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RECRUITERS: EMPLOYMENT APPEAL TRIBUNAL GIVES RULING IN HOLIDAY PAY CASES

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Non-guaranteed overtime must be taken into account for the purposes of calculating holiday pay BUT the scope for workers to bring claims for arrears of holiday pay is very limited, rules Employment Appeal Tribunal

The EAT has today issued its much-anticipated decision in ***Bear Scotland Ltd v Fulton & anor*** and the other consolidated holiday appeals.

Recruiters will recall that these appeals concern the calculation of holiday pay under the Working Time Directive, in particular whether it should include an amount in respect of "non-guaranteed" overtime (where an employer is not contractually obliged to offer it but a worker is contractually obliged to perform it if requested).

The EAT reached 3 key conclusions:

a) **"non-guaranteed" overtime should have been taken into account when calculating holiday pay for the purposes of the four weeks' holiday entitlement that derives from the Working Time Directive (EU leave).** This is because under EU law workers are entitled to receive their "normal remuneration" when taking such leave and the overtime in these cases had been so regularly required by the employers as to amount to normal remuneration. This part of the decision is in line with recent CJEU decisions (***British Airways plc v Williams*** and more recently ***Lock v British Gas Trading Limited***) that during periods of EU leave workers are entitled to receive any remuneration intrinsically linked to the performance of the tasks they are required to carry out under their contracts (in broad terms, not to be worse off taking holidays than not doing so). The EAT also accepted that certain allowances (radius allowance and travelling time payments) fell within "normal remuneration" for the purposes of calculating holiday pay. This part of the ruling does not strictly apply to UK leave, i.e. the additional 1.6 weeks' leave provided under the UK's Working Time Regulations 1998. Whether recruiters will think that the saving of not applying it to those days is worth the administrative burden of operating two different holiday pay rates remains to be seen.

b) **the Working Time Regulations 1998 must be interpreted so as to give effect to these requirements of the Directive.** The EAT said that it was obliged as far as possible to interpret the WTR in light of the wording and purpose of the Directive and it was prepared to read words into the WTR to achieve this.

BUT (and this is a very significant point)

c) the scope for workers to recover underpayments of holiday pay by unlawful deduction from wages claims is limited. The EAT concluded that the workers could not claim any consequent holiday underpayment as being an unlawful deduction from pay under the Employment Rights Act 1996 using each shortfall as the last of a series of deductions where in any case a period of more than three months had elapsed between the deductions. This part of the judgment is of great significance (potentially more so than the adjustment of rates going forwards) and is likely to limit significantly the extent to which workers can look backwards to recover historical underpayments.

Although it was of the view that it did not strictly need to deal with this matter in light of its conclusions at (c) above, the EAT then went on to say that contrary to what had been said at Tribunal stage, it is not necessarily for the worker to specify what type of leave he is taking, i.e. EU leave (the four weeks from the Directive) or UK leave (the additional 1.6 weeks' leave from the WTR). The EAT said that it was minded instead to adopt the approach put forward by the employers in these appeals, namely that it is for the employer to determine what type of leave is being taken. This is because: (i) it is the employer's obligation to pay for leave so it should have the choice as to which type of leave a worker takes; (ii) the employer has the power (within reasonable bounds and following the procedure laid down in the WTR) to direct when holiday should and should not be taken; and (iii) the additional 8 days of UK leave are described in the WTR as "additional leave", which suggests that they should be the last to be taken during the course of a leave year.

This is a decision of wide-reaching legal and practical importance. Andrew Stones, a Partner in our Labour and Employment team, led the appeals on behalf of two of the employers in this case. If you would like to discuss the implications of this Judgment for recruiters, please speak to:

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