Employment Law

Simpson Millar LLP Solicitors

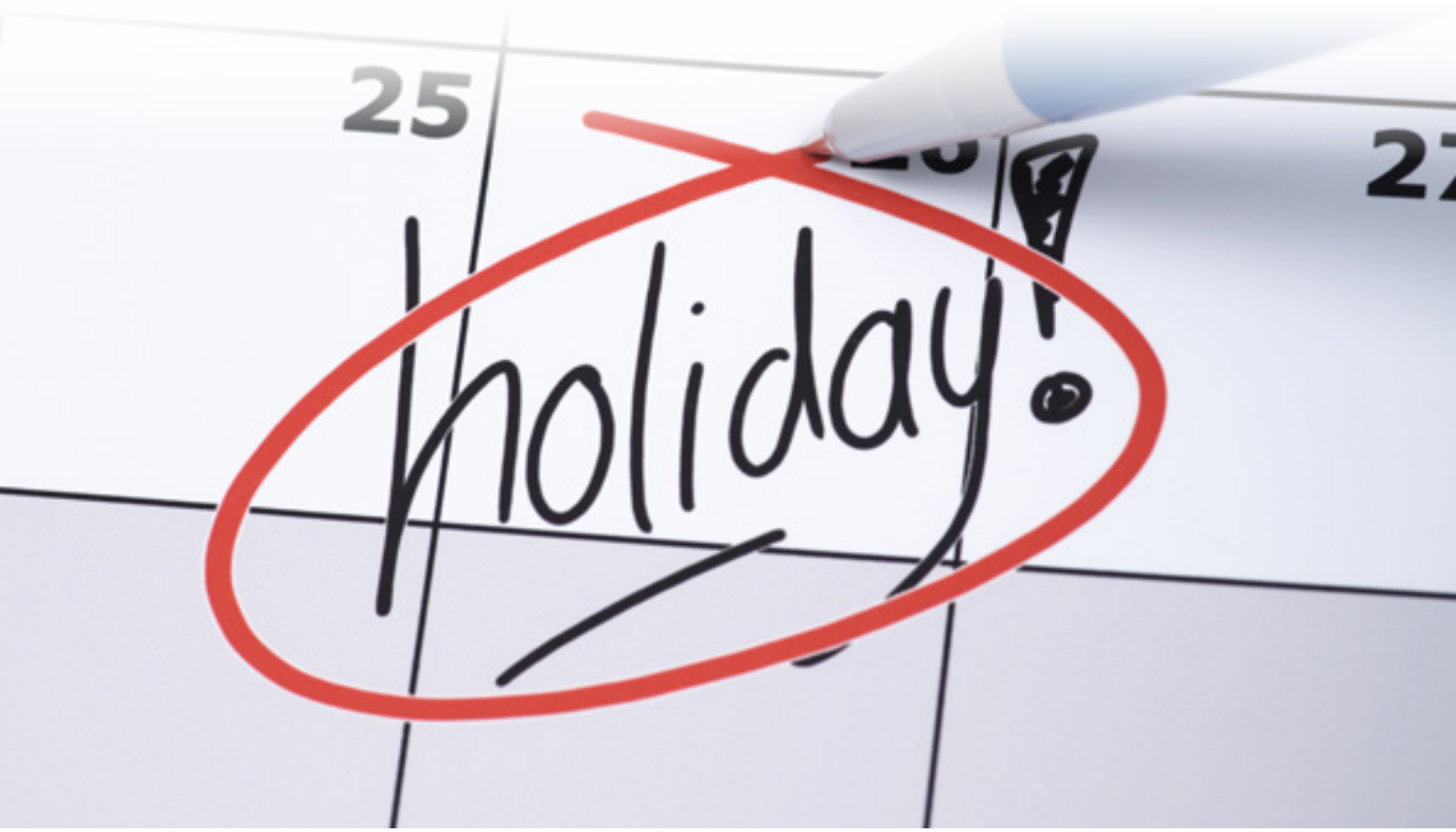
Review

www.simpsonmillar.co.uk

WINTER 2014

WORKERS ON HOLIDAY TO RECEIVE NORMAL PAY

INCLUDING REGULARLY REQUIRED OVERTIME



The Employment Appeal Tribunal (EAT) has ruled that 'normal remuneration' under Article 7 of the Working Time Directive (WTD) includes overtime which employees are under an obligation to accept, even if there is no requirement on the employer to provide a minimum number of hours of overtime. This means that this type of overtime is now to be taken into account when calculating holiday pay under Regulation 13 of the Working Time Regulations 1998 (WTR).

