



Holiday pay rules

In the countdown to Christmas, many employers will be feeling the pinch as a result of two recent court decisions which will benefit workers

Two recent cases have the effect of increasing holiday pay for those employees:

1. That regularly work overtime, or
2. Whose pay is made up of basic pay plus commission.

These decisions will impact upon the five million or so workers in the UK who currently work overtime (one sixth of the nation's workforce). The ruling that overtime should be taken into account when holiday pay is calculated was made in a recent Employment Appeal Tribunal case (Bear Scotland Ltd v Fulton and others (2014)) and the Government has set up a task force to assess its impact.

A recent Court of Justice of the European Union's (CJEU) decision determined that a "week's pay" for the purposes of calculating holiday pay should include sums in respect of commission payments. This determination is not being challenged (Lock v British Gas Trading Ltd (2014)). The case has been remitted to the Tribunal and is due to be heard early next year.

Until the Government intervenes, or provides further guidance, employers are advised to factor into holiday pay calculations any:

1. Commission payments, where commission is "intrinsicly linked" to a person's work; and
2. Guaranteed and non-guaranteed overtime.

Reference period for calculating holiday pay

Unhelpfully, the cases do not state what the appropriate reference period should be when calculating holiday pay. Under the Employment Rights Act 1996, a "week's pay" is calculated using a 12 week reference period. However it is not clear whether this is applicable to holiday pay. Due to this uncertainty, we recommend that employers use the 12 week reference period until the Government or the Courts provide further guidance. How much of one's holiday entitlement do these ruling apply to?

Employers should also bear in mind that the recent rulings only apply to the four weeks' minimum annual leave stipulated in the Working Time Directive and not to the additional 1.6 weeks' provided for in the Working Time Regulations 1998. In other words, if a full time employee is entitled to the statutory minimum holiday entitlement of twenty-eight days (inclusive of bank holidays), then twenty days' holiday pay would need to include amounts for overtime and commission. The additional eight days' would not need to include amounts for overtime and commission.

How far back can an employee claim for unpaid holiday?

The good news for businesses is that (unless the ruling is appealed – and UNITE have suggested that they are not going to appeal) an employee will not be able to claim that there has been a series of deductions where there has been a gap of three months between holiday periods so the scope of claims for back pay should be limited.