



November 2014 Update

Welcome to this month's edition of Employment Law update - where we discuss the latest legislation and guidance.

Where are we now with Holiday Pay?

There has been extensive coverage in the media on what is included in holiday pay after the Employment Appeals Tribunal (EAT) decision on 4 November 2014 in *Bear Scotland and others v Mr Fulton and others*. Be careful on relying on the media reports - we have summarised the key points with guidance below on this important judgment.

The case of Bear Scotland was about how an employer should calculate holiday pay. The EAT decided that both guaranteed and non-guaranteed compulsory overtime worked by a worker should be included when the employer calculates holiday pay. Importantly, employees can make claims for backdated holiday pay.

There are three types of overtime:

- **Compulsory overtime** - this should be included when calculating holiday pay.
- **Non-guaranteed overtime** - that is, overtime which the worker is required to work if so asked by the employer but which the employer does not guarantee to provide.
- **Voluntary overtime** - this is overtime which an employer is not obliged to offer and the worker is not obliged to accept. Such overtime is not covered by the decision which has left some confusion. However with the way European case law is moving, it seems very possible that true voluntary overtime will be included in calculating holiday pay going forward.

The Key points to take from the decision are:

- Holiday pay should be equivalent to a worker's "normal" pay. What is "normal" depends upon whether the payments in question have been made for a sufficient period of time to justify the label of being "normal". If overtime is regularly worked then this payment would be seen to be "normal".
- Overtime which a worker is not permitted to refuse (ie guaranteed and non-guaranteed overtime) must count as part of their "normal" pay when calculating holiday pay.
- There has been much concern of the length of time that an employee can backdate holiday pay claims as technically they could back date them to 1998 (the date of of Working Time Regulations) which could have a large financial implication for employers. This decision clarified that as far as historic underpayments of holiday pay are concerned, the vast majority of workers will only be able to recover underpayments in the last three months with an unlawful deduction from wages claim (with a small number only able to recover sums further back).

Further points to bear in mind as guidance:

- The judgment only applies to the 20 days' annual leave guaranteed under the Working Time Directive, not the additional 8 days' leave. The extra 8 days Bank / public holidays given in England are more than the European Directive so it is legal to pay a higher rate of pay including overtime payments for the 20 working days per year holiday entitlement, with the remaining 8 days being paid at the level it previously was. However administering this may be more problematic and an employer may decide to pay all 28 days at the higher holiday pay rate.
- There is confusion about 'voluntary overtime'. The judgment has no definitive statement to confirm that purely voluntary overtime would also be included. There are comments in the judgment that lean towards this view and the various European-level decisions favour the fact that voluntary overtime which is regularly worked by a worker would count as part of their "normal" pay and hence should be included when calculating holiday pay but it is not clear. If an employer is uncertain about this - the best guidance would be that if voluntary overtime is worked on a regular basis with similar hours each week then this is likely to be reasonable to add into "normal" pay for holiday pay purposes. However, sporadic voluntary overtime would likely not fall into this category.
- Only where worker's previous periods of holiday are separated by a gap of less than 3 months are they able to recover underpayments for a longer period than the 3-month limit set out above, by arguing that the underpayments form part of a "series" of underpayments. Even in these cases it is unlikely that an employee will be able to recover

underpaid holiday for more than one holiday year.

- A 12-week reference period for calculating average pay is usually accepted as a fair method, however, bear in mind that some workers' pay may vary throughout the year and a 12-week snapshot could be misleading depending upon the 12-week period captured. In such cases a longer period may be necessary and justified, even up to a 12-month reference period in some cases.
- Commission payments - after the decision of Lock v British Gas Trading Ltd it is now accepted that commission payments should be included in holiday pay where an employee:
 1. receives commission as part of their pay;
 2. the commission is permanent enough to be regarded as forming part of their monthly pay; and
 3. there is an 'intrinsic' link between that commission and the performance of tasks that they are required to do.

Payments to take into account when calculating holiday pay:

- commission payments
- guaranteed and non-guaranteed overtime that is regularly worked
- only consider voluntary overtime if this is a set pattern and regular
- incentive bonuses
- travel time payments (not expenses, but payments for the time spent travelling)
- shift premia
- seniority payments (payments linked to qualifications / grade / experience)
- Stand-by payments
- Any other relevant payment intrinsically linked to the job such as "time away" payments.

Employers: going forward, the EAT has given leave to appeal to the Court of Appeal, however following the judgment the Business Secretary, Vince Cable, announced that the Department for Business Innovation & Skills (BIS) will be setting up a taskforce to urgently assess the impact on businesses. One issue identified is that employees may book holiday after higher periods of overtime to increase their holiday pay related to the previous 12 weeks' earnings.

The main point is that costs for employers will increase in the long-run which may result in more agency staff being used or a decrease in overtime with a move to pay a slightly higher annual wage without overtime payments or to use temporary staff to cover overtime.

Contact us if you need further guidance.

Health and Safety Compliance guides released

In an effort to help employers and business proprietors to comply with health and safety laws, the Health and Safety Executive (HSE) has published a revised version of their guide, 'Health and Safety Made Simple - The Basics for your Business'.

The guide helps you to write a health and safety policy, assists with controlling risks and providing adequate workplace work place facilities. The guide also provides information on other practical measures such as making arrangements for first aid, getting the right insurance and briefing staff.

Employers: To download the guide visit:

<http://www.hse.gov.uk/pubns/indg449.htm?ebul=hsegen&cr=14/01-sep-14>

Proposed change to Apprenticeship rate

In a bid to make apprenticeships more financially attractive for young people, BIS is set to propose to the Low Pay Commission (LPC) that the National Minimum Wage for apprentices should be brought in line with the young workers rate which applies to 16 and 17 year olds.

Apprenticeships are becoming a more popular option for young people. The proposal to increase the rate of pay is intended to fuel this further with the aims of further improving the standard of applicants and giving businesses a wider pool to choose from. This could have a long term positive impact for business as evidence shows that apprentices tend to stay with employers longer than other employees. A study has shown 43% of employers are more likely to offer apprenticeships now than they were two years ago.

Employers: The current NMW rate for 16 and 17 year olds is £3.79 per hour, while apprentices under the age of 19 and in the first year of their apprenticeship are only entitled to a minimum of £2.73 per hour.

Employment Law Support advice includes:

- Company Handbooks
- Contracts of Employment
- Self Employed /Fixed Term Contracts
- Disciplinary & Grievance Procedures
- Training Agreement
- Discrimination including Age, Disability, Race and Sex
- Flexible Working
- Termination of Employment
- Managing Sickness
- Managing Redundancy
- Policies, Practice and Procedure
- Maternity and Paternity regulations
- TUPE
- HR consultancy

QUESTIONS?

As always, should you have any questions or comments please [e-mail us](mailto:enquiries@employmentlawsupport.co.uk) at enquiries@employmentlawsupport.co.uk

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Business Forum

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