



HR Broadcast – Holiday in the final year

After TUPE (Transfer of Undertakings Protection of Employment) Regulations, issues involving holiday entitlement must rank as the one that causes greatest confusion amongst our most valued clients. In this Broadcast we will deal with calculating annual holiday entitlement in the final year of employment.

As you will be aware, under the Working Time Regulations 1998 all workers have a right to a minimum of 5.6 weeks' paid holiday in each leave year. The Regulations also set out the position if an employee leaves your employment part-way through a leave year. Please note that there is no distinction between resignation and dismissal; in both cases the employee has a pro rata statutory holiday entitlement based on the expired period of that final leave year.

Where the proportion of holiday taken by the employee is less than the proportion of the leave year which has expired, you must pay in lieu any days' holiday which they've accrued but not yet taken (at the date of termination). Again, please note that a day's pay for these purposes is based on working days not calendar days. There are 260 working days in the year for an employee who works five days a week, so pay in lieu of one day's holiday will be 1/260th of their annual salary. You should also be aware that if the calculation results in a fraction of a day, you can round it up to the nearest half or full day. In most circumstances we would advise rounding up to the nearest half day. What you can't do is round it down.

Unless the employee was entitled or allowed to carry over untaken holiday from a previous leave year, they won't receive a payment in respect of any earlier untaken holiday when their employment terminates, as it will already have been lost.

Please be aware that this statutory formula won't apply if there's a "relevant agreement" in place, such as an employment contract, which sets out your own method of calculating the sum due on termination. Unusually, the Regulations suggest you can provide that the sum you'll pay in lieu is less than that provided by the statutory formula but you can't exclude the right to payment altogether.

In the early 2000's a number of contracts of employment allowed a £1 nominal payment in lieu of accrued untaken holiday, however a 2013 case confirmed this was not acceptable. In the recent case of *Podlasiak v Edinburgh Woollen Mill Limited*, Ms Podlasiak worked for Edinburgh Woollen Mill under a zero hours contract. Upon termination of this contract, Ms Podlasiak had 3 days of accrued and untaken holiday. Had Ms Podlasiak taken this holiday during her employment, she would have been paid the net sum of £176.

It is trite law that upon termination of employment, workers are entitled to be paid in lieu of accrued and untaken holiday. In this instance, Edinburgh Woollen Mill sought to rely on a clause in Ms Podlasiak's contract which provided that upon termination of her employment, Ms Podlasiak would be entitled to



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the sum of £1 in lieu of any untaken holiday. Ms Podlasiak claimed that she should have received the sum of £176.

The Tribunal found in favour of Ms Podlasiak and ordered Edinburgh Woollen Mill to pay her the sum of £176. The Judge concluded that payment in lieu of holiday has to be calculated to reflect the pay that the individual would have received had they taken the leave in respect of which the payment in lieu is made. It therefore held that the term in Ms Podlasiak's contract providing for a token payment of £1 was impermissible. However, this is only a first instance decision and so it is not binding on other Tribunals and on future cases.

There is just one further issue as regards "excess holiday taken". Where your employee has taken more holiday than they've accrued at their termination date, you can only deduct an amount equal to the excess holiday taken from their final salary payment if a relevant agreement (such as the contract of employment) provides for a deduction from wages to be made. If the final salary payment doesn't fully cover the amount equal to the excess holiday taken, you can only require the employee to compensate you if the relevant agreement provides for it.