

## Holiday Pay

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**CATEGORY:**

ARTICLE

'Rolled up holiday pay' is holiday pay that is incorporated into a worker's basic wage or rate. It is used by employers in an attempt to comply with the Working Time Regulations, without having to pay workers during periods when they are not working.

Rolled up holiday pay is most commonly used in respect of non-standard labour. For example: it is a good way of avoiding a dispute about holiday pay with casual workers and those on short-term contracts; and where there are twenty-four hour shift systems, it is difficult to think of another way in which appropriate provision could be made for the payment of statutory holidays.

In recent times, the practice of rolling up holiday has come under close scrutiny. Many workers and practitioners have suggested that it is inconsistent with the spirit of the Working Time Regulations, because if staff are not paid at the time they take their holiday, they are unlikely to take it at all.

In the case of *Caulfield v Marshalls Clay Products*, the Employment Appeal Tribunal decided that there was nothing unlawful about rolling up holiday pay provided certain guidelines were followed. Those guidelines were set out in its judgment. The case was then referred to the Court of Appeal who, whilst agreeing with the EAT, referred the matter on to the European Court of Justice to clarify the position. The ECJ is unlikely to hear the case for several months.

Now, in the case of *Smith v Morrisroes*, the EAT has re-drafted the Marshalls Clay guidelines. The new guidelines are:

There must be a 'mutual agreement' for genuine payment of holidays, representing a 'true addition' to the contractual rate of pay.

The best way of evidencing this is for:

- the provision for rolled up holiday pay to be clearly incorporated into the contract;
- the percentage or amount allocated to holiday pay (or particulars sufficient to enable it to be calculated) to be identified in the contract, and preferably also in the payslip; and
- records to be kept of holidays taken (or of absences from work when holidays can be taken) and for reasonably practicable steps to be taken to ensure that workers take their holidays before the end of the relevant holiday year.

(These guidelines are subject to any subsequent change in the law as a result of the ECJ reference in *Marshalls Clay*.)

In setting these new guidelines, the EAT noted the following.

- There are economic advantages for the worker in having rolled up holiday pay: first, the holiday pay is paid on an accruing basis in advance (giving a cash flow advantage); second, where overtime is worked often it is paid at the contractual rate (incorporating the element of rolled up holiday pay), so the worker gains extra holiday pay each time overtime is worked.
- The requirement for there to be a 'true addition' to the contractual rate of pay will not be satisfied if an existing contract is varied to provide that holiday pay is rolled up into the contractual rate of pay without that pay being increased. One exception exists: where the employer can show that the total remuneration remained the same owing to an agreement to reduce the basic rate because of some economic difficulties or downturn in business. Withers' view is that such cases are likely to be limited.
- When issuing a statement of employment particulars, the calculation of the rolled up holiday pay (either its percentage or its amount) need not actually be set out in the body of the contract of employment, but it is important that sufficient particulars be given, and be available, to enable holiday pay to be calculated.
- It is recognised that employers may not be able to record the actual dates of the statutory holidays to which employees are entitled, or which they are taking. School teachers and others may be entitled to more than the four weeks' statutory holiday entitlement, and an employer will only be able to record the total period of absence within which the four weeks are taken. Similarly, if the Court of Appeal in the *Ainsworth* case (see below) decides that those on long-term sick leave are also entitled to holiday pay, it will again not be possible for employers to know precisely when such holiday is being taken, and it would be sufficient for them to be able to record the employee's absence.

The facts of the various cases in *Smith v Morrisroes* show how the EAT operated its guidelines in practice.