EMPLOYMENT UPDATE

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Holiday pay confusion

Last August we reported that the legality of rolled-up holiday pay was in the unusual situation of being subject to a North - South divide. However this month a decision in the Leeds Employment Tribunal has thrown the whole issue back into the melting pot.

Last year the Employment Appeal Tribunal in the case of **Marshalls Clay Products Ltd v Caulfield** decided that rolled up holiday pay could be lawful if it is properly included in the contract. This was in contrast to the decision a few months before of the Scottish Appeal Court in **Munro v MPB Structures Ltd.** That court, like the Employment Appeal Tribunal in Scotland, took the view that workers should receive holiday pay as and when they took holiday and not in advance.

The general expectation was that the English Tribunals would follow the decision of the English Employment Appeal Tribunal and the Scottish Tribunals would follow the Munro decision. Therefore employers in England and Wales would able to continue to use allowances whilst those in Scotland were at risk of claims for compensation.

However this month in the case of **Robinson-Steele v RF Retail Services Ltd** the Leeds Employment Tribunal when considering Mr Robinson-Steele's claim for holiday pay under the Working Time Regulations decided that it preferred the interpretation of the Regulations that was reached in Munro.

Mr Robinson-Steele had carried out casual work from week to week. The contract under which he carried out the work contained a provision that in addition to his hourly rate he would receive an allowance equivalent to 8.33 per cent that would be paid in respect of his entitlement to annual leave. When his contract came to an end he made a claim for holiday pay he alleged was due under the Working Time Regulations. He had only taken two days leave and under the Regulations he would be entitled to two and a half weeks leave.

The Tribunal preferring the interpretation given in Munro considered that the holiday allowance did not meet the requirements of the European Working Time Directive to provide pay as and when holidays are taken. It therefore decided to take the unusual step of referring the issue directly to the European Court of Justice with two questions to be answered. Firstly whether our national law was consistent with the European Directive by allowing holiday pay to be paid by way of an allowance and secondly, whether credit should be given for sums paid under such an allowance.

This referral is obviously a cause for concern as it had been hoped that at least in England and Wales these issues had been resolved. However with this latest twist the holiday pay arrangements for casual workers and those on shift systems may have to be reviewed.

The risk is that if the rolled-up payment method is found to be inconsistent with the Directive, it is likely that employers will face potentially large "unlawful deduction from wages" claims from workers in relation to holiday pay stretching back to the implementation of the Working Time Regulations in 1998.

In a further development this month the rights to paid leave under the Working Time Directive and the rights of employees on maternity leave came under the scrutiny of the European Court of Justice.

In **Gomez v Continental Industrias del Caucho SA** the issue referred by the Spanish court was whether the employee had to be allowed to take her holidays under the Directive at a time other than that she was absent due to maternity leave. A collective agreement at Mrs Gomez's place of employment meant that the annual holidays were fixed at a certain time of year for all employees. This period coincided with the time that she was absent due to maternity leave.

The decision of the Court was that the principle of equal treatment between men and women meant that a worker must be able to take her annual leave during a period other than that of her maternity leave. This included in the particular circumstances where the period of maternity leave coincided with the general period of annual leave fixed for the entire workforce.

The application of this ruling in the UK could cause considerable practical concerns. For example, many employers include the bank holidays as part of the statutory leave entitlement. If these now fall during a period of maternity leave the employee will have to be allowed to take them off at a later date.

A third holiday case this month will give some comfort to employers. On 25 March in **Bamsey v Albion Engineering Ltd & Manufacturing PLC** the Court of Appeal confirmed that the pay for holidays taken under the Working Time Regulations should not include overtime. Mr Bamsay was contracted to work 39 hours per week yet over the 12-week prior to taking annual leave he had worked an average of 60-hours. Nevertheless it was held that his holiday pay should be based on a 39-hour week only.

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