Workers' voluntary overtime should be included in holiday pay, Court of Appeal rules

11 Jun 2019 By Annie Makoff-Clark

Judgment in favour of ambulance workers could have wider implications, say employment lawyers

Voluntary overtime for ambulance workers should be factored into holiday pay allocations, providing such overtime is sufficiently regular to form part of a normal remuneration package, a court has ruled.

In a new ruling (https://www.bailii.org/cgi-bin/format.cgi?doc=/ew/cases/EWCA/Civ/2019/947.html) that could set a precedent around overtime and remuneration for both public and private sector workers, the Court of Appeal found in favour of ambulance crews whose contracts cited various overtime arrangements which had not been taken into account when calculating holiday pay.

The ambulance workers' contracts included two types of overtime: mandatory and non-guaranteed overtime, when emergency shifts overran, and voluntary overtime, which is agreed in advance by staff.

An initial 2017 ruling in *Flowers and others v East of England Ambulance Service NHS Trust* upheld part of the employees' complaint and agreed that mandatory and non-guaranteed overtime should form part of their remuneration and holiday pay calculations. However, it was found that as ambulance crews were not obliged to undertake voluntary overtime, this should not form part of existing remuneration agreements.

- Are working time rules changing for UK employers? (http://www.peoplemanagement.co.uk/experts/legal/working-time-rules-changing-uk-employers)
- Government urges employers to tackle 'alarming' lack of awareness over holiday pay (http://www.peoplemanagement.co.uk/news/articles/government-urges-employers-tackle-alarming-lack-awareness-holiday-pay)
- Does voluntary overtime count towards holiday pay? (http://www.peoplemanagement.co.uk/experts/legal/voluntary-overtime-count-towards-holiday-pay)

Following an appeal, the Employment Appeal Tribunal (EAT) ruled that voluntary overtime should also be taken into account when calculating holiday pay, alongside mandatory and non-guaranteed overtime. The EAT recommended that future tribunals should assess similar cases on their own merit to ascertain whether or not voluntary overtime was paid on a regular and/or recurring basis.

In the latest appeal brought by the East of England Ambulance Service NHS Trust, the Court of Appeal upheld the EAT's ruling. The case could have implications for organisations, primarily but not exclusively in the public sector, where workers regularly undertake paid overtime.

In his judgment yesterday, Lord Justice Bean said: "The employment tribunal in the present case made no error of law in finding that the remuneration linked to overtime work that was performed on a voluntary basis could be included in normal remuneration for calculating holiday pay."

Dave Prentis, general secretary of Unison, which supported the ambulance workers in their case, described the ruling as a "victory for all health service workers" who regularly go the "extra mile".

"Before today's judgment, NHS workers who did regular overtime or often worked well beyond their shifts saw a drop in their pay whenever they took a well-deserved break. Leave calculations that weren't based on the extra shifts and hours they did week in, week out meant many were considerably out of pocket."

Unison added the ruling could benefit huge numbers of NHS staff employed under the Agenda for Change (AfC) pay system, which was introduced in

2004 to ensures that workers – with the exception of doctors, dentists and most senior managers, whose pay and benefits are dealt with under different systems – received the same pay during leave as they did when working.

Helen Beech, partner at Clarkslegal, said the ruling appeared to be in line with other cases regarding holiday pay calculations.

“Where the overtime, voluntary or otherwise, is sufficiently regular and settled, it implies that the employee relies on those payments as part of their regular remuneration, and the loss of such payments would result in a disincentive to take their annual leave which would mean the employer is in breach of the Working Time Regulations,” she said.

Beech said employers should take “extra care” when calculating holiday pay for their employees and said, currently, the only way to avoid an overtime claim was to monitor how and to whom it is allocated.

“HR should also be mindful that under the Working Time Regulations, they should not be disincentivising employees from taking their holiday as this could lead to a claim,” she said.

Beech added the case “gave clarity” to a previous ruling issued by the Court of Justice of the European Union (CJEU) in the case *Hein v Albert Holzkamm* (https://www.bailii.org/eu/cases/EUECJ/2018/C38517.html) .

However, Beverley Sunderland, managing director of Crossland Employment Solicitors, expressed concern over the Court of Appeal’s handling of the case. Also citing Hein, she said the ruling “flew in the face of previous cases and the direction of travel for holiday pay”.

“No doubt there will be numerous cases on exactly what is meant by this [ruling],” she said.

It is not the first time that public sector workers have sought legal action around overtime payments. In April, the High Court ruled that firefighters were entitled to increased pensions (https://www.peoplemanagement.co.uk/news/articles/firefighters-overtime-payments-pensionable-high-court-rules) if they earned additional pay for overtime. That ruling is likely to have wider implications for public sector staff who work overtime and make use of defined benefit schemes, it was reported.

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