HOLIDAY PAY

The recent cases of Lock v British Gas Trading Ltd (a UNISON case) and Wood v Hertel concern the payment of commission or overtime in respect of periods of annual leave. The rulings may have far-reaching implications for many UNISON members, who from now on should be paid during their holidays for regular additional work carried out while at work. They may also have claims for some under-payments while they have been on leave.

In addition to the rulings above in March 2016 UNISON announced victory in a claim for ‘overruns’ to count in the calculation of holiday pay. South Central Ambulance Service conceded that regular overruns should be paid when staff go on holiday (see page 4).

Since this guidance was first published in December 2014 the Court of Appeal in Northern Ireland has ruled in the case Patterson v. Castlereagh Borough Council [2015] that voluntary overtime (work which the employer might request but the employee was not contractually obliged to work) should be included in holiday pay calculations. Although this ruling only applies in Northern Ireland it is highly likely to be persuasive in non-NI jurisdictions (see case law update on page 7).

This guidance is for branches and organising staff, to help explain the situation. It gives advice about how to approach claims, what to look out for, negotiating to ensure these judgments are enacted in members’ holiday pay, getting the most for members, and possible complications.

Introduction

Recent legal judgments have changed the way in which many workers should be paid while they are on holiday.

The European Court has ruled that workers ought not to suffer financially when they take annual leave: ‘Where such a worker is paid commission calculated on the basis of the sales that they make, that commission must also be included in the calculation of the holiday pay’.
A further judgment was made by the Employment Appeal Tribunal (EAT) in February 2016. This hearing reaffirmed the decision taken by the Court of Justice of the European Union. The EAT found that that the domestic legislation could be interpreted in a way which conforms to the requirements of Article 7 of the working time directive. It upheld the similar decision of *Bear Scotland & Others v Fulton & Others* [2015] ICR 221 that was recently determined.

Mr Lock was employed by British Gas as a salesman and was represented by UNISON. His remuneration package included a basic salary plus commission that was based on the number and type of contracts he persuaded customers to enter into. However, when he took periods of annual leave he would be paid just his basic pay, with no payment for commission. This was significantly less than his normal pay and was a disincentive to take annual leave. Mr Lock first challenged this injustice at an employment tribunal in April 2012.

Mr Lock is a UNISON member and UNISON is supporting his claim along with over 700 others that are currently lodged with the employment tribunal pending the outcome of Mr Lock’s claim. The case was initially started in an employment tribunal and then referred to the Court of Justice of the European Union that ruled in favour of Mr Lock. The case then was referred back to the employment tribunal, which again ruled in favour of Mr Lock.

In November 2014, the Employment Appeal Tribunal (EAT) delivered its judgment on *Wood v Hertel*, which also concerned holiday pay. The judgment states that pay for non-guaranteed overtime, which employees are required to work, and which is regularly required, should be included in holiday pay. This only relates to ‘Regulation 13 leave’, in other words the 20 days’ leave guaranteed by European law. It does not apply to the eight additional days’ leave that UK law gives workers (‘Regulation 13A’) or to any leave on top of that, such as contractual annual leave agreed with the employer.

This may have implications for many members’ pay. It potentially affects any payments for time or activities at work that are not paid for during periods of annual leave – for example bonuses, overtime payments, shift allowance, sleep-in payments, and special education needs allowances. Both full-time and part-time workers could be affected.

In *Patterson v Castlereagh Borough Council*, the Court of Appeal in Northern Ireland found that voluntary overtime (work which the employer might request but the employee was not contractually obliged to work) should be included in holiday pay calculations.

The Northern Ireland Court of Appeal said that the rationale behind the *Working Time Directive 2003/88/EC* is “that a worker should not have any disincentive placed in his path that may lead to him not taking his holidays – if he comes to expect a certain level of pay as normal then he should receive that during his holiday period”.

The case is only binding in relation to Northern Ireland. However, it is highly likely to be persuasive in other non-NI jurisdictions. It will be useful in arguments with employers who are not currently taking voluntary overtime into account when calculating members’ holiday pay.
This is similar to the decision in *Bear Scotland Ltd v Fulton* (also known as *Wood v Hertel*) where the Employment Appeal Tribunal of England & Wales found that remuneration will amount to normal pay where there is an intrinsic or direct link between the remuneration and the tasks which a worker is required to carry out.

**Employer payments and time limits**

Some employers are now attempting to limit their liability in respect of claims by including sums for these additional activities in workers' pay, thereby triggering limitation with the intention that claims go out of time.

