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**INFORMATION NOTE NO. 3**

**June 2019**

## **HOLIDAYS AND HOLIDAY PAY**

Arrangements for holidays and holiday pay should be agreed between employers and workers or their representatives. Disagreements over holidays and holiday pay are common if entitlements are not clearly set out in writing. Such disagreements may lead to deterioration in employment relations and possible complaints to industrial tribunals.

### **Holiday entitlement and the law**

The Working Time Regulations (Northern Ireland) 2016 (the Regulations) set down the minimum annual leave provisions for workers although some employers may provide more generous contractual holidays. The Regulations apply to all workers whether employed on a full-time or part-time basis, temporary or permanent contract and to agency workers and freelancers.

Under the Regulations, workers have the right to:

- 5.6 weeks' paid leave each year, capped at 28 days
- receive a payment for untaken statutory leave entitlement on termination of employment.

The provisions in the Regulations on holidays and holiday pay do not, at present, apply to workers in the armed forces or police or parts of the civil protection services where their activities conflict with the statutory entitlement to paid annual leave.

Schedule 2 of the Regulations makes special provisions for annual leave in relation to agricultural workers. Their holidays are laid down by the [Agricultural Wages Board for Northern Ireland](#) (telephone number 028 9052 0813).

### **Public holidays and the law**

There is no statutory entitlement to paid leave for public holidays. Generally, public holidays include bank holidays, holidays by Royal Proclamation and 'common law holidays'. Banks are not allowed to operate on bank holidays. When public holidays in the Christmas and New Year period fall on Saturdays and Sundays, alternative week days are declared public holidays. Any right to paid time off for such holidays depends on the terms of the worker's contract. If the contract does not refer to public holidays then the right to paid leave may have built up through custom and practice. Paid public holidays can be counted as part of the statutory 5.6 weeks holiday entitlement under The Working Time Regulations (Northern Ireland) 2016

### **Providing information on holiday entitlements to workers**

Employers are required by law to provide all employees, within two months of commencing employment, a written statement of employment particulars. The law requires this written statement to contain details of holidays and holiday pay entitlements. Details of holiday pay and entitlements may also be included in the employee's written contract, where there is one.

The written statement or contract should contain sufficient detail to enable the employee's entitlement to be precisely calculated, including any entitlement to accrued holiday pay on the termination of employment.

## **Part-time worker's holiday entitlements**

### **Annual Leave Entitlements**

Part-time workers are entitled to the same holidays as full-time workers, calculated on a pro-rata basis. For example, an employee who works three days a week is entitled to 16.8 days paid holiday - their normal working week multiplied by 5.6. Holiday entitlements for part-time workers can also be calculated in hours where their number of hours worked per day varies. For example, an employee who works fifteen hours a week which includes two days at six hours per day and one day at three hours is entitled to 84 hours holidays per year - their normal week multiplied by 5.6.

### **Public Holiday Entitlements**

The Part-time Workers (Prevention of less Favourable Treatment) Regulations 2000 provide that part-time workers should not be treated less favourably than comparable full-timers in regard to their contractual terms. As most bank and public holidays fall on a Monday those staff who do not normally work that day could be disadvantaged. Good practice suggests that such workers should be given a pro rata entitlement of days off in lieu according to the number of hours they work. For example, an employee who works three days per week is entitled to three fifths of the public holiday entitlement that a full time worker who works five days per week is entitled to.

Guidance on the rights of Part-time workers can be found as follows.

Employers- [Part-time workers' rights](#)

## Agency and casual worker's holiday entitlements

Agency and casual workers are entitled to holidays under the Regulations in the same way as other workers. However, entitlement will depend on their employment relationship, pattern of work and length of service and may be calculated on a pro rata basis. Where this is the case, wages on each termination will normally contain an element of holiday pay where the appropriate leave entitlement has not been taken.

## Establishing the holiday leave year

The Regulations stipulate that the leave year will begin:

- on the date the worker began working for the current employer; or
- on a date set by the employer which should be set out in the written statement of main terms and conditions - perhaps, for example, from 1<sup>st</sup> April to 31<sup>st</sup> March.

If a worker starts work part way through the company's leave year, the initial holiday entitlement is ordinarily based on the period from that date until the leave year ends. In most cases employers will calculate entitlement for a part year pro rata to the full year. So, if a worker begins work in July and the company's leave year runs from April to March, the entitlement will be approximately three-quarters of the full entitlement for that year.

