

Holiday Pay – An employer cannot pay an allowance instead of granting leave*

This issue arose in case ADJ-00025369 between a Former Tutor and an Educational Training Board. In this case the issue was that the employee was paid an additional sum on top of the salary to cover annual leave. The Adjudication Officer referred to the case of Kvaerner Cementation (Ireland) Limited -v- Martin Tracy DWT017 where the Labour Court held

“Article 7 of the Directive provides as follows

- (1) Member States shall take the measures necessary to ensure that every worker is entitled to paid leave of at least four weeks in accordance with the conditions or entitlements to, and the granting of, such leave laid down by national legislation and/or practice*
- (2) The minimum period of annual leave may not be replaced by an allowance in lieu, except where the employment relationship is terminated. Part III of the 1997 Act was enacted to give effect to Article 7 (1) of the Directive. It provides employees with an entitlement to four weeks paid annual leave per year (and proportionally less where the employee has less than a full year’s employment) and to be paid leave, or additional payment in respect of public holidays. This part also makes consequential provisions in relation to the calculation and time of payment for such leave. It also makes provision at Section 23 where the payment of compensation to an employee where annual leave is outstanding at the cesser of his/her employment”*

The Adjudication Officer pointed out that the Labour Court went on to state

“What emerges from these statutory provisions is that:

- 1. The primary obligation on an employer is to ensure that employees receive the requisite period of paid leave.*
- 2. That obligations cannot be offset by payment of an allowance in lieu of such leave.*
- 3. The obligation is imposed for the protection of the health and safety of workers”*

The Adjudication Officer then went on to state that the Court decided that

“The inclusion of an element in basic pay designed to cover holiday pay is inconsistent with the result with Article 7 of the Directive Part III of the Act is intended to achieve.”

The Adjudication Officer also quoted the Labour Court case is Mold Nal Limited -v- Motovilova DWT0754 where the Labour Court did not accept the Respondent’s position of paying an allowance in lieu of annual leave entitlements where the Labour Court stated

“The right of paid annual leave is provided for by Article 7 of Directive 93/104/EEC concerning certain aspects of the Organisation of Working Time. Section 19 of the Organisation of Working Time Act gives effect to Article 7 of the Directive and must be interpreted so as to achieve the result envisaged by the Directive.”

The Adjudication Officer pointed out the Labour Court had held in that case that Article 7 of the Directive and the Organisation of Working Time Act provides that the prescribed minimum period of annual leave may not be replaced by an allowance in lieu except where the employment relationship is terminated.

This is a helpful decision by the Adjudication Officer. It does mean that where an employer decides to pay an additional amount to cover annual leave this will not stop the employee being able to bring a successful claim against the employer for not receiving their annual leave entitlements.

This issue also arose in case ADJ-00027402. The Adjudication Officer pointed out that in Royal Liver Assurance Limited -v- SIPTU DWT41/2001 the Labour Court framed the description of annual leave as;

“A term of common usage in Industrial Relations and is well understood as meaning a period of rest and relaxation during which a worker is paid his normal wages without any obligation to work or provide any service to the employer”.

The case of Federatie Nederlandse Vakbeweging 2006 ECR1-3423 was quoted where the Court of Justice of the European Union stated as regards annual leave that it was;

“Particularly important principle of community law from which there can be no derogations”.

In relation to the issue of payment in lieu the Adjudication Officer referred to the case of Faser Court Limited trading as Casey Enterprises and Shay O Brien DWT0743 where the Labour Court drew on the case of C-134/04 known as the Robinson Steel case, and C-257/04 being a case of Michael Jason Clarke -v- Frank Staddon Limited stating;

“The fact that the type of arrangement relied on by the respondent does not meet the requirements of the Directive and the Act has been put beyond doubt by recent decisions of the ECJ. In that case the Court of Justice made it clear that the relevant obligation imposed on an employer under the Directive can only be met by paying the employee in respect of holidays at the time the holidays are taken. The Decision is absolutely binding on this Court. Consequently, the defence to the within claim relied on by the respondent is unsustainable by law”.

The Adjudication Officer also referred to the case of Lock -v- British Gas Trading Limited C-539/12 where the Court of Justice considered by way of preliminary ruling payment and calculation of holiday pay where the remuneration was largely based on commission. In that case it was held that commission should be taken into account as not to do so may deter a worker from taking annual leave contrary to the objectives of Article 7.

This again is a helpful decision of the Adjudication Officer in setting out the law as regards holidays. An employer cannot pay in lieu of holiday and equally where commission is earned the average commission has to be taken into account in setting the holiday pay.

***Before acting or refraining from acting on anything in this guide, legal advice should be sought from a solicitor.**

***In contentious cases a solicitor may not charge fees or expenses as a proportion or percentage of any award or settlement.**