



December 2014



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Employment Law Update;

Holiday and Overtime Pay

Following the EAT ruling on 4th November 2014 for overtime to be included when calculating holiday pay, please find further clarification for what the ruling could potentially mean for you, if applicable, below.

This ruling was made by an employment appeal tribunal and, as it has not yet been appealed, is now case law/employment law and must be adhered to. However, the EAT has given permission for the ruling to be appealed by the Court of Appeal, meaning that the ruling could change. Public opinion, and a lack of support from the Government, dictates that it is likely that this case will be brought against the Court of Appeal at some point in late 2015.

The ruling in the case of Bear Scotland & Ors vs. Fulton & Ors, means that holiday payments can no longer be paid at a basic rate and must include guaranteed overtime hours too. To calculate this, an employer must look at the 12 weeks leading up to the employee's holiday, and calculate an average of their hours worked. In time, this ruling may be changed to include non-guaranteed and voluntary overtime, but currently this is not the case.

The definitions of the three types of overtime are as follows;

- Guaranteed Overtime is where the contract of employment requires both the employer to offer overtime and the employee to work it.
- Non-guaranteed Overtime is where there is not a contractual agreement to offer overtime but if the employer offers it, the employee is required to work it.
- Voluntary Overtime is where the employer may ask the employee to work the over-time but where the employee is not required to work it unless they agree to do so.

This ruling has come into place because the EU courts believe the UK has misunderstood the Working Time Regulations with regard to how holiday pay should be calculated. Due to this link to the EU rulings, this latest ruling about holiday pay only applies to 4 of the 5.6 weeks of an employee's holiday entitlement. This is because the EU gives employees 4 weeks of holiday, the extra 1.6 weeks was implemented by the UK. These first 4 weeks include bank holidays. The remaining 1.6 weeks' holiday, or any additional contractual holiday, can be based on normal remuneration excluding overtime.

As a result of the new ruling an employee can now make a claim for underpayment of holiday pay, firstly to their employer and if their claim is not paid, then to an employment tribunal. However, an employee can only claim for underpaid holiday pay if the underpayment has occurred within 3 months of the claim. In order to make the claim to their employer the employee must first raise a grievance i.e. the employee must exhaust all internal routes. If the matter is not rectified internally then the employee will be able to contact ACAS to begin the process for raising an employment tribunal claim.

If an employee attempts to make a claim outside of the 3 month time frame it will be denied. If an employee makes a claim in time, the employment tribunal will have the power to order the company to compensate the employee. Employees will be able to claim backdated pay in respect of underpaid holiday if they can show that their underpayments are part of a series. Holiday underpayments will be considered part of a series if they are less than 3 months apart, e.g. an employee who raises a claim in October for a holiday in September and a holiday July will be able to claim for both holidays as part of a series. An employee who raises a claim in October for a holiday in September and a holiday in April will only be able to claim for an underpayment for the holiday in September.

So what should you (the employer) do now? Best practice would dictate that when employment law is changed, an employer reacts by changing their company policies. However, many employers are currently reluctant to do this because of the uncertainty surrounding the longevity of this new ruling. The options are as follows;

- You could do nothing. By this we mean change no policies or procedures and deal with individual employees when they come to you on a case by case basis.
- Change your employee contracts to provide for voluntary overtime as opposed to guaranteed overtime. If you intend to change employee contracts please liaise with us beforehand.
- Change your holiday policy to include a clause which limits or refuses holidays after periods of high overtime. If you intend to change your policies please liaise with us beforehand.
- Using agency or bank staff to cover periods traditionally covered by overtime.
- Accept the change in employment law and immediately start factoring guaranteed overtime hours into holiday pay calculations.

Information on this new ruling is scarce, and at times contradictory due to different interpretations of the facts. If you have any questions or queries surrounding this subject, please don't hesitate to contact us at hradvice@hasslefreehr.co.uk.

Sources: Gov.uk

Acas

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For clarification of any of the above updates or for advice and guidance on any HR and/or Health and Safety Concerns contact us by emailing hradvice@hasslefreehr.co.uk or by calling 02476 664092.

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