## Carrying over holidays into another leave year

Amendments to holiday entitlements from October 2007 include the right for employers and workers to agree that up to 1.6 weeks can be carried over into the next holiday year. A minimum of 4 weeks annual leave must be taken each year. Where an employer provides in excess of 5.6 weeks they may agree that this additional amount can also be carried over into the next holiday year.

## Accrual of holidays

The Regulations permit an employer to operate a holiday accrual system for workers who are in their first year of employment (only). In practice this means that a new worker will accrue one twelfth of their annual holiday entitlement each month they are employed. This will apply from the start of the employment. For example, an individual who works five days per week and who has been employed for six months will have built up fourteen days annual leave. This is based on an annual entitlement of  $28/12 \times 6 = 14$  days (2.8 weeks).

## Holiday entitlements during periods of absence

As long as a contract exists between the employer and the worker, the statutory minimum entitlement to paid holiday will continue to accrue during periods of absence, such as ordinary and additional maternity leave.

If the employee is prevented because of sickness absence from taking their accrued holiday before the end of the holiday year, then the employer must allow them to carry forward all or some of their accrued holiday to the next year, even if the contract states that no carry-over is allowed. As a minimum, the employer must ensure that the employee has been able to take or carry over four weeks holiday each year.

## Calculating holiday pay (See appendix on page 10)

For each week of their statutory leave entitlement workers are entitled to be paid a week's pay calculated in accordance with Part I, Chapter IV of the Employment Rights (Northern Ireland) Order 1996 as follows:

### Workers with normal working hours

- If a worker's pay does not vary with the amount of work done then a week's pay is the amount due for a week's work under the worker's contract

- If a worker's pay varies with the amount of work done such as with piece work or where a week's pay is partly made up of variable bonuses or commissions then the amount of a week's pay is the pay for the normal weekly working hours multiplied by the workers average hourly rate over the previous twelve weeks. To calculate a week's holiday pay for a worker, their weekly pay for the previous twelve weeks is added up and divided by the total number of hours worked during the same twelve week period. This total, the average hourly rate is then multiplied by the normal weekly working hours. Any week in which no pay was due should be replaced by the last previous week in which pay was received to bring the total to twelve.
- Shift and rota workers, whose pay varies because they work their normal hours at varying times and in varying amounts in different weeks, have their week's pay calculated differently. Their average weekly hours of work, in the preceding twelve weeks, are multiplied by their average hourly rate. The hourly rate is calculated as above and includes any shift allowance which is payable.

### Workers with no normal working hours

- If a worker has no normal working hours then a week's pay is the average pay received over the preceding 12 weeks. Any week for which no pay was due should be replaced by the last previous week for which pay was due.

For example to calculate holiday pay due for a worker whose hourly rate is £6.50\* and whose hours of work vary from week to week, has worked for six weeks at 45 hours, three weeks at 25 hours and three weeks at 40 hours is entitled to holiday pay for a week's holiday of:

$$(6 \times 45) + (3 \times 25) + (3 \times 40) / 12 \times \text{£[minimum wage rate](#)*} = \text{£251.87}$$

\*the National Minimum Wage rate for workers changes on a yearly basis each April. Please see [here](#) for current rates.

An interactive tool to enable employers to calculate annual holiday entitlements is available on nibusinessinfo - [Calculate your employees' holiday entitlement](#)

## Applying for holidays

### Requesting holidays

Workers are required to give notice to their employers if they wish to take a holiday. The notice must be twice as long as the period of leave requested. For example, a worker requesting one week's holiday needs to give two week's notice. The employer can refuse permission by giving notice at least as long as the leave requested, in this example this would be one week.

### Putting restrictions on when holidays can be taken

Restrictions on taking holidays may be expressly stated in the contract of employment, implied from custom and practice or incorporated into individual contracts from a collective agreement between the employer and Trade Union(s).

Employers may choose to:

- shut down for certain periods during which all or some groups of workers have to use their annual holiday entitlement;
- nominate particular dates as days of closure, when workers are expected to take annual leave, e.g. over the Christmas and New Year period;
- determine the maximum amounts of leave that can be taken on any one occasion and also the periods when leave may be taken.

Any clash of requested holiday dates may be resolved by management. For example consideration of the particular circumstances of the

individuals concerned as well as the needs of the business or by other means such as drawing lots or agreeing 'first come, first served'.

In the absence of an agreement on the taking of leave, the provisions of the Regulations apply where an employer can require a worker to take all or any of the leave to which a worker is entitled at specific times, provided that the worker is given prior notice. The notice period should be at least twice the period of leave to be taken. For example, employers wishing to have a Christmas shut down spanning one week would have to give at least two weeks' notice to their workers.