Simpson Millar LLP
Solicitors

WORKERS ON HOLIDAY TO RECEIVE NORMAL PAY
INCLUDING REGULARLY REQUIRED OVERTIME

Background

On 4 November 2014, the EAT handed down its decision in the case of *Bear Scotland Limited & Others v David Fulton & Others UKEATS/0047/13/BI (joined with Hertel (UK) Limited v Mr K Woods & Others* and *Amec Group Limited v Mr Law & Others*). Bear Scotland Limited had appealed against the Employment Tribunal's (ET) decision which had decided that the Company had made unlawful deductions from the wages of two of its employees, David Fulton and Douglas Baxter because it had not included overtime and other payments when calculating the holiday pay due to them. The appeals by Bear Scotland, Hertel and Amec (on the same issues) were rejected by the EAT.

Amec and Hertel had also appealed against the ET's decision that claimants could claim arrears of unpaid holiday pay due as unlawful deductions from wages under the Employment Rights Act 1996 (ERA) on the basis that on each occasion when holidays were underpaid this was one deduction in a series of deductions. The EAT allowed this appeal in respect of any underpayments that were more than 3 months before the next underpayment.

The EAT upheld Amec and Hertel's appeal in relation to taxable remuneration and confirmed that time spent travelling to work did not form part of 'normal remuneration'.

The Legislation

The WTD was implemented into UK law in the form of the WTR in 1998. Article 7 of the WTD and Regulation 13 of the WTR provide that a worker is entitled to at least four weeks paid annual leave. Regulation 16 of the WTR states that a worker is entitled to receive a week's pay in respect of each week of leave. Regulation 16(2) of the WTR provides that sections 221-224 of the ERA need to be applied when calculating the amount of a week's pay. Sections 221-224 of the ERA provide that, where an employee works normal hours under their contract of employment, he/she would receive payment for those hours worked for that week and where there are no normal working hours; their weekly pay would be calculated according to the average hours of work.

Sections 234 of the ERA defines "normal working hours" as follows:

(1) Where an employee is entitled to overtime pay when employed for more than a fixed number of hours in a week or other period, there are for the purposes of this Act normal working hours in his case.

(2) Subject to subsection (3), the normal working hours in such a case are the fixed number of hours.

(3) Where in such a case—

(a) the contract of employment fixes the number, or minimum number, of hours of employment in a week or other period (whether or not it also provides for the reduction of that number or minimum in certain circumstances), and

(b) that number or minimum number of hours exceeds the number of hours without overtime,
the normal working hours are that number or minimum number of hours (and not the number of hours without overtime).

This means that if the contract stipulates a fixed or minimum number of hours that the employee must work that exceeds the number of hours without overtime then s234(3) provides that the number or minimum number of hours shall be taken as the normal working hours even if some of the hours are paid at an overtime rate. The result of applying s234(3) as worded is that only overtime that is obligatory on both sides, that is, the employer is obliged to provide it and the employee is obliged to work it, is part of the worker's "normal working hours".

The Issues to be determined by the EAT

The appeals concerned three main issues which would have a direct impact on holiday pay. These were:

1. Should pay during annual leave include non-guaranteed overtime and other elements of remuneration?

2. Should Regulation 16 of WTR, sections 221-224 and section 234 of the ERA give effect to the requirement under Article 7 of the WTD?

3. If it is determined that non-guaranteed overtime pay and other elements of remuneration are part of their pay for annual leave, does the ET have jurisdiction to consider these claims as 'series of deductions' within the meaning of section 23(3) of the ERA?

Should pay during annual leave include non-guaranteed overtime and other elements of remuneration?

The claimants in Hertel and Amec worked under the terms of the National Agreement for the Engineering Construction Industry (NAECI). Clause 7 of the NAECI placed an obligation on employees to work overtime but there was no obligation on the employer to provide overtime ('non-guaranteed overtime'). Clause 10.3 of the NAECI provided that payment for holidays for the purpose of calculating 'a week's pay' was to be calculated in accordance with the statutory provisions contained in sections 221-224 of the ERA. When the employer calculated the holiday pay, it used the normal working hours as 38 because the basic working week under the NAECI consisted of 38 normal working hours.

Subsequently, the claimants began work on the West Burton CCTG project. It was a condition of this work that all employers and employees had to comply with a supplementary project agreement (SPA) as well as the NAECI. Clause 10 of SPA placed on obligation on employees to work non-guaranteed overtime and this did not form part of their normal working hours. Further, the clause stated that overtime would not be taken into account when calculating holiday pay.

The Appellants argued that since the employer was not under an obligation to provide overtime, this did not need to be taken into account when calculating holiday pay for the purpose of Article 7 of the WTD.

