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UK Update - Holiday pay

The Employment Appeal Tribunal rules that holiday pay should include overtime, but employers gain some relief as the scope for back pay claims is restricted

The UK Employment Appeal Tribunal (EAT) has handed down its decision in the conjoined cases of *Bear Scotland Ltd and ors v Fulton and ors; Hertel (UK) Ltd v Woods and ors; Amec Group Ltd v Law and ors.*

The position in the UK had been very clear for many years. Workers with normal, basic working hours under their contract have had holiday pay calculated using just those basic hours and basic pay. Overtime pay has not been included. This was confirmed as the correct approach about ten years ago by the Court of Appeal (*Bamsey and others v Albon Engineering and Manufacturing plc* [2004] IRLR 457) so employers had a high level of comfort that basic pay is the correct approach for holiday pay.

The European Court of Justice (ECJ) in *British Airways plc v Williams and Others* [2012] ICR 1375 said that holiday pay needed to include "normal remuneration", which includes payments "linked intrinsically to the performance of the tasks which the worker is required to carry out under his contract of employment".

Earlier this year, the ECJ (*Lock v British Gas Trading Limited and others* (C-539/12)) held that holiday pay needed to include commission payments. It didn't explain how businesses are supposed to do that, and the case has gone back to the UK tribunal to be heard in February.

The EAT has now decided that overtime needs to be included in holiday pay, even though it means that the UK Working Time Regulations have to be interpreted in a different way from how they were by the Court of Appeal in the *Bamsey* case ten years ago. The EAT decision has been reached because of the need to comply with the European Working Time Directive, as interpreted by the ECJ. Mr Justice Langstaff, in delivering his decision, refused to refer the case to the ECJ on the basis that there was no need - the European position is clear.

The decision applies only to the four weeks' holiday per year that the European Working Time Directive requires, not the additional 1.6 weeks that are given under the UK rules - and also not to any additional contractual holiday employers may offer.

There were fears that the decision could mean claims against employers for a shortfall in holiday pay going back many years. The EAT has said that claims for back pay can only be pursued in a tribunal if there is no more than a three-month gap between times when the four week European minimum holiday is taken. As soon as there is a three-month gap, it means that earlier shortfalls cannot be pursued in a tribunal. Also, workers do not decide which holidays are the European four weeks and which are the UK 'extra'. This gives employers considerable scope to limit claims.

There might be scope for arguing that the decision relates only to overtime that the worker is required to do, and does not apply to overtime that is genuinely voluntary. The decision leaves that line of defence for employers slightly open.

We can expect the decision to be appealed - leave has been given to appeal to the Court of Appeal, and a later appeal to the Supreme Court is also likely. There may also be a need to refer the case to the ECJ at the later stage, even though the EAT chose not to do so at this stage.

Despite the fact that the overtime and commission cases roll on, employers need to come to terms with the fact that the days of just paying basic pay during holidays are over.

Employers that are not doing so already should plan for how to reduce the impact of this decision and budget for increased costs. The increased costs may have an effect on planned pay rises, approaches to overtime, commission criteria and recruitment.

Employers should also review their holiday policies - before the decision it did not matter whether a particular day's holiday counted as "European leave", "UK extra statutory leave" or "additional contractual leave" as the pay was the same for each. Now that the EAT says that "European leave" is at a higher rate of pay, there are now two types of holiday and the approach to booking holidays will need to be adapted to take that into account.

As for calculating holiday pay during the "European leave" to take into account overtime, the implication from the EAT decision is that employers need to look at the average pay (including overtime) over the 12 weeks prior to the start of that holiday. If overtime is irregular, workers may try to take holiday shortly after a period of high levels of overtime. However, remember it is not just for the worker to decide which holiday is "European leave". In practice, it seems that the employer will be able to decide – if workers are getting at least four weeks' holiday with pay that takes into account overtime, it would be difficult for them to establish a claim that it should be different weeks.

This is potentially a hugely onerous decision for the construction industry given the number of individuals who work overtime.

Further information

If you would like to discuss this decision and how your business should adapt, please contact your usual Clyde & Co LLP contact or

Chris Holme
E: chris.holme@clydeco.com
T: +44 (0)20 7876 6216

Charles Urquhart
E: charles.urquhart@clydeco.com
T: +44 (0)20 7876 4215

Clyde & Co LLP
The St Botolph Building
138 Houndsditch
London EC3A 7AR

T: +44 (0)20 7876 5000
F: +44 (0)20 7876 5111

Further advice should be taken before relying on the contents of this summary.