

Client Alert

Corporate Practice Group

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Overtime Payments Included In Paid Holiday

The UK Employment Appeal Tribunal (the “EAT”) has ruled that overtime payments, even if they are not guaranteed, must be included in calculating the rate at which holiday is paid to employees. The decision has significant implications for employers with workers who work variable hours, e.g. seasonal workers, or who work unfixd hours.

The Government has announced that a taskforce will assess the impact of this decision in *Bear Scotland and others v. Fulton and others*.

Right to paid holiday

The Working Time Regulations 1998 (the “WTR”) provide that all workers are entitled to paid holiday. Workers are entitled to 5.6 weeks of holiday per year (including eight statutory and public holidays in the UK). Calculating holiday pay for workers with normal working hours and fixed remuneration rates is relatively straightforward. The employer should calculate the rate of the pay for each working day and apply the same rate for each day of holiday.

For workers with no normal working hours and/or variable remuneration, the calculation becomes more complex. Many employers use average remuneration or, as was the case for some of the employees in *Bear Scotland*, remuneration for their core (or “normal”) working hours but excluding their overtime hours.

The additional complexity is the rate at which holiday pay should be paid. The rate of pay should be the normal remuneration rate, rather than simply the basic rate of pay. Normal remuneration has, in previous cases such as *Lock v. British Gas Trading Ltd*, also been held to include incentives such as commission payments or, in *British Airways plc v. Williams* (decided under the Civil Aviation Working Time Directive), allowances intrinsically linked to the performance of the tasks the employees were required to perform.

Employers should calculate overtime over a 12 week reference period.

The EAT decided that an essential feature of the WTR was that holiday was paid. It ruled that non-guaranteed overtime was to be treated as part of “normal remuneration” when calculating holiday pay. This applies to just four weeks of holiday entitlement granted under EU law (rather than the additional 1.6 weeks of holiday entitlement granted under UK law).

For more information, contact:

Pulina Whitaker
+44 (0)20 7551 7586
pwhitaker@kslaw.com

King & Spalding
London
125 Old Broad Street
London EC2N 1AR
Tel: +44 20 7551 7500
Fax: +44 20 7551 7575

www.kslaw.com

Time limit for claiming back-dated holiday pay

The EAT ruled that the three month time limit to bring claims for deduction from wages applies from the date of the last deduction. If the employer has failed to pay holiday pay as part of a “series of deductions” a claim for more than three months’ deductions from wages could be brought. This somewhat limits the period in which workers can claim for back-dated unpaid holiday pay although there is likely to be scope for debate over the concept of a “series of deductions”. The Government has, however, announced that a task force will review and assess the implications of *Bear Scotland* for businesses.

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