

## LEGAL BRIEFING

# Holiday Pay: Where are we now?

**OVERVIEW**

**Over the last few years there has been a flurry of case law (domestic and European) which has changed the (previously uncontroversial) position on calculation of holiday pay. Employers could be forgiven for being somewhat unclear on which components of pay should or shouldn't be included for holiday pay purposes, given that new decisions have been flowing from the Employment Tribunals and appellate Courts on an almost monthly basis. So, where do things currently stand?**

By way of a brief recap, all workers in the U.K. are entitled to 4 weeks' annual leave under European Law ('Euro Leave') together with an extra 1.6 weeks' annual leave ('UK Leave') as a result of the UK's decision to top up the minimum Euro Leave through the Working Time Regulations. For a full time employee working five days per week, this results in an overall minimum of 28 days' (5.6 weeks') holiday per year.

So far, so good. The complexities arise when you come to work out how much a worker is due to be paid for the holidays they take.

Historically, a number of employers paid 'basic pay' only for all holidays, without taking into account variable components of pay such as commission/allowances/overtime. This practice was challenged in the domestic and European courts by a number of workers (in different sectors, focussing on different elements of pay), with the combined result that a radically different approach to calculation of holiday pay should now be adopted by employers.

Put simply, the result of the holiday pay litigation is that workers should now receive 'normal pay' in respect of their Euro Leave (the first 4 weeks of annual leave). Normal pay, in effect, means the pay they would have received if they had been at work instead of being on leave. The policy rationale for

this approach is that it would disincentivise workers from taking leave if they were to receive less than they would had they remained at work.

## OVERTIME

The holiday pay decisions have provided some guidance on the question of which specific elements of pay should be included for the purposes of 'normal pay'. We now know that commission and guaranteed compulsory overtime are definitely to be included. Non guaranteed overtime (overtime which the worker is not entitled to be offered but is required to work if asked) is also to be included.

But what about voluntary overtime? It had previously been thought this might be treated differently to other types of overtime because of the lack of any contractual requirement to do the work when asked. A decision from the Employment Appeal Tribunal ('EAT') earlier this month has provided guidance on this tricky issue.

The EAT determined that 'normal pay' should include voluntary overtime if that overtime was worked regularly and was reoccurring. No specific guidance on what will count as 'normal' or 'regular' was given, but we know Tribunals will look at the period of time over which the payment in question has been made, how regularly it is being paid and the rate of reoccurrence. For example, working overtime voluntarily every Saturday on an ongoing basis would mean that such overtime payments were part of normal pay. The EAT's decision made it clear that exceptional - irregular - payments would not count as 'normal pay' and should therefore not be included for holiday pay purposes. This should mean that those workers who rarely work overtime or do so on a 'one off' basis, wouldn't be caught by this decision.

The position on overtime payments seems to boil down to the question of whether such work is done regularly and on a reoccurring basis. The 'type' of overtime now appears to be a largely irrelevant factor when it comes to the calculation of holiday pay. That said, it is of course possible that this recent decision could be appealed and so, before changing current practices, employers should assess the implications carefully and take legal advice.

Employers who do decide to include 'regular' voluntary overtime payments will also need to decide what they categorise as 'regular/reoccurring'. No guarantee can be given as to whether a particular definition of regular will be legally compliant, but we would recommend taking a relatively generous approach from a workers' perspective, given the guidance so far from the Tribunals.

From a practical perspective, employers will need to decide whether it is worthwhile restricting 'normal pay' to Euro Leave or whether to adopt this for all annual leave, to avoid administrative and payroll difficulties. Ideally, the terms of contracts of employment should also be reviewed, to dovetail with the approach being taken to calculation of holiday pay (including if the calculation method differs for different types of annual leave).

The issue of which reference period should be used for working out normal/average pay is also still open to debate. In the recent EAT case referred to above, it appeared that a 12 week reference period was endorsed as being appropriate in the circumstances, but other judicial guidance has suggested a 12 month reference period might be appropriate if it more accurately represented 'normal pay'. Again, we would recommend adopting an approach which is objectively fair to workers, to avoid challenges being made at a later date.

Finally, whilst the recent EAT case primarily dealt with the issue of voluntary overtime, it was also held that regular payments for travel and standby/callout allowances counted as 'normal pay' as they were paid on a sufficiently regular basis (one week in every five). This aspect of the decision

serves as a reminder that if employers are determined to tackle this issue of holiday pay compliance once and for all, a comprehensive audit of all variable components of pay should be undertaken. With the assistance of legally privileged advice, any risks can then be identified and appropriately addressed whilst bearing in mind the commercial implications of any changes to the status quo.

## CONTACT US

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Our team has extensive experience of advising on holiday pay compliance and regularly represent employers in Tribunals throughout the UK where challenges are raised by workers in respect of holiday pay. Please get in touch with Sean, Mandy or Jen if you would like assistance with your organisation's current holiday pay arrangements.

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