30 of the Working Time Regulations 1998 (WTR) or by bringing an unlawful deduction from wages claim under the Employment Rights Act 1996 (ERA).

Under the WTR, workers must bring a claim within three months of the alleged underpayment. With an unlawful deduction from wages claim under the ERA, workers must bring a complaint within three months from the date of the alleged deduction or, where the claim is brought in respect of a series of deductions, from the date of the last alleged deduction or underpayment.

In 2014 the EAT in *Bear Scotland Ltd v Fulton & anor* ruled that workers could not go back and claim all arrears of holiday pay as being unlawful deductions from their pay if there had been a gap of more than 3 months between any of the alleged underpayments. When the case was remitted back to the Employment Tribunal to determine the facts, it excluded as time barred all claims or parts of claims where a period of more than three months had elapsed between successive underpayments of holiday pay. Unhappy with this outcome, the workers once again took their case to the EAT, claiming that the relevant passages in the EAT's 2014 decision were not binding.

The Scottish EAT has now given these arguments short shrift, confirming that the relevant passages in the EAT's earlier decision were binding. It also said that it was not permissible for the workers to use a later appeal in the same case to obtain a departure from an earlier decision in the same litigation.

It is worth remembering that this decision applies to all claims for unlawful deduction from wages, not just those for underpayment of holiday pay. There is also now the two-year backstop period that applies to most unlawful deduction from wages claims, meaning that a Tribunal can only look back two years from the date of the complaint when considering remedies.

Squire Patton Boggs has a national Holiday Pay Taskforce comprising some of the leading experts on this subject. If you would like to discuss any questions relating to holiday pay and what it means for your business, please speak to you usual contact or, alternatively, a member of our Holiday Pay Taskforce:

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