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## Employment Affairs Information Service

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21 August 2015

Circular No: EA 156

Dear Member,

### **CALCULATING HOLIDAY PAY GUIDANCE FOR EMPLOYERS**

You will be aware that in addition to current legislation, a number of recent court judgements, in particular the case of *Bear Scotland v Fulton*, should be considered when calculating holiday pay. This may require the updating of the process you follow when calculating your employees' holiday pay.

#### **Key points**

- **Guaranteed** (contractual) and normal **non-guaranteed** overtime should be considered when calculating an employee's statutory holiday pay entitlement but there is currently no definitive case law that suggests **voluntary** overtime needs to be taken into account.
- **Commission** may need to be factored into statutory holiday pay calculations.
- **Work-related travel** should be factored into statutory holiday pay calculations.
- An employee's entitlement to holiday pay will continue to accrue during **sick leave**.
- There are different rules for calculating holiday pay depending on the **working patterns** involved.
- Employees must take their statutory paid annual leave allowance and can only be **paid in lieu** for this when their employment ends.

These key points are now addressed in more detail.

#### **Guaranteed overtime**

This is where the employer is obliged to offer and pay for agreed overtime. Guaranteed overtime must be included within the holiday pay calculation.

#### **Non-guaranteed overtime**

This is where there is no obligation by the employer to offer overtime but, if it is offered, the employee cannot unreasonably refuse to work overtime. Non-guaranteed overtime should be included within the holiday pay calculation.

The judgement in the case of Bear Scotland v Fulton has clarified that:-

- Employees should have their normal non-guaranteed overtime taken into account when being paid holiday pay.
- An employee making a claim must have had an underpayment for holiday pay that has taken place within three months of lodging an employment tribunal claim.
- If a claim involves a series of underpayments, any claims for earlier underpayments will fail if there has been a break of more than three months between those underpayments.
- Only the 20 days leave entitlement under the original Working Time Directive applies to this judgement.

This judgement may impact where non-guaranteed overtime is carried out by employees on a regular or consistent basis.

### **Voluntary overtime**

This is where there is no contractual obligation on either side to offer or accept overtime. At the moment there is no requirement for employers to include voluntary overtime when calculating holiday pay.

### **Commission**

In May 2014 the European Court of Justice (ECJ) heard the case of Lock v British Gas Trading Ltd and ruled that commission normally earned by an employee should be factored into holiday pay calculations. British Gas has lodged an appeal against this ruling and the Employment Appeal Tribunal (EAT) is expected to hear the case towards the end of 2015.

### **Travel**

Payments that are made for time spent travelling to a job as part of an employee's normal pay need to be included when calculating holiday pay. This means that any SJIB Travel Time payments should be included.

The SJIB Travel Allowance does not form part of an employee's normal pay and does not need to be included when calculating holiday pay.

### **Holiday pay and sickness**

When an employee takes paid or unpaid sick leave, holidays continue to accrue.

If an employee is unable to take holidays in the current leave year because of long term sickness, the employee should be allowed to carry over a maximum of 20 days until it is possible to take them. Alternatively, during a specified period of sickness absence, an employee may choose to be paid for leave at the appropriate rate.

### **Calculating holiday pay for different working patterns**

No matter the working pattern, holiday pay should still be based on a "week's normal remuneration". This usually means an employee's weekly wage but may also include allowances or similar payments.

- For employees with fixed working hours (non variable) – holiday pay would be a week’s normal remuneration.
- For employees with no normal working hours – holiday pay would still be a week’s normal remuneration but usually calculated by working out the average pay received over the previous 12 weeks in which they were paid. (See example below of how to work out an average week’s holiday pay)
- For employees on shift working – a week’s holiday pay is usually calculated by working out the average number of hours worked in the previous 12 weeks at their average hourly rate.

Average weekly earnings =  $\frac{\text{Normal earnings*over the last 12 weeks worked}}{\text{Number of hours worked in the last 12 week period}} \times 37.5^{**}$

\* Normal earnings should include guaranteed, non-guaranteed overtime and travel time (*and commission where appropriate*).

\*\* 37.5 are the currently determined hours defined in the SJIB National Working Rules. This figure should be changed if the contractual hours are different.

### **Payment in lieu of holidays**

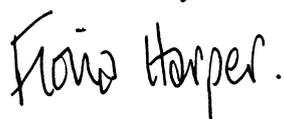
When employment is terminated, all outstanding holidays that have been accrued and not taken must be paid in lieu.

### **Further information**

SELECT will continue to monitor the situation, in particular when further guidance becomes available through the courts or as a result of Government reviews. Meanwhile any enquiries should be directed to [julie.thompson@select.org.uk](mailto:julie.thompson@select.org.uk), [michelle.courtney@sjib.org.uk](mailto:michelle.courtney@sjib.org.uk) and/or [lynne.macdonald@sjib.org.uk](mailto:lynne.macdonald@sjib.org.uk)

Members may also wish to seek legal advice depending on their individual circumstances.

Yours faithfully,



Fiona Harper  
Head of Employment Affairs