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HOLIDAY PAY - VOLUNTARY OVERTIME CAN BE INCLUDED

We have looked at holiday pay several times over recent months, following the decisions of the ECJ, EAT and Employment Tribunal in the *Bear Scotland v Fulton and Lock v British Gas* cases. To recap, those cases have established that holiday pay needs to take into account commission payments and compulsory non-guaranteed overtime payments, as these are intrinsically linked to the performance of tasks which the employee is required to carry out under his or her contract.

The Northern Ireland Court of Appeal in *Patterson v Castlereagh Borough Council* has now ruled that there is no reason in principle to exclude voluntary overtime from holiday pay calculations, but that it will be a question of fact in each case whether the 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*".

Interestingly, both sides in the litigation agreed that voluntary overtime ought to be taken into account so the point of principle was not fully argued. That fact, and the rule that Northern Irish cases are not formally binding on the English courts, means there may yet be scope for further debate on overtime. Before that, however, will come the appeal to the EAT by British Gas against the decision of the Leicester Employment Tribunal that the UK Working Time Regulations could be read purposively to give effect to the ECJ's decision that the EU Working Time Directive requires commission payments to be included in holiday pay (see our eBulletin on that decision [here](#)). The courts at all levels have so far appeared keen to include a wide range of payments for holiday pay purposes, and the prospects of British Gas bucking this trend do not look good.

The *Patterson* decision comes just as new Regulations come into effect limiting the scope of compensation for unpaid holiday. Where a claim for unpaid wages (which includes unpaid or miscalculated holiday pay) is brought on or after 1 July 2015, the Tribunal can now only look back to award two years' worth of underpayments. This should substantially limit most companies' historic exposure. However, where a business has large volumes of overtime and / or sales teams on commission-based remuneration arrangements, the potential for significant claims going forward remains if the holiday pay issue is not addressed.

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