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Employment Law BULLETIN

Welcome to our November employment law bulletin.

The big news this month was the delivery by the EAT of its long awaited judgment in three employment tribunal cases under the lead name of *Bear Scotland Ltd v Fulton*. These concerned the question of whether non-guaranteed overtime should be taken into account when calculating holiday pay for the purposes of the minimum four weeks statutory annual leave required by the Working Time Directive. The EAT has held that it does need to be counted. On the other hand, the EAT significantly limited the extent to which workers can make retrospective claims for underpaid holiday. The EAT held that workers cannot use each shortfall in holiday pay as part of a series of deductions (for the purposes of unlawful deductions claims) where a period of more than three months has elapsed between the deductions. The EAT has given the parties leave to appeal and therefore the position may still change.

In *MacAlinden v Lazarov* and *Halawi v WDFG UK Ltd* the EAT has considered the subject of employment status for the purposes of the right to bring a statutory employment claim.

There are two TUPE cases in the EAT. *Vernon v Azure Support Services Ltd* concerns the time limit for bringing a harassment claim following a TUPE transfer. In *Eville & Jones (UK) Limited v Grants Veterinary Services Ltd (in liquidation)* the EAT considered a case where an employer had failed to provide employee liability information to a transferee prior to the transfer of an undertaking.

In *Ridge v HM Land Registry* the EAT considered whether an employer might exercise the right of set-off in a claim for breach of contract brought by an employee in an employment tribunal. And in *General Dynamics Information Technology v Carranza* the EAT ruled on whether an employer should have ignored a disabled employee's final written warning for breach of the employer's sickness absence policy as part of its duty to make reasonable adjustments under the Equality Act 2010.

Our client briefing this month is on the subject of time off for training.

May I also remind you of our forthcoming events:

Click any event title for further details.

What's new in Employment law?
Highlights of 2014 plus your 2015 HR planner
• Breakfast Seminar, 2nd December 2014

Key Issues in Employment Law and Practice
• Conference, London, 5th December 2014

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Wherever you see the BAILII logo simply click on it to view more detail about a case

1: Holiday pay and overtime payments

The EAT has delivered its long awaited judgment in the combined cases of ***Bear Scotland Ltd v Fulton and others*** UKEATS/0047/13, *Hertel (UK) Ltd v Woods and others* UKEAT/0160/14 and *AMEC Group Ltd v Law and others* UKEAT/0161/14. The EAT held that payments for overtime a worker is required to work but which an employer is not required to offer (non-guaranteed overtime) is "normal remuneration" for the purposes of Article 7 of the Working Time Directive, and the Working Time Regulations 1998 (WTR 1998) must be interpreted to achieve this principle. This means that non-guaranteed overtime should be taken into account when calculating holiday pay for the purposes of the minimum four weeks' statutory annual leave required by the Working Time Directive (set out at regulation 13 of the WTR 1998).

But the principle does not apply to the additional 1.6 weeks' leave provided by regulation 13A of the WTR 1998 which remain subject to the "week's pay" provisions of the Employment Rights Act 1996, under which only compulsory, guaranteed, overtime is taken into account in respect of workers who work normal hours. This is because the additional hours have been introduced by domestic legislation and not the EU Directive concerned.

The EAT also significantly limited the extent to which workers can make retrospective claims for underpaid holiday. It held that workers cannot use each shortfall in holiday pay as part of a series of deductions (for the purposes of unlawful deductions claims) where a period of more than three months has elapsed between the deductions. Because the additional 1.6 weeks' leave does not have to include non-guaranteed overtime, this may mean that it is easier for employers to show a break in the series of deductions of more than three months where the additional leave is paid at the correct rate.

The EAT has given the parties leave to appeal, noting that the series of unlawful deductions point is "arguable as well as of public importance". Therefore it is by no means certain that the current position will be maintained in the future.

Further issues arising

In considering calculation of holiday pay it is important to distinguish whether the organisation is calculating holiday pay for workers with or without normal working hours. Workers with normal working hours have a weeks' pay calculated by reference to those hours. The calculation relating to average weekly remuneration applies to workers who do not have normal working hours. Workers who do not have normal working hours should have average weekly remuneration calculated over a longer reference period – the EAT referred to 12 weeks.