### **Worker's rights when holiday entitlement is denied**

Workers denied statutory entitlements to paid annual leave under the Regulations should seek to settle disputes with their employer by talking through the problem. If the problem cannot be resolved informally, the worker should follow the organisation's grievance procedure which should contain the principles contained in the LRA Code of Practice on Disciplinary and Grievance Procedures. (See [Information Note 1 - Employee Grievances](#))

The employee should put their complaint in writing to the employer. If it is not possible to reach an agreement in this way, workers may submit a complaint to an Industrial Tribunal, or use the Labour Relations Arbitration Scheme\*, within three months of the refusal. If the complaint is upheld, the tribunal or arbitrator will make a declaration to that effect and may award compensation to be paid to the worker by the employer.

#### **\*Labour Relations Arbitration Scheme**

This scheme is designed to be a speedy, informal, confidential and non-legalistic alternative to an industrial tribunal. Entry to the Scheme is entirely voluntary and its use must be agreed by all parties to a claim through a signed arbitration agreement.



An arbitrator hears the case and makes a decision which is binding on both parties. There is no right to go to an industrial tribunal if the parties have opted to use this scheme instead. The remedies and compensation which an arbitrator can award are the same as those at an industrial tribunal.

## **Holiday entitlements upon termination of employment**

### **Calculating holiday pay for leavers**

No matter how short the period of employment, a worker has the right to be paid for leave accrued during that time. Under Part III of the Employment Rights (Northern Ireland) Order 1996 employers should include in a written statement of employment particulars sufficient detail to enable the precise calculation of a worker's entitlement to accrued holiday pay on termination of employment.

Accrued holiday on termination need not to be rounded to the nearest half day - payment can be made for the exact amount of leave accrued.

Unless a contract of employment improves the position, the provisions of the Regulations apply and payment for untaken leave should be calculated using the formula below:

**(A x B) - C** where:

**A** is the period of leave to which the worker is entitled

**B** is the proportion of the worker's leave year which expired before employment ended

**C** is the period of leave taken by the worker between the start of the leave year and the termination date

For example:

A worker, who works 5 days a week, qualifies for 5.6 weeks' annual leave and finished employment after 6 months, having taken 5 days' leave, will be entitled to:

In weeks,  $5.6 \text{ weeks} \times 0.5 - 1 \text{ week} = 1.8 \text{ week's pay}$  or in days,  $28 \text{ days} \times 0.5 - 5 \text{ days} = 9 \text{ day's pay}$ .

## Recovering overpaid holiday pay upon termination of employment

Regulation 14 of the Regulations states that an employer and worker can draw up a 'relevant agreement', e.g. in the contract of employment to provide that a worker will compensate the employer, whether by payment, undertaking additional work or otherwise, if leave already taken is in excess of entitlement when employment ends.

There should be a 'relevant agreement' in place; if not, and a deduction of overpayment is made by the employer from the worker's final wage payment, the worker may have the right to submit a claim to an Industrial Tribunal or use the Labour Relations Arbitration Scheme\* under Part IV of the Employment Rights (Northern Ireland) Order 1996 - the right not to suffer unauthorised deductions.

### **\*Labour Relations Arbitration Scheme**

This scheme is designed to be a speedy, informal, confidential and non-legalistic alternative to an industrial tribunal. Entry to the Scheme is entirely voluntary and its use must be agreed by all parties to a claim through a signed arbitration agreement. An arbitrator hears the case and makes a decision which is binding on both parties. There is no right to go to an industrial tribunal if the parties have opted to use this scheme instead. The remedies and compensation which an arbitrator can award are the same as those at an industrial tribunal

### **Rolled up holiday pay**

“Rolled-up” holiday pay refers to the practice of an employer agreeing with workers that their pay for annual leave is included in their hourly rate and paid as part of remuneration for working time, but not paid in respect of a specific period of leave actually taken - indeed the worker may not formally take any particular period of leave, but is treated as being on holiday when he or she is not working. This system has been criticised as discouraging workers from taking holidays. Following an ECJ Judgement on 16 March 2006, “Rolled-up” holiday pay is now considered unlawful under the Working Time Directive, and must be paid in respect of a specific period during which the worker actually takes leave.

## APPENDIX

### CALCULATING HOLIDAY PAY

The question of how much pay a worker is due during a period of holiday has been the subject of a number of recent court judgments.

