The Agenda podcast by Lewis Silkin: In-House Employment Lawyers Coffee Break

Episode 7: Holiday pay and reasonable adjustments

Colin

Hello and welcome, Colin and David here for your coffee break! Each month, we talk you through the latest employment law developments and practical takeaways that you need to know this month.

David

Yes, thanks Colin. You'll be pleased to hear that after the last few episodes where we brought news of new legislation, and we told everyone there were new policies to draft, it's been a bit of a quieter month for employment lawyers! So, we're going to focus on two Employment Appeal Tribunal decisions, one's about holiday pay and the second one's about reasonable adjustments. As I say, the first one is a holiday pay claim and it's against an airline.

Some jokes are too obvious even for me, so we'll let you write your own punchlines while I hand over to Colin to walk us through the case of *British Airways v Mello*.

Colin

Okay, so this is an EAT decision, which gives us some useful guidance on how tribunals will approach determining which allowances form part of the so-called "normal" pay and therefore need to be included in holiday pay calculations. The case came about because BA's cabin crew received different allowances when they were working in addition to basic pay. One of them was a meal allowance which BA paid at a very generous flat rate. So, the question was which of these allowances had to be taken into account when calculating holiday pay?

David

Ah, it just gets so tricky when there's complicated pay structures and different types of allowances in place. Lots of our clients in different sectors, they've grappled with what payments should be included, particularly if they weren't regularly paid and where they're tied to expenses employees are likely to incur.

Colin

Yes, absolutely. So, for an employee to bring a claim, there has to be a series of underpayments and in this case, the Tribunal said that a number of the allowances, including the meal allowance, were relevant when calculating holiday pay. The Tribunal had looked at each allowance separately to determine whether or not there was a series of deductions.

But the EAT said that's wrong. They said all of the deductions came about because of a failure to take one or more allowances into account. So, in other words, the deductions were sufficiently similar to form part of the same series and the EAT said that tribunals shouldn't take too granular an approach when they're considering the similarity of deductions.

So really, any deductions from holiday pay are likely to be a series as long as there's a sufficient "temporal" connection.

David

And even that bit's not always straightforward to determine, is it? Some of the listeners will be familiar with the recent Supreme Court judgment in *Agnew* and that confirmed that a gap of three months between

deductions, well, that's no longer going to automatically break a series of deductions. The EAT, here, was bound to follow that decision because it's a more senior court.

But arguments around a break in the series, and these often arise because of the kind of sporadic, irregular way employees take holiday in practice, they did used to provide a comfort blanket to some employers. I think decisions like these and *Agnew*, well, they're starting to make that comfort look a bit useless. More like one of those airline blankets that doesn't quite cover your feet, to stretch the metaphor.

Colin

Ah, well yes, indeed, unhelpfully not. And the question of whether or not there was actually a sufficient connection in time has been referred back to the Tribunal. But I think it will be hard for employers to argue that there isn't a series of deductions unless there are, for example, two quite random underpayments paid a long time apart. But the EAT did make a point of saying that there will inherently be gaps in time between holidays and so we can expect the Tribunals will have some sympathy for that.

David

That's clear, if not particularly comforting. And, of course, employers do still have the 2-year backstop provisions. So, there's always that to fall back on, save for employees based in Northern Ireland to whom the backstop doesn't apply.

The other point I thought was interesting was the generous meal allowance you mentioned earlier, part of which is obviously to cover expenses. Now normally, genuine expenses wouldn't need to be taken into account when calculating holiday pay, but it was obviously more complicated here because the allowance was quite so generous. It's perhaps relevant that for tax purposes at least, HMRC can apportion a payment so that its part-pay and part-expense. But the EAT was clear here, that's not what Tribunals should do. Instead, it's binary – either a payment is an expense payment or it's not.

Colin

I think you're giving me some Brexit flashbacks there, with your reference to Northern Irish backstops, David. But yes, on expenses that's right. And again, the EAT didn't give a lot of guidance on what would tip the balance - it will be for the Tribunal to reconsider, in this case, the meal payments in question. It is helpful to know that the Tribunal isn't expected to apportion payments in the same way that HMRC would. Although employers who do pay inflated expenses allowances may want to have another look at those.

And finally, on this case, it's worth mentioning that the EAT had an interesting discussion on whether employers can dictate the order in which holiday is used.

