

EMPLOYMENT LAW NEWS FLASH

SHOULD HOLIDAY PAY INCLUDE OVERTIME?



The Employment Appeal Tribunal (EAT) has recently ruled that non-guaranteed overtime should be taken into account when calculating holiday pay. However, it has severely limited the scope for workers to make back-dated claims for underpaid holiday.

Fulton v. Bear Scotland and Others

Background

Under the Working Time Regulations, all full-time workers on a five day week are entitled to 28 days holiday per year minimum which can include bank holidays (the statutory entitlement). Part-time workers are entitled to the same level of holiday leave pro rata.

Under UK law, holiday pay is calculated using basic pay i.e. it does not include additional items such as overtime or commission unless the overtime is compulsory and guaranteed. However, under EU law which applies to four weeks of the statutory entitlement, holiday pay should be based on 'normal remuneration' and not simply basic pay.

Facts

In the Bear Scotland case before the EAT, the workers argued that their holiday pay should take into account non-guaranteed overtime i.e. overtime which the workers were required to do but which the employer was not required to provide (as specified in their employment contracts) as this was part of their 'normal remuneration'.

Decision

The EAT ruled that 'normal remuneration' does include non-guaranteed overtime so this should be taken into account when calculating four weeks of holiday leave to which EU law applies. However, the EAT limited any claims for underpayment of holiday pay to a three month period i.e. any claims have to be made within three months of the date of the holiday leave. This will prevent substantial claims for backdated holiday pay.

The parties were given permission to appeal to the Court of Appeal so this may not be the final decision on the matter, but the most contentious point is the three month period for backdated claims.

Comment

Contrary to various press reports, the EAT decision does not state that all overtime has to be taken into account when calculating holiday pay. It refers specifically to *non-guaranteed overtime* i.e. overtime which the worker is required to do but the employer is not required to provide. The case confirms that compulsory and guaranteed overtime should be taken into account when calculating holiday pay. However, it did not address the issue of voluntary or occasional overtime but it seems unlikely these would be considered as part of a worker's 'normal remuneration' unless the worker can show this is an essential part of their job.

The Government has set up a task force to consider the impact of the decision. However, the effect of the decision is that some employers are now taking overtime and commission into account when calculating holiday pay by using an average figure from the preceding 12 week period. However, other employers continue to calculate holiday pay using basic pay only.

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