The idea is that once employers start to pay workers during leave for these additional activities, the recurrence of ongoing under-payments is deemed to be broken, and so workers would have three months less one day to submit a claim to an Employment Tribunal for under-payment. To do this, the employer simply needs to make a payment, and put a note on the worker’s payslip saying that this payment has been made so as to reimburse the worker, during holidays, for extra work done. The precise amount does not need to be negotiated with the worker.

Therefore, if your members’ pay now includes an element of additional pay, the time for bringing a claim will have started from the date on which they were last underpaid in respect of annual leave immediately before the first time they were paid the additional sums. The position may be more complicated if workers have already taken four weeks’ leave within their leave year, but this is the basic position (see below for more on this). If more than three months elapse from the last time an individual was underpaid (i.e. received holiday pay that did not include additional sums) then that individual may be unable to pursue a claim.

However, the *Wood v Hertel* EAT judgment placed further limits on what back pay might be payable. The EAT said that a series of deductions will be broken if there is a period of more than three months between the deductions in respect of Reg 13 leave, i.e. the basic four weeks’ leave. In other words: if a member took a period of leave, then had a gap of three months or more before their next leave, only that last period of leave would potentially qualify for back pay.

Claims can only be submitted in respect of Reg 13 leave - i.e. the first 20 days of leave in the leave year. And we are to assume that this leave is taken before any additional leave. So, claims can only be submitted in respect of underpayment in relation to the member’s first 20 days in their leave year. Limitation will therefore depend on how and when an individual takes leave and what the dates of the individual leave year fall within, e.g. January-December or April-March. Therefore claims for holiday pay must be submitted within three months less one day of the date on which the underpayment was made in respect of the first 20 days’ leave. A series of deductions will be broken if there are more than three months between underpayments following Reg 13 leave.

**Identifying individual cases**

You will need to act quickly to identify those of your members who:

- a) Receive extra payments that are not paid in respect of holiday periods; and
- b) Have begun to see additional sums included in their pay/ payslips.
UNISON Victory in a claim for ‘overruns’ with South Central Ambulance Service (March 2016)

UNISON has been successful in a claim for ‘overruns’ to count in the calculation of holiday pay. Overruns happen when ambulance staff attend a patient just before the end of their shift. They are not voluntary as they cannot simply walk away when their shift finishes. South Central Ambulance Service (SCAS) conceded that regular overruns should be paid when staff go on holiday. While mechanics have yet to be worked out, SCAS has agreed to backdate the payments to 1 April 2015 when UNISON submitted the claim.

Ambulance members should speak directly with their Branch if they are in receipt of regular payments for overruns.

If members think they have a case, they will need to complete the specific Holiday Pay Case Form which has been produced for dealing with these claims. This form is available on the UNISON website at: www.unison.org.uk/catalogue/22914 (PDF version) and www.unison.org.uk/document/4195 (Word version).

Once received in the region, please input referrals onto the CASE system and send to Thompsons with supporting documentation to ensure that nothing is missed. It is vital that we act swiftly. On receipt of a Holiday Pay Case Form, if on the face of it, there is a potential claim for holiday pay with reasonable prospects of success but it is not clear whether an underpayment in respect of Reg 13 leave has been made in the last three months (and the Holiday Pay Case Form should assist with this), then early conciliation should be triggered as soon as the Case Form is received to ensure that potential claims do not go out of time. As is the case for non holiday pay claims, early conciliation may be used to allow for the claim to be assessed and to resolve the case without the need for a claim to be submitted.

Submission and re-submission of claims

If a claim with reasonable prospects of success cannot be resolved during early conciliation and is submitted to the Tribunal, then the person with conduct of the claim would be responsible for resubmitting the claims. In most cases this will be Thompsons. Claims must be submitted within three months less one day of the date on which the underpayment was made that corresponds to any period of Reg 13 leave. Once a claim has been submitted, it must be re-submitted every three months to make sure that there is not a break of more than three months between the deductions.

Some important factors in identifying cases

It is very important that we manage members’ expectations. While there may be a large number of members who may have a claim, the EAT judgment places severe constraints on how far back these claims can go. In addition, there are a number of complicated issues which may impact on each member’s claim in different ways.

