# EAT finds that holiday pay must include non-guaranteed overtime

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The Employment Appeal Tribunal has ruled that holiday pay must include pay for non-guaranteed overtime, i.e. that which the

employee must work but the employer is not obliged to offer.

The appeal before the EAT was based on a combination of questions relating to holiday pay raised in first instance cases. The cases concerned situations where employment contracts set out ‘normal working hours’ whilst also requiring the employee to work additional hours when asked. One case also concerned payments referred to as a ‘radius allowance’ (payable to employees whose daily commute was over 8 miles) and ‘travelling time payments’ (payable to employees according to the time they spent travelling).

The task before the EAT was to determine whether overtime pay and/or other contractual payments should be included in the first four weeks of statutory holiday pay pursuant to the Working Time Regulations 1998. It was also asked to consider whether, if those payments do form part of holiday pay, employees could make claims against their employers for historical underpayments of holiday pay.

The EAT held that the correct interpretation of the legislation is that any ‘normal’ pay is included, being any payment which is intrinsically linked to the employee’s performance of his contractual duties. As overtime in these cases was always accepted and worked in settled patterns, this should have formed part of ‘normal pay’ for the purposes of calculating holiday pay. To hold otherwise would disincentivise taking holiday. The overtime was also intrinsically linked to contractual duties given that the employers required staff to work the additional hours. It was held that radius and travelling time payments were payable for time spent travelling between sites and was connected to the performance of contractual duties. Therefore, these payments were also part of ‘normal pay’ and must be accounted for in holiday pay.

The EAT concluded that, despite employees’ entitlement to overtime pay when on annual leave, historical underpayments

could only be claimed where a period of no longer than three months separated each deduction. Despite being given leave to do so, the Claimants have since elected not to appeal this point. This is a surprising decision given that there was much scope to argue this finding.

In the wake of this decision, employers would be prudent to review the working arrangements of their staff to assess whether changes need to be made to company remuneration policies.

*Bear Scotland Ltd v Fulton and another UKEATS/0047/13, Hertel (UK) Ltd v Woods and others UKEAT/0160/14 and Amec Group Ltd v Law and others UKEAT/0161/14*

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