Holiday pay and overtime; the Employment Appeal Tribunal decision in the cases of Bear Scotland Ltd v Fulton and others; Hertel v Wood and others; and Amec Group v Law and others

Updated August 2018

Summary

The key outcomes arising from the decision of the Employment Appeal Tribunal (the EAT decision) are as follows:

- The proper interpretation of the Working Time Directive requires that payments made to workers for 'non-guaranteed' overtime must be included in holiday pay calculations.
- The Working Time Regulations must be interpreted in such a way to allow the above interpretation.
- Claims for a series of underpaid holiday payments (arising where the employer has not included overtime payment as above) pursued as unlawful deduction from wages claims will be outside the normal time limit that an employment tribunal allows if there has been a break of more than three months from the date of the last underpayment.
- Claims for underpayments are also limited to the 4 weeks' holiday entitlement under the European Working Time Directive, rather than the 5.6 weeks' entitlement to leave under the domestic legislation, the Working Time Regulations 1998.

1. Background: Entitlement to statutory holiday pay- The European Working Time Directive

The UK is required to have legislation in place that implements the European Working Time Directive (the Directive). This legislation broadly provides health and safety protection for workers by imposing rights relating to working time and entitlement to rest from work. Our domestic legislation, the Working Time Regulations 1998 (the WTR), are designed to meet this obligation. The Directive provides workers with a minimum of 4 weeks' paid annual leave but the WTR go beyond this requirement and gives workers a right to a minimum of 5.6 weeks' paid annual leave. Over time, a series of decisions given by the Court of Justice of the European Union have called into question whether the WTR properly implement the Directive.

The issue in question relates to holiday pay and how this should be calculated to comply with the Directive – specifically whether overtime payments made to workers should be included in their holiday pay calculations rather than just basic pay.

The EAT heard the three cases of *Bear Scotland Ltd v Fulton and others*, *Hertel v Wood and others* and *Amec Group v Law and others*; it gave the judgment on 4 November 2014 and ruled that overtime payments should be included in the calculation of holiday pay in respect of workers who:

- Have normal working hours under their contracts; and
- Work 'non-guaranteed' overtime (meaning overtime that the employer is not required to provide but when offered, the worker is required to do).

What is the distinction between 'normal working hours' and 'no normal working hours'?

The way in which holiday pay is calculated depends on the terms of a worker's contract. The first issue is whether under the contract the worker has normal working hours or no normal working hours.

Normal working hours

If the contract sets out fixed hours that the worker must work each week, the worker has normal working hours.

No normal working hours

If there are no specific hours set out under the contract, for example where the worker may be offered as many or as few hours as the employer requires (or in the case of a temporary worker, the hiring client), then there are no normal working hours. This is generally the case for temporary workers working under a contract for services, where there is no obligation for work to be provided and no obligation for the temporary worker to do work; their terms are usually flexible to allow for variations in client requirements.

Whether a worker potentially has a claim to recover holiday pay as a result of the EAT decision will depend on whether they have normal working hours and the circumstances in which they work overtime.

2. Which workers ARE NOT directly affected by the EAT decision?

Workers with no normal working hours

If your workers do not have normal working hours, the judgment should have little direct impact.

This is because the method of calculating their holiday pay **already** requires an employer to take the total average of pay received over the previous 12 weeks. Note that many temporary workers are engaged under a contract for services under which there is no obligation to provide work or for them to do the work provided. Typically the contract will provide flexibility for the temporary worker to work as many or as few hours required, depending on client demand, meaning that there are no normal hours fixed under the contract. This may also be the case where a contract of employment is used.

There are normal hours under the contract – compulsory overtime

For workers who do have normal working hours and whose pay **does not** vary depending on the amount of work done/the time the work is done and work overtime which is compulsory (i.e. the employer must offer it and the employee/worker must work it) the holiday pay should already take the overtime hours and pay into account, so again there will be little direct impact here providing you are already calculating holiday pay correctly.

There are normal hours under the contract – pay varies

For workers with normal working hours whose pay does vary either based on the amount of work done or the time the work is done, holiday pay should already take into account payment for all work done based on an average of the previous 12 weeks where pay was received.

3. Which workers does the EAT decision directly affect?

Workers with normal working hours and non-guaranteed overtime

The EAT decision concerns the calculation of holiday pay for workers:

- Who have **normal working hours** (and whose pay does not vary depending on the amount of work done or the time the work is done); and,
- In relation to **'non-guaranteed' overtime** (meaning overtime that the employer is not obliged to offer but when offered, the worker is required to do).

The EAT has ruled that overtime should be included in the holiday pay calculations. This contrasts with the previously accepted method of calculating holiday pay for such workers which excluded overtime payments.

As things now stand the EAT decision is binding on employment tribunals in respect of other claimants bringing claims on the same grounds. If you have workers who fall into this category and you do not currently take into account overtime then this decision will affect you.

