



The Cost of Holidays Rises

There have been some major changes recently which bring into question the way in which we calculate the holiday pay.

At the moment the law says that a week's pay is the amount a worker would expect to earn in a week. If pay varies, a week's pay is the average weekly earnings over the 12-week period ending with the week immediately preceding the date on which holiday begins. A week's pay is generally taken to be the annual salary divided by 52 and has only included basic pay rates but excluded overtime or commission.

A number of cases have cast doubt over which elements of pay should be taken into account when calculating normal pay for the purposes of holiday pay. In one case, the European Court of Justice held that any aspect of pay that is intrinsically linked to the performance of the tasks that the worker is required to carry out should be included in the calculation of the worker's total pay. This means a commission or bonus related to the way in which work is performed and not something such as an annual company bonus.

There is also now uncertainty over the previously accepted position that overtime hours do not form part of normal working hours for these purposes unless the employer is contractually bound to provide a specified number of overtime hours and the employee is obliged to work them.

An employment tribunal, following the above decision held that overtime should be included in the calculation of normal pay, whether or not it is contractual. However, in another case, another employment tribunal decided that non-contractual overtime does not have to be taken into account in the calculation of a week's pay.

In a case involving British Gas employees, the European Court of justice held that commission payments must be included in the calculation of holiday pay.

This is in contrast to previous UK case law and it is not yet clear how employment tribunals will approach this issue so the issue has been referred to the Employment Appeal Tribunal.

If the Employment Appeal Tribunal upholds the tribunal's decisions, this would affect all UK employers because it would mean that the UK had failed to implement the Working Time Directive properly and Parliament would have to amend the regulations. The result could be that employers will have to include non-contractual overtime in the calculation of holiday pay.

The ruling against employers could even lead employers that have followed the current UK law in good faith facing retrospective claims from employees dating back to the beginning of their employment.

As you can see even the employment tribunals cannot agree on the correct interpretation so we are waiting further clarification before advising any employer to make changes or additional payments!

The Employment Appeal Tribunal has given one of the parties the opportunity to present written submissions. These are not likely to be received by them until September 2014, with a decision to follow in October 2014 and a decision should not be expected until the end of the year.