

Legal update — August 2017

## Employment

# Voluntary overtime to be included in holiday pay calculations

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Following the Court of Appeal's decision in ***British Gas Trading Ltd v Lock and anor*** it has been established practice that the Working Time Regulations 1998 (the WTR) should be interpreted in line with the Working Time Directive (WTD) to include results-based commission in statutory holiday pay. However, the issue of voluntary overtime has remained a bit of a grey area. This is no longer the case, following the Employment Appeal Tribunal's (EAT's) decision in ***Dudley Metropolitan Borough Council v Mr G Willetts and others***, which has confirmed that payment for voluntary overtime falls within the concept of "normal remuneration" for the purposes of calculating holiday pay.

### What does the law say about holiday pay?

Article 7 of the WTD provides that member states must ensure that workers have the right to at least four weeks' paid leave. Although it does not specify how statutory holiday pay should be calculated, the European Court of Justice (ECJ) has held that "paid annual leave" means that workers on holiday should receive their "normal remuneration".

The WTD is implemented into UK law by the WTR. The WTR provide workers with 5.6 weeks' annual leave, and workers are entitled to be paid at the rate of a "week's pay" for each week of leave, calculated in accordance with sections 221 to 224 of the Employment Rights Act 1996 (ERA 1996).

### The *Willetts* case

In *Willetts* a group of 56 workers employed within a directorate that carried out housing repairs for the Council claimed that they had not received the correct rate of statutory holiday pay. They argued that they should have received additional sums in respect of voluntary overtime, call-out payments and mileage and standby allowances. The Tribunal concluded that the allowances should be included in most of the claimants' statutory holiday pay. The claimants were paid in such a manner, and with sufficient regularity, for the payments to be considered part of their normal remuneration.

The EAT agreed. It held that in a case where the pattern of work, though voluntary, extends for a sufficient period of time on a regular and/or recurring basis, it will be for the tribunal to determine whether it is sufficiently regular and settled for payments made in respect of it to amount to normal remuneration. The EAT emphasised that the WTD does not draw a distinction between work that involves tasks that are contractually required and those that are done as a consequence of volunteering to be on standby or callout or working overtime under other special or separate arrangements. The question in every case will be whether the payment forms part of the worker's normal remuneration.



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### How should such payments be calculated?

Ambiguity remains as to the practicalities of how such payments should be calculated. The Advocate General in *Lock* suggested that when calculating a worker's "normal remuneration" during their holiday, the previous 12 months should be taken as the appropriate reference period. However, suggestions of a predetermined fixed period were ignored by the ECJ which ruled that holiday pay must correspond to the worker's "normal remuneration" and that this was a matter for the national courts to work out by taking an average over a reference period that it "considered to be representative".

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Do not hesitate to get in touch with us to discuss how to approach the calculation of such payments or any other concerns you have about holiday pay.

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