CLYDE&CO

UK Update

Holiday pay update: Good news for employers?

Regulations were put before Parliament on 18 December 2014 under which claims for backdated pay would be limited to two years with effect from 1 July 2015.

The Regulations show surprisingly prompt action in the wake of the *Bear Scotland*, *Hertel* and *Amec* decision in the Employment Appeal Tribunal in November on overtime and holiday pay, as well as limiting the effects of the *Lock* decision in the European Court of Justice on commission and holiday pay earlier this year.

The explanatory note to the Regulations states that the Regulations are particularly intended to cover backdated claims for holiday pay. However, the Regulations will also cover other shortfalls in pay. The Regulations will cover all unlawful deductions from wages claims which are presented to a tribunal on or after 1 July 2015, with just a few exceptions such as statutory sick pay and maternity/paternity pay.

Holiday pay so far

In November 2014, the Employment Appeal Tribunal (EAT) held in the joined cases of *Bear Scotland*, *Hertel* and *Amec* that pay for EU holiday - that is, the four weeks' leave granted under the Working Time Directive - should include overtime that a worker is required to work, even if that overtime is not strictly guaranteed. This was further to the decision of the European Court of Justice in *Lock v British Gas* that held that holiday pay should include commission.

The decisions do not apply to the additional 1.6 weeks under the Working Time Regulations – only to the four weeks under the Working Time Directive.

Shortly after the EAT decision was announced, the Department for Business, Innovation and Skills (BIS) set up a task force to consider ways to allay concerns amongst employers that workers would seek to recoup holiday pay going back as far as 1998 when the Working Time Regulations came into force. In *Hertel* and *Amec*, the EAT had made efforts to limit the scope for workers to bring such backdated claims by holding that a gap of three months between periods of underpaid EU holiday would 'break the chain', and no shortfall could be recovered in respect of holidays prior to that gap. This has provided some comfort to employers and has also led to audits being conducted as to patterns of holidays in recent years in order to assess the exposure.

What do the Regulations say?

The Regulations alter the existing rules on employment tribunal claims for unlawful deductions from wages - the method which is generally used bring holiday pay claims - to prevent claims brought from 1 July 2015 onwards from stretching back further than two years.

In addition, the Regulations provide that the right to paid holiday is not implied into employees' contracts by operation of law. This is to confirm that workers are not able to circumvent the back pay restrictions

arising from the *Hertel* and *Amec* decision or from the Regulations themselves by bringing breach of contract claims in the High Court. Breach of contract claims could go back up to six years. Although the likelihood of such breach of contract claims succeeding was questionable anyway, the Regulations will avoid the issue from when the Regulations come into force on 8 January 2015.

How much certainty does this actually afford employers?

As it stands at the moment, the two time-related restrictions on unlawful deductions from wages claims are:

- A claim for unlawful deductions from wages must be brought within three months of the deduction. With a series of deductions over a period of time, the claim must be brought within three months of the last deduction; and
- A series is broken by there being a three month gap at any time, so preventing claims for deductions prior to that gap. That is the effect of the decision in *Hertel* and *Amec*, but it may be challenged in future appeals

The Regulations will impose a *third* restriction so that even if there is an unbroken series of deductions going back many years, a claim can only cover the two years up to the date the claim was presented to the Employment Tribunal.

In respect of holiday pay, employers can expect to see a flurry of claims prior to 1 July 2015 in order to beat the implementation of the Regulations. The deadline will force unions and workers to either sacrifice potential claims or issue proceedings.

There may also be a risk of claims brought before 8 January 2015 by workers who want to try their luck on a breach of contract claim before that avenue is definitely closed.

A possible challenge?

The decision in *Bear Scotland*, *Hertel* and *Amec* was clear in that employees in the UK are entitled, as a matter of EU law, to overtime as part of holiday pay. Unions and other employee associations might therefore seek to challenge the Regulations on the basis that they limit the ability of workers to exercise their rights under EU law effectively in the courts and tribunals, otherwise known as the "principle of effectiveness". The principle, enshrined in EU law and recognised by courts in the UK, makes it unlawful for the UK government to take steps, including new legislation, which have the effect of preventing workers from obtaining an effective remedy before a tribunal.

However, by giving a window of time before the new legislation takes effect in respect of tribunal claims, workers have the opportunity to bring a claim before July 2015 and try to 'catch up' on outstanding pay claims. Therefore, no one loses an effective remedy if they act before 1 July 2015. Having said that, this is not clear cut, and some form of challenge is foreseeable.

The Regulations should be welcomed by employers as some further relief from the backdated holiday pay problem, but they can expect June 2015 to be a busy month for new tribunal claims.

Read our previous alerts on this topic:

What to watch out for in 2015: Why is holiday pay an issue

Holiday pay update (overtime)

Holiday pay should include commission

Further information

If you would like further information on any issue raised in this update please contact:

Adam Lambert
E: adam.lambert@clydeco.com

Hannah Crisp
E: hannah.crisp@clydeco.com

Clyde & Co LLP
The St Botolph Building
138 Houndsditch
London EC3A 7AR

T: +44 (0)20 7876 5000
F: +44 (0)20 7876 5111

Further advice should be taken before relying on the contents of this summary.

Clyde & Co LLP accepts no responsibility for loss occasioned to any person acting or refraining from acting as a result of material contained in this summary.

No part of this summary may be used, reproduced, stored in a retrieval system or transmitted in any form or by any means, electronic, mechanical, photocopying, reading or otherwise without the prior permission of Clyde & Co LLP.

Clyde & Co LLP is a limited liability partnership registered in England and Wales. Authorised and regulated by the Solicitors Regulation Authority.

© Clyde & Co LLP 2014