ALLEN & OVERY

Holiday pay – Summer Update

31 July 2018

It's that time of year when many will be taking a break, jetting off to sunny climes or enjoying the sunshine at home. Here's a look at how recent developments – and changes ahead – may impact your holiday pay bill and calculations.

EAT: no change on voluntary overtime

Voluntary overtime should be factored into Regulation 13 holiday pay (for the first four weeks' holiday) if sufficiently regular and settled to count as "normal remuneration". The EAT has stood by this view in *Flowers v East of England Ambulance Trust*, following its decision in *Dudley* last year. As Tribunals must apply EAT decisions to any claims brought, continue to assume that any overtime normally received, whether voluntary or not, counts for holiday pay purposes.

The EAT has not, unfortunately, elaborated on when overtime is "regular" and "settled". This will depend on the facts of each case, such as here where the claimants' overtime patterns must be assessed by the Employment Tribunal. For further guidance on how to approach this, please see our **Summer 2017 Update**.

Flowers also highlights the need for careful drafting of contractual holiday pay clauses, to avoid unintended enhancements and breach of contract claims. Risk exposure is higher for contractual claims, as the "three-month" *Bear Scotland* rule and two-year backstop period (that limit liability for unlawful deduction claims) don't apply to them. In *Flowers*, holiday pay under NHS Terms & Conditions was construed as including voluntary overtime, regardless of how regularly it was worked. Given the cost ramifications, the NHS is seeking to appeal, so we may yet hear from the Court of Appeal on this issue.

Managing risk for contingent workers

In November, *The Sash Window Workshop Ltd v King* will return to the Court of Appeal to interpret the ECJ's ruling that "workers" denied paid holiday rights accrue their entitlement indefinitely and can be paid in lieu of it on termination. It is a risk area specifically if you use nominally self-employed contractors (who can establish that they are in fact "workers") or gig workers who don't receive paid holiday. For this group, there is potentially significant exposure to termination payments and backdated claims.

This risk is heightened by the wave of worker status litigation which shows no signs of abating. More claims await, including one from foster carers (being heard by an Employment Tribunal in September) that will challenge the two-year backstop period for unlawful deduction claims. The legal tests (on which there was little clarity in the Supreme Court's recent *Pimlico Plumbers* ruling), the fact-sensitive nature of decisions to date and fee-free Tribunals, make fertile ground for similar claims, with paid holiday rights and back pay just part of the prize.

This underpins the need to categorise your staff correctly from the outset and, if you haven't already done so, to audit current arrangements with "self-employed" contractors to ensure that they aren't in reality "workers". For those most at risk of being "workers", an option would be to provide them with paid holiday now, with a view to averting litigation and minimising future termination liability (even if this won't extinguish past liability). Alternatively, it may make sense to await the Court of Appeal ruling in *King* to decide how best to manage your risk exposure.

Additional pay for part-timers

A risk assessment is also necessary if you've been paying holiday to employees who work variable or irregular hours at the rate of 12.07% of their annualised hours; this is the pro-rated weekly accrual rate (5.6 weeks divided by 46.4 working weeks) suggested in

Acas guidance and used by the gov.uk online holiday entitlement calculator.

In a case related to teachers that is just as relevant to casual, zero-hours or other part-time staff, the EAT has ruled in *Brazel v The Harper Trust* that you must instead calculate the normal rate of pay averaged over the 12 weeks prior to holiday being taken, as per the Working Time Regulations 1998 and Employment Rights Act 1996 formula for those with no normal working hours. This may result in part-time workers being treated more favourably than full-timers in some circumstances.

If you've been using the 12.07% rate, conduct an audit to check that it doesn't result in your workers receiving less than their statutory entitlement, and that there have been no past underpayments. If you are exposed to claims, consider changing your approach for future holiday payments, which may also help manage your risk of historical liability (on account of the "three-month" *Bear Scotland* rule).

Brexit: business as usual

Might we see any relaxation in holiday rules as a result of Brexit? We doubt it, at least in the short- to medium-term. UK courts and Tribunals must continue to apply ECJ rulings until the UK's withdrawal from the EU and during the post-Brexit transition period (until the end of 2020). The Government has pledged to protect workers' EU law rights and, in its recent White Paper, proposes that current employment laws be safeguarded (by the UK and EU) as part of any Brexit deal. Even in the longer term, ECJ case rulings are so embedded in our holiday pay case law that they are likely to remain influential.

Updated A&O Guidance – and Happy Holidays

We have updated our guidance *Holiday pay – where are we now?* to reflect recent changes. Please click **here** to access this.

Wherever you are holidaying, we wish you a happy and re-energising break.

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