



XpertHR Podcast

Original XpertHR podcast: 11th August 2017

- Jeya Thiruchelvam: Hi, and welcome to this week's XpertHR podcast with me, Jeya Thiruchelvam.
- Last week, the Employment Appeal Tribunal (EAT) gave us the benefit of its wisdom and binding guidance on the vexed issue of the impact of voluntary overtime performed by employees on the calculation of holiday pay.
- Joining me on the phone today to discuss the EAT's decision is Nick Chronias, who's a partner with DAC Beachcroft.
- Hi Nick.
- Nick Chronias: Good morning Jeya.
- Jeya Thiruchelvam: So to give our listeners some context, 56 council workers brought claims for unlawful deductions of wages in relation to the calculation of their holiday pay. What was their main argument? [0:00:44.3]
- Nick Chronias: Their main argument was that they were entitled to have the payment that they received when they worked that voluntary overtime included in their first four weeks of holiday pay, as required by the Working Time Directive - and as we've implemented through our Working Time Regulations.
- Jeya Thiruchelvam: And so, this case was different because they were trying to get voluntary overtime included? [0:01:07.0]
- Nick Chronias: That's right.
- So your listeners will know all about the *Bear Scotland* case. That was a case that confirmed contractual overtime, where employees are required to work overtime when asked to by their employers, where in this case, the individuals could choose whether they worked the overtime or not.
- Jeya Thiruchelvam: And did the workers have contractual hours? [0:01:25.0]
- Nick Chronias: They did. They had regular and normal hours of work.
- And so, the challenge they had on the law, is that under our law, when it comes to calculating a week's pay for holiday pay under the Working Time Regulations, the law says that you should receive your normal pay, where you have got set working hours, for those set working hours.

But what they were saying was that that wouldn't honour the Working Time Directive principle, that everyone should receive their normal remuneration. That is that any payments are intrinsically linked to their performance of their duties, but they weren't allowed to include that voluntary overtime in the holiday pay that they received.

Jeya Thiruchelvam: So they were saying that, despite the fact that the overtime was entirely voluntary, that it should be included in the calculation of a week's pay? [0:02:15.5]

Nick Chronias: That's absolutely right.

Jeya Thiruchelvam: Who's side did the EAT come down on? [0:02:19.5]

Nick Chronias: They came down in favour of the employees.

And the most critical reason for the EAT reaching that decision was that, in their view, the law requires that individuals should basically receive, when they are on that first four weeks of holiday, under the Working Time Regulations, the same pay as they would have received if they had been at work.

And so, the critical question is, what are they getting paid when they are at work? And basically, making sure that that is mirrored when they are on holiday.

And if that doesn't happen, then that breaches the law as it's been interpreted in a number of cases, including *Bear Scotland* and the *Williams* case as well.

Jeya Thiruchelvam: So I suppose the key question that the EAT was trying to answer, and that employers should be asking, is whether overtime can be properly said to form part of a person's normal pay? [0:03:14.0]

Nick Chronias: Correct. And that was the nub of the question that they looked at.

And what they decided was that in circumstances where these individuals regularly worked overtime once every four weeks, or once every five weeks, the employment tribunal had been entitled to find that that was sufficiently predictable and routine that it should fall to be treated as part of their normal pay. And that it didn't actually matter that it wasn't part of their contractual obligations.

So the EAT specifically rejected the employer's argument that only payments that are linked to an obligation that the person is required to carry out under their contract, have to be included in normal remuneration.

Jeya Thiruchelvam: And the EAT also drew a distinction, didn't it, between overtime, like you said, that's normally worked and paid, but also overtime that's exceptional, or which is usually unpaid? [0:04:10.0]

Nick Chronias: That's right, they did. And that is going to be the, I think, key area for debate in the future, and we'll talk about that in a bit more detail in a minute.

But from case to case, you may get a different answer depending on, I think, three key considerations. First, how predictable the overtime

or the other activity is. Second, how regular it is, so how often it happens. And third, how long it has been worked for.

