Employment Newsletter

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JULY

BACKHOUSE JONES

Holiday Pay – Should overtime be taken into account when calculating holiday pay?

In the case of *Flowers v East of England Ambulance Trust*, if voluntary overtime is sufficiently regular and settled for payments made in respect of it amount to 'normal' remuneration, it should be taken into account when calculating holiday pay.

The Facts

As you may or may not be aware, the Flowers case referred to above has been through the Employment Tribunal, the Employment Appeal Tribunal and now we have very recently received the latest decision from the Court of Appeal in determining the matter of whether voluntary overtime should be taken into account when calculating holiday pay.

Various ambulance crew worked entirely voluntary overtime and they were free to choose whether or not to do it. On a holiday pay claim to the tribunal, the ambulance crew claimants argued that their voluntary overtime should count towards their 'normal' remuneration, and therefore be included in holiday pay.

The decision of the EAT held that both non-guaranteed and voluntary pay should be taken into account by the employer when calculating the four weeks paid leave under Article 7, so long as the payments are sufficiently regular and paid over a sufficient period. However, comments made by the ECJ in another case (*Hein v Albert Holzkamm GmbH & Co*) had called this approach into question. The ECJ made the following observations; "given its exceptional and unforeseeable nature, remuneration received for overtime does not, in principle, form part of the normal remuneration that the worker may claim in respect of the paid annual leave provided for in Article 7" (referred to above).

This was contrasted with the situation where "the obligations arising from the employment contract require the worker to work overtime on a broadly regular and predictable basis, and the corresponding pay constitutes a significant element of the total remuneration that the worker receives for his professional activity, the pay received for that overtime work should be included in the normal remuneration due under the right to paid annual leave provided for by Article 7". This second comment seemingly suggested that for overtime to be included in normal remuneration for the calculation of holiday pay, a worker must be required by their contract to work it, thus excluding pay for voluntary overtime. We have since been waiting for the outcome of the Court of Appeal decision in Flowers to provide some clarity in relation to these comments.

The Court of Appeal held that the ECJ was simply drawing a distinction between exceptional and unforeseeable overtime payments on the one hand, and broadly regular and predictable ones on the other. It was confirmed that the EAT had been correct in its decision and voluntary overtime should be counted when calculating holiday pay provided it is *sufficiently regular* and settled for payments made in respect of it to amount to *normal remuneration*.

Commentary

The Tribunal in the above Flowers case had applied the case of *Dudley Metropolitan Borough Council v Willets and Others UKEAT* in making its initial decision. This case decided that the overarching principle established by

ECJ case law was that holiday pay should correspond to normal remuneration so as to not discourage workers from taking annual leave.

As to whether overtime was paid over a sufficient period of time and on a regular or reoccurring bases will turn on the individual facts of each case and would be a matter for the Tribunal to decide whether the holiday pay corresponds to normal remuneration.

So, what should now be included in holiday pay under the Working Time Directive?

- Payments linked intrinsically to the performance of the tasks which the worker is required to carry out under their contract of employment
- commission
- compulsory and guaranteed overtime
- non-guaranteed overtime
- voluntary overtime, out of hours standby, call outs provided they are sufficiently regular or reoccurring to qualify as "normal"
- payments which relate to the worker's professional and personal status
- an amount to reflect the contractual results-based commission a worker ordinarily receives
- potential incentive bonus arrangements (not the same as annual discretionary bonus)

Payments which are intended "exclusively to cover occasional or ancillary costs" arising at the time the worker performs the task required by the contract are excluded from holiday pay under the Working Time Directive.

It is also important to note that the prevailing view of the Courts is that the rules discussed above only apply to the four weeks leave covered under the Working Time Directive, and not the remaining 1.6 weeks afforded by the national legislation (Working Time Regulations 1998). It is up to you as the employer to decide which leave is taken and when.

Holiday pay calculations - more clarification

Chief Constable of Northern Ireland Police v Agnew

Does a gap of more than 3 months in a 'series' of deductions break that series?

No held the Court of Appeal in Northern Ireland ('NICA') in Chief Constable of Northern Ireland Police v Agnew. It is important to note however that this case is from Northern Ireland and is therefore not binding in Great Britain.

The Facts

The Chief Constable of Northern Ireland Police had not paid the appropriate amount of holiday pay to police constables and police sergeants, since the commencement of the Working Time Regulations. Throughout the period since 23 November 1998 when the Regulations commenced, the Chief Constable calculated the amount of holiday pay by reference to basic salary. It is now accepted that he was required to calculate by reference to 'normal pay' which includes both basic pay and matters such as overtime and various allowances over a reference period prior to the holiday.

