



Holiday Pay

Introduction

Factoring overtime pay into holiday pay after the recent case law decision in Bear Scotland, is a source of considerable confusion for many employers. We outline the key points.

What Type of Holiday?

Technically the legal position is different depending on the legal source of the holiday entitlement being taken. The first step is to identify which of the three potential holiday entitlements:

- European
- UK; or
- Contractual

is being taken and then identify what has to be paid for overtime.

The Entitlements

European - This is holiday entitlement under regulation 13 of the Working Time Regulations 1998 (WTR). The basic 4 weeks paid annual leave entitlement.

UK - This is the additional 1.6 weeks statutory holiday that exists in the UK and is provided for in regulation 13A of the WTR.

Contractual - This is normally any entitlement above the European and UK entitlements but the terms of the contract can also affect the commitment to pay for holiday that is also European and/or UK in nature.

The Position for European Entitlement

Following the Bear Scotland case, overtime pay has to be factored into holiday pay, where overtime working is both regular and compulsory for the employee, even if not guaranteed by the employer.

Whilst the rules on how to do this are still not fully clarified, the current best approach is to calculate holiday pay based on an average of the employee's pay including overtime earnings, over a 12 week period (with some exceptions and skipped weeks) prior to an individual's holiday.

The precise calculation approach is complex and requires certain weeks to be skipped over in averaging out a total of 12 weeks' pay. Specific advice should be sought on this process.

What about voluntary overtime?

In Patterson the Northern Ireland Court of Appeal decided that voluntary overtime that is regularly worked as part of the normal pattern of the employee's employment, should be factored into European Holiday pay. This case is not strictly binding on the courts in England and Wales but is a clear indication that the focus should be on how normal the overtime is, not whether it is technically voluntary or compulsory, but not guaranteed.

The Position for UK Entitlement

The position for the additional 1.6 weeks that arises under UK law only (and so is not subject to the EU case law that led to the finding in Bear strictly speaking) remains unclear. Pre Bear UK case law was clear that overtime pay does not have to be factored into holiday pay. Arguably after the Bear decision, for the UK entitlement, this remains the case. However, this split approach does then raise other complexities and practical difficulties in identifying which holiday entitlement is being taken on each occasion and then running two

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separate potential calculation methodologies.

So which type is being taken?

In *Bear*, the court said that absent a clear agreement it would be sensible to treat the first 4 weeks taken in any holiday year as the European entitlement. By the same logic the next 1.6 weeks would be the UK entitlement and anything else after that treated as pure contractual entitlement.

This is not entirely settled law but it does currently represent the best guidance we have.

The Position for Contractual Entitlements

There can be two types of contractual entitlement. The overlay and the excess. The overlay is where a contract provides for a more generous holiday pay approach than the European or UK approach. Where this is the case, the employee is entitled under their contract to the more generous contractual approach for the European and UK holiday entitlements. However, most employment contracts have historically only offered basic pay only for holiday, making the overlay situation rare.

The contractual entitlement to pay for holiday in excess of the UK and European entitlements depends on the wording of each employee's own employment contract.

Back Pay

Most employers have not paid overtime earnings as part of holiday pay. Where overtime earnings have not been built into holiday pay for European holiday, employees can bring claims that can potentially go back a number of years.

For claims issued before 1 July 2015 this could go back to the commencement of their employment or the introduction of the working time regulations in 2008, unless there is a break of 3 months or more. However, from 1 July back pay claims as unlawful deductions from wages, will be limited to a 2 year period.

A note of caution, the 3 months break rule is complex in practice. There is no guarantee that future cases will not overturn this aspect of the *Bear* judgment.

Comment

Employers need to think about a number of practical issues in the short term in response to the recent legal cases:

Audit and Assess

- You should conduct an audit to assess how you currently value holiday pay.
- What is included and what is not?

EU vs UK vs Contractual

- Are you going to separate EU from UK from Contractual entitlements for pay purposes?
- What changes will be needed to payroll, holiday booking procedures, holiday recording procedures, contracts and policies?

Contracts and Policies

- Do you need to amend your contracts?
- One issue is reclaiming overtaken holiday, what does your contract say about how this is valued given that the recent cases mean each holiday day can be worth a different amount?

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The Legal 500

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