And I think those are going to be the three considerations that are going to be argued over in future cases, and may, depending on the facts of the case, lead to different decisions than the decision that the EAT reached in the *Dudley* case.

Jeya Thiruchelvam: Okay. So the EAT has set down a binding principle, but actually whether or not this principle is applied on a case-by-case basis will depend on those three points that you have just mentioned?
[0:05:10.5]

Nick Chronias: That's right. The EAT has made clear that whether something is normal pay will be fact sensitive from case to case. But that in this case, there was sufficient regularity and predictability about the overtime that they worked, that it fell within normal pay.

Jeya Thiruchelvam: So this decision was obviously at the EAT level. Is there any scope for it being appealed? Or do you think it's going to be appealed?
[0:05:37.0]

Nick Chronias: There is scope for it to be appealed. But as far as I know, having checked, no permission to appeal has been sought yet. And obviously, if it isn't sought, then the decision remains and is binding on employment tribunals.

Jeya Thiruchelvam: Because this is quite a technical case, probably for some of our listeners, so can you tell us what things they should be doing differently when they go away after they've listened to this podcast, in terms of practical implications and practical things? [0:06:05.0]

Nick Chronias: Sure. So there are still a number of employers, because of the legal uncertainty that has been created about holiday pay, who have been taking a wait-and-see approach. It's much harder to legally maintain that wait-and-see approach given this decision, because it's very, very clear about the principle that voluntary overtime can and should be included when it forms part of normal pay.

So for those employers that operate voluntary overtime arrangements, they need to look at those three elements that I've talked about – for how long people have been working it, how regular is that pattern, and how predictable is it. And if, for example, they're in a situation where they have people who have for many months or years, have been working say, one week of overtime in every three, or one week in every four, then I think that in those circumstances the law is basically saying that they should be including that overtime payment in those four weeks of holiday pay, because it would be treated as normal pay.

Where employers' circumstances are different, where it is more unpredictable, where voluntary overtime may only just have started, then I think those employers can legitimately say, 'Well actually, if we monitor it and if that pattern becomes more regular and more predictable and spreads over a greater period of time, then their vulnerability will go up.'

But if it's something that is a recent situation, or if the pattern is very unpredictable and if, for example, a person does a week's overtime next week, and then doesn't do any for another two months, and then does a week's overtime a month after that, then that person may well be in a different category.

But that's where this fact sensitivity, that the EAT mentioned, comes into the equation.

Jeya Thiruchelvam:

So if we take that first group of employers who are employing employees who do fairly predictable and regular overtime. So looking forward, they have to take their overtime into account when they are calculating a week's pay for the purposes of holiday pay? [0:08:14.5]

In terms of looking back, at employers' previous liabilities, where do they stand with that? [0:08:21.0]

Nick Chronias:

So the EAT's decision left untouched the guidance that we have in the *Bear Scotland* case about time limits, which basically says that the clock is reset where there is three months in which the individual has been paid properly.

So if, for example, there is a situation where the employee has taken holiday but they've been paid what's due to them – so, for example, it relates to the fifth week or the weeks of holiday pay over and above the four weeks that are required by the Working Time Directive, or even over and above that, which the employer contractually gives, then that would potentially break the chain and the employee would not be able to go back further to make claims that might be historically based in holiday that they took a year or two years ago.

Alongside that is also the change that was introduced to the Working Time Regulations following the *Bear Scotland* decision that puts a two-year backdating limitation on these types of claims as well.

Jeya Thiruchelvam:

Okay, so we're looking at a time limit, or a potential liability period, of either three months or two years, and three months is dependent on them having received the correct payment included, which factors in their payment for the regular overtime? [0:09:41.5]

Nick Chronias:

Correct.

Jeya Thiruchelvam:

Okay, that's a really useful summary of the *Dudley* case.

Just staying with holiday pay though, are there any other elements that we don't have case law on, in terms of what holiday pay is made up of? [0:09:54.0]

Nick Chronias:

There are. So the two areas that I haven't seen any case law on are bonuses and on pensions.

