



HR Broadcast – Voluntary overtime to be included in holiday pay

Once upon a time payments of a week's wages for holiday pay were limited to basic or normal pay not including any additional sums for overtime, bonuses, call-out payments and any additional payments made in the normal course of employment.

Over the last two or three years in a series of cases the position has changed drastically. One outstanding issue, now resolved, concerned voluntary overtime where there was no contractual obligation on an employee to do overtime. The significant point was whether or not there had to be contractual requirement to work extra hours before that should be taken into account in the calculation of a week's pay.

The Employment Appeal Tribunal (EAT) has now determined that voluntary overtime and also out of hours standby payments, call out allowances and travel allowances must be taken into account even where there is no contractual obligation to carry out work involving such payments.

The case related to workers for Dudley Metropolitan Borough Council who opted in and out of additional tasks.

The only proviso now remaining is that such work must be undertaken 'regularly' and over a sufficiently long period of time; and those factors have not been defined. It will all be a question of fact and degree. There will clearly be a number of cases where there will be some debate whether overtime is regular and should be taken into account.

Part of the argument is that it is a health and safety requirement for workers to take statutory leave and if they are penalised in any way, by receiving less pay for holiday weeks than they would receive while working, then they may be deterred from taking their holiday.

Anything which is not usually paid or is exceptional will not fall into the definition of regular and need not be included. It seems to us for example that a one-off bonus which is not regularly paid should be excluded.

Further, payments not specifically linked to performance, such as seniority payments should be included; they are normal pay.

In determining the average for a week's pay the employer must look at the previous 12 weeks payments.

A final thought; the statutory obligation to provide paid holiday derives from both EU and British law.

Under the EU Working Time Directive four weeks holiday must be given and this is topped up by the additional 1.6 weeks under British regulations. This decision only applies to the four week period but we suspect that for most employers the calculation would become too complicated to split out the higher rate of a week's pay and apply it just to the four weeks and not to the remainder.