

CALCULATION OF HOLIDAY PAY

Where are we now?



Despite the plethora of recent cases, there is still uncertainty over what components of an employee's pay should be taken into account for the purposes of calculating holiday pay. One key question for many employers is how far back can an employee go with his/her claim for back-dated holiday pay?

Two-year backstop from 1 July 2015

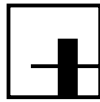
The Government set up a holiday pay taskforce to review the position. This has resulted in the Deduction from Wages (Limitation) Regulations 2014 being published. The regulations impose a two-year backstop on most unlawful deductions from wages claims, including claims for holiday pay, meaning that employees cannot go back further than two years with their claim. This backstop period will apply to claims presented on or after 1 July 2015.

In *Bear Scotland*, the EAT already established that the chain of unlawful deductions will be broken if more than three months has elapsed between the deductions, i.e. if more than three months have passed with no holiday being taken (or with holiday taken being paid correctly). This ruling already limits the scope for many workers to bring claims for underpaid holiday pay stretching back to previous holiday years.

There is also the suggestion (although no binding legal authority on this point) that it is for an employer to determine which type of leave (i.e. the 20 days European Working Time Directive leave entitlement or the eight additional days Working Time Regulation leave) is being taken by the worker at any particular time.

If we take these two points from *Bear Scotland* together, it is difficult to see how a worker will be able to extend their claim back beyond a year in any event. In most cases, a worker, depending on the pattern of their holidays, will have more than a three-month gap between holidays. Even if they took a holiday every three months, because the entitlement to the higher amount of holiday pay only applies to the 20 days European holiday, the employee needs to be able to show that he took a European holiday every three months to link unlawful deductions and that is likely to be difficult in practice. As such, the two-year backstop, while welcome as it provides certainty as to the maximum level of a claim, may not actually need to be relied upon in the majority of cases.

We have prepared a handy '[at a glance guide to holiday pay](#)' which provides a quick overview of what is (and is not) currently included in UK holiday pay.

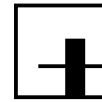


At a glance guide to holiday pay

The overall aim of the legislation relating to working time and holidays is to ensure that a worker is not worse off as a result of taking holidays and as such, is not financially dis-incentivised from taking his annual leave. Essentially, this means workers should get the same wage each month, regardless of whether they are working or on holiday. This is easy enough for salaried workers, with a standard monthly wage. The difficulty arises where an employee's pay fluctuates and is supplemented to some extent by overtime, commission or other payments.

So, what payments should be included when calculating holiday pay? The general rule coming out of recent case law is that **payments intrinsically linked to the performance of the employee's tasks should be included**. Employers must ensure that a worker continues to receive 'normal' pay when on holiday. Employers will therefore have to consider whether or not the employee receives the payment regularly enough for it to be thought of as a normal part of remuneration. In practice, this could be difficult to determine and each case will fall on its own facts. In the table below, we've set out a general overview of where the law stands on the types of payments that should be included in holiday pay if the worker normally receives them while at work, and what this means in practice:

Type of payment	Included?	What else do I need to know?
Salary	Yes	Basic salary has always been included in holiday pay in the UK.
Overtime (guaranteed under the employment contract)	Yes	Contractual guaranteed overtime has always been included in holiday pay in the UK.
Overtime (not guaranteed but compulsory if the employer requests)	Yes (probably)	Non-guaranteed overtime that the worker must accept should be included in holiday pay if it is worked regularly.
Overtime (voluntary)	Yes (probably)	Voluntary overtime (that is not guaranteed, and that the worker can refuse) should probably be included if it is worked regularly. However, employers should approach this rule cautiously and each case will fall on its own facts. The Court of Appeal in Northern Ireland recently ruled on this in the case of <i>Patterson v Castlereagh Borough Council</i> and held that voluntary overtime should be paid in holiday pay if the overtime pay meets the requirements of "normal remuneration".
Commission	It depends	Commission intrinsically linked to the performance of tasks which the worker is employed to do should be included (e.g. a sales person earning commission on each order he achieves), as confirmed in the Court of Appeal's recent judgement in <i>British Gas v Lock</i> . The Court of Appeal did not, however, clarify how long the reference period should be in order to assess employees' average commission payment. However, commission which will not reduce as a result of the employee taking holidays may not need to be included (e.g. on-going commission for introducing a client or commission paid on completion of long-term projects).

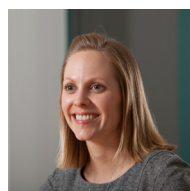


Allowances	It depends	<p>Allowances paid with the intention of genuinely reimbursing the worker for occasional ancillary costs which are actually incurred, such as paying for food, travel tickets or a mileage payment should not be included.</p> <p>However, if the allowance is not intended to directly relate to a cost actually incurred (for example, a shift allowance, a flat rate fuel allowance, or lump sum allowance for spending a night away from home), then it probably should be included.</p>
Bonus (productivity/ attendance/ performance)	Yes (probably)	<p>Bonuses paid to reward the performance of tasks or to incentivise employees will normally be intrinsically linked to the task or role and as such should be included in the calculation of holiday pay.</p> <p>For example, a performance bonus based on individual production levels or targets. The position in relation to a bonus relating to the performance of a team or business area may also require to be included, but the position is less clear.</p>
Bonus (annual discretionary and other)	Maybe	<p>This is a grey area. Annual discretionary bonuses are normally linked to the performance of the worker's duties in some way (perhaps other than a one-off Christmas bonus given to all employees). Therefore, it is arguable that holiday pay should include a sum in respect of annual bonus although each case will turn on its own facts and for now most employers are taking the view that discretionary bonuses are not normal pay and so should not be included in holiday pay.</p> <p>Following European rulings, it is not possible to argue that the bonus already includes an element of holiday pay (meaning that additional sums in respect of holiday pay are not due), as rolled-up holiday pay is contrary to European law.</p> <p>If annual bonuses are to be included in the calculation of holiday pay, then a further issue is what reference period should be used when calculating the holiday pay. Recent judgments suggest it is for employers to determine the appropriate reference period.</p>
Standby and emergency call-out payments	Yes	These should be included in holiday pay.
Acting-up supplement	Yes	These should be included in holiday pay.

For further information or advice on any of the issues discussed in this briefing note, please get in touch with your usual Shepherd and Wedderburn contact.



Neil Maclean
 Partner
 T +44(0)131 473 5181
 M +44(0)782 541 3316
 E neil.maclean@shepwedd.com



Katie Russell
 Partner
 T +44(0)131 473 5266
 M +44(0)787 269 9897
 E katie.russell@shepwedd.com



Elouisa Crichton
 Associate
 T +44(0)141 566 7249
 M +44(0)770 214 1289
 E elouisa.crichton@shepwedd.com