

Employment Briefing Note

Overtime and Holiday Pay

What is included in holiday pay?

Following recent media interest you almost certainly will have heard about a decision from the Employment Appeal Tribunal which considered the question of whether or not overtime should be included in the calculation of holiday pay. Our e-briefing following receipt of the judgment appears [here](#).

Please do note that the decision is likely to be the subject of a further appeal and it may be that the position changes again once any appeal is determined.

Whilst the headlines reported were primarily concerned with the question of whether or not overtime is included in the calculation of the holiday pay, the judgment in *Bear Scotland – v- Fulton* (and combined cases) dealt with certain other issues relating to holiday pay which may have a more subtle impact for employers.

Is Overtime to be included?

The principle issue addressed by the Employment Appeal Tribunal was whether or not pay for overtime should be included in the calculation of pay for a period taken as holiday.

The answer, in broad terms, was that overtime should be taken into account when calculating pay for periods of holiday. The EAT held that overtime which is not voluntary or, in other words overtime which an employee would be required to work if asked, must be included in holiday pay calculations. There is a question over whether overtime is voluntary.

The EAT did not address all circumstances where overtime may be considered obligatory (the cases before it concerned express contractual agreements to work overtime) which leaves scope for doubt about the extent of the **obligation** to work overtime. What if, in the absence of an express agreement an employer simply asks an employee to work overtime; could there be a genuine inference that the request is actually an obligation? This raises the question of what is genuinely *voluntary* overtime?

The likelihood is though that unless there is compelling evidence that a particular period of overtime is genuinely voluntary that all overtime worked should be used in the calculations.

Increased rate of pay for 4 weeks or 5.6 weeks holiday?

The judgment in *Bear Scotland* discussed the point of whether or not overtime should be included in the calculation of the full 5.6 weeks holiday entitlement (as required by UK legislation) or just the minimum 4 weeks holiday required by European legislation. The decision taken was that overtime need only be included for the purposes of calculating the 4 weeks minimum entitlement. This appears to be a positive point for employers.

The EAT further confirmed that when identifying these two “types” of leave, the first 4 weeks (20 days) taken in the holiday year will be the holiday for which overtime should be included in the calculation of holiday pay. It follows that the remaining 1.6 weeks (8 days) will not require overtime to be included when calculating holiday pay.

Limitation – how far back can underpayment claims go?

Prior to the decision being handed down by the EAT, there was great concern that liability for any additional payments found to be owed to employees who did not receive full holiday pay may go back as far as the implementation of the Working Time Regulations in 1998.

The EAT's decision confirms that claims for "underpaid" holiday must be brought within 3 months of the date of the last underpayment. This may include a series of underpayments which have been ongoing, but only where the series of underpayments is not interrupted by a period of 3 months. Accordingly, it is unlikely that claims will span several years and, in any event, any claim for a "series" of underpayments must be made within 3 months of the latest underpayment and historic claims will be out of time if subsequent underpayments in the series occurred more than 3 months later.

Some care needs to be taken as to the date of any historic "underpayments" as the limitation period runs from the date when the actual payment of holiday pay was made rather than the date of the holiday itself. Accordingly, if holiday is taken mid-September and the payment was made at the end of September then it is the date of the payment not the date of the holiday that is significant.

Our View

The judgment is, in legal terms, not entirely straightforward. There were certain legal "niceties" which potentially clashed with European legislation and rules of interpretation which required consideration by the EAT. Whilst there may be scope for differing interpretations of the decision, we have debated the judgment as a team and our view of the relevant issues is as follows:

- Unless it is certain that overtime is entirely voluntary, employers should take account of overtime worked when calculating holiday pay. This advice is increasingly significant where a pattern of working overtime exists and where there is limited scope for staff to decline to work overtime.
- It is possible to only include overtime when calculating holiday pay for the holiday taken which is attributed to the minimum 4 weeks entitlement (the first 4 weeks taken in the holiday year). This may provide savings in comparison to including overtime for the entire 5.6 weeks (28 days) entitlement. Whilst this may be fine in theory, the administering of what would be, in effect, two rates of holiday pay may require some consideration both practically and commercially.
- Where a 3 month period has elapsed since an employee was last paid for a period of holiday, it is likely that any claim now brought for underpayment of pay for that period of holiday will be out of time. Where holiday has been taken within the last 3 months, there may still be a possible claim for underpayment, together with claims for previous underpayments provided the previous underpayments are not separated by any periods of 3 months during which no holiday was taken.

Practical Steps

1. Review current practices regarding the working of overtime and the calculation of holiday pay; consider whether future overtime arrangements should be altered.
2. Where overtime is worked and has not been considered when calculating holiday pay, prepare to adjust future payments of holiday pay to include overtime. It may be that you make it clear that you are changing your policy subject to any further appeal decision.
3. Consider the extent of any historic claims for underpayments; who has taken holiday in the last 3 months? Only when you know how much of an underpayment issue you are facing can you decide how to deal with changing the system into the future.
4. Review current terms and conditions of employment regarding holiday; is there scope to amend terms and conditions to limit holiday pay or to deal with the 20/8 day split?
5. Take advice. We do not think that a “one size fits all” approach is going to work, rather some thought needs to be had as to how you address the issues raised within your business and for your staff.

For further information on how this may affect your business please contact one of our employment team:

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