Holiday Hell - Time to give employers a break?

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I'm feeling very sorry for one of my new clients this week – a small family run business facing holiday pay complaints from their emboldened employees. Emboldened because, as you will have seen from the headlines, the courts have dealt another blow to the interpretation in English law of the European working time legislation and specifically, how it provides for holiday pay to be calculated. The holiday pay saga (pun intended) has a lengthy history and is not yet concluded. This week's Employment Appeal Tribunal ('EAT') decision, in the joined cases of Bear Scotland Ltd and Others v Fulton and Others; Hertel (UK) Ltd v Woods and Others and Amec Group Ltd v Law and Others, confirmed that calculation of holiday pay should take into account all aspects of a worker's normal remuneration – including payments for non-guaranteed overtime. Additionally, taxable elements of certain travelling time payments were also found to be part of 'normal remuneration' and something for inclusion in holiday pay.The EAT acknowledged that this has not always been the English courts' way of interpreting the law – the Court of Appeal held in 2004 that compulsory but non-guaranteed overtime did not have to be taken into account when calculating holiday pay. However, the EAT concluded that this decision was reached before more recent judgments of the Europen Court of Justice which have made it apparent that the previous interpretation was not correct. Consequently, the EAT arrived at a different conclusion. This is why I am feeling sorry for my new client. Like many companies they had very good reason to think that they were complying with the law but now need to not only consider revising their practices but also budget for the costs associated with potential claims. They are a small business and had not expected such expenses. Like many organisations they fear the impact that it will have upon their finances and are contemplating making cuts to pay for any potential liabilities… So, potentially, a pyrrhic victory in the offing for their emboldened (but possibly short-sighted) employees. As an employment lawyer I question whether this is a just outcome for employers. It feels very close to retrospective legislation. It is not unheard of for the law to sometimes have this effect – for example some tax law deliberately has backdated impact – but it doesn't feel right and is generally frowned upon by legislators. Against this rather gloomy backdrop there is, however, a chink of light for employers in the EAT ruling. It is already established law that Tribunals cannot hear claims for unlawful deductions from wages that are brought more than three months after a one off deduction (underpayment) or the last deduction in a series of deductions. In this latest decision, the EAT considered which deductions are part of a 'series' and concluded that, where there is a gap of more than three months between deductions in a chain, then the 'series' is broken. So this may curtail to some extent the potential effect of the overall judgment depending on whether the employers appeal and whether the higher courts agree with the EAT's view. It is also not the end of the story. Not only is this latest decision likely to be appealed but other related judgments are awaited. It is interesting that the the Judge in this EAT case concluded by acknowleding that the issues are of public importance. Our economy is only just in recovery mode. The potential impact of the ruling – and other judgments which are awaited – could cost eye-watering amounts. John Lewis, for example, hit the headlines over the summer when it confirmed it had set aside £40m for compensating staff who were inadvertently underpaid in connection with holiday pay. It also comes at a time when the future of England in Europe is under the spotlight. Developments like these are going to give the Euro-sceptics plenty to talk about. That said, there are estimated to be up to five million people in the UK that work overtime who may well feel rather differently….

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