Evidencing claims

It is important that members provide as much evidence as possible (for example payslips) regarding what leave they have taken, and if possible, what work they have done which has given rise to additional payments. Employers should have these records, but it will be helpful if members have this information themselves.
Regularity of payments

The more ‘regular’ a payment is, the more likely it is that a member will be successful in claiming that they should be remunerated for that work, even when they are on leave. The important thing is that the payment in question (payment for overtime, commission, etc.) is a regular one; the precise amount of the payment, e.g. the precise amount of overtime worked, does not necessarily need to be the same every time.

Negotiating advice for regions and branches

Settlements

It is vital that regions and branches enter into talks with employers, so that you can reach early agreement with employers in relation to the future payment of holiday pay, and potentially agreement on back pay as well. Where there are collective national agreements in place, for example Agenda for Change, branches should be careful not to undermine these by local agreements - but the way in which holiday pay for additional hours worked is calculated may be clarified locally. The complicated legal position means that resolving these matters without litigation is the optimum outcome.

Negotiating with employers on future holiday pay

The main implication of the Lock and Wood judgments is that there is now a clear legal position with respect to members’ holiday pay in the future. Holiday pay must include payment for regular additional work usually undertaken, like overtime and commission.

Check your local agreements

In all cases, it is vital that you check whatever local agreement that is in place governing pay and conditions. Be clear what it says about holiday pay, in particular how workers should be paid during leave, what pay should include, and how payment for additional work that is normally done should be calculated (for example an average of the work done over the last three months, as in Agenda for Change in the NHS, or over some other period). If what is provided for is less than what the recent legal judgments provide for, then members may have a claim for back pay, and the agreement with the employer regarding holiday pay will need re-negotiating to reflect the improvements in the law.

Ensure terms and conditions relating to holiday pay are changed

Approach employers and ensure that collective agreements, staff handbooks, terms and conditions and members’ contracts are updated as appropriate, so that holiday pay explicitly includes payment to reflect what additional work members would have done had they been at work. In employers where UNISON is recognised, you can do this through the normal joint negotiation routes. If we’re not recognised, you should nonetheless speak to employers, as this new rule regarding holiday pay is a statutory requirement. The NHS Staff Council will review pay whilst on annual leave for NHS staff on Agenda for Change terms and conditions shortly.

Get it extended to all leave, not just the first 20 days
Push hard for this new approach to holiday pay to apply to all leave. The Lock and Wood judgments apply only to the 20 days of leave guaranteed by European law, but we should argue for it to cover all leave: the 20 days guaranteed by European law, the eight further days guaranteed by UK law, and any additional leave granted by individual employers. You should argue that all leave is leave and should be treated the same; and also that it will be enormously difficult for employers to set up administrative systems which pay different amounts for different types of leave (this will be particularly true in employers where everyone has different leave years – for example on the anniversary of joining).

Consider all possible additional payments – not just overtime
For each employer, consider carefully all of the additional payments that could and should be covered, and hence included on holiday pay. The Lock judgment is about commission payments, and the Wood judgment is about overtime, but various other types of payment are likely to be included. Branches and organisers should negotiate strongly for all of these payments to be specifically referred to as included in holiday pay, in the revised terms and conditions. But you should also make sure that there is some wording like ‘...and any other types of additional payment which may arise’ so that everything is covered.

Examples of additional work that should be covered include bonuses, commission, overtime payments, shift allowance, sleep-in payments, and special education needs allowances.

Check that current agreements are strong enough
Where an employer already pays members for regular additional work while they're on holiday, you should check that the agreement or provision in place is strong enough, or whether it could be improved. For example it may already cover overtime, but not sleep-ins (in care work) that are regularly worked.

Arrange workplace meetings – get members' input
You may wish to arrange workplace meetings, so you can ask members what sorts of payments for additional work they receive, so you can include them in your negotiations.

Be clear about what constitutes 'regular' additional work
The employer may seek to argue that some payments are not ‘regular’ ones – or they may wish to place a strict interpretation on what constitutes regular. In UNISON’s view this ‘regularity’ should be broadly defined – for example a piece of additional work should not have to be done every month, in order for it to be represented in the member’s holiday pay. And it does not matter if the amount of the payment is different each time – it could still count as regular. So, negotiate with the employer about how this regularity will be defined.

Negotiate around how the amount of holiday pay should be calculated
Consider what period of time should be used in order to calculate holiday pay for additional hours worked. Some jobs have the potential for more overtime during certain parts of the year. For example, if a member gets more overtime during the summer, they would want that overtime to influence their holiday pay for as long as possible. If payment for additional hours
is calculated only over the last three months, then by Christmas, overtime worked during the summer won’t influence holiday pay. So in that situation, a 12-month calculating period would work better. But it is important you speak to members to find out what would work best for them.

