

CHANGES TO UK HOLIDAY PAY

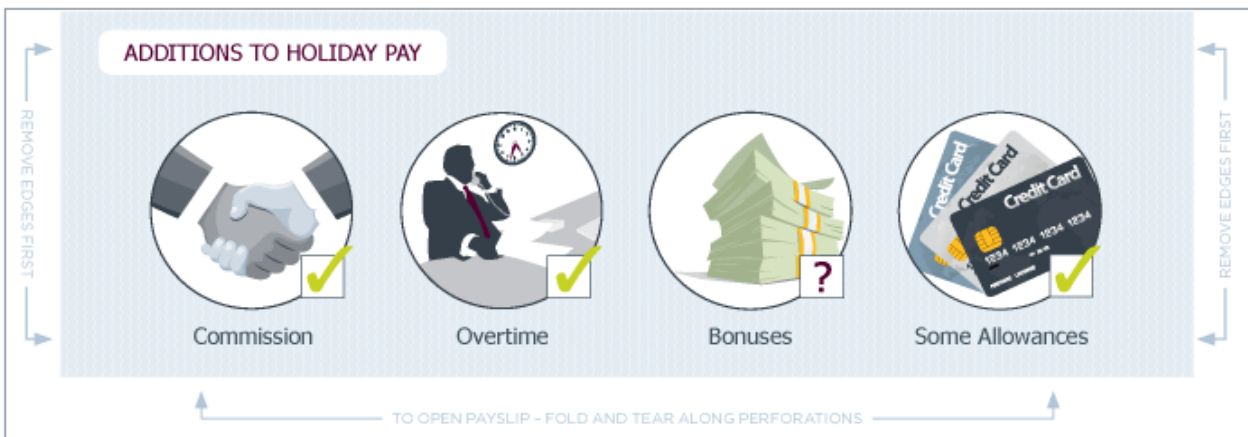
What you need to do now

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The decision in *Bear Scotland v Fulton and Ors* is out. The EAT held that holiday pay should include overtime but that the ability of workers to recover historic underpayments is limited. With an appeal on the cards, this is unlikely to be the end of the matter. So what should you do now? We assess the risks and options.

What should holiday pay include?



The risks



Liability for historic underpayment



Increased cost of future holiday pay



Management time and cost dealing with the issue



Reputational liability

The next steps

1. Assess potential exposure by auditing:
 - Pay structures
 - Workforce awareness of issue
 - Holiday pay records
2. Decide on strategy - possible options:
 - Do nothing and wait for further legal developments
 - Break historic underpayment chain
 - Pay correctly going forward
 - Settle now and pay correctly going forward

The EAT decision

The EAT has said that overtime should be included when calculating holiday pay, concluding that the Working Time Regulations can be interpreted in accordance with earlier ECJ decisions on the Working Time Directive. However, it also held that the ability of workers to bring claims for a series of deductions in relation to historic holiday pay is more limited than feared, as any break of three months between underpayments will break the chain.

Although an appeal is likely, the current legal position is that holiday pay for many UK workers should now be calculated to take account of overtime, commission and other additional remuneration which wasn't previously included. The position on historic claims is complicated, but employers may well still be vulnerable to claims for unpaid holiday, particularly if they do not have detailed records showing when a worker took their holiday. Please see our legal analysis for more details.

Your Audit

Before deciding on a strategy, it is crucial that you understand the issues and assess how they apply to your business.

Does this affect us at all?

The majority of UK employers are affected. Industry sectors where overtime or commission-based remuneration are common, or those with unionised workforces, are particularly at risk. This is likely to include the retail, IT and manufacturing sectors. Further, this may well be an issue for sectors which include bonuses as part of remuneration. At worst, this could even apply to highly paid workers in the financial services sector. You should also consider the allowances you pay to staff. Some allowances will be excluded but others, which are not akin to expenses, are covered.

You can use this checklist to assess how significant this is for your organisation:

	Major Issue
1 Your pay structures include overtime, commission, allowances or bonuses.	Yes
2 You currently take these payments into account when calculating holiday pay.	No
3 These types of pay structures apply to a material part of your workforce.	Yes
4 You have good historic holiday pay records.	No
5 You have a high turnover of staff.	No
6 You are unionised.	Yes
7 You have a sophisticated workforce.	Yes
8 Holiday pay entitlement affects other aspects of remuneration, for example pension contributions.	Yes

Your strategy

What are the options?

	Advantages	Disadvantages	Recommendations
1 Do nothing and wait for further legal developments	<ul style="list-style-type: none"> + Potentially delays financial impact + Liability falls away for workers who leave and don't claim promptly 	<ul style="list-style-type: none"> - Liability continues to grow until issue is addressed - Potentially negative PR risk - Extent of liability may rise if scope of historic claims is increased on appeal 	Good for employers willing to take a high risk approach. Employers may also wish to consider this approach if the cost of implementing the change is significant and/or limited holiday records are available to calculate historic liability
2 Break chain of historic underpayment	<ul style="list-style-type: none"> + May limit historic payment liability 	<ul style="list-style-type: none"> - Difficult to calculate conforming payments - Does not significantly improve on current legal position - Does not resolve future liabilities - Negative PR 	High risk – this option is not recommended
3 Pay correctly going forward	<ul style="list-style-type: none"> + Resolves future liability + Historic liability falls away if workers don't claim promptly 	<ul style="list-style-type: none"> - Flags historic underpayment to workforce - Possibility of paying more for future holiday pay than required, depending on final clarification of the law - Mixed PR message 	Good for employers whose risk of historic claims is small and/or where the cost of changing future calculation is low
4 Settle now and pay correctly going forward	<ul style="list-style-type: none"> + Certainty - draws a line under the issue + Possibility of settling for less than full liability depending on final clarification of the law + Potentially positive PR 	<ul style="list-style-type: none"> - Possibility of settling for more than full liability and/or overpaying for future holiday depending on final clarification of the law 	<p>Good for risk adverse employers and/or employers whose overall liabilities are low</p> <p>Also good for employers who can negotiate a discounted settlement on the basis of the EAT's finding about historic liability.</p>

What is the extent of my historic liability?

The extent of the historic liability is not yet clear. The EAT found a way to lessen the potential exposure for employers by finding that any break of three months will break the chain if a worker argues that there has been a series of deductions. However, this is the most controversial part of the judgment and it is likely to be appealed. The worst case scenario on appeal is a finding that liability for underpayments stretches back to the start of an individual's employment, subject to a longstop date of 1998.

Getting in touch

If you would like to talk through your project or discuss solutions to your legal needs, please get in touch.

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