



HFMA briefing
February 2020 (updated April 2020)



Holiday pay and overtime

Accounting and governance issues



Background

Under UK law, almost all workers are entitled to 5.6 weeks' paid holiday a year¹. For those individuals working a 5-day week, this means that they are entitled to, at least, 28 days paid leave a year. The amount that the worker is paid is based on the amount that they are usually paid and is usually based on the average weekly pay from the previous 12 weeks.

For workers who are paid a fixed amount for a fixed number of hours, the calculation of holiday pay is straightforward. It is more complex for those who work shift work or do not have a fixed number of hours each week.

In the NHS, for staff working under agenda for change terms and conditions, holiday entitlements are set out in section 13 of the NHS terms and conditions of service handbook².

This briefing sets out the background to the issue and provides links to useful guidance. The briefing does not include any advice as the HFMA does not provide financial or legal advice.

¹ HMRC, *Holiday entitlement*, accessed 15 January 2020

² NHS Employers, *NHS terms and conditions of service handbook*, 2019

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Overtime and holiday pay

How the amount of holiday is calculated has been the subject of many recent employment tribunals and appeals. There are three cases that are of most relevance to the NHS, all relate to the inclusion of overtime in holiday pay calculations. The cases are summarised below.

Bear Scotland

Bear Scotland Ltd and Others v Mr David Fulton and Others³ (Bear Scotland) related to non-guaranteed, not voluntary, but nonetheless regular overtime. This is overtime that the employer is not obliged to provide but which, if the employer offers it, the employee is contractually obliged to perform. The overtime also has to be worked sufficiently regularly that it is part of the worker's normal pay.

In this case, the holiday pay was limited to the European Working Time Directive holiday entitlement of 20 days (150 hours for agenda for change contracts). The ruling also limited the amount of time that claims could be backdated.

Dudley MBC

The Dudley Metropolitan Borough Council v Mr G Willetts and others⁴ (Dudley MBC) case extended the Bear Scotland ruling to include guaranteed (voluntary) overtime. This means that payments of overtime should be included in holiday pay where they are usual and regularly paid. The 20-day holiday entitlement cap remains.

This case has reached the end of the appeal process, so it is now case law⁵.

Flowers and others

Mr N Flowers and Others v East of England Ambulance Trust⁶ (Flowers) relates to whether voluntary overtime should be included in all holiday pay⁷. It referred specifically to paragraph 13.9 of the agenda for change terms and conditions.

The Court of Appeal upheld⁸ the original judgment in June 2019. **However, the Supreme Court granted the ambulance trust permission to appeal in March 2020⁹. The decision is not expected for several months.**

Impact on NHS bodies

Whether NHS bodies are impacted by these cases will depend on what triggers the overtime and how overtime is paid for and managed. Some NHS bodies use bank arrangements for overtime, others do not. NHS bodies need to understand the impact of these cases on their arrangements to

³ Employment appeal tribunal decisions, *Bear Scotland Ltd and others v Mr David Fulton and others*, 4 November 2014

⁴ Employment Appeal Tribunal, *Dudley Metropolitan Borough Council v Mr G Willetts and others*, 31 July 2017

⁵ Irwin Mitchell, *Binding decision: Voluntary overtime must be included in holiday pay*, 1 August 2017

⁶ Employment appeal tribunal decisions, *Mr N Flowers and Others v East of England Ambulance Trust*, 16 April 2018

⁷ DAC Beachcroft, *Court of Appeal confirms voluntary overtime should be included in holiday pay under agenda for change*, 11 June 2019

⁸ The Court of Appeal (Civil Division), *East of England Ambulance Service NHS Trust v Neil Flowers and others*, 10 June 2019

⁹ HR law lice, *Supreme Court grants permission to appeal in voluntary overtime case*, 17 March 2020

understand whether they may need to amend the way that they calculate holiday pay and/ or make a provision for this liability.

Based on discussions with HFMA members, ambulance trusts are the most affected by these cases because when their staff are working on a call at the end of their shift they are required keep working and finish the call. However, other NHS bodies may be affected when staff are regularly work overtime.

Some NHS bodies are paying staff on the basis of some of these cases and providing for the impact of other cases. As Dudley MBC is now case law, NHS bodies should be calculating holiday pay on this basis. However, the Flowers case may impact on this ruling, so some NHS bodies are providing for these payments rather than making payments to staff.

Finance staff should liaise with their human resources (HR) colleagues to ensure that they are aware of these cases and have assessed whether they have an impact on the NHS body.

There is no single source of guidance on these cases. NHS Employers issued guidance¹⁰ in February 2018 that considers the Bear Scotland and Dudley MBC cases in relation to agenda for change. However, it does not include the more recent Flowers case. Most legal firms have issued updates as the cases progress, some are referenced in this briefing but there are many more available. HR and finance teams should familiarise themselves with the issues when assessing the potential impact on the NHS body and determining whether changes to payment arrangements may be necessary and therefore a provision is required.

Auditors may ask for evidence that NHS bodies have considered whether these cases have an impact on them and, if so, whether they have recorded appropriate liabilities in their accounts.

¹⁰ NHS Employers, *Update to overtime and holiday pay*, 2018

About the HFMA

The Healthcare Financial Management Association (HFMA) is the professional body for finance staff in healthcare. For nearly 70 years, it has provided independent and objective advice to its members and the wider healthcare community. It is a charitable organisation that promotes best practice and innovation in financial management and governance across the UK health economy through its local and national networks.

The association also analyses and responds to national policy and aims to exert influence in shaping the wider healthcare agenda. It has particular interest in promoting the highest professional standards in financial management and governance and is keen to work with other organisations to promote approaches that really are 'fit for purpose' and effective.

The HFMA offers a range of qualifications in healthcare business and finance at undergraduate and postgraduate level and can provide a route to an MBA in healthcare finance. The qualifications are delivered through HFMA's Academy which was launched in 2017 and has already established strong learner and alumni networks.

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