

# Flexible working and overtime: the new holiday rule

By Lynne Marr and Lorna Beveridge, employment department of Brodies LLP

I've read a number of articles in the media recently about holiday pay and how employers may have been paying this incorrectly. We have a number of workers who work on-call or do a lot of overtime at particular times of the year. How might this affect us?

Historically, many employers have calculated holiday pay using basic salary. In November 2014, the Employment Appeal Tribunal (EAT) held that in many cases this approach will be incorrect, leaving employers across the UK open to tribunal claims from workers for backdated holiday pay and higher amounts of holiday pay in the future.

The EAT confirmed that holiday pay must be calculated using a worker's "normal pay" – that is, pay which is normally received when at work. This includes payments such as guaranteed and non-guaranteed regular overtime, and certain allowances, for example shift allowances, or on-call payments. It may even include voluntary overtime, which is the subject of considerable debate. At the moment this rule only requires an employer to include these additional elements of pay when calculating holiday pay for the first four weeks of a worker's annual leave entitlement. This is their annual entitlement under European law. The remaining 1.6 additional weeks provided to workers under the UK Working Time Regulations can continue to be calculated using basic pay only.

Before the EAT ruling there was widespread concern among employers that claims for back pay of underpaid holiday pay could go as far back as 1998. Ultimately, the EAT held that workers must bring claims within three months of the last

underpayment in a series of underpaid holidays. Therefore, claims will be limited depending on how a worker's holidays have been spaced out. Also, where claims are brought on or after 1 July 2015, new regulations mean that workers will be limited to claiming underpayments from the previous two years only. The EAT decision has not been appealed but there are other cases going through the UK courts dealing with similar issues, causing further uncertainty for employers and workers alike. The law is likely to develop over the next few years as more decisions come out of the courts but what should employers be thinking about now?

Firstly – are we affected? You could be affected if any of your workers receive:

- commission;
- guaranteed overtime;
- regular non-guaranteed overtime;
- bonus/incentive payments;
- shift allowances; or
- any other premiums like on-call payments.

Workers receiving any of these payments may have a claim.

If you think you may be affected what can you do?

- Assess your potential liability for back pay. How many workers are affected? What sort of payments do they receive? How far back might their claims go? Are your workers union members and therefore more likely to complain to an employment tribunal?
- Consider whether you want to change your pay system to minimise liability in the future.
- Keep an eye on legal updates – the position may well change as the cases progress through the courts and there are still some unanswered questions. The government has also set up a task force to look at the issue, so watch this space.
- Brief the members of your HR team so that they know how to spot claims or grievances coming in and have a plan for dealing with these.

If you need help speak to your advisers now – the issues are complex.

## CONFOR | LEGAL ADVICE HELPLINE

Members can get 30 minutes of free legal advice from our associated specialist solicitors. This is meant as a first guidance and does not constitute a full client-solicitor relationship.

For **England and Wales** please contact:

Atkinson Ritson Solicitors,  
www.atkinsonritson.co.uk Tel: 01228 525221  
E: info@atkinsonritson.co.uk

For **Scotland** please contact: Brodies Solicitors,  
www.brodies.com Tel: 0131 656 3795

E: Confor@brodies.com

Please mention 'Confor helpline' when calling, describe your enquiry and a qualified legal advisor will call or email you back.

If you have any queries relating to holiday pay and how this might affect you, please do not hesitate to get in touch by calling the Confor Legal Advice Helpline. There is no 'one size fits all' approach and we are happy to talk through your particular circumstances. lynne.marr@brodies.com

If you have a forestry-related legal enquiry, and would like to get an expert reply from Brodies LLP, please contact the editor. This covers but is not limited to Scotland-specific enquiries.



## Edward Maynard Liddon (1928 – 2015)

Born in Paddington London 13 June 1928. He grew up at Blundells in West Monkton. His school years were interrupted by WW2 and he was evacuated to Lee Abbey from Harrow. He was turned down for Military Service owing to his eyesight, and so turned to Forestry. He trained as a forester at Huntley Manor in Gloucestershire. It was in Gloucester that he met Anne Gibbs, his future wife.

His next job was for Woodland Management Association (WMA) based in Berkshire. He married Anne at Standish Church on 15 September 1951 and they lived outside Newbury for several years. Edward returned to Somerset with Anne, and lived in Durston where, in 1953, he set up Durston (Somerset) Woodlands, a forestry management and contracting business. The firm flourished and broadened out into Arboriculture and landscaping. Together with his wife they set up a small retail tree and shrub nursery.

When Dutch elm disease struck, his arboriculture teams became heavily involved trying to stem the spread of the disease, and were in the forefront of stem injection, even to the extent of travelling to Holland to train the Dutch in Dutch elm disease treatment.

Not happy with just running the business, Edward became involved in local council representing his local area on the Rural District Councils, and became a church warden. He was chairman of the Association of Professional Foresters in 1975 and 1976 and then set up the first of the now well-known biannual APF machinery demonstration which was held at Longleat in Wiltshire under his chairmanship.

In 1987 Edward sold the business and formed Sylvabor Consultancy which he ran as sole proprietor until his eventual retirement in 2013 at the age of 85.

During his life he was a keen supporter of country sports and hunting. At the tender age of 8 he hunted with the Taunton Vale Foxhounds. A little later his interest moved to stag hunting, following the hunt from Mrs Winbush's time as Master up to 2015. He was a keen follower and supporter of the Quantock Staghounds, being their car marshal for many years up to 1999, and helping at the point to point. Both he and Anne served time on the QSH executive, and organised many Quantock shows.

Edward passed away peacefully on Wednesday 11 February 2015.

He will be sadly missed by his wife, daughter, son and two granddaughters, as well as his many friends in forestry, hunting and the countryside of the southwest of England.