The EAT considered the case of *Lock* v *British Gas Trading Ltd [2014] ICR 813* in which the salary of a salesman was made up of 60% commission. The commission was paid on a monthly basis and calculated on the basis of the sales achieved. When the salesman was on annual leave, he could not earn commission which had a huge impact on his salary when on holiday. It was decided that in this case Article 7 of the WTD did not allow national legislation to prevent an employee from claiming commission as well as basic salary when on annual leave. Pay in respect of annual leave should correspond with the normal pay received by the worker because it was 'directly linked' to the work the Mr Lock normally carried out and therefore commission was to be taken into account during annual leave. In the present case, it was argued that the overtime payments amounted to a small proportion of the pay.

Mr Justice Langstaff (EAT) made the observation that 'normal pay' amounted to pay that was normally received. In circumstances where there was no 'normal pay', an average taken over a period would be appropriate. On the evidence, the ET was permitted to take the view that overtime was 'so regularly required' that these payments formed part of normal remuneration.

In the appeals, the employer could require the worker to carry out the overtime but the employer was not obliged to offer overtime. Mr Justice Langstaff held that it was certain that Article 7 of the WTD provided that non-guaranteed overtime is to be taken into account when calculating pay during annual leave.

Should Regulation 16 of WTR, sections 221-224 and section 234 of the ERA give effect to the requirement under Article 7 of the WTD?

As it was decided that under Article 7 of the WTD, workers are entitled to claim payments for overtime during their holiday, the next issue was whether domestic legislation should conform to the WTD to provide the same result. The arguments put forward by the Appellants included that national law could not be overridden by interpretation of Directives and it was for the national court to decide whether it had to conform to the WTD using its own interpretative methods.

When deciding this issue, Mr Justice Langstaff stated that the intention of the WTR was to implement the WTD and this was 'fully and accurately', therefore domestic law must conform to the interpretation of the WTD.

If it is determined that non-guaranteed overtime pay and other elements of remuneration are part of their pay for annual leave, does the Employment Tribunal have jurisdiction to consider these claims as 'series of deductions' within the meaning of section 23(3) of the ERA?

Section 23(2) to 23(4) of the ERA states:

'(2) Subject to subsection (4), an employment tribunal shall not consider a complaint under this section unless it is presented before the end of the period of three months beginning with—

(a) in the case of a complaint relating to a deduction by the employer, the date of payment of the wages from which the deduction was made, or
(b) in the case of a complaint relating to a payment received by the employer, the date when the payment was received.

(3) Where a complaint is brought under this section in respect of—
(a) a series of deductions or payments, or
(b) a number of payments falling within subsection (1)(d) and made in pursuance of demands for payment subject to the same limit under section 21(1) but received by the employer on different dates,
the references in subsection (2) to the deduction or payment are to the last deduction or payment in the series or to the last of the payments so received.

(4) Where the employment tribunal is satisfied that it was not reasonably practicable for a complaint under this section to be presented before the end of the relevant period of three months, the tribunal may consider the complaint if it is presented within such further period as the tribunal considers reasonable'.

According to section 23 of the ERA and this judgment, this provision would allow a claimant to bring a claim in respect of unpaid holiday pay more than three months before issuing the claim at the ET where the failure forms a part a 'series of deductions'. The EAT then went on to consider the meaning of a 'series of deductions'. The ET judge had held that a 'series of deductions' of similar deductions which occurred regularly and where there were intervals of correct payment could form a series. The Appellants argued that this was incorrect and that a series would be broken if correct payment was made and the next series would begin from the next deduction.

Mr Justice Langstaff held that the "sense of the legislation" meant that if there was a gap of more than three months between the deductions, then this would break the series so a claimant can only bring a claim in respect of the deductions made three months before issuing the claim.

Mr Justice Langstaff granted leave to the employers to appeal to the Court of Appeal against his findings that non-guaranteed overtime was part of pay under Article 7 of the WTD and that the WTR could be interpreted to conform to give effect to Article 7, though he did not consider such an appeal to have reasonable prospects of success. He also gave leave to the employees to appeal against his finding that gaps of more than 3 months broke the series of deductions making deductions more than 3 months earlier than the earlier deduction out of time. Notably, he considered this ground of appeal to be arguable.

What does this decision mean?

Although the employees in the Bear case are not appealing, the decision is likely to be challenged in other cases. However that may not be for some time.

Prior to this decision, holiday pay was calculated according to a week's pay but employers will now need to take into account non-guaranteed overtime when calculating holiday pay.

