



CONSTRUCTION AND ENGINEERING BRIEFING

December 2014

HOLIDAY PAY - COUNTING THE COST THIS CHRISTMAS

It's that time of year again. The decorations are out, Christmas parties are in full swing and the construction industry is gearing up for its annual shut down period. With the holiday season fast approaching, employers will have to decide soon how they will calculate holiday pay following the recent Employment Appeal Tribunal decision involving a UK contractor which confirmed that many elements of pay which are currently excluded from the holiday pay of employees, must now be included - an outcome which will lead to significantly higher wage bills for many employers in the UK construction industry.

THE CASE

The case in question is *Bear Scotland v Fulton and Baxter; Hertel (UK Limited) and Wood and others; and Amec Group Limited v Law and others*.

Several of the claimants in this case were employed on NAECI standard terms and paid overtime, shift allowances and other variable elements that are common industry practice. However, their holiday pay did not include these additional payments.

This decision is the latest in a series of recent cases that considered what elements of pay should be included in holiday pay. The issue arose because of an apparent conflict between UK and European law as to how holiday pay should be calculated and in

particular whether elements of remuneration such as overtime and commission must be included.

THE JUDGMENT

The EAT held as follows:

- Non-guaranteed overtime (that is overtime which the employer does not have to offer, but the employee is expected to work if offered) is part of normal remuneration and must be included in holiday pay, as must any other payments which form part of normal remuneration, including travel time and other comparable payments. The decision did not rule on whether "voluntary" overtime should be included within holiday pay;

- However, any claims in respect of historical underpaid holiday pay can only be pursued (broadly speaking) to the extent that no more than three months elapsed between any such underpayments. This significantly limits the back pay liability for most employers.

WHAT DOES THIS MEAN FOR EMPLOYEES IN THE CONSTRUCTION INDUSTRY?

This decision will be of great interest to employers and contractors specifically in the construction industry where regular overtime and additional allowances are standard industry practice.

Whilst this decision was limited to its own specific facts and did not address voluntary overtime, the UK and CJEU decisions read together represent a settled view that normal remuneration is required to be paid during holiday and not just a worker's basic rate of pay.

Employers will now need to decide whether to include overtime (and other payments) within the calculation of holiday pay. For certain payments (e.g. productivity and attendance bonuses) it is already settled law that these payments must be included in holiday pay in future. However, the uncertainty regarding voluntary overtime may give employers an option not to include overtime payments in holiday pay for the time being, at least whilst the current uncertainty exists. There is likely to be more scope to argue that genuinely ad-hoc and irregular overtime should not be included in holiday pay.

If employers decide to include other elements of pay within holiday pay then another question to determine is what is the correct reference period that should be used to calculate average earnings. It is currently unclear whether a 12 week reference period is appropriate or whether a longer average gives a representative normal period. This is likely to depend on particular working patterns and whether pay fluctuates at different times of the year.

WHAT SHOULD EMPLOYERS DO NOW?

- Decide what is 'normal remuneration' by analysing all pay elements and current holiday pay arrangements.
- Assess likely financial exposure if overtime and other payments were included before reaching a decision.
- Check employment contracts and how overtime is dealt with i.e. genuinely voluntary or not and what happens in practice.
- Pay holiday at different rates or equalise up to pay all leave at normal remuneration.

- Decide how to deal with existing claims (if any)? Incentive to settle?
- Structure working arrangements for the future to minimise the increased liability for holiday pay e.g.
 - rely on voluntary overtime – further claims likely
 - Use bank or agency staff
 - Prevent leave from being taken at certain times of year
 - Structure payments differently

HOT OFF THE PRESS!

Since this alert was drafted, there has been a new important development:

The Government has this week published new Regulations which will limit all deductions from wages claims (not just holiday pay) to a maximum of two years. This will act as a 'backstop' in the holiday pay claims; most claims will in any event be limited to the current holiday year due to the 'three month gap between deductions' rule imposed by the EAT in *Bear Scotland*. Crucially however the new Regulations will protect employers against the risk of future litigation repealing the three month rule. However, the limitation only applies to claims presented on or after 1 July 2015.

HOW WE CAN HELP

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We also have a page on *LinkedIn*

We also have one of the largest global [Litigation and Arbitration](#) practices comprising of a team of experienced litigators able to represent a varied range of interests on an international basis.

REALWORLD

Construction and Engineering is part of our wider Real Estate practice - the largest group of Real Estate lawyers in the world.

[REALWORLD](#) is our interactive online guide to real estate that provides answers to the key questions that arise when entering foreign real estate markets.

The site covers questions related to sale and purchase, real estate finance, leases, construction, planning and zoning, real estate taxes and corporate vehicles. It allows users to compare the way in which issues in any two (or more) different countries are dealt with and help evaluate the possible options.

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Knowledge, support and networking for the in-house lawyer community

WIN is the DLA Piper programme for in-house lawyers. The aim of the programme is to listen to our clients and identify the key legal and commercial issues in-house lawyers face on a day to day basis so we can tailor our services to meet their changing needs and priorities.

Many of our in-house clients are helping us shape the agenda so that it remains topical and relevant. Clients can join the discussion at www.dlapiperwin.com and tell us what topic areas are of interest for access to a master-class programme of targeted updates and educational networking events.

For more information or to request additional information on WIN please contact Richard Norman or Bethany Jennings via www.dlapiperwin.com.

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