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## Overtime, Commission and Holiday Pay

### A History of Holiday Pay

The UK's Working Time Regulations (1998) implement the European Working Time Directive. Due to the Working Time Directive not being specific, each European Union member country decides how to specifically implement the Directive in their country. As such, the UK Government decided that holiday pay should be calculated based upon an employee's normal working hours and normal remuneration. It was also decided that normal working hours should include compulsory overtime, but not any other form of other overtime (non-guaranteed or voluntary) or commission. It was also decided that when an employee did not have normal working hours, their holiday pay would be calculated from their average earnings over the previous 12 weeks; including compulsory overtime payments and commission.

### Recent Case Law

However, over the last few years there have been several UK Employment Tribunal cases which have resulted in 'new' case law, which has changed the way that holiday pay is now calculated:

- **BA Plc v Williams [SCM 2012]:** BA Pilots received basic pay and monthly "top up" payments for a number of responsibilities. They raised a claim against their employer because they suffered a financial detriment when they took annual leave as their holiday pay was only based upon their basic pay. The Supreme Court agreed with the claimants and said that because these payments were intrinsic to their role and part of their normal remuneration, they should be included in the calculations of their holiday pay to prevent them being disincentivised from taking annual leave.
- **Bear Scotland v Fulton [EAT, 2014]:** In this case a large number of employees raised claims because their regularly worked overtime was not considered in the calculation of their holiday pay. The employees felt that this was an unlawful deduction from their wages, and despite the employees being unsuccessful in their first tribunal, the Employment Appeals Tribunal agreed with them and ruled that guaranteed and non-guaranteed overtime should be included in the calculation of holiday pay, but that voluntary overtime should not.
- **Lock v British Gas [ET, 2015]:** This claimant was a salesman who earned both a basic rate of pay and commission, he brought forward a claim on the basis that his commission formed part of his normal remuneration. His argument was that by providing him with his basic rate of pay whilst on annual leave he was being penalised for not being able to work and earn commission. This was referred to the European Court of Justice who agreed that anything that is liable to deter an employee from exercising their right to take annual leave is contrary to the objective of the Working Time Directive, and therefore not appropriate. The Employment Tribunal then agreed that commission should be included in holiday calculations. This ruling is currently being appealed by the employer and therefore an official ruling and decision on this case is not expected until 2017.

### What does this mean?

Currently non-guaranteed and guaranteed overtime should be included in the calculation of holiday pay, but voluntary overtime does not have to be. This should be calculated in the same way that holiday payments are calculated for an employee who does not have normal working hours; by calculating the average payment an employee has received over the 12 weeks prior to the holiday. Many employers are currently choosing to not act on the issue of commission until this has been given a more definitive ruling by the Employment Appeal Tribunal.

### Definitions of Overtime

- Compulsory (Guaranteed) Overtime: where an employer is contractually obliged to offer overtime and an employee is contractually obliged to work it.
- Non-Guaranteed Overtime: where an employer is not contractually obliged to offer overtime, but if it is offered an employee is contractually obliged to work it.
- Voluntary Overtime: where the employer is not contractually obliged to offer overtime, and an employee is not contractually obliged to work it if it is offered.

The rulings in regard to overtime and holiday only apply to the four weeks of holiday specified in the Working Time Directive and do not apply to the fifth week provided for by the Working Time Regulations.

Due to these rulings an employee can now make a claim for an unlawful deduction from their wages if they feel that they have been underpaid holiday pay. As always, an employee can only raise a claim within three months of the "incident" that they are claiming for. Also, this claim can only be backdated if there are no more than three months between each claim for holiday i.e. holidays in January and March can be part of the same claim as part of a "chain", but holidays in January and June could not be part of the same claim as the "chain" would be broken. Due to concerns from employers, the Government decided on the 1<sup>st</sup> July 2015 that claims can only be backdated for no more than two years, regardless of whether or not the "chain" of three months between each claim is intact.

### How Can We Help?

With regard to the rulings about over-time and holiday pay, many employers are being left with the choice of whether or not they are going to be reactive or proactive. A proactive approach would include guaranteed and non-guaranteed overtime payments in holiday pay calculations, whereas a reactive approach would be to wait to see if an employee raises a claim. With positive employee relations, openness and transparency in mind, we would recommend a proactive approach is adopted. This not only prevents the potential risk of a claim or bad publicity, it also helps to create a strong employer brand and good employee relations with existing employees.

With regard to the ruling about commission and holiday pay – watch this space!

If you have any queries relating to any of the subjects raised within this newsletter then please do not hesitate to contact us at [hradvice@hasslefreehr.co.uk](mailto:hradvice@hasslefreehr.co.uk)

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](mailto:hradvice@hasslefreehr.co.uk) or by calling 02476 664092.

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