

10 April 2015

3HR Legal Weekly

Employment Law

How to calculate holiday pay the final answer - for the time being!

The issue of how to calculate holiday pay has proven to be one of the most complex areas of employment law we've seen recently. We have addressed this issue in our previous newsletters. To recap, the European Court of justice (ECJ) has ruled that workers on holiday must receive "normal remuneration", including sales commission payments and compulsory non-guaranteed overtime. Previously, only 'guaranteed and compulsory overtime' was included, resulting in a lower week's pay and therefore lower holiday pay for many workers. The ECJ has confirmed that 'normal remuneration' includes payment for work that is 'intrinsically linked to the performance of tasks which are required to be carried out under the contract of employment'. Consequently, commission payments are also held to be included; otherwise, those on holiday would receive less pay than they would have done had they not taken that holiday and instead used the time to generate commission.

One question that had not been answered was how precisely employers should calculate normal remuneration. This has now, for the time being, been answered in *Lock v British Gas Trading Ltd*. The Employment Tribunal has decided that employers are to apply average commission and overtime over a 12-week reference period for the purpose of holiday pay. This decision in fact poses a problem as most employers operate a monthly payroll (and three months consists of 13 weeks). It seems that applying a three-month or 13-week period is the closest to the requirement which can be commercially achieved. In addition, it remains to be seen how other forms of incentives or voluntary overtime are to be treated.

If you would like to discuss any particular practical issues, please contact me or your usual 3HR contact.

Thomas Miles
Solicitor
E: thomas.miles@3hrlegal.com



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Working Parents

Q: How can we support our employees with young families?

A: The 2015 Modern Families Index (a study of more than 1,000 working parents, published by childcare provider Bright Horizons and charity Working Families), has found that more than a third of working fathers have pretended to be unwell and taken a day of sick leave, in order to care for their children.

The survey also found that half of working fathers were nervous about asking their employer to reduce their hours. Having a clear policy in place to handle flexible working requests will show that as an employer you will take these concerns seriously. You should be aware that you can only refuse these requests for certain business reasons set out in the legislation. Being seen as an employer who will consider flexible working is likely to help recruitment and retention efforts.

The research also found that of those parents paying for childcare, 18 per cent found that the costs outweighed the benefits of working.

Another way in which employers can attract and retain employees is by offering an employer supported childcare scheme, under which parents can make savings of up to around £1000 per year. Up to £243 worth of tax-free childcare vouchers per month can be bought through salary sacrifice arrangements. Companies also benefit from a reduced bill for employer NI contributions.

The current government plans to change this system and offer a scheme not dependent upon employer participation from autumn of this year. All working parents will be able to claim 20 per cent of their childcare costs up to a maximum of £2,000 per child each year. Employees already enrolled in an employer-supported scheme will be able to continue to benefit from it for as long as their employer runs it, but new members will need to join any new government scheme.

Hanna Beg
Solicitor and Senior HR Consultant
hanna.beg@3hrlegal.com



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The registered office is New Broad Street House, 35 New Broad Street, London EC2M 1NH, registered in England and Wales no: 08198795
Tel: 0207 194 8140 Web: www.3hrlegal.com