The 12 week reference period is set out in Employment Rights Act 1996 (ERA) and it is a good starting point for calculations. However, if 12 weeks is not considered representative of normal remuneration (and as such fails to comply with the Working Time Directive) the reference period may have to be longer. There is a risk that calculations may have to be dealt with on a case by case basis.

It is useful to breakdown the different "types" of overtime and the obligations on employers in respect of each:

- **Guaranteed compulsory overtime** is treated as normal hours of working and should be included in the calculation of holiday pay in respect of the full 5.6 weeks. This position was clarified in case law going back several years.

- **Non-guaranteed overtime** (where the employee is obliged to work if requested but the employer is not obliged to provide overtime or payment in lieu) is now also included in calculation of statutory holiday pay for the 4 weeks granted under Regulation 13 WTR.

- **Truly voluntary overtime** (where the employee is not obliged to work it and the employer is not obliged to pay it) comes into a different category. The EAT has not clarified the position on this form of overtime. However, it is possible employment tribunals may see voluntary overtime as forming part of normal remuneration if a settled pattern develops over sufficient period of time to justify the label of "normal" pay. This argument was raised in a case similar to those appealed, but it was settled before the appeal hearing, so there is no finding on this point and the uncertainty remains.

Employers will face an administrative challenge if they choose to calculate holiday rates of pay differently for 4 weeks and the additional 1.6 weeks.

Travel costs – the EAT found time spent travelling is not an expense ancillary to travel (such as a train ticket or bus fare would be) and it is not a cost. The radius and travelling time allowances paid to the workers involved in the appeal cases were not paid purely because of where the workers lived. Rather, they were payment for time spent by the worker travelling to a number of sites, as is common in the construction industry, for example. As such, the taxable element of these allowances formed part of the worker's normal remuneration.

2: Were actors working under a profit share agreement "workers" for the purposes of employment legislation?

Not necessarily, said the EAT on the facts in ***MacAlinden v Lazarov and others***.

Five actors were hired to appear in a play: They were recruited on an "actor's contract" which remunerated them by way of a profit share. The play gained critical success but did not produce a profit. The claimants received nothing. On the termination of their engagement they pursued claims to the employment tribunal for payment of the national minimum wage and holiday pay. They could only succeed if they were "workers" as defined in the relevant legislation. The Employment Judge determined that they were workers. He considered that the claimants undertook to perform work personally. And he found that there was a sufficient degree of mutual obligations for the claimants to be workers.

On appeal, the Respondent contended that the Employment Judge had not properly considered whether the actors were carrying out a profession or a business undertaking and so that the other party to the contract was a client or a customer, this being the exception to the definition of a worker.

The EAT agreed. On the witness evidence, there was some indication at least that the actors concerned were people who were embarking on a professional business undertaking. They appeared to be actively marketing their services as an independent person to the world in general, rather than being recruited to work for any individual as an integral part of that individual's operations.

In this case the Employment Judge had not applied the statement of principle by Langstaff J in *Cotswold Developments Construction Limited v Williams* [2006] IRLR 181 to the effect that the focus must be on whether the purported worker actively markets his services as an independent person to the world in general (a person who will thus have a client or customer), on the one hand, or whether he is recruited by the principal to work for that principal as an integral part of the principal's operations, on the other. The matter was remitted to a fresh employment tribunal.

3: Beauty consultant working through her own limited company was not "in employment" for the purposes of a discrimination claim

In ***Halawi v WDFG UK Ltd (t/a World Duty Free)***, the Court of Appeal considered the employment status of a beauty consultant offering her services through her own limited company.

The Equality Act 2010 contains a wide definition of employment which may extend to the self-employed if they are working under a "contract personally to do work" ; that is if they are obliged to perform the work personally and cannot send a substitute to perform the contract.

