

## HOLIDAY PAY QUESTIONS ARISING FROM THE WEBINAR WITH EMPLOYERS FEDERATION ON 23 OCTOBER 2023

### COMPOSITE WHOLE AND DEFINING WTD DAYS

- 1. If leave is taken as a composite whole does that mean therefore that holiday pay should be 'normal' for all annual leave entitlement - WTD, 1.6 and enhanced? I missed a bit in the middle so you may have already addressed this sorry.**

No - the entitlement for 'normal' remuneration only applies to the 4 week's leave provided for by the Working Time Directive (WTD) and not to all annual leave provided for under the Working Time Regulation's (WTR) i.e. the addition 1.6 weeks and/ or to any additional leave provided for under the contract of employment.

The import of the composite whole approach is that for each day of leave a proportion or fraction of that leave day will attract an entitlement to normal remuneration.

For example, if a worker is entitled to 33 days holiday under the composite whole approach, each day of leave will be made up of;

- 20/33 will be in respect of the WTD;
- 8/33 will be in respect of WTR;
- 5/33 will be the additional amount under the contractual entitlement.

Only 20/33 of each day of leave (WTD leave) must be paid at the rate of normal remuneration.

- 2. Re. distinguishing leave - could an employer get around this by stipulating that holidays are broken down according to WTD, 1.6 and contractual?**

The default position is that all holiday is viewed as one "pot", regardless of where it is derived from and each day of holiday will be a mixture of the different types of holiday to which a worker is entitled.

However, the Supreme Court did say that "*Insofar as it is not practicable to distinguish between different types of leave then all leave ....worker is entitled must form part of a composite pot.*"

This suggest that it may be possible to distinguish each type of leave – i.e. derived from the Working Time Directive (4 weeks); the addition leave under

the Working Time Regulations (Northern Ireland) 1998 (1.6 weeks) and; any further contractual entitlement. Whilst no guidance has been provided by the Supreme Court on how employers may distinguish the leave, it is thought that it may be done by way of (1) contract (2) policy document (3) pay slip. There are mixed views on the practicalities of distinguishing such leave. In the absence of distinguishing the leave, the default position remains that all leave forms part of a composite pot.

## REFERENCE PERIOD AND ONE OF PAYMENTS

- 3. Is it possible to calculate holiday pay over a 12-month reference period and make a one-off payment based on the average amount over this time?**
- 4. Just to check, if a 52-week reference period is used, that should be the calculation used each time an employee takes leave?**

If you have chosen a 52-week reference period, then that is the period you will look back at retrospectively to determine the 'normal remuneration earned by the individual.

If you use a 'rolling period' then you will need to do a new calculation at the time of each period of leave. If you use a fixed period (e.g. an average weekly wage for the previous year) then you will apply that amount for any leave during the holiday year.

In Northern Ireland, a week's pay is calculated in accordance with the definition of a week's pay set out in the Employment Rights (Northern Ireland) Order 1996. This uses a rolling reference period of 12 weeks for workers who have no normal working hours.

In *Agnew* the Supreme Court agreed with the Northern Ireland Court of Appeal (NICA) that what was an appropriate reference period was a question of fact and that both points should be addressed in evidence in individual cases.

However, the NICA had encouraged the parties to agree how pay should be calculated based on a twelve-month reference period but did not make any findings on this point. The Supreme Court's comments on this were equally as light.

Having said that, paying a one-off payment is not legally correct as the correct amount of holiday pay should be paid at the time the holiday is taken. The Organisation should check if the amount of holiday pay/ top up reflects the amount of underpayment, then the risk of a legal claim may be low. The danger is that given this is an incorrect way of paying holiday pay it could constitute an *underlying vice* and open up the back door to historical back dated holiday pay claims.

NB: in Great Britain (but not Northern Ireland) from 6 April 2020, the GB law was changed increasing the reference period from 12 weeks to 52 weeks.

You should take specific legal advice in relation to implementing this approach for your business.

**5. Where an employer has a scheme of retrospectively calculating and paying holiday overtime does this protect against further historic claims back to 1998?**

See also above. Again, this is not legally correct, as the correct amount of holiday pay should be paid at the time the holiday is taken. However, if the amount of holiday pay that is eventually paid is correct, then the risk of a claim may be low. The Organisation should check if the amount of holiday pay/ top up reflects the amount of underpayment, then the risk of a legal claim may be low. The danger is that given this is an incorrect way of paying holiday pay it could constitute an *underlying vice* and open up the back door to historical back dated holiday pay claims.

You should take specific legal advice in relation to implementing this approach for your business.

