

Employment Law Plus

- Practical and commercial solutions to HR challenges

Calculating holiday pay

- WTR: Only basic pay, not overtime, bonuses, commission etc
- Overtime: Only compulsory, guaranteed overtime included in calculation (*Bamsey*)

British Airways v Williams ECJ

- Civil Aviation (Working Time Regulations)
- Supplementary payments for time spent flying and allowances for professional and personal status
- Should holiday pay reflect basic pay or normal pay?

British Airways v Williams ECJ

- Supplementary payments and allowances
 - pay equivalent of their normal remuneration
 - as long as there is an intrinsic link between the payment and duties

Lock v British Gas Trading

- Commission payments

Lock v British Gas Trading

- Commission payments directly and intrinsically linked to work should form part of holiday pay

Bear Scotland v Fulton

- Overtime payments

Bear Scotland v Fulton

- Overtime compulsory for employees if asked to do it
- but employer not obliged to provide it
- Almost invariably worked 6 hours longer each week under a local agreement than their hours under a national agreement.

Bear Scotland v Fulton

- Overtime payments should be included in holiday pay

Hertel v Woods, Amec Group v Law

- Radius allowance and travelling time payments - partly taxed (HMRC treated as partly for travel costs to site)
- Held payments:
 - not a reimbursement of expenses
 - directly linked to work carried out
 - should be included in the holiday pay calculation

These decisions do not necessarily mean that if an employee works overtime, the overtime payment needs to be included as an extra payment for holiday pay

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- Decisions only affect employees whose pay varies depending on the amount of overtime worked
- Overtime payments must be part of normal remuneration
- What is normal?
 - Length of time
 - Regularity of payment
 - ???

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- Decision not relate to entirely voluntary overtime
- Does that matter?

- Which holiday does this apply to?
 - Minimum holiday entitlement of 4 weeks under the Working Time Directive
 - Not further holiday entitlement up to 28 days under the WTR
 - Not to any additional contractual holiday pay.

Can employees make claims for back pay of holiday payments?

- Must bring claims within three months of the last underpayment
- Holiday pay going back years as “unlawful deduction from pay” claims
- *Bear Scotland*: Gap of more than three months between each underpayment claimed breaks chain of back pay which can be claimed
- Claim only relates to first 4 weeks holiday under WTD (contract point)
- From 1 July 2015, limit on 2 years prior to claim

What should employers do?

- Government to review WTR
- Wait and see?
- But potential for embarrassment and breach of company values

How should holiday pay be calculated?

- Not straightforward
- Average 12 wks prior to holiday?
- *Locke* – Leicester ET