

UK Employment Appeal Tribunal Confirms That Statutory Holiday Pay Should Include Voluntary Overtime

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One of the last remaining pieces in the jigsaw of what constitutes “normal pay” for the purpose of calculating statutory holiday pay was completed by the Employment Appeal Tribunal (EAT) yesterday when it confirmed that such calculations should include voluntary overtime.

Willets and Others v. Dudley Metropolitan Borough Council is a claim for unlawful deductions from wages by five lead claimants in respect of 56 employees. The Employment Tribunal (see “[Holiday Pay in the UK – the great unanswered question](#)”) had previously found that out-of-hours standby payments, call-out allowances, the taxable elements of travel allowances (mileage payments) and regular additional voluntary overtime should be considered as part of a week’s pay for most of the lead claimants for the purpose of calculating statutory holiday pay. In its view, the payments were intrinsically linked to normal work, paid in such a manner and (for those individuals) with sufficient regularity to be considered a part of their normal remuneration.

Dudley MBC unsuccessfully appealed the decision to the EAT. The EAT rejected its suggested exclusion of payments for voluntary work which is normally undertaken as an “excessively narrow interpretation” of normal pay, which could give rise to a “fragmenting of pay into different components to minimise levels of holiday pay”. In the EAT’s view, that would result in the risk of a worker suffering a financial disadvantage that might deter him from exercising the right to take leave, contrary to the underlying objective of the Working Time Directive. The EAT noted that whether a payment is “normal” is a question of fact and degree. It concluded that “a payment is normally made if paid over a sufficient period of time on a regular basis, say for one week each month or one week in every five weeks, even if it is not paid more frequently or even each week”.

The EAT also reduced the importance in the earlier case law of establishing an intrinsic link between the payment and the performance of the tasks required under the contract when deciding if a payment is part of normal pay. In the EAT’s opinion, such a criterion is “a [its emphasis] decisive criterion but not the or the only decisive criterion”.

So, where does this latest decision leave employers? The European and UK courts have already established that non-guaranteed overtime and commission payments should be included when calculating pay for the EU Working Time Directive-derived four-week minimum holiday leave. It will come as no surprise to many that a similar approach has now been confirmed in relation to voluntary overtime. But that still leaves the question of exactly how you assess normal pay – what is “sufficient regularity” for these purposes? With respect to the EAT, being told that this is a question of “fact and degree” is hardly helpful when you are inputting the payroll.

When faced with a tribunal claim in relation to what constitutes “normal pay” for the purpose of calculating statutory holiday pay, we would continue to advise employers to ask their tribunal to consider the question from *Williams*: “has the employee been put at a financial disadvantage through going on the holiday for which the underpayment is claimed?” If he cannot get past that, we would say that issues of what constitutes normal pay, etc., should not arise.

It is also worth remembering that there is a two-year backstop period that applies to most unlawful deduction from wages claims, meaning that a tribunal can only look back two years from the date of the complaint when considering unlawful deductions. The EAT also confirmed its May 2017 *Bear Scotland* decision that any gap of three months or more between unpaid EU Working Time Directive holiday leave breaks the series of deductions for the purposes of a claim in the tribunal.

We have a national “Holiday Pay Taskforce” comprising some of the leading experts on this subject. If you would like to discuss any questions relating to holiday pay and what it means to your business, please speak to your usual contact or alternatively a member of our Holiday Pay Taskforce.

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