



# Wish you weren't here!

## Holiday pay checklist

Calculating holiday pay should be simple and indeed that used to be the case. However, following recent decisions employers may need to change the way they calculate holiday pay as well as deal with claims for back pay. We have been following the current holiday pay cases, tweeting live from the hearings and updating you on their progress.

Our checklist highlights the key issues employers need to be aware of.

### Right to holiday in the UK

In the UK, workers have the following rights relating to annual leave:

- Four weeks paid annual leave under the Working Time Directive (WTD); plus
- A further right to 1.6 weeks annual leave under the Working Time Regulations (WTR); plus
- Any further contractual holiday entitlement provided by their employer.

### Dispute: What payments should be included when calculating holiday pay?

The WTRs broadly advocate that holiday pay should be paid in accordance with basic pay only. Workers have argued that this approach is incompatible with the WTD and that holiday pay should be calculated by taking into account all other payments routinely earned (such as commission and overtime).

Recent judgments by the Court of Justice of the European Union (CJEU) in UK cases (*Williams & others v British Airways plc* and *Lock v British Gas Trading Ltd*) agreed and said that workers should receive their “normal pay” whilst on holiday which would ordinarily include commission payments and certain travel supplements. “Normal pay” is widely defined to include such payments which are “linked intrinsically to the performance of the tasks which the worker is required to carry out under his contract of employment”. The CJEU said that if holiday pay did not include payments routinely earned it would act as a disincentive to take holiday.

### Later judgments

Judgment then followed in the cases of *Fulton and others v Bear Scotland Ltd*, *Wood and others v Hertel (UK) Ltd* and *Law and others v AMEC Group Ltd* which gave us binding legal guidance on how to calculate holiday pay in relation to the four week entitlement under the WTD. In these cases the EAT agreed with the CJEU that holiday pay (for the four week European entitlement) should be based on a worker’s “normal pay”. Normal pay would include overtime pay (guaranteed and non-guaranteed) as well as time travel payments and a radius allowance.

So, what payments should be included when calculating holiday pay for the four weeks European leave?

- Overtime (guaranteed, non-guaranteed and probably “normal” voluntary overtime)
- Commission
- Standby payments and emergency call out payments
- Shift Allowances and premiums
- Productivity bonuses
- Travel and other allowances that are treated as taxable remuneration or a taxable benefit.



#### What payments should not be included?

- Benefits in kind
- Bonuses not linked to performance
- Expenses (i.e. travel) which reimburse workers for costs incurred
- Probably one-off annual bonuses

### What do employers need to do?

The EAT decision means that employers may need to change the way they calculate holiday pay for the four week European holiday entitlement. However, the bigger question for employers is to what extent can they be liable for historic underpayments of holiday pay following this judgment?

The suggestion before this judgment was that employers could potentially be liable for underpayments going back to 1998 – when the WTR were implemented! The good news for employers is that the EAT held that if there was a gap of more than three months in any series of deductions from holiday pay then workers would be prevented from pursuing claims for earlier deductions.

Whilst that means in most cases, claims are likely to be limited to the current holiday year this aspect of the judgment is not black and white!

#### What options do employers have?

- There are a range of options for employers at present:
- Maintaining the status quo and not changing the way holiday pay is calculated in the hope the EAT judgment is overturned or workers are simply unaware of their rights;
  - Implementing new holiday pay calculations going forward but not offering anything in relation to back pay; and
  - Implementing new holiday pay calculations going forward and negotiating with staff/unions on a sum to settle back pay claims.

### In our view

There is no “one size fits all” solution. We would advocate that most employers include additional payments when calculating holiday pay going forward as this aspect of the judgment is here to stay.

However, it may be the most advantageous time for employers to enter into discussions with staff/unions in relation to back pay claims as there is a short window for those claims to be presented and an employer could argue that claims dating back beyond the current holiday year are likely to be out of time.

Employers may also want to look at sacrificing other benefits (subject to contract) if workers are unreasonable in negotiations.

### Find out how DWF can help you



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To view all our blogs on the current holiday pay dispute visit our holiday pay hub:

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