- CJEU cases ([Williams v British Airways](#) and [Lock v British Gas](#)). The intent of EU law is that a worker's holiday pay should reflect the pay that a worker normally earns. A worker's holiday pay should include their basic pay plus an amount equivalent to any overtime pay / sales commission / other pay supplements that the worker regularly receives.
- GB cases - [Bear Scotland v Fulton](#), and [Dudley v Willets](#)
- NI cases - [Patterson V Castlereagh BC](#) and the PSNI overtime case

This means that the rules employers and workers follow to calculate holiday pay may need to be updated.

#### In summary;

- Guaranteed and normal non-guaranteed overtime should be considered when calculating a worker's statutory holiday pay entitlement.
- Commission should be factored into statutory holiday pay calculations.
- Work-related travel may need to be factored into statutory holiday pay calculations.
- A worker's entitlement to holiday pay will continue to accrue during sick leave.
- There are different rules for calculating holiday pay depending on the working patterns involved.
- Workers must take their statutory paid annual leave allowance and can only be 'paid in lieu' for this when their employment ends.

## Guaranteed overtime

Guaranteed overtime is where the employer is obliged by the contract to offer and pay for agreed overtime. Following a judgment in 2014, guaranteed overtime must be included within the calculation of holiday pay

## Non-guaranteed overtime

Non-guaranteed overtime is where there is no obligation by the employer to offer overtime but if they do then the worker is obliged by the contract to work overtime. On 4th November 2014 the Employment Appeal Tribunal made a ruling in the case of Bear Scotland v Fulton which covers how holiday pay should be calculated when non-guaranteed overtime is worked.

- Workers should have their normal non-guaranteed overtime taken into account when they are being paid annual leave.
- Anybody making a claim must have had an underpayment for holiday pay that has taken place within three months of lodging an industrial tribunal claim.
- If a claim involves a series of underpayments, any claims for the earlier underpayments will fail if there has been a break of more than three months between those underpayments.
- Only the 4 weeks' annual leave entitlement under the original Working Time Directive are covered by this judgment, rather than the full 5.6 weeks' leave provided by the Regulations as they operate in the UK.

This judgment may have an impact in situations where non-guaranteed overtime is carried out by workers on a regular or consistent basis.

It is unlikely to have an impact in situations where non-guaranteed overtime is either already factored into holiday pay, or possibly where this overtime is only used on genuinely one-off occasions.

Employers, workers and trade unions are encouraged to discuss any concerns arising from this judgment with a view to seeking agreement on any measures or policy changes they feel may be necessary. The Labour Relations Agency (LRA) may be able to help parties find solutions.

## Limit on a claim for an underpayment

The [Deduction from Wages \(Limitation\) Regulations 2014](#) regulations made changes to the Employment Rights Act 1996 in relation to claims for

deduction of wages. The changes mean that when making claims for a series of backdated deductions from wages, including any shortfall in holiday pay, the period that the claim can cover is limited to a maximum of 2 years.

The position in Northern Ireland at the moment is not clear although the Department for the Economy may consult on this issue in the near future.

## Voluntary Overtime

The law surrounding the calculation of holiday pay is in a state of evolution. The starting position is that employees are entitled to receive 'normal remuneration' during periods of annual leave. However what is considered 'normal remuneration'?

The most recent development in this area has come following the case of *Patterson v Castlereagh Borough Council* (2015) decided by the Northern Ireland Court of Appeal.

The decision was by no means definitive and merely established that, in principle, it is possible for voluntary overtime payments to be included as part of an employee's 'normal remuneration' for the purposes of the Working Time Regulations (Northern Ireland) 2016. Therefore, if an employer is under no obligation to offer and an employee is under no obligation to accept overtime but on occasions an employee works overtime on an entirely voluntary basis, this can be taken into account when calculating the employee's holiday pay.

This decision suggests that a move to extend the law so that payments for wholly voluntary overtime will be included in holiday pay calculations is likely. It will however continue to be a question of fact for each tribunal to determine whether or not overtime is 'normally' carried out and whether overtime pay can properly be described as forming part of 'normal remuneration' for these purposes.

This issue has now been referred back to the Employment Tribunal in Northern Ireland to make a decision on the specific facts of this case. It is hoped that once this point is clarified practical guidance on this issue

will be provided by the resulting judgment.

