

Rolled Up Holiday Pay: Is it Still Lawful?

Workers are entitled to four weeks paid holiday per year. This right was introduced in the UK in 1998 by the Working Time Regulations and seems like a simple enough idea. Unfortunately, nothing is ever simple in the world of employment law and this email comments on the practice of rolled up holiday pay and why it may now, according to the European Courts of Justice, be unlawful.

Rolled up holiday pay is where a worker's rate of pay expressly includes an element of holiday pay. This is usually expressed as a percentage, for example an employee receives £7.50 per hour, 7% of which is holiday pay. When a worker goes on holiday, he or she receives no pay, because it has already been paid in their salary. We have discussed the definition of a worker in past emails. Suffice to say that it includes employees and many freelance workers.

Rolled up pay is useful in businesses where there are a significant number of temporary workers or workers working irregular hours. It is easier to administer than trying to calculate how much holiday this type of worker has accrued. However, the main problem with rolled up holiday pay is that it does not encourage workers to take holiday, as the more they work, the more they are paid.

Unions and individuals have challenged the use of rolled up pay in the courts, on the basis that this payment method does not accord with the Working Time Regulations or the EU Working Time Directive. The net result of these challenges was that rolled up pay was held to be unlawful in Scotland, and workers were awarded holiday pay in addition to their rolled up pay, whilst in England it was held to be lawful provided that the holiday element of the rolled up pay was clearly identified in the contract and preferably in the pay slip together with the percentage or amount of holiday pay. Because of this anomalous situation, a number of cases were joined together and sent to the European Courts of Justice to sort out.

The ECJ has decided that the purpose of the Directive was to ensure that workers do take holiday for their health and safety and that they receive remuneration when doing so. Consequently, rolled up holiday pay cannot be lawful. The ECJ went on to

invite Member States to legislate to ensure such practices are not continued.

However, and just to be confusing, the ECJ also decided that an employer would be given the benefit of having paid any clearly identified rolled up holiday pay if a worker were to pursue a claim for holiday pay.

This decision of the ECJ does not provide a strong incentive to discontinue the practice of rolled up holiday pay. However, it is likely that the Government will legislate to make the practice of rolled up holiday pay unlawful. If you are currently not using rolled up pay, but are considering doing so, we are recommending that you do not do so, as any such scheme is likely to be relatively short lived. If you are currently using a rolled up pay scheme, it is time to start thinking about moving to the more traditional method of paying holiday pay when a worker actually takes holiday. This is unlikely to be a popular move and we would recommend that you take advice before embarking on this course.

For more specific information or to discuss your requirements please call either Amanda Galashan or Julie Calleux at EmployEase on 0207 831 5052, or email us at info@employease.co.uk.

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