

**Board of Directors Meeting  
24 August 2021**

**Overtime Payments during Leave (“Flowers”)**

<b>Agenda Item Number:</b>		<b>12.0</b>
<b>Presented for:</b>	Discussion, Decision/Approval	
<b>Report of:</b>	Interim Chief Executive	
<b>Author (s):</b>	Head of HR	
<b>Report History:</b>	NONE	
<b>Publication Under Freedom of Information Act:</b>	This paper can be made available under the Freedom of Information Act 2000 if requested.	
<b>Links to HIF’s Objectives</b>		
<b>Deliver an efficient and effective service offering to Harrogate and District Foundation Trust</b>		√
<b>Create strong sustainable partnerships</b>		
<b>Develop sustainable organisational systems</b>		
<b>Develop and maintain a strong, efficient and agile workforce</b>		√
<b>Strengthen the local community through collaboration</b>		

<b>Recommendation:</b>
The Board is asked to review the information within this paper and approve the recommendations.

**HIF Board**  
**24 August 2021**  
**OVERTIME PAYMENTS DURING LEAVE (“FLOWERS”)**

**1.1 Introduction**

1.2 The purpose of this report is to:

- outline the implications of the ruling on the Flowers v East of England Ambulance Trust, Employment Tribunal Appeal and the Court of Appeal ruling.
- recommend People and Culture Committee advise HIF Board, to apply the Flowers case judgment to all eligible HIF staff.

**2.1 Background**

2.2 Mr N Flowers and 12 colleagues from East of England Ambulance Trust (the Trust), submitted an appeal to the Employment Appeal Tribunal in 2018. The Appeal related to voluntary overtime and the calculation of holiday pay.

2.3 Mr Flowers and his colleagues were employed by the Trust in various roles relating to the provision of ambulance services. Their employment was governed by AfC.

2.4 Section 13.9 of AfC provides:

“Pay during annual leave will include regularly paid supplements, including any recruitment and retention premia, payments for work outside normal hours and high cost area supplements. Pay is calculated on the basis of what the individual would have received had he/she been at work. This would be based on the previous three months at work or any other reference period that may be locally agreed.”

2.5 The claimants argued that the calculation of their holiday pay should include both non-guaranteed overtime and voluntary overtime, under section 13.9 of AfC and pursuant to the Working Time Directive (WTD).

2.6 Following the 2015 decision in *Bear Scotland Ltd v Fulton*, the Trust admitted the Working Time Directive claim in respect of non-guaranteed overtime.

2.7 The Employment Tribunal upheld the claimants’ contractual claims for non-guaranteed overtime but dismissed their statutory and contractual claims for voluntary overtime.

2.8 Both parties appealed those parts of the decision that went against them.

**3.0 Employment Appeals Tribunal (EAT) Decision**

3.1 In relation to their WTD claim, the EAT found that voluntary overtime which is part of a regular and settled pattern of overtime worked by the individual should be taken into account for the purposes of calculating pay in respect of statutory holiday.

3.2 It had been hoped that guidance would be given on what is meant by the term “regular” but the EAT did not deal with this point and the claimants’ WTD claims have been remitted to the Employment Tribunal to be assessed on a case-by-case basis.

- 3.3 In relation to their contractual claims, the EAT found that the purpose of section 13.9 AfC was to calculate holiday pay on the basis of what the employee would in fact have been paid if at work.
- 3.4 The EAT commented that there was no justification within AfC for excluding overtime from 13.9 or for distinguishing between non-guaranteed and voluntary overtime, and both should be treated as “pay”.
- 3.5 The EAT confirmed that the calculation of holiday pay should be based on the pay received in the previous three month period (or such other period as is identified locally) and that the claimants had a contractual right to have all overtime included in the calculation.
- 3.6 The Trust requested permission to appeal the decision to the Court of Appeal.

#### 4.0 **Court of Appeal (CA)**

- 4.1 The CA had been specifically asked to consider the question of whether there was any basis for distinguishing between voluntary and non-guaranteed overtime for the purpose of section 13.9.
- 4.2 The CA dismissed the Trust’s argument that, as overtime is not a regularly paid supplement, it should not be included in the calculation of holiday pay. It also rejected the suggestion that the fact that overtime was not expressly referred to in section 13.9 meant that it should be excluded from the calculation.
- 4.3 The CA pointed out that to do so would result in annual leave payments falling well short of what an individual “would have received if he or she had been at work”, which is specifically required by 13.9
- 4.4 The CA therefore dismissed the Trust’s appeal and upheld the EAT’s decision.
- 4.5 Whilst the judgment centres on a consideration of non-guaranteed versus voluntary overtime, its effect is much wider. Under a proper interpretation of section 13.9, any payments which have been made to the employee over the previous three months should be factored into the calculation of holiday pay.
- 4.6 The Trust has appealed to the Supreme Court on both the contractual and WTD issues. As a result, there remained uncertainty until the legal process had concluded.
- 4.7 The Supreme Court was due to hear the appeal on 22<sup>nd</sup> June 2021. However, it was agreed to settle claims on the basis of the Court of Appeal’s decision.

#### 5.0 **Framework Agreement**

- 5.1 The NHS Staff Council has agreed a framework to enable NHS employers in England to resolve issues in relation to the correct calculation of pay while on annual leave, in respect of regularly worked overtime and additional standard hours (AST), under the NHS terms and conditions of service (Agenda for Change).

- 5.1 Section 13.9 of the [NHS terms and conditions of service](#) states that:
- 'Pay during annual leave will include regularly paid supplements, including any recruitment and retention premia, payments for work outside normal hours and high cost area supplements. Pay is calculated on the basis of what the individual would have received had he/she been at work.'
- 5.2 The national discussions that have taken place now clarify how NHS employers should interpret section 13.9 of the NHS terms and conditions of service. It is now accepted that employers should include regularly worked overtime and additional standard hours in the calculation of pay when staff are on annual leave.
- 5.3 Corrective payments will be made in respect of the period covering the financial years 2019/2020 and 2020/2021. The corrective payments will be based on overtime earned in the financial years 2019/2020 and 2020/2021. To be eligible for a corrective payment in either or both financial years a member of staff will need to meet the eligibility criteria set out in the framework agreement.
- 5.4 Arrangements are underway to make corrective payments in September 2021.
- 6.0 **Financial Implications**
- 6.1 Budget provision is available to support corrective payments to be made as detailed within the framework agreement.
- 7.0 **Recommendations**
- 7.1 To ensure parity and fairness, the Board is requested to approve that the Flowers case judgment is applied to all eligible HIF staff.