## Commission

Commission is usually an amount of money a worker receives as a result of making sales and can make up some or all of their earnings. On 22 May 2014, the **European Court of Justice** heard the case of *Lock v British Gas Trading Ltd* and ruled that commission which a worker would normally earn should be factored into holiday pay calculations. This ruling was referred back to the UK to specify how holiday pay including commission should be calculated.

**The Employment Tribunal** decided that the Working Time Regulations can be interpreted so as to include commission payments when calculating holiday pay for employees whose pay normally includes an element of commission. This applies to the 4 weeks' annual leave granted under Regulation 13 of the Working Time Regulations and not to the additional 1.6 weeks granted under Regulation 13A.

The employment tribunal inserted new words into regulation 16(3) of the Working Time Regulations 1998 as follows:-

"(e) as if, in the case of the entitlement under regulation 13, a worker with normal working hours whose remuneration includes commission or similar payment shall be deemed to have remuneration which varies with the amount of work done for the purpose of section 221."

In essence the *Lock v British Gas* case addressed the core issue that the week's pay provisions of the Employment Rights Act 1996 (NI Order in Northern Ireland) should be re-written for the purposes of the Working Time Regulations so that commission and similar payments are included in holiday pay. Unfortunately the decision did not clarify other key issues related to commission such as reference periods and how to quantify a claim for the commission element of holiday pay.

Those issues, notes the tribunal, will be reserved for another stage in the litigation and as such specialist legal advice should be sought whilst there is uncertainty regarding this aspect of the interpretation of the law.



The EAT upheld the employment tribunal decision and followed its own earlier decision in *Bear Scotland Ltd and others v Fulton and others*, a similar case on whether overtime payments should be included in holiday pay.

Arguments at the **Court of Appeal** in July 2016 primarily involved the question of whether or not the Working Time Regulations 1998 could be interpreted to include commission in Mr Lock's holiday pay.

The Court of Appeal also heard arguments about whether or not a decision to include commission in holiday pay for workers such as Mr Lock might be too broad and have unintended consequences.

For example, a decision to include commission in holiday pay is not intended to apply to staff who receive an annual discretionary bonus based on team or organisational performance.

The parties agreed that the outcome of the Court of Appeal decision should apply only to workers who have normal working hours, whose pay does not vary according to the amount of work done, but who receive individual results-based commission as a part of their normal remuneration.

## **Work-related travel**

Work-related travel can have a number of different meanings but for most employment matters, this will usually mean any travel that is made for work purposes that is not a part of a worker's commute to their usual place of work. On 4 November 2014 the Employment Appeal Tribunal issued a judgment in a case joined to *Bear Scotland v Fulton* which covers how holiday pay should be calculated in relation to work-related travel.

Where payments are made for time spent travelling to and from work as part of a worker's normal pay, these may need to be considered when calculating holiday pay.

## **Holiday pay and sickness**

When a worker takes paid or unpaid sick leave, their annual leave will continue to accrue. If a worker is unable to take their annual leave in their current leave year because of sickness, they should be allowed to carry that annual leave over until they are able to take it, or they may choose to specify a period where they are sick but still wish to be paid annual leave at their usual annual leave rate.

### Calculating holiday pay for different working patterns

No matter the working pattern, a worker should still receive holiday pay based on a 'week's normal remuneration'. This usually means their weekly wage but may include allowances or similar payments. Some of these payments might include the situations described earlier on this page, such as commission.

- For workers with fixed working hours - If a worker's working hours do not vary, holiday pay would be a week's normal remuneration.
- For workers with no normal working hours - If a worker has no normal working hours then their holiday pay would still be a week's normal remuneration but the week's pay is usually calculated by working out the average pay received over the previous 12 weeks in which they were paid.
- For shift workers - If a worker works shifts then a week's holiday pay is usually calculated by working out the average number of hours worked in the previous 12 weeks at their average hourly rate.

### Payment in lieu of holidays

While workers are in employment, 5.6 weeks of their annual leave (this is the amount all UK workers are statutorily entitled to) must be taken and cannot be 'paid off'. Anything above the statutory allowance may be paid in lieu but this would depend on the terms of the contract.

When a worker's employment is terminated, all outstanding holiday pay that has been accrued but not taken (including the statutory allowance) must be paid.

## **Role of the Labour Relations Agency**

The Labour Relations Agency can provide information and advice to employees and employers on holiday entitlements and, in the event of complaints being made to an industrial tribunal, a conciliation service. The Agency can also assist employers in drawing up the 'Statement of Main Terms and Conditions of Employment'

See LRA website for further information on services provided at [www.lra.org.uk](http://www.lra.org.uk)

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