ECJ case law clarifies that a person will be "in employment" for the purposes of EU discrimination law if the work of that person is controlled by an employer and there is a relationship of subordination to the employer involving integration into its organisation.

Mrs Halawi had set up her own limited company and through this provided her services as a beauty consultant to Caroline South Associates (CSA). CSA provided sales staff to Shisedo, a cosmetics company. These sales staff, including Mrs Halawi, worked in retail space within Heathrow Airport provided by World Duty Free (WDF). WDF decided to withdraw Mrs Halawi's airside pass and so she was unable to continue her work. She brought claims for unfair dismissal and discrimination.

The employment tribunal ruled that Mrs Halawi was not in "employment" as defined by the Equality Act 2010. While she wore a Shisedo uniform, she did not have an employment contract with Shisedo, CSA or WDF. The only contract which existed was that between CSA and Mrs Halawi's company and this contract had no elements suggesting an employment relationship. There was found to be no mutuality of obligation as CSA was not obliged to offer work and Mrs Halawi was not obliged to accept it.

On appeal, the EAT upheld the tribunal's decision stating that there was no employment relationship as there was no control, no subordination or economic dependency. In concluding that Mrs Halawi was not employed under a "contract personally to do work", the EAT pointed to the fact that Mrs Halawi could send a substitute to do the work, and had in fact done so on occasions.

Mrs Halawi appealed to the Court of Appeal arguing that only a relationship of subordination or economic dependency was required in order to be "in employment" under EU law and that personal service was not required. The Court of Appeal dismissed the appeal, stating that economic dependency on its own is not sufficient to establish a relationship of subordination and that personal service is an essential element in the definition of employment under EU law. Key to the Court of Appeal's decision were the lack of integration of Mrs Halawi into WDF's business, the lack of control over Mrs Halawi's work, the lack of documentation to evidence an employment relationship, the lack of a relationship of subordination and a real power of substitution.

4: The date of a TUPE transfer was irrelevant to the time limit for bringing a harassment claim

In ***Vernon v Azure Support Services Ltd and others***, the EAT found that time for a harassment claim (relating to acts both before and after a TUPE transfer) began to run from the last act of harassment, rather than the date of the transfer. It also found that the transferee was vicariously liable for the acts of the harassing employee before the transfer, even though the harasser's employment contract did not transfer to the transferee.

Ms Vernon worked as a sales manager for conferences and events for Port Vale Football Club until her employment transferred to Azure Support Services Ltd (Azure) under TUPE. Mr Bedding, who was employed by the football club as football sales manager sexually harassed Ms Vernon both before and after the date of the transfer. Mr Bedding's employment did not transfer to Azure. Ms Vernon complained to her employer about the harassment but no action was taken. Ms Vernon was suspended in connection with rumours that she had had a personal relationship with one of the club's footballers in breach of Azure's contract with the club. She was ultimately dismissed because she had originally withheld, and later revealed, certain details when explaining the nature of her contact with the footballer and she had allegedly failed in her duty of trust and confidence to her employer.

Ms Vernon brought claims including direct and indirect sex discrimination, sexual harassment and victimisation after the protected act of complaining about her harassment.

At first instance, the tribunal held that the dismissal was an act of direct sex discrimination. It held that Mr Bedding was liable for harassment. While the football club was also liable up to the date of the TUPE transfer, the tribunal found that the club could not be liable for Mr Bedding's acts after that date because the claimant and Mr Bedding did not have the same employer.

On appeal, the EAT agreed with the tribunal's finding that Ms Vernon had been discriminated against on the ground of sex. They approved the tribunal's choice of comparator: a man who had been the subject of rumours and who had given the explanations which Ms Vernon gave. The EAT clarified that the sexuality of such a comparator is irrelevant to the question of whether the claimant was dismissed because of her gender.

Azure argued that the continuing nature of the harassment was stopped by the TUPE transfer and that the claimant's claim was out of time because time began to run from the date on which her employment with the football club ceased. The EAT disagreed, stating that date on which the employment transferred was irrelevant for the purposes of an Equality Act claim. Where the conduct complained of takes place over a period of time, the claimant must bring the claim within three months of the end of that period. Here, the conduct was a continuing act extending both before and after the TUPE transfer, bringing Ms Vernon's claim within the time limit.