Workers with normal working hours and voluntary overtime

Since *Bear Scotland Ltd v Fulton and others,* there has been another ruling by the EAT on voluntary overtime. In the case of *Dudley Metropolitan Borough Council v Willetts* (Dudley v Willetts), it was established that any regular payments made for voluntary overtime (ie overtime that the employer is not required to offer and which the worker is not required to do) **does** have to be taken into account in calculating employee's holiday pay. In the Dudley v Willetts, the Employment Appeal Tribunal (EAT) decided that 'normal remuneration' (normal pay) should include regular payments made to workers who worked entirely voluntary overtime. The EAT reasoned that understanding what constitutes normal remuneration is dependent on questions of 'regularity' and 'frequency', and that if overtime payments are made on a regular basis, this is sufficient for it to be included in holiday pay calculations.

This decision falls in line with a previous employment tribunal decision (in the case of Neal v Freightliner) that voluntary overtime payments should be included in holiday pay calculations to ensure that, in line with the Directive, a worker's holiday pay reflects the worker's normal pay.

The Neal v Freightliner decision was initially appealed and was also due to be heard by the EAT, together with the cases that are the subject of this briefing, but it was settled by the parties prior to the appeal. However, as this position has been reaffirmed in the EAT case of Metropolitan Borough Council v Willetts above, it sets a precedent that other employment tribunals have to follow in cases with similar facts.

The Employment Appeal Tribunal in *Flowers v East of England Ambulance Trust* gave a further ruling on voluntary overtime and the calculation of holiday pay. Compulsory overtime performed by employees when their shift overruns should be included in holiday pay calculations.The overarching principle is that *normal* remuneration must be maintained in respect of the period of annual leave guaranteed by Article 7 of the Working Time Directive 2003/88/EC (WTD). Thus the payments during annual leave under the WTD must correspond to the normal remuneration received while working. For a payment (such as voluntary overtime) to count as *'normal'* remuneration, for the purposes of a claim for statutory holiday pay under the WTD, it must have been paid over a sufficient period of time. This will be a question of *fact* and *degree*. Items which are not usually paid or are exceptional do not count. Items that are usually paid and regular across time may do so.

4. How has the EAT limited the scope of claims?

Overtime payments limited to the 4 weeks' holiday entitlement under the Directive

The EAT decision (in the three cases of *Bear Scotland Ltd v Fulton and others; Hertel v Wood and others; and Amec Group v Law and others*) relates to compliance with the European Directive which provides for a statutory 4 week holiday period. Therefore workers will only be entitled to have overtime payments included in calculations for 4 weeks of their holiday entitlement and not the additional 1.6 weeks' leave that workers are entitled to under our domestic WTR.

Businesses who are adjusting pay to take the EAT decision into account may choose to limit this adjustment to 4 weeks' pay rather than the total 5.6 weeks. However to avoid additional administrative issues, the preference may be to make adjustments in relation to the total 5.6 weeks leave.

Time limits for claiming holiday pay

There had been concerns that this case could lead to workers being able to claim holiday payments going back as far as 1998 (when the WTR first came into effect) if they argued that they had suffered an unlawful deduction from wages and that there had been a series of underpayments (deductions) over the course of their employment.

The EAT decision limited the extent of backdated claims by determining that, if there have been a series of underpayments which have been interrupted by a period of three months (e.g. where a worker has worked for a period of three months without taking any paid holiday leave), the underpayments prior to the three month period cannot be claimed. Given that the ruling does not apply to the 1.6 additional weeks' leave under our domestic WTR, it is likely that many workers will have interruptions of three months or more where no underpayment has been made; this means, in the main, the lengthier periods of claims will be reduced.

Note however that the EAT decision did not address the issue of when it is possible to extend the normal time limit for claims to be heard (e.g. when it is not reasonably practicable for claims to be brought within the normal time limit), and whether workers might argue that the circumstances here previously prevented them from pursuing their claims.

Case update – time limits for claiming holiday pay

After the case was heard by the EAT, it was then sent back to an employment tribunal (ET) to decide which of the claimants' holiday pay claims could be regarded as being brought within the three-month time period. The ET held that a certain number of the claims were time-barred. The claimants subsequently appealed again to the EAT for a second time, arguing that the three-month time limit should not be followed as a strict rule but should only be perceived and followed as a strong presumption that could be challenged with evidence.

However, the EAT dismissed the claimants' appeal and ultimately held that the three-month time limit was a strict rule. The only exception to this rule are circumstances that make it not 'reasonably practicable' to bring a claim to court within the three-month time limit (the EAT did not expand on this). The EAT emphasised that the question of whether or not there have been a 'series of deductions' is a question of fact and merely showing a factual link between each deduction is not enough to show that it was a 'single continuing act'. Thus, in short, the EAT (for the second time) has reaffirmed the three-month time limit as a strict rule and businesses should be aware of this.

REC Legal

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Holiday pay and overtime: who is affected by the decision in Bear Scotland Ltd v Fulton and others?