**6. We have sales people who have a very quiet month in December and they have asked that the additional holiday pay based on their commission is paid in this month as their commission is so low - is this ok that it is not actually paid when on holidays?**

Strictly speaking this is not legally correct and the correct amount of holiday pay should be paid at the time the holiday is taken. However, if the amount of holiday pay that is eventually paid is correct, then the risk of a claim may be low. If your calculations are incorrect however, this may result in claims potentially going back to the commencement of the employment or implementation of the Working Time Regulations (Northern Ireland) 1998.

The danger is that given this is an incorrect way of paying holiday pay it could constitute an *underlying vice* and open up the back door to historical back dated holiday pay claims.

You should take specific legal advice in relation to implementing this approach for your business.

## **WHAT IS NORMAL PAY?**

**7. Does an annual bonus effect holiday pay?**

There are some issues that have not yet been addressed in the case law, including the extent to which an annual discretionary bonuses and bonuses not linked to workers' performance should be factored into the week's pay for holiday pay purposes. Unfortunately, the case law does not provide any definitive guidance on the mechanism for calculating statutory holiday pay to take account of such payments.

Whether your annual bonus is included will depend on the terms of the bonus scheme.

Generally, we take the view that, provided the bonus received is unaffected by the taking of holiday, the worker will already have received the relevant bonus payment in respect of the period of holiday and will not be entitled to more. Therefore, where a bonus is based solely on company performance, there is a strong argument that, provided there is no financial disincentive to taking holiday, the bonus need not be included.

However, bonuses (especially discretionary bonuses) are often linked to performance and there is a risk that a worker who takes less holiday may perform better over the year and achieve a higher bonus.

Calculating holiday pay is often a complex issue, and we recommend that you seek specific advice as to how to apply the current law to your circumstances.

## **8. If an employee does voluntary overtime, would this apply?**

Yes – it is irrelevant whether the overtime is compulsory, guaranteed or voluntary overtime. The key question is - is the overtime regularly worked? All overtime regularly worked should be included in the calculation of normal pay. What is regular is a question of fact to be decided on the particular circumstances of each case.

## **POTENTIAL CLAIMS**

### **9. We are now paying all holidays at normal pay, but prior to this we did not. How far can an employee claim back for?**

This depends on how long you have been paying annual leave correctly, i.e., at the normal rate of pay.

If the underlying vice has been corrected and the date of the last incorrect payment of annual leave for your workers/employees was more than 3 months ago, then the worker may be out of time for bringing a complaint to the Tribunal. You also need to take into account the mandatory early conciliation process which requires a person to approach the Labour Relations Agency before being able to bring a Tribunal claim. The early conciliation can extend the 3-month tribunal time period by up to a further month.

If the date of the last incorrect payment is less than 4 months ago, and if the worker/employee decides to pursue a complaint to the Industrial Tribunal alleging an unlawful deduction from wages, then the claim can potentially go back to the later of the start of their employment or the implementation of the Working Time Regulations (Northern Ireland) 1998 (23 November 1998).

You may wish to seek specific legal advice on this.

### **10. We have employees who we have not paid correctly but now have left the company - do we need to try and contact these employees and pay them?**

You could adopt a wait and see approach. If the employees have left the company more than 4 months ago, then they will be out of time in pursuing a Tribunal claim. You should be aware that in limited circumstances the Tribunal can extend time if the Tribunal finds it was not reasonably practicable to present the claim within the legal time period.

**11. If payment was on basic pay between 1998 and say, 2015 and therefore not compliant, does that mean tribunal claims could be taken?**

Claims must be presented to the Industrial Tribunal within 3 months of the date of the last incorrect payment. Therefore, if the deductions relate to the period 1998-2015 and the *underlying vice* was corrected in 2015 and since then correct payments have been made, then any new claims would be out of date.

**12. Is the obligation on the employee to state what the loss is?**

The employee must demonstrate the precise amount of wages that have been deducted. However, given the potential difficulties with historically calculating these sums and paucity of records going back to the beginning of employment/implementation of the Working Time Regulations (Northern Ireland) 1998, it may not be possible to say with exact preision what is due and owing.

The President of the Industrial Tribunals, Mr Noel Kelly, has encouraged parties to adopt a pragmatic approach in respect of the calculation of underpayments. In his briefing note following the Tribunal User Group Meeting on 6 November 2023 he stated:

*'[Parties] have to be practical about this. It will simply not be possible to produce and to analyse the necessary documentation to fix precise sums in relation to underpayments of holiday pay. In many cases the documentation will simply not exist. In other cases it will be manual documentation or documentation on microfiche systems. Even if the documentation has been retained digitally, it will be a massive task to extract the necessary information and to formulate in a way that will enable a tribunal to assess precisely the amount of holiday pay underpaid.'*

*The practical implication of this is that the **only** way forward is a broad-brush approach to such settlements. There will have to be standard payments agreed between the respondents and the claimants in respect of different grades, length of service etc. There will inevitably be some winners or losers but there does not appear to be any alternative.'*

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