Ms Vernon also appealed, arguing that vicarious liability for Mr Bedding's conduct before the transfer had transferred to Azure under TUPE. The EAT allowed her appeal.

Employers should note that the transferee employer in this case was found to be liable for the conduct of Mr Bedding before the transfer, even though he was at no time an employee of the transferee. While the transferee was not liable for Mr Bedding's conduct after the transfer, the fact that the conduct continued after that date had the effect of giving more time for the claimant to bring the claim.

5: TUPE: Employment tribunal considers the duty to provide employee liability information

In *Eville & Jones (UK) Limited v Grants Veterinary Services Ltd (in liquidation)* (Case no. ET/1803898/12) an employment tribunal ordered a transferor to pay to a transferee compensation of £65,500. This arose out of a breach by the transferor to provide employee liability information as required by regulation 11 of TUPE.

The case involved a second generation contracting out of services following a retendering exercise. There was no dispute that this was a relevant transfer for the purposes of TUPE. Eville & Jones

and Grants supplied veterinary and meat inspectors to slaughterhouses under contracts with the Foods Standards Agency (FSA). These contracts were fixed term for three years due to expire in November 2011. In March 2011 the FSA issued notices to all contractors that their existing contracts would terminate on 1st April 2012 and invited tenders for all of the “clusters” into which the FSA's areas of operation had been geographically divided. On 24th November 2011 it was announced that Eville & Jones had been successful in tendering for all of the clusters in England. As a result there was a service provision change and a TUPE transfer from Grants to Eville & Jones in relation to the work that Grants had previously carried out for the FSA.

Eville & Jones entered into a new contract with the FSA in February 2012. The transfer date was 22nd April 2012. However, Grants was in financial difficulty, particularly as a result of the loss of the FSA as its sole client. Insolvency practitioners were consulted in July 2011 and business recovery professionals engaged in November 2011. By December 2011 Grants had an unpaid debt due to HMRC of £333,994.75 including a late payment penalty. HMRC presented a winding up petition to the Court on 9th February 2012 and the hearing date was set for 26th March 2012. Employees were paid as normal in February. But from then on Grants worked towards possible voluntary arrangement. Meanwhile it suffered further claims including from HMRC and a car leasing company. On 27th March 2012 Grants wrote to its employees advising that March salaries would not be paid but were delayed until early April. By late March Eville & Jones became aware (by indirect means) of the delay in salary payments to Grants staff. Eville & Jones were concerned but believed that the payments would be made. But on 2nd April 2012 (the date of commencement of the FSA contract) Grants' bank account was frozen. The March salaries had not been paid.

Given the TUPE transfer, Grants had no alternative but to honour the back pay. Thereafter Eville & Jones issued tribunal proceedings against Grants for breach of regulation 11(2)(d)(ii) of TUPE arguing that Grants had reasonable grounds to believe that its employees might bring claims and had not disclosed this in accordance with the regulations.

The case was brought under the provisions of regulation 11 of TUPE as amended by the Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 2014 in this case. Employee liability information had to be delivered no later than 14 days before the transfer. The date of the transfer was 2nd April 2012 and so the information had to be supplied, in accurate form, by 19th March 2012.

On the facts, the tribunal concluded that, as at 19th March 2012, Grants had reasonable grounds to believe that claims would be brought, in circumstances where the employees were in fact unlikely to receive their March salaries. By then it was clear there were financial difficulties and an insolvency arrangement planned. The company's letter to employees saying that March salaries were simply delayed was not a genuine statement of what in fact was occurring. Given the history and the company's knowledge of likely events there were no special circumstances rendering it not reasonably practicable to excuse non-compliance with the transferor's obligations to provide employee liability information. The employment tribunal then addressed itself on remedy. An employment tribunal must have regard to any loss sustained by the transferee as a result of the failure to provide employee liability information, the overriding principle being that awards are made on a just and equitable basis.