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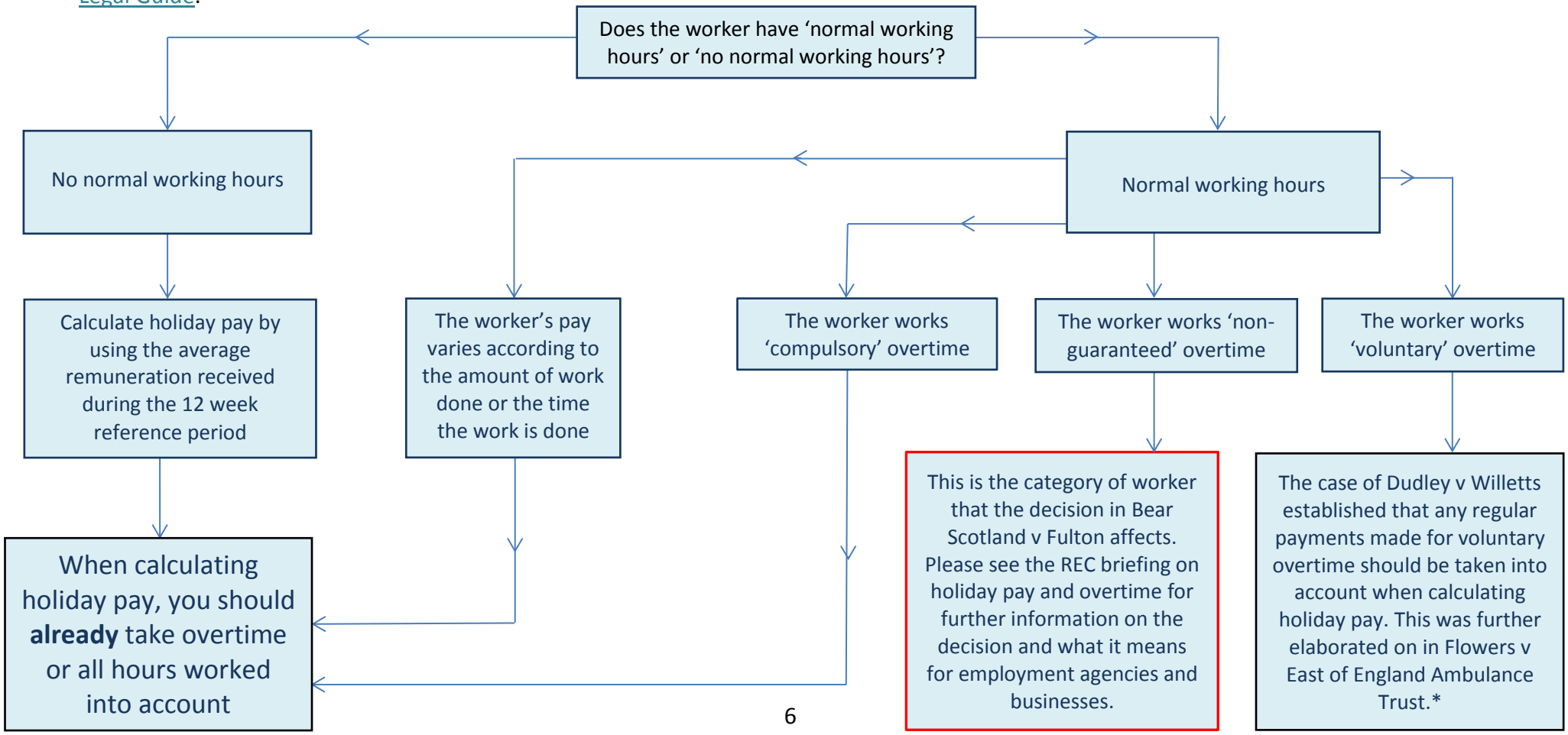
For the definitions of the terms used below and for further information, please see the REC briefing on holiday pay and overtime and the REC Legal Guide.



*** The case of Flowers v East of England Ambulance Trust a decision by the Employment Appeal Tribunal, April 2018.**

- The overarching principle is that *normal* remuneration must be maintained in respect of the period of annual leave guaranteed by Article 7 of the Working Time Directive 2003/88/EC (WTD). Thus the payments during annual leave under the WTD must correspond to the normal remuneration received while working.
- For a payment (such as voluntary overtime) to count as *'normal'* remuneration, for the purposes of a claim for statutory holiday pay under the WTD, it must have been paid over a sufficient period of time.
- This will be a question of *fact* and *degree*. Items which are not usually paid or are exceptional do not count. Items that are usually paid and regular across time may do so.
- (Under the NHS Terms and Conditions of Service, relevant NHS employees also have a contractual right to have their holiday pay calculated by reference to overtime including voluntary overtime (and, it would appear, not only where that voluntary overtime is so regular and recurring as to be 'normal'), according to the EAT.)