

SHOCK CHANGE TO HOLIDAY PAY ARRANGEMENTS

Perhaps the most significant piece of health and safety legislation to affect swimming teachers and coaches in the last ten years was The Working Time Regulations 1998, not for the wide ranging controls it imposed on hours of work but because it gave every worker the right to a minimum of four weeks paid holiday. Until that time many employed swimming teachers and coaches usually worked school terms with school holidays off without pay.

The Regulations made no distinction between full-time, part-time, fixed-term and casual employees. It took several years for employers to comply with these Regulations but by and large most swimming teachers and coaches now receive paid holidays or an enhanced hourly payment in lieu of paid holidays. The Institute of Swimming helped many members with internal grievance complaints and applications to Employment Tribunals to win this right.

However the guidance on calculation implied that a thirteen-week period of work was necessary to calculate the holiday pay. Some employees interpreted this as meaning that workers on short-term or casual contracts were not entitled to holiday pay. This inaccurate interpretation was clarified by the decision of the European Court of Justice in *R v Secretary of State for Trade and Industry ex parte BECTU* (2001). This case ruled that Regulation 13(7) of the Working Time Regulations 1998 (which provides that a worker's entitlement to 4 weeks paid holiday only arises if he has been employed for 13 weeks) is incompatible with European Law. The Government therefore removed the 13-week qualifying period so that workers became entitled to paid leave from the first day of employment by the Amendment to the Working Time Regulations 1998 (SI 1998/1833).

The Regulations introduced the legal right for every worker to receive four weeks paid holiday but as referred to earlier because of the nature of swimming teachers and coaches work many employers chose to provide the pay as an identifiable enhancement on the hourly rate of pay rather than stipulate which four weeks of the school holidays were the 'paid' weeks. Generally this methodology is referred to as 'rolled-up' holiday pay and suited many swimming teachers and coaches as it helped to maintain a certain amount of independence through the holiday period.

However the Regulations coupled with the Employment Rights Act 1996 was part of a raft of legislation that minimised the advantages to employers of having 'casual' or 'fixed-term' employee contracts and in the swimming teaching/lesson world this manifested itself in the movement from the provision of 3 x 12 week terms per year (36 paid weeks) to the adoption of 5 x 10 week terms (50 paid weeks) or 4 x 12 week terms (48 paid weeks). It can be seen that the adoption of the 50 paid weeks option makes the application of holiday pay as an enhancement on the hourly rate difficult as the employee would only achieve two weeks 'real' holiday.

The position on the legality of 'rolled-up' paid holiday and whether or not it contravened the Working Time Regulations 1998 was clarified in the Court of Appeal in *Marshall's Clay Products Limited v Caulfield* (2004) (a decision binding only in England and Wales) which held that paying holiday pay on a rolled-up basis did **not** breach the Regulations. However, the position in Scotland was different: the Scottish Court of Session decided in *MPB Structures Limited v Munro* (2003) that rolling up **is** unlawful. To resolve the matter, the Court of Appeal in *Marshall's Clay* and an Employment Tribunal in another similar case, *Robinson-Steele v RD Retail Services*, asked the European Court of Justice to give its view.



The ECJ decided that:

- the right of a worker to paid annual leave is a particularly important principle of European law;
- the minimum period of paid annual leave (four weeks) may not be replaced by an allowance in lieu, except where the employment relationship is terminated. That prohibition is intended to ensure that workers are normally entitled to actual rest, with a view to ensuring effective protection of their health and safety;
- the practice of rolling up effectively means that the minimum period of paid annual leave is replaced by an allowance in lieu **during** employment. This is not permitted under the Directive;
- workers cannot agree to contract out of these rights and so what their contracts of employment say is irrelevant;
- to comply with the Directive, holiday pay must be a payment in respect of a specific period during which the worker actually takes leave from work.

This decision effectively restores some logic to what was always intended to be a health and safety arrangement rather than being a social issue. Paid holiday must happen.

Practical advice

- Employers who currently roll up holiday pay will need to change their working practices. Workers will be able to bring claims now on the basis of the ECJ decision. However you must be fair and give employers time to make changes.
- If employers have been paying holiday pay on a rolled-up basis, the ECJ has said that they will be able to set off that holiday pay against any that may be due to the worker. This is, though, only the case if the rolled-up holiday pay element was paid “transparently and comprehensibly”. It will be up to employers to show that this is the case. Employers who have followed previous best practice guidance on this, for example by showing the holiday pay element separately in contracts and preferably also on payslips, should be able to do this.
- The ECJ stated that the European Member States are required to take appropriate measures to ensure that rolling up practices do not continue and so we can expect some amendments to the Regulations in the UK and these will probably be introduced sometime later this year.
- Bear in mind that, under the law as it currently stands, claims for unpaid holiday pay must generally be brought within three months of the end of the worker's contract or the end of the relevant holiday year. This, together with the ability to off set payments already made, is likely to limit the impact of this judgment for employers. However, the House of Lords is due to consider this point in October this year in the case of *Ainsworth v HM Revenue & Customs*. They will also be deciding whether workers are entitled to holiday pay during extended periods of sickness and other absence.



It seems likely based on this decision that most employers will opt for a working 48- week year with 4 x 12 week terms and four weeks paid holiday probably two at Christmas and two at Easter so there is a distinct likelihood that employers will seek to vary many swimming teachers contracts in the next year with the advantage that UK law requires them to do so!

Any swimming teacher and coach for whom this is an issue should contact Dennis Freeman-Wright on dfw@btinternet.com for further advice.

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