**Outsourced members – what happened after transfer?**

Where members have been outsourced from a public sector employer which already pays members for additional work while on holiday, it is vital that you check what has happened to the terms and conditions of members following TUPE transfer. Check whether the agreement to pay them for additional work while on holiday transferred; check whether the employer kept it or varied contracts to remove it; and if necessary, negotiate the necessary improvements. The employer may claim that this is an extra cost not covered by their contract with the public sector commissioning body. If so, you should make it clear that this new holiday pay requirement is not optional. (But see the ‘Community’ section below for further advice on using this issue to initiate talks on a broader range of workplace issues.) Check whether any outsourced members have had their pay and conditions changed recently by their employer. If they have claims for back pay, these could relate to older (higher) rates of pay.

**Pension contributions**

Negotiators should check whether the additional payments are pensionable, and if so, ensure that member and employer contributions are being deducted when these payments are made during periods of holiday.

### Case Law Update - Voluntary overtime should be included in holiday pay (Northern Ireland Only)

| Case name: Patterson v Castlereagh Borough Council [2015] NICA 47 |
|--------------|-------------------------------------------------------------|
| **Court:** Court of Appeal                                    |
| **Date:** 17 June 2015                                        |
| **Link to decision:** [www.courtsni.gov.uk/en-GB/Judicial%20Decisions/PublishedByYear/Documents/2015/[2015]%20NICA%2047/j_j_GIL9695Final.htm](http://www.courtsni.gov.uk/en-GB/Judicial%20Decisions/PublishedByYear/Documents/2015/[2015]%20NICA%2047/j_j_GIL9695Final.htm) |
| **Where does this apply:** Northern Ireland                   |

**Case analysis**

The Court of Appeal in Northern Ireland has ruled that voluntary overtime (work which the employer might request but the employee was not contractually obliged to work) should be included in holiday pay calculations.

The Industrial Tribunal rejected a claim that Mr Patterson’s voluntary overtime in his full time employment should be included in his annual leave calculation. This was on the basis that voluntary overtime was not non-guaranteed overtime, which the Employment Appeal Tribunal in Bear Scotland & Others v Fulton & Others held should be included in the annual leave calculation.

The Court of Appeal said that the rationale behind the Working Time Directive 2003/88/EC is “that a worker should not have any disincentive placed in his path that may lead to him not taking his holidays – if he comes to expect a certain level of pay as normal then he should receive that during his holiday period”. The court did note that “from a purely practical viewpoint this may smack more of theory than reality in most instances”.
The court agreed with a concession made by Castlereagh Borough Council that “in principle there is no reason why voluntary overtime should not be included as a part of a determination of entitlement to paid annual leave”. However, this will be a question of fact on “whether or not... voluntary overtime was normally carried out by the worker and carried with it the appropriately permanent feature of the remuneration to trigger its inclusion in the calculation”.

The case was remitted to the Tribunal to hear further evidence of the overtime actually worked within a suitable reference period and determine the case based on the court’s decision.

**Case implications**
The case is only binding on Northern Ireland. However, it is highly likely to be persuasive in non-NI jurisdictions. It will be useful in arguments with employers who are not currently taking voluntary overtime into account when calculating members’ holiday pay.

**Service Group specific advice**
The Lock and Wood rulings may have different applications to members depending on the sector in which they work. This applies both to dealing with potential claims for back pay, and to negotiating to secure future holiday pay.

**Energy**
Employers within this service group are likely to have members who earn regular commission. Some energy companies employing UNISON members have already incorporated average commission payments into annual leave but this may not be consistent within specific bargaining groups. It may not also be the case that other regular payments including overtime are included. These members should be identified and potential claims brought forward.

**Community**
Many Community employers will not want to face up to this issue, as it will further push their already-stretched finances. But this may give us the opportunity to reach a collective understanding with them potentially opening the door for recruiting. So in addition to protective claims covering individuals’ rights, and negotiating to ensure that members are paid properly while on holiday in the future, it may be possible to use this as an opportunity to approach not-for-profit employers to engage in dialogue about a broader range of issues.

If you are taking cases for members employed by national employers, check with your Regional Head of Community to see if we nationally negotiate with them, and if so ensure that the lead officer is notified of the claim.

