

11<sup>th</sup> November 2014

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## Holiday pay and overtime payments

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Most employers calculate holiday pay on the basis of basic pay only. The question of whether this basis of calculation of holiday pay is correct has been the subject of judicial consideration in a number of recent cases.

The recent decision handed down by the Employment Appeal Tribunal (EAT) in *Bear Scotland Ltd v Fulton & anor* (and conjoined cases) concerns the calculation of holiday pay under the European Working Time Directive ('WTD'), in particular whether it should include an amount in respect of 'non-guaranteed' overtime - where an employer is not contractually obliged to offer overtime, but where a worker is contractually obliged to perform such overtime if so requested.

### The EAT held that:

1. As part of their holiday pay workers are entitled to be paid a sum of money to reflect normal 'non-guaranteed' overtime – overtime which they are normally obliged to work.

Under EU law workers are entitled to receive their 'normal remuneration' when taking holiday as prescribed by the WTD. Overtime regularly required by employers will in future now amount to normal remuneration.

2. Overtime in holiday pay will apply only to the basic 20 days holiday granted under the WTD, not the additional 8 days holiday under regulation 13A of the UK Working Time Regulations (WTR).
3. Claims for arrears of holiday pay will be out of time if there has been a break of more than three months between successive underpayments in respect of holiday pay.

Leave has been granted to appeal the decision by the EAT to the Court of Appeal.

Following the judgment handed down, Business Secretary Vince Cable has announced he is setting up a taskforce to assess the possible impact of the ruling on holiday pay from the EAT, including voluntary overtime which is a separate issue, but may well also fall into the category of 'normal remuneration'.

The taskforce will consist of a selection of government departments and business representative groups. The taskforce will provide a forum to discuss how the impact on business can be limited by the EAT decision.