David

Yeah, and it's now fairly common for contracts to state that the first bucket, EU-based leave, that's deemed to be taken first. That's followed by UK statutory leave, and then last but not least, contractual leave. And that's because different types of leave can be paid at different rates and it's treated differently when considering carry over of holiday.

Colin

Yes, exactly. So, the EAT actually found that BA didn't have such a contractual power. But it seems that, in principle, a contract validly could do so. So while there may be further case law on this, we would recommend that, for now, you still set out the order that different types of leave have to be taken if you distinguish the different pots in practice.

Reasonable adjustments

David

Thanks Colin. Next up is our second EAT case which answers the question of whether, in the case of an employee who becomes disabled and can't do their current job anymore, it's a reasonable adjustment to offer them a trial period in another role?

Colin

Yes, yes, it is!

David

Spoiler alert! But you're right, of course. The EAT said that a trial period can be a reasonable adjustment in and of itself.

So, this case is called *Rentokil v Miller*. Mr. Miller did a pest control job working in the field. Much of his job involved spending time up ladders and working at heights. Now I have to say, this caused great concern when we discussed it as a team and we all collectively wondered whether there was some new strain of airborne mice and rats that we should be worried about. Anyway, Mr. Miller was diagnosed with MS and very sadly, that job became too physically demanding for him.

To be fair, the employer's approach had been to do what I'm sure all of our listeners would correctly advise in these cases, to look for alternative roles for him. They duly identified an admin role and Mr. Miller applied for it. Unfortunately, he didn't score well in the maths and verbal reasoning test, so Rentokil concluded that the admin role wasn't a suitable alternative and they moved onto managing his exit.

When this case came before the employment appeal tribunal, they were asked to determine if offering the claimant a trial period in that admin role might have been a reasonable adjustment, notwithstanding that the test scores weren't great. And as Colin trailed, the appeal tribunal said yes.

Colin

And that's not really that surprising, is it David from a legal perspective? Because the EHRC code doesn't go as far as mentioning trial periods but what it does cover is transfers to alternative vacancies so you can see why it wouldn't be a huge step to see why ‘trying out’ for an alternative role could be a reasonable adjustment.

David

Yes, I agree with that. And I think the question employment lawyers now need to be asking in these types of scenarios is not “is there another role?” but “is there another role they could try out for?” bearing in mind, of course, that it does still need to be reasonable.

Colin

Yes, and I thought it was interesting that at tribunal stage, the Tribunal wasn't satisfied that it wasn't reasonable to have offered the admin role because among other things, dismissal was a very real likelihood if a different role couldn't be found. But it also disagreed with the employer's assessment of the employee's ability to do his job.

David

Yes, that was an interesting example of a Tribunal being willing to stand in the shoes of the employer and basically say their decision was the wrong one.

Anyway, the broader point I think is that, and obviously we say this time and time again, each case will turn on its own facts when we're analysing what the alternative role looks like. The initial Tribunal wouldn't have

reached the same conclusion if the alternative role had been a very technical role in the IT department, to take an example. The gap in knowledge there isn't fixable by some training.

The other question arising from the case is, would the outcome be the same for a new job applicant rather than an incumbent employee? Obviously, the duty to make reasonable adjustments applies to job applicants as well as employees. So, if you have an applicant who puts her hand up and says '*well I can't actually do this job I've applied for but can you try me out in a different role instead please?*', could they rely on this case? Personally, I think that's a bit of a stretch and so I think the answer must be no. The scope of adjustments employers or would-be employers need to make, it's a kind of spectrum and here, the appeals tribunal and the first tribunal were clear that they were looking at what might be reasonable, where the employee was going to lose his job if no alternate role could be found.

Colin

Yes, I tend to agree. I don't think this case is a license to try out jobs that you're not immediately qualified for.

So that's all we have time for today. Just a quick shout out to remind you that our Managing an International Workforce Event - that's the biggest conference on the employment law calendar, with about three hundred four hundred delegates from around the world, of employment law in London every year - that's taking place next month on the 20th of June. If you haven't had your invite yet, do get in touch with me or David, or one of the rest of the team at Lewis Silkin.

David

Yes, really looking forward to seeing everyone there. In the meantime, if you'd like to be part of our In-House Employment Lawyers Community and avail yourself of the many in-person and remote sessions we host, please do get in touch with us.

We'd also love to know what you thought of today's episode, so please do leave us a review wherever you get your podcasts. Thanks so much for joining us today and the coffee break will be back in June.