



Holiday pay should include overtime

The Employment Appeal Tribunal (EAT) has today held that non-guaranteed overtime should be included in the calculation of a worker's holiday pay.

As the majority of employers currently calculate holiday pay by reference to basic salary only, today's decision (in tandem with the European decision of *Lock* - see our previous **briefing** regarding commission) has significant ramifications for all employers who operate paid overtime practices.

In its judgment, the EAT found that:

- Non-guaranteed overtime forms part of a worker's normal pay and must therefore be included in holiday pay calculations. (Non-guaranteed overtime is overtime which the employer does not have to offer but the employee must work if offered.)
- This principle applies to the four weeks' annual leave under the Working Time Directive and not the additional 1.6 weeks' annual leave granted to workers in the UK under the Working Time Regulations.

However, the good news for employers is that the EAT has severely restricted the ability for workers to bring backdated claims. Claims will be out of time if there has been a gap of more than three months between successive underpayments. In addition, as the EAT held that the 1.6 weeks of 'additional leave' are the last days to be taken during the course of any leave year, this will make a three month gap even more likely.

A number of issues remain unresolved and employers are likely to face continued uncertainty about how holiday pay should be calculated for some time as leave to appeal has been granted.

We will review the Judgment in more detail but today's decision will clearly have an impact on how employers calculate holiday pay in the future.

Given the potential financial exposure to businesses that these holiday pay cases have created, we have designed a Holiday Pay Analyser that will tell you, in a clear and concise way, what your legal risks are as well as estimating your potential financial exposure. The fixed fee report is the easy way to make sure you stay on top of the fast moving and ever changing legal and financial landscape in relation to holiday pay.

Bear Scotland Ltd & Others v Fulton and Others, Hertel (UK) Ltd v Woods and Others, Amec Group Ltd v Law and Others.

Contact

For more information on how the Burgess Salmon Holiday Pay Analyser can help you assess your legal and financial risk or for specific advice on this issue, please contact Roger Bull below or get in touch with your usual Burgess Salmon contact.



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