The pensions I think is a particularly complex area.

On bonuses, my assessment based on the case law that we've got, is that the risks for employers could only arise for bonuses that are based on that individual's own performance. So, for example, a bonus that is based on corporate performance, or the achievement of a team's financial targets, as opposed to an individual's targets, would

be outside the scope. But there is potential vulnerability that for bonus payments that are specifically linked to an individual's performance in his or her role, may have to be included.

But that's where we are waiting for case law to see what courts and tribunals say.

Jeya Thiruchelvam: And did you mention pensions? [0:10:48.0]

Nick Chronias: I did. And as I said, pensions are a very complex area because the debate is whether in terms of contributions that have been made in to a pension scheme, or the benefits that accrue to employees as a result of those contributions, should fall to being included in holiday pay as well.

As I said, that's a very untested and complicated area, but there might be some argument in respect of it.

Jeya Thiruchelvam: So just revisiting this concept of a week's normal pay – how does an employer do that? Obviously, in other areas like calculating maximum working hours, we can use a twelve-week reference period. But, are employers allowed or permitted to use a similar kind of period when we're calculating a normal week's pay? [0:11:36.5]

Nick Chronias: That hasn't been definitively dealt with by the courts. *Bear Scotland* said that the twelve-week reference period in the Employment Rights Act section about calculating a week's pay, was an appropriate look-back period to use. But there hasn't been anything that has been said that it is impermissible to use a longer reference period.

For example, going back to your question about practicalities, I'm certainly aware of some employers that are looking to negotiate or agree longer reference periods, for example, with their recognised trade unions, so that it smooths out effectively peaks and troughs, and that it's both fair to the employer and fair to the employee. For example, where there is a predictable surge of activity, where an employee works a substantial amount of overtime, that they don't get a big pay bump if they then take holiday immediately after that. But equally, that if they have a particularly significant period where they haven't worked the overtime, that that is smoothed out and some element of that is included if you use a longer reference period.

I'm aware of that, but as I said before, what hasn't been tested is the legality of that, at the moment. The *Bear Scotland* case as we've seen, thinks that 12 weeks is appropriate, but it certainly doesn't say, 'And no other reference period is appropriate.'

Jeya Thiruchelvam: Thank you. That's a really useful look at that area of the law.

Obviously, we had the epic decision about the abolition of employment tribunal fees last week. So do you think that's going to open the floodgates in terms of employees pursuing these types of outstanding holiday pay claims? [0:13:14.0]

Nick Chronias: I think that in the same way as the Supreme Court found that the fees were an impediment to people accessing the employment tribunal system generally. There is obviously a risk that with the removal of

the fees, people will be more encouraged and feel more able to bring holiday pay claims.

Back when the *Bear Scotland* decision came out, there was a lot of commentary that suggested that there would be many, many thousands of holiday pay claimants, in a way similar to the equal pay cases within the public sector that were a significant facet of the employment tribunal landscape, perhaps about 10 years ago. That didn't happen. And it may be that the fees were a contributing factor to that not happening and with their removal that means that people will be more prepared to bring these claims.

Obviously, it's very early days yet, I haven't seen any rush of new cases as a result of this, but there is some risk that there will be an increased number of cases on the holiday pay area because of the removal of the fees. Precisely because this is exactly the sort of case that in general terms is not of huge financial value to the individual. So they might say that the nearly £400 of fees that they would have to spend to bring their unlawful deduction from wages claim is too high a price to pay. Well they might well think now that there is no fee, that they should give it a go.

Jeya Thiruchelvam: Yes, start reassessing what they are going to do about that.

Thanks very much Nick for joining us today.

Nick Chronias: My pleasure.

Jeya Thiruchelvam: So we have a wealth of guidance on the subject on the site, including a case report on the EAT decision in *Dudley Council and Willetts, and others*, and a dedicated section in the Employment law manual that deals with holiday pay.

That brings us to the end of this week's podcast. Thanks for listening. We're back again next Friday, but until then, it's goodbye from us.