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Term-time school worker entitled to national minimum wage for unworked basic hours

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Workers are entitled to receive a minimum hourly rate of pay, the national minimum wage (NMW).

The Employment Appeal Tribunal (**EAT**) decided in the case of *Lloyd v Elmhurst School Limited [2022]* that the Employment Tribunal (**ET**) had erred by finding that a term-time salaried hours worker was not entitled to the NMW for hours worked outside school term-time.

Ms Lloyd, a learning support assistant, worked three days a week during school terms and was paid her salary in monthly instalments. Ms Lloyd's employment contract stated that she was entitled to "*usual school holidays*" as "*holiday with pay*". Her contract did not include any provisions in respect of hours of work, her rate of pay for school holidays or her annual salary. She brought a claim for unlawful deduction from wages under the Employment Rights Act 1996, contending that she had not been paid the NMW. The question for the ET was whether Ms Lloyd's basic hours should be calculated over 52 weeks or the 36 weeks she actually worked (plus four weeks of leave entitlement). The ET dismissed her claim on the basis that her basic hours for the purpose of regulation 21(3) of the National Minimum Wage Regulations 2015 (NMW Regulations) were based on 21 hours over 40 weeks, which were the 36 weeks she worked during school terms and her leave entitlement of four weeks under the Working Time Directive. The ET considered that the additional 12 weeks' contractual holiday did not form part of her basic hours. Ms Lloyd appealed the ET's decision.

The EAT held that the ET should have focussed on Ms Lloyd's employment contract rather than the hours she had in fact worked. The EAT found that a worker's basic hours do not depend on the hours actually worked, and basic hours can include periods of absence where contractual salary is due to be paid. It was wrong of the ET to focus on whether the Claimant was working outside school terms or not.

The EAT's decision provides clarification on what is meant by "basic hours" within the meaning of regulation 21(3) of the NMW Regulations. Employers should identify a worker's basic hours by using their employment contract, not the actual hours that they work. Employers should also take care to ensure the drafting of worker's contracts are detailed and precise. In Ms Lloyd's case, the wording of the clause in her contract was a key component of the EAT's analysis of how her basic hours should be calculated.

Following the Supreme Court's decision in *Harpur Trust v Brazel [2022]* this decision again places emphasis on the complexities relating to part-year workers.

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