



European Employment Law ALERT

Extra Pay for UK Employees During Annual Leave (Part 2)

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Holiday Pay - Good News and Bad News

The UK Employment Appeal Tribunal (“EAT”) has extended holiday pay to include extra payments for overtime and travel allowances. In good news for employers, however, the EAT has given scope to potentially limit claims for back pay. (*Bear Scotland v Fulton*)

Background

This judgment follows the recent European Court of Justice (“ECJ”) decision of *Lock v. British Gas Trading Ltd.* which held that “normal pay” during statutory annual leave should include commission. As we identified in our [alert](#) on that case, a number of questions remained. Other than commission, what other payments should be included in holiday pay? What reference period should be used to work out “normal pay”? And can employees really claim for back holiday pay as far back as 1998, when the UK annual leave legislation was introduced? We now have answers to some, although not all, of these questions.

Key points from the EAT decision

- **Regular contractual overtime should be included when calculating holiday pay:** Based on previous Court decisions, we already knew that regular compulsory and guaranteed overtime need to be included when calculating pay for periods of holiday. The EAT has now held that the calculation should also include “non-guaranteed overtime” (i.e. overtime which is not guaranteed but which an employer can insist is worked). Only regular overtime needs to be included however, so not occasional or ad hoc arrangements. Questions remain over whether payment needs to be factored in for overtime which is genuinely voluntary and which the employee has the right to refuse.
- **Travel allowances should be included when calculating four weeks’ statutory holiday pay:** Travel allowances or payments made for time travelling to work also need to be included in holiday pay. A simple reimbursement of actual travel costs by way of expenses payments does not.
- **These extra payments only apply to the European statutory minimum holiday of four weeks:** The EAT confirmed that “normal pay” only applies for the four week minimum (which is reduced for a part-time worker) under the European Working Time Directive. This means there is no requirement to include overtime or travel allowances when paying for the extra 1.6 weeks’ (8 days) statutory holiday under the UK Working Time Regulations 1998, or any

more generous company holiday arrangements. Although left open in the EAT decision, we see scope for employers to decide which holiday is allocated towards that four week minimum, and potentially to choose periods where variable pay elements have a lower impact.

- **Time limits for claims:** Any claim for unpaid holiday pay must be brought within three months of the underpayment, or where there is an ongoing failure to pay the right holiday pay, the last in the series of underpayments. The EAT held that where there is a break of more than 3 months between the deductions this will mean the employee is out of time to bring a claim. This is potentially good news for employers, who otherwise face the risk of claims dating back to 1998 when the UK Working Time Regulations became law. However, this point is likely to be appealed and given UK public holidays are spread throughout the year we anticipate it may difficult to find a clear 3-month break.
- **Rules apply against private employers:** As anticipated in our previous alert, the EAT was willing to “bend” the rules of the UK Working Time Regulations to fit with these changes. This means that the decision applies against private employers now, without waiting for the UK legislation to be amended.

What next?

Although the EAT’s judgment is a significant decision, the legal landscape in this area still remains uncertain. Unless a settlement is reached, the decision will almost certainly be appealed to the Court of Appeal which may in particular take a different view on the issue of time limits to bring a claim. In February of next year, the Employment Tribunal will decide on the *Lock* case which we recently reported on (click [here](#) to view alert). Based on the direction of travel, employers would be wise to expect that the Tribunal’s decision will be that holiday pay should also include commission.

Given the scale of the issue and concerns raised by business, the UK Government has announced a new “task-force” to assess the impact of the EAT’s ruling and to find ways to limit the impact on employers.

Although employers are starting to assess their potential costs and options, many will want to take a “wait and see” approach. Introducing a new system of holiday pay at this stage carries the risk of flagging up the issue with employees, and will not be effective to close the issue down if the law continues to change in this area over the coming months.

Further Alerts will follow, in what is likely to be an area of change.

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Seyfarth Shaw LLP European Employment Law ALERT | November 25, 2014

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