The transferee had incurred management expenses and legal costs together with additional banking expenses in having to react quickly to the problem of the inherited wage claims. However the tribunal rejected Eville & Jones' argument that had it known of the likely failure to pay its employees it would somehow have been able to reduce its overall liability in the circumstances. Eville & Jones would not have threatened to withdraw from its contract with the FSA because of reputational damage. Therefore the tribunal made the minimum award of £500 per employee which resulted in a total award of £65,500 based on 131 transferring employees. This was in fact in excess of the administrative costs put forward by the transferee (£42,000). The tribunal put the true figure for this claim at little more than £3,000. But the employment tribunal did not feel constrained by the level of loss suffered by the transferee. It awarded the minimum of £500 per

employee and did not think it just and equitable to reduce it. This was not a minor or inadvertent breach but a failure which was significant and anything but inadvertent.

6: Set-off defence available to employer in a breach of contract claim brought in the Employment Tribunal

In ***Ridge v HM Land Registry***, the EAT agreed with an employment tribunal that legal set-off was available to an employer as a defence to a breach of contract claim, even though the employer's counterclaim was out of time under the Employment Tribunal Rules of Procedure.

A breach of contract or debt claim can be brought by an employee in the employment tribunal if the claim exists at the time of the termination of employment, or if the claim arises on termination. Any counterclaim brought by the employer must be brought within 28 days of the breach of contract claim being served.

In civil court actions, the defence of legal set-off can be raised where both parties owe each other money. There is no requirement for the two claims to be based on connected transactions, but the value of the claims but be “ascertainable with certainty”.

Mr Ridge worked as a software engineer for HM Land Registry (HMLR). He was dismissed after taking repeated short-term sickness absences. He brought a series of tribunal claims for disability discrimination, unfair dismissal, victimisation and breach of contract. The breach of contract claim was for unpaid pension contributions during his notice period. HMLR brought a counterclaim for overpayment of wages but this counterclaim was not submitted within the 28 day deadline and the tribunal found there were no grounds to extend time.

At first instance the tribunal found that the dismissal was fair and dismissed the discrimination claim. It found that Mr Ridge's claim for unpaid pension contributions was valid but ruled that HMLR overpayment of wages could provide a defence to the claim by way of set-off.

The EAT upheld the tribunal's decision on unfair dismissal and the set-off defence. It stated that if breach of contract claims can be brought by employees in the employment tribunal, then the defences which would be available to a defendant in the civil courts should be available to an employer in the employment tribunal. The EAT also clarified that where the value of a claim or counterclaim is disputed by the parties, this does not mean that the amount is not “ascertainable with certainty” after consideration by the tribunal. The case was remitted to a fresh tribunal to decide the value of the amount to be set-off.

7: The duty to make reasonable adjustments and treatment of prior warnings

In ***General Dynamics Information Technology v Carranza***, the EAT considered whether an employer should have ignored a disabled employee's final written warning for breach of the employer's sickness absence policy as part of its duty to make reasonable adjustments under the Equality Act 2010.

In this case, Mr Carranza was originally employed by Lambeth Council. Lambeth Council had

disregarded Mr Carranza's disability-related absence and had made adjustments, including allowing him extra breaks and time off for appointments. The employer's sickness absence policy was triggered, however, by non-disability related absences. Shortly before a TUPE transfer to General Dynamics Information Technology took place, Mr Carranza received a final written warning. The employee continued to take time off for both disability-related and non-disability related reasons. Following advice from Occupational Health concerning both his short-term health issues and the likelihood that his disability would continue to lead to sickness absences, Mr Carranza was dismissed. He brought claims for unfair dismissal and disability discrimination in the employment tribunal.

The tribunal ruled that the employer had failed to make reasonable adjustments which would avoid the employee being disadvantaged by the provision, criterion or practice (PCP) of a general requirement to attend work consistently. It stated that it would have been reasonable to disregard the final written warning. It held that the dismissal was unfair as a reasonable employer would have considered the context of the final written warning rather than taking it at face value.