The issues in the appeal were wide ranging and a number of issues including what is meant by a 'series' of deductions from wages relating to holiday pay and the meaning of 'series' in the Employment Rights (Northern Ireland) Order 1996 (ERO). The Claimants in this matter argued that the decision in *Bear Scotland Ltd v Fulton* (the authority in Great Britain) was wrong, namely that a gap of more than 3 months between deductions broke a 'series'. The Judge in the present case agreed with this argument and decided that this could potentially lead to "arbitrary and unfair results".

What this means is that if a gap of three months occurs between "incorrect" holiday payments to an employee, this breaks the chain and prevents an employee claiming back any further by arguing that the incorrect payments are linked – a series. The break in chain effectively limits the claim to that date which this Judge deemed to be potentially unfair.

He went on to say:

"There is nothing in the ERO which expressly imposes a limit on the gaps between particular deductions making up a series. We do not consider that there is anything implied from the terms of the ERO which compels to such an interpretation of a series. As a matter of the proper construction of the ERO we conclude that a series is not broken by a gap of three months or more."

Commentary

The case law surrounding the calculation of holiday pay has been unfolding over the past few years and this is a development of note. The current authority followed by the Tribunals in Great Britain is that of Bear Scotland which references that a three month gap does breaks the chain. As Chief Constable of Northern Ireland Police v Agnew derives from Northern Ireland it is therefore not binding on Tribunals of Great Britain, however it is important to note this derogation as it could influence and persuade the Courts for future decisions.

The wording of the ERO and the British equivalent legislation, Employment Rights Act 1996 is pretty much identical. This is therefore

a case that future Claimants are likely to reference and may well provide strong persuasive argument against Justice Langstaff's decision in Bear Scotland.

Determining whether a gap of 3 months between deductions actually break a 'series' for the purposes of limiting holiday pay claims, will undoubtedly be challenged further in time, although currently the authority to confirm that it does, prevails.

The importance of occupational health reports

Kelly v Royal Mail Group Limited UKEAT/0262/18/RN

The Employment Appeal Tribunal (EAT) has held that an employer's reliance on occupational health reports, in the absence of any other evidence, was sufficient when considering the question of its employee's disability.

The facts

The Claimant worked as a postman and had poor attendance generally. The Respondent operated an attendance policy which contained three attendance review stages, based on the number of absences in certain periods. The third and final review stage involved a consideration of dismissal.

The Claimant's absence record meant that he had repeatedly triggered the attendance review procedure previously and a period of absence from December 2016 to February 2017, relating to surgery to correct Carpal Tunnel Syndrome in his wrist, triggered the final review stage.

The Respondent concluded that it could not have confidence in the Claimant maintaining a satisfactory attendance in the future and it therefore decided to dismiss the Claimant. The Claimant brought a claim in the Employment Tribunal (ET) for unfair dismissal and disability discrimination.

The ET held that, although the decision to dismiss was harsh, it fell within the band of reasonable responses and was fair. The allegation of discrimination was also dismissed on the basis that the Respondent did not know and could not reasonably have been expected to know that the Claimant had a disability.

The Claimant appealed the decision on the basis that the ET was wrong to conclude that the dismissal for two periods of absence for corrective surgery, for which the Claimant was essentially blameless, was fair. The Claimant also said that the ET was wrong to accept that the Respondent did not have constructive knowledge of the disability when it did little more than "rubber stamp" the conclusion of occupational health.

The EAT dismissed the Claimant's appeal. The EAT said that conduct that is in line with policy is unlikely to be unfair. The periods of absence for corrective surgery were extended by other factors and the Respondent was not prevented from taking these into account when making the decision to dismiss.

The EAT found that the Respondent had not simply rubber-stamped the occupational health reports but had given independent consideration to the question of disability. There were four separate occupational health reports which unanimously concluded that the Claimant's condition did not fall within the Equality Act 2010. In addition, neither the Claimant nor his trade union representative had asserted that there was a disability.

Commentary

This case shows that, where the occupational health reports consider the question of a disability in detail, in the absence of any other evidence (for example from the employee himself or his union representative), the employer's reliance on the reports will not be considered merely a rubber-stamping exercise and is likely to be sufficient when concluding that an employee is or is not disabled. This goes to show just how important occupational health reports can be when assessing whether an employee could potentially have a disability.

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