

GUIDE

Holiday Pay Issues

It is probably not a surprise to many who have been following the issue that this is the sixth update we have prepared on the calculation of holiday pay since late 2014.

The main issues have concerned whether or not commission and overtime should be taken into account when an employer is calculating how much to pay a worker for a period of holiday and we set out below the current position and the most recent developments.

Impact of Commission

In the judgments of a string of cases from the European Court of Justice (ECJ) concerning workers and their holiday pay, the case of *British Gas v Lock* confirmed that a worker's holiday pay must be calculated to compensate him for the loss of any commission as a result of being on holiday.

In the *Lock* case, a sales consultant for British Gas was paid a basic salary plus commission on a monthly basis. The commission fluctuated depending on his sales but in general made up about 60% of his wages. When he was on holiday, he was only paid his basic salary. He therefore brought a claim asserting that his holiday pay should be calculated using basic pay plus commission he would have earned had he not been on holiday.

The tribunal referred the case to the ECJ which held that Mr Lock's holiday pay *should* include a sum to reflect the fact that he effectively lost commission by taking holiday. The reasoning of the ECJ was that if a worker was not remunerated in this way, they would be deterred from taking annual leave which would be incompatible with the Working Time Directive. The ECJ left open the question of how that 'lost' commission should be calculated and remitted the case back to the Employment Tribunal.

The Employment Tribunal, in the light of the ECJ judgment decided that Mr Lock's holiday pay should be calculated by reference to his basic salary plus lost commission and that for Mr Lock, who worked regular hours, this should be

calculated as if he were a 'piece worker'. This meant holiday pay would be determined on the basis of an average hourly rate of pay including basic salary and commission over the previous 12 weeks.

Overtime

The decision of the Employment Tribunal in *Neal v Freightliner Limited* made employers sit up and take note because in that case the Tribunal decided that holiday pay should be calculated to include remuneration for normal working hours including any voluntary overtime.

The rationale for this decision was that the European Court of Justice (ECJ) determined in the case of *British Airways Plc v Williams* (which was not concerned with overtime) that holiday pay should include any remuneration 'intrinsicly linked' to the performance of the task which the worker was required to carry out.

On the basis of that, the ECJ determined in *Williams* that a pilot's holiday pay should include their flight supplements. In *Neal v Freightliner Limited* the Employment Tribunal considered that when doing voluntary overtime, the employee was doing the same job that they did during their core hours and therefore, the remuneration for voluntary overtime was 'intrinsicly linked' to the performance of the task. The *Neal v Freightliner Limited* decision was a first instance decision but it was appealed to the Employment Appeal Tribunal (EAT) and was conjoined with a number of other cases addressing similar questions known as the Bear Scotland appeals.

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Impact of Employment Appeal Tribunal decision in the joint appeals known as the Bear Scotland decision

The Employment Appeal Tribunal (EAT) in the *Bear Scotland* decision did not deal with the question of voluntary overtime because the case of *Neal v Freightliner Limited* settled before being heard by the EAT.

The EAT did however consider the question of non-guaranteed overtime, which is overtime that is not guaranteed but, where it is required by the employer, the employee is obliged to work it. This is in contrast to voluntary overtime where an employee is allowed to turn down any offer for overtime.

The EAT determined that holiday pay should include a payment to represent the loss of any non-guaranteed overtime usually worked for the four weeks annual leave taken under the Working Time Directive. The EAT said that a worker is entitled to receive 'normal' pay whilst on holiday. 'Normal' pay is that which is paid for the task the worker is required to carry out and which is made for a sufficient period of time to qualify as 'normal'. This is easy to establish where the pattern of work is settled, for example, where an employee works a set amount of non-guaranteed overtime every week, but where hours of overtime undertaken fluctuate from week-to-week or where there are peak periods of overtime (like Christmas in the retail sector), 'normal' would have to be considered over a reference period. The EAT however gave no guidance as to what that reference period should be and that is a matter which remains to be determined.

This decision on the face of it, only applies to the 4 weeks (inclusive of bank holiday) 'Euro' holiday that an employee is entitled to under the European Working Time Directive and not to the additional 1.8 weeks leave granted by the UK Government (making a total entitlement of 5.6 weeks holiday a year inclusive of bank holidays). In addition, it is unlikely to result in a flurry of claims for back-dated underpayment of holiday because the EAT also stated that if there has been a break of more than 3 months between leave dates, that will break any series of 'unlawful deductions' which limits how far employees can go back.

Backdated Claims

Immediately following the Bear Scotland decision the Government announced that it was setting up a task force to consider the impact of the Bear Scotland decision and having done so it introduced The Deduction from Wages (Limitation) Regulations 2014. These Regulations apply to any claim presented on or after 1 July 2015 and provide for the following:

- unlawful deductions claims cannot go back more than two years before the date of the lodging of a claim with the Employment Tribunal (subject to some exceptions for maternity pay etc); and
- the right to paid holiday under the Working Time Regulations does not confer a contractual right to that paid holiday.

Voluntary Overtime

In August 2017, the Employment Appeal Tribunal (EAT) which is binding in England and Wales revisited the same question originally posed by *Neal V Freightliner* on the question of voluntary overtime and confirmed that the loss of any voluntary overtime should also be taken into account when calculating holiday pay.

The case of *Dudley Metropolitan Borough Council v. Mr G. Willetts & Ors* determined the issue. In short, the EAT decided that if an employee goes on holiday, when calculating 'normal' weekly remuneration, no realistic distinction can be made between the work that they are contractually obliged to carry out (such as compulsory overtime) and work that is performed voluntarily by the employee for which they are paid on a regular basis such that it can be said to be part of their 'normal' remuneration.

If you would like any further information about how this guide could impact you, or any other employment issue, please contact Linky Trott.

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