Employers have argued that this decision will have a huge financial impact on them and will leave many employers out of pocket and that where the employee does not have a set amount of overtime, it will cause difficulties for employers when calculating holiday pay.

However, in reaping the savings made by not paying holiday pay in full at the time, such employers were taking a calculated commercial risk. They will now need to rectify the position or face legal claims. For some employers, the considerable past savings employers sought to make will now cost them more than it would have done, had they included overtime in the first place.

As a result of this decision, Business Secretary Vince Cable has announced that he will be setting up a taskforce, consisting of government departments and businesses to assess the impact of this ruling. The aim of this review is to discuss ways of limiting financial exposure on businesses. So far the taskforce consists only of representatives from Government and business employers' organisations with no scope for contribution from unions, law centres and employee organisations.

After this decision, TUC General Secretary Frances O'Grady stated:

'Failing to count overtime when calculating holiday pay is quite simply wrong. This ruling marks a victory for people who work long and hard to make a living, and who deserve to be properly paid when they take their well-earned leave...

Scaremongering about the possible impact of this ruling is irresponsible. British business is far more robust than some of its spokespeople would admit. It's worth remembering that in 1999 a change in the law meant that six million people gained more holiday entitlements, and businesses easily absorbed the increase and employment continued to rise.'

Where does this leave workers whose pay for non-guaranteed but compulsory over time has not been included in their holiday pay?

Employees may now pursue unlawful deduction of wages claims for the arrears in relation to the non-payment of overtime during their holidays but only within the three month limitation period (subject to complying with the Early Conciliation procedure through ACAS). Workers must bear in mind that in a 'series of deductions', there must not be a time lapse of more than three months between each deduction as this will break the series.

On 18 December 2014, the Government introduced the Deduction from Wages (Limitation) Regulations 2014 'DW Regulations' which come into force on 8 January 2015. Regulation 2 amends section 23 of the ERA to insert a new subsection 4A which states that an ET cannot consider unauthorised deduction from wages complaints where the deduction was made earlier than two years before the date on which the claim is lodged in the ET. This amendment will only apply to those claims presented to an ET on or after 1 July 2015 so claimants wishing to lodge claims should not delay in doing so.

Regulation 3 of the DW Regulations also makes an amendment to Regulation 16 of the WTR making the right to payment in respect of annual leave as a separate statutory right and not a contractual right. This effectively prevents workers from pursuing claims in the county court.

The DW Regulations provide some comfort to employers in that employees will be prevented from pursuing claims going back over many years. However, the ET is likely to see a considerable increase in these claims lodged by claimants before the deadline of 1 July 2015.

What about pay for voluntary overtime?

Although on the facts of this case the decision relates to pay for overtime the worker is required to work, it also provides support for claims to include in holiday pay for voluntary overtime.

In the case of *British Airways Plc* v *Williams and others (case c-155/10)* the European Court of Justice (CJEU) found that workers are entitled to their normal remuneration for annual leave under the WTD. Although the claims in the Williams case were under the Civil Aviation (Working Time) Regulations 2004, which implement Council Directive 2000/79/EC relating to mobile staff in Civil Aviation, Directive 2000/79/EC includes the same provisions on annual leave as the WTD. The findings in the Williams case were adopted by the CJEU in the case of *Lock* v *British Gas Trading Ltd (caseC-539/12)*. By applying the test in the Williams case and finding that the WTR can be interpreted to give effect to the WTD, the EAT's decision in the Bear case opens the way for claims to include voluntary overtime in holiday pay.

If you think you have not been paid correctly for your holiday pay, you should seek advice as soon as possible from a legal or trade union representative. You can also contact the ACAS helpline for guidance.

Employment Department Contacts:

Linda Stewart
At our Wimbledon office Tel: 0345 357 9450
Email: linda.stewart@simpsonmillar.co.uk

Joy Drummond
At our London office Tel: 0345 357 9400
Email: joy.drummond@simpsonmillar.co.uk

Aneeqa Ali
At our Wimbledon Office Tel: 0345 357 9450
Email: aneeqa.ali@simpsonmillar.co.uk

UK Offices

Simpson Millar LLP Solicitors offer a full range of legal services. To find out more information please visit our website at:
www.simpsonmillar.co.uk

Alternatively, to discuss your needs with one of our legal advisors please call our legal helpline on:
0808 129 3320
or email:
info@simpsonmillar.co.uk

Registered office:
Simpson Millar LLP Solicitors
27 St Paul's Street
Leeds
West Yorkshire LS1 2JG

Lexcel Practice Management Standard Law Society Accredited

INVESTOR IN PEOPLE

Simpson Millar LLP Solicitors