Holiday Pay Judgment: What it means for you

On 4 November 2014, the Employment Appeal Tribunal (EAT) handed down its decision in **Bear Scotland Ltd v Fulton and Baxter, Hertel (UK) Ltd v Wood and others** and **Amec Group Limited v Law and others**. It is a ground-breaking decision which gives some clarity to various European Judgments on the issue.

The key points to take from the decision are that:

1. Holiday pay should be equivalent to a worker's "normal" pay. What is "normal" depends on whether the payment in question has been made for a sufficient period of time to justify the label of being "normal" (the regularity / pattern of payments will be relevant in this regard).

2. Overtime which a worker is not permitted to refuse (i.e. guaranteed and non-guaranteed overtime) must count as part of their "normal" pay when calculating the pay they should receive on holiday.

3. The Working Time Regulations which transposed the European Working Time Directive into UK law is incompatible with the Directive, but can be interpreted so as to give effect to it using a strong interpretative technique, by interpolating words.

4. So far as historic underpayments of holiday pay are concerned, the vast majority of workers will only be able to recover underpayments in the last three months (with a small number being able to recover sums further back).

However, there are various intricacies which employment lawyers, employers and workers need to appreciate:

1. The Judgment only applies in respect to the 20 days' annual leave guaranteed under the Working Time Directive, not the additional 8 days' leave which is a purely domestic-driven right, set out in the Working Time Regulations. As such, workers can expect to receive a higher rate of holiday pay (that which includes overtime, commissions and various other payments) for 20 out of their 28-days' holiday per year, with the remaining 8 days being paid at the level it previously was, unless their employer decides to pay all 28 days at the higher level.

2. Where workers' previous periods of holiday are separated by a gap of less than 3 months, they may be able to recover underpayments for a longer period than the 3-month limit set out above, by arguing that the underpayments form part of a "series". Even in those cases however, it is unlikely that they will be able to go back in time to recover underpaid holiday for more than one holiday year (due to the way the EAT construed the difference between the European 20 days' leave and the domestic 8 days' leave as potentially breaking the "series" of deductions from pay).

3. There is no definitive statement in the Judgment to confirm that purely voluntary overtime (that which the employer is not obliged to offer and the worker is not obliged to accept) would also be included. However, comments in the Judgment and the underlying ethos of the various European-level decisions could be said to lean towards the view that voluntary overtime which is regularly worked by a worker would count as part of their "normal" pay and hence should be included when calculating holiday pay.

Sue Ferguson, OptionsHR, 0118 940 3032, www.optionshr.co.uk**, sueferguson@optionshr.co.uk**

4. Whilst the domestic 12-week reference period for calculating average pay might be maintained going forward, there could be a change to this (brought about through case law or legislative change) due to the fact that some workers' pay is highly variable throughout the year and a 12-week snapshot could be misleading depending on the 12-week period captured. For example, a retail worker who does far more overtime during certain periods (perhaps Christmas) would have a far higher average number of hours as their "normal pay" if they took leave in January. Similarly, a salesperson who takes leave shortly after an unusually large commission payment could receive inflated holiday pay which is not representative of "normal pay". In such cases, a longer period may be necessary and justified. In one of the Opinions of an Advocate General, it was suggested that a 12-month reference period might be appropriate. This is not binding however, and we shall have to wait and see how this issue is resolved.

As a result of this Judgment and the decisions in **Williams v British Airways** and **Lock v British Gas Trading Ltd** lawyers can now say with some confidence that the following elements of a worker's pay packet should count when calculating their 20 days' holiday derived from the Directive:

- Commission payments
- Guaranteed and non-guaranteed overtime that is regularly worked
- Incentive bonuses
- Travel time payments (not expenses, but payments for the time spent travelling)
- Shift premia
- Seniority payments (payments linked to qualifications / grade / experience)
- Stand-by payments
- Certain other payments (such as "flying pay" and "time away pay" provided such payments are not expenses).

Background

Article 7 of the Working Time Directive guarantees all workers a minimum of 4 weeks' paid annual leave. The Directive makes no mention as to how to calculate pay during such leave. Domestic legislation has provided a mechanism for calculating "normal" pay, which is to be used as the benchmark for what a worker should receive when on holiday. This mechanism adopts an average calculated over a 12-week period. The same legislation also provides workers in the UK with an additional 8 days' leave per year.

In **Bamsey v Albon Engineering & Manufacturing** the employee had worked approximately 60 hours per week on average in the 12-week period before taking annual leave, but only the 39 basic working hours guaranteed under his contract were deemed to count towards holiday pay. The Court of Appeal decided that overtime would only count as "normal pay" where it was both compulsory and guaranteed. This was the position in domestic law until several more recent European decisions cast doubt on this position.

The Court of Justice of the European Union held in **Williams v British Airways** that where an element of a worker's pay packet could be said to be "intrinsically linked" to the work they are required to carry out under their contract, it should count when determining their "normal" pay (which would then form the basis of quantifying holiday pay). This included time away pay (insofar as it was not a genuine expenses payment), flying pay, and of course, their normal basic pay. The CJEU also stated that seniority payments would be included.

In **Lock v British Gas Trading Ltd**, the CJEU held that commission payments which are regularly received by a worker form part of their "normal pay" and hence are included when calculating holiday pay. In this case, the commission received by the worker amounted to 60% of the worker's take-home pay, such that this was highly significant for him.

Conclusion

The recent EAT decision will give some comfort to businesses that feared potential back-payments for 16 years' holiday entitlements by their workforce. However, they must now resolve past liabilities and start paying correctly going forward. This will increase their operating costs. It is estimated to be approximately a 3-5% increase on payroll. For workers, there is a victory in a sense, although the guillotine on claiming back pay will be unwelcome. The parties have been granted leave to appeal to the Court of Appeal, so the position on this issue may yet change