**Health**
Staff employed on Agenda for Change terms and conditions in the NHS already benefit from section 13.9 of the NHS Agenda for Change agreement which states that:

“Pay during annual leave will include regularly paid supplements, including any recruitment and retention premia, payments for work outside normal hours and high cost area
supplements. Pay is calculated on the basis of what the individual would have received had he/she been at work. This would be based on the previous three months at work or any other reference period that may be locally agreed.”

This suggests that in the NHS, workers already receive the holiday pay that the Lock ruling suggests that they are entitled to. However, the system used to calculate and pay staff, Electronic Staff Records (ESR), has no automatic system in place to ensure the correct payment of unsocial hours during annual leave. Some NHS Trusts use an average payment, sometimes seen on a payslip as WTD payment*, which may not accurately reflect the normal levels of unsocial hours. This is the case for staff who work variable shift patterns or a majority of night work as part of their regular work, for example, a night telephonist who works mostly nights or weekends might be receiving 40% unsocial hours payments but on leave this drops to a lower average percentage payment.

The NHS Staff Council will review pay whilst on annual leave for NHS staff on Agenda for Change terms and conditions shortly.

Some outsourced workers in the NHS may also be affected by Lock, as they may not be covered by Agenda for Change. If any members have been TUPE transferred out of the NHS, it is vital that you check whether any of their Agenda for Change terms and conditions have been varied since the transfer. If section 13.9 no longer applies, then Lock could be an important ruling for them.

NHS staff who undertake regular overtime or work on bank contracts to undertake additional hours may also be able to claim these as regular payments and should be encouraged to complete a case form.

“Working Time Directive (WTD) payments are determined locally and may vary from Trust to Trust.

Local Government

To give another example, in Local Government, the National Joint Council (NJC) Green Book, section 7.1 states that “Employees shall, irrespective of length of service, be entitled to a holiday with a normal day’s pay for each of the statutory, general and public holidays as they occur,” and section 7.11 says “Normal pay includes all earnings that would be paid during a period of normal working, but excluding any payments not made on a regular basis.” So it is hoped that most members will already be paid during holiday for extra work undertaken – though it may depend on how ‘regular’ the overtime or other payment is. It is vital that branches check any local agreement they have in place regarding holiday pay, and also check that it is being followed by the employer.

Education - term time only workers

For term time only workers whose pay is divided into twelve equal monthly instalments, it may not be easy to identify if they are getting less pay when they are on leave. If a member receives any additional allowances and thinks that they may be being underpaid during periods of annual leave, they should request a breakdown from their employer on the rate of pay they receive while on leave in the first instance.

Organising and recruiting
The recent holiday pay judgments give UNISON activists and organisers an organising and recruitment opportunity. In fighting the Lock case, UNISON has ensured that people who rely on pay enhancements, which they receive on a regular basis, can take blocks of annual leave without a reduction in pay for that month. Previously members had to spread leave out to avoid a significant drop in pay in any one month. This is a victory that will make a difference to members’ lives and we need to capitalise on it when organising.

UNISON’s Strategic Organising Unit is producing more detailed organising advice about how to build UNISON membership and activism on the back of the holiday pay victory. This will be available soon.

Appendix 1: letter to member

Dear Member

Holiday pay – additional payments

This is important – please read if you work on commission, work overtime, receive a bonus, shift premium, special educational needs allowance, or any other regular payment that is not paid for holiday periods.

The Employment Appeal Tribunal has handed down its decision in British Gas Trading Limited v Mr Z J Lock & Secretary of State for Business, Innovation and Skills in a UNISON case that workers ought not to suffer financially when they take annual leave. This means that if you receive any of the above payments or any other additional payments when you are at work (other than expenses) but do not receive them for periods when you are on holiday, you may be able to claim back pay in respect of non-payment of these additional sums.

Please contact your Branch immediately if the above applies to you, complete a case form, and begin collecting evidence to back up a claim. It is also important that you contact your Branch and complete a case form if your employer has recently started to include any additional payments in your pay that are referred to in your payslip or if you have just noticed that your pay has increased without explanation.

You must act quickly. Most tribunal claims must be submitted within three months less one day of the date of the act complained of. In these circumstances, the act complained of is the failure to pay the additional sums for annual leave. Therefore, if the payments are now being made, time started to run from the date on which you were most recently paid holiday pay that did not include any additional sums.
Upon receipt of your case form, your claim will be considered and you will be contacted and advised as to whether your claim has reasonable prospects of success.