



## HR Broadcast – Update on “What is working time?”

A number of previous HR Broadcasts have dealt with recent complications about what should be included in holiday pay. For years our understanding was that holiday pay meant basic pay not including any bonuses or overtime or commission.

In the last few months decisions made by the European Court have changed our perception of what needs to be included in holiday pay in particular. Overtime should now be included although, strictly speaking, recent changes only apply to contractual overtime. This means that the employee is contractually required to work overtime when requested to do so by the employer.

Many employers have taken this as an indication that they should pay averaged overtime whether or not there is a contractual obligation on the part of the employee. In fact, an Industrial Tribunal in Northern Ireland has already concluded that even voluntary overtime should be included in holiday pay and while that decision is not binding on English courts and tribunals we do seem to be moving that way.

Employers were understandably very concerned about claims for historic underpaid holiday pay but the government stepped in to limit any claim to the last 2 years. We are not aware of any significant issues in respect of claims for past underpayments.

Subsequent cases have considered bonuses and commission. The position is not absolutely

resolved because at least one key case is the subject of an appeal. However, the best advice at present is that if any additional payment is intrinsically related to the regular salary which the employee receives then that also should be averaged and included in holiday pay.

So, commission which might directly related to sales achieved would be a good example of what should be included in holiday pay as the employee cannot generate commission while on holiday. However, an annual bonus might be treated differently as that might, for example, related to the performance of the business as a whole.

Very recently the main adviser to the European Court of Justice has dealt with the question of just what is working time in circumstances where employees travel out to customers from home. This will be a very common situation for employers employing, for example, installation and servicing engineers frequently using company vehicles.

In this particular case, which derived from Spain, the first and last journeys of the employees were not treated as working time but as part of the technician's daily rest periods. Their working time was calculated from the time of arrival at their first customer through to the time of departure from their last customer but not the travelling time.

The advice given was that where travel was necessary for workers to provide technical services as designated by the employer then it



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was an integral part of the job. In practice there was no difference between the first and last journeys and journeys between customers during the working day.

The best guidance we have at present is that the more that an employer determines the working pattern of the employee, for example by providing a list of customers to be visited and the times, the more likely it is that the first and last travelling time will be regarded as working time.

And very recently a similar sort of case has arisen in the context of time off for trade union representatives. The particular employer provided time off for union activities, as they were obliged to do, but treated that time off as rest time. An Employment Appeal Tribunal has concluded that this is incorrect, that the trade union activities were intrinsically part of the job and that therefore the employees should be paid for that time and, in addition, be entitled to necessary rest breaks.

As stated above some of these cases are the subject of appeals and at present we can only provide best advice on a case-by-case situation. Most situations, fortunately, will be very straightforward but there is no doubt that there will be the occasional complicated set of circumstances to be considered.

We will keep you updated on any changes to the law or interpretation.