While the EAT agreed with the tribunal's identification of the PCP, it disagreed that the mental process of disregarding a warning could be a “step” designed to avoid a disadvantage to the disabled employee. The EAT was clear that in identifying such a step, the tribunal should not have focused on the employer's reasoning, but on the practical actions it took. It held that the employer's leniency earlier in the process did not now render the employer unreasonable in failing to disregard sickness absences.

The EAT stated that a tribunal need not re-open a final warning when considering whether dismissal was unfair. A tribunal will decide whether a reasonable employer should have taken the warning into account by considering whether it was given in good faith, whether on the face of it there were grounds for issuing it, and whether the warning was manifestly inappropriate. The EAT disagreed with the tribunal's finding that the employer should have re-visited the final warning before dismissal. In finding that the dismissal was fair, the EAT took into account the final written warning, the considerable periods of absence after this warning was issued and the professional advice from Occupational Health that Mr Carranza's patterns of absence were unlikely to improve.

8: Client Briefing: Time off for training

This client briefing just provides an overview of the law in this area. You should talk to a lawyer for a complete understanding of how it may affect your particular circumstances.

This client briefing sets out how an organisation should respond if an employee makes a request for time off for work or study or training.

What is the right?

Organisations which employ 250 or more employees are obliged to consider an employee's request to take time off for study or training.

Who is eligible?

Only employees with more than 26 weeks' service with the organisation will be entitled to make a request for time off for study or training.

The study or training applied for must be for the purpose of improving the employee's effectiveness at work and also to improve the performance of the organisation.

It does not have to lead to a formal qualification (for example, it could simply be training on a new piece of software or equipment).

The right does not apply to:

- Agency workers
- School age children
- Young employees who qualify for a separate right to time off for training

How does it work?

An employee may only make one application for time off for training in any 12 month period.

Their application must be in writing and include details of the training they want to undertake.

The organisation must consider all requests seriously.

What is the procedure for dealing with a request?

The procedure the organisation must follow mirrors the procedure for dealing with a flexible working request. The organisation should:

- Hold a meeting with the employee to discuss their application within 28 days of receiving it
- Allow the employee to be accompanied by a colleague, who can address the meeting and confer with the employee making the request
- Give the employee a written, dated notice of the decision within 14 days of the meeting

What are the grounds for refusing a request to take time off for training?

There are a number of specified reasons that an organisation can rely on to decline a request:

- Where it does not believe that the training requested will help improve the performance of the organisation
- Where there is an unacceptable cost burden
- Where the employer will not be able to reallocate work

The right to appeal

The employee has the right to appeal the decision. The appeal must be dated, in writing, set out the grounds on which they wish to appeal and be submitted within 14 days of the initial decision.

An organisation has 14 days to either uphold the appeal and notify the employee or hold a further meeting with them to discuss the appeal.

How much time can be taken off?

The organisation can grant all, part or none of the time off that is requested by the employee. There is no right to payment, even if the request for time off is granted.

On what grounds could an employee bring an employment tribunal claim against the organisation for a failure to comply with these rules?

- The organisation fails to hold a meeting with the employee within 28 days on receiving their applications, or within the 14 days of their notice of appeal against an initial decision.

- The organisation fails to notify the employee of its decision within 14 days of the initial meeting to discuss their application or within 14 days of an appeal meeting.
- The organisation refuses their application, in full or in part, for a reason other than one or more the permissible grounds for refusal and then fails to correct the decision on appeal.
- The organisation made the decision to refuse all or part of their application on incorrect facts and failed to correct the error on appeal.
- The organisation fails to:
  - Allow the employee to be accompanied by a colleague of their choosing at a meeting
  - Allow their colleagues to address the meeting or confer with the employee during the meeting
  - Postpone the meeting under the procedure because the employee's chosen companion is unavailable

What are the penalties for failing to deal with the request adequately?

It is automatically unfair to dismiss an employee because an application for time off for training has been made.

An employment tribunal may award compensation of up to eight weeks' pay (or up to two weeks pay for a breach of the right to be accompanied provisions) and the organisation may be ordered to reconsider the application.

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