SUMMARY

2018/43 Non-guaranteed and voluntary overtime should be taken into account when calculating holiday pay (UK)

The Employment Appeal Tribunal has ruled both non-guaranteed and voluntary overtime should be included in the calculation of holiday pay.

Summary

The Employment Appeal Tribunal ('EAT') has ruled both non-guaranteed and voluntary overtime should be included in the calculation of holiday pay.

Background

In this case the claimants were a group of National Health Service ('NHS') employees, specifically employed with the East of England Ambulance Trust. The employees were from time to time required to carry out tasks at the end of their shifts, including so-called shift overruns, where tasks needed to be completed by the same employee after the end of their normal shift (the 'non-guaranteed overtime').

The employees could sometimes choose to take overtime shifts ('voluntary overtime'), which the employees were completely free to accept or reject. If they wished to work such a shift, they had to express an interest. There was no obligation or expectation on employees to take these overtime shifts if they did not express an interest.

The employees believed that non-guaranteed and voluntary overtime should be included in the calculation of their holiday pay. The Trust disagreed.

The employees made a claim directly under the Working Time Directive 2003/88/EC ('WTD')

and not under the Working Time Regulations, as the NHS is a public body of the State.

As all of the claimants were employed under contracts which incorporate the NHS Terms and Conditions of Service, containing provisions on holiday pay, they also brought a contractual claim that the Trust had made unlawful deductions to their holiday pay.

Legal background

Article 7 of the WTD sets out the period of paid annual leave to workers:

1. Member States shall take the measures necessary to ensure that every worker is entitled to paid annual leave of at least four weeks in accordance with the conditions for entitlement to, and granting of, such leave laid down by national legislation and/or practice.

2. The minimum period of paid annual leave may not be replaced by an allowance in lieu, except where the employment relationship is terminated.

The NHS Terms and Conditions of Service (also known as the 'Agenda for Change'), which contains the national agreements on pay and conditions of service covering most NHS employees, set out the holiday entitlements for NHS employees (clause 13.9):

"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."

Employment Tribunal judgment

The Employment Tribunal agreed with the Claimants, both on the contractual claim and the WTD claim, that the non-guaranteed overtime should be included in holiday pay. However, it held that the voluntary overtime should not.

The contractual claim

On the non-guaranteed overtime, the ET emphasised that it was acknowledged by the Trust's witnesses that the employees in question were not allowed to leave their job at the end of their shifts if they were still on an emergency call and that carrying out this work was a contractual duty. The ET was satisfied with this.

Regarding the voluntary overtime, the ET decided it was possible to draw a distinction between this and the non-guaranteed overtime as the voluntary overtime was *"by its very nature voluntary"* and there was no contractual obligation on the employees to take on this overtime.

The WTD claim

On the WTD claim, the Trust conceded that the non-guaranteed overtime should be included in calculating statutory holiday pay and the ET confirmed that it would have come to that conclusion.

On the voluntary overtime, the Trust did not make any concessions, and on this claim, the ET found that a distinction could be made between the voluntary overtime in this case and the supplementary payments in *Williams – v – British Airways* (C-155/10) in which the European Court found that the payments in question were *"intrinsically linked to the performance of the tasks which [the pilot] is required to carry out under his contract of employment"*. The ET was not satisfied that such an intrinsic link could be established with respect to the voluntary overtime in this case as it was purely voluntary and that there was no contractual requirement to carry it out.

Both parties appealed the ET's decision to the Employment Appeal Tribunal (EAT).

Employment Appeal Tribunal judgment

The EAT allowed the Claimant's appeal and dismissed the Trust's appeal.

The WTD claim

The issue on the appeal on this point was solely whether the voluntary overtime should be included in the calculation of holiday under the WTD.

After the ET's decision in this case, but before the EAT hearing, another EAT judgment on a WTD claim on voluntary overtime was handed down in *Dudley Metropolitan Borough Council – v – Willets* (*Dudley*) holding that voluntary overtime fell within "normal remuneration" as defined in the WTD.

The Claimants believed this case matched exactly with the facts in *Dudley*. The Trust believed that the decision in *Dudley* was wrong and that the two cases could be distinguished on the facts. The EAT disagreed with the Trust and followed the approach in *Dudley*. In *Dudley*, the EAT reviewed EU case law and UK case law and identified a number of principles of

importance when assessing what to be included in holiday, and the overarching principle derived from the analysis was that *"normal remuneration must be maintained in respect of the period of annual leave guaranteed by article 7 [WTD]"*. In addition, the EAT pointed out it would be wrong to solely rely on the "intrinsic link" test as this would undermine the overarching principle.

Applying the principles to the facts, the EAT held that the fact that the employee agreed to carry out the overtime without a contractual obligation to do so was not a convincing reason to exclude it from the calculation. The point was rather that "normal pay" is what is normally received and this was something that would need to be assessed for each individual employee. As a consequence, the voluntary overtime should be included if it was sufficiently regular and settled for the individual employee.

The contractual claim

Both the non-guaranteed overtime and the voluntary overtime were at issue under the contractual question.

The EAT ruled that both types of overtime were to be included in the calculation of holiday pay under clause 13.9 in the NHS Terms and Conditions of Service. The EAT held that the clause should be read as a whole and that the purpose of the clause was to calculate holiday pay on the basis of what the employee would in fact have been paid had s/he been at work. Further, the EAT pointed out that the clause appeared in its current form from 2009 and since the EU Court's case law on the WTD was established in 2006 it made *"obvious sense for the contract to march in step with the WTD so far as possible"*. Therefore, there was no basis for distinguishing between non-guaranteed overtime and voluntary overtime, and so both types should be included in the calculation of holiday pay under the contractual terms.

Commentary

The decision of the EAT means that the case will be sent back to the ET to assess the correct holiday pay for each employee. At the same time the Trust has lodged an application for leave to appeal the EAT decision to the Court of Appeal. This leaves the various NHS Trusts in a dilemma as to whether to calculate holiday pay now on the basis of the EAT judgment and whether to do so based on the WTD or the clause in the NHS Terms and Conditions of Service.

With regards to the calculation of holiday pay under the WTD, the EAT has removed the last bit of doubt, if there was any at all, that the EAT judgment in *Dudley* was incorrect (subject to

successful or unsuccessful appeal at the Court of Appeal). This confirmation means that overtime should generally, irrespective of the type of overtime being worked, be included in calculation of holiday under the WTD if the overtime is sufficiently regular and settled. This can prove unsatisfactory for both employers and employees as the holiday pay must be calculated each time on a case-by-case basis for the individual and hence not very easy to administrate.

On the contractual point, the EAT judgment in this case is quite significant as the NHS Terms and Conditions of Service applies to almost all staff of the NHS, except very senior managers. In England alone, there are 1.2 million staff employed by the NHS. The EAT's interpretation of clause 13.9 in the NHS Terms and Conditions of Service means that, unlike the WTD point, all overtime should be included irrespective of whether it is regular or not and, bearing the number of NHS staff in mind, this will result in a very large holiday-pay bill in financially difficult times for the NHS.

Subject: paid leave

Parties: Flowers & Others – v – East of England Ambulance Trust

Court: Employment Appeal Tribunal

Date: 16 April 2018

Case Number: UKEAT/0235/17

Internet Publication: http://www.bailii.org/uk/cases/UKEAT/2018/0235_17_1604.html

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Creator: Employment Appeal Tribunal
Verdict at: 2018-04-16
Case number: UKEAT/0235/17