
Commission and overtime – included in holiday pay?

Does your business have workers who do overtime or earn commission? How do you calculate their holiday pay? Perhaps you base it on their basic pay – after all, they don't work overtime or earn commission while on holiday. Is this correct?

No – holiday pay **must** include the overtime and commission that workers would earn if they weren't on holiday

Courts and tribunals have covered this topic many times in recent years. In July this year, the Employment Appeal Tribunal confirmed that employers must include overtime pay in calculating holiday pay if it's regularly received and so part of their normal pay. However, if the overtime is genuinely a one-off, you could exclude it.

So, what are the general rules?

- Under our national law, workers are entitled to 5.6 weeks' paid holiday each year.
- 4 weeks of that is derived from European Union law. The additional 1.6 weeks is UK law only, relating to our bank holidays.
- EU says holiday pay must include all normal pay, including commission and overtime. That means, strictly speaking, it only applies to the first 4 weeks – pay for the remaining 1.6 could exclude commission and overtime if they're not contractually guaranteed. In practice, many employers calculate all holiday pay the European way, because splitting it can be quite complicated.
- For workers whose pay is variable, you must calculate their holiday pay based on the average salary, including any commission and overtime, for the previous 12 weeks in which they were paid – if no pay was received in any given week, exclude that week and go a further week back.
- If the worker's *basic* pay doesn't vary, but they receive overtime pay or commission, then this should be included if it's sufficiently regular to be considered part of their normal pay. Should you also use the 12-week reference period for calculating holiday pay? That would normally be sensible – the law isn't clear, but that approach has been accepted in several judgments.
- Whilst a worker's employed, you must not offer to pay them instead of them taking the leave. That would discourage taking of holiday and the European Court of Justice has ruled against such practices, since the EU sees taking holiday as a health and safety issue.
- If a worker has untaken leave at the end of their employment, then you must pay them in lieu of their holiday.

What this means for you

If your workers' pay varies, you must take care to include all normal pay in their holiday pay calculation. If their pay is fixed, you'll need to assess whether any commission and overtime they earn is sufficiently regular for holiday pay purposes. Unfortunately there is little guidance on what counts are 'regular' – certainly it's likely to be if it's weekly or monthly, and probably also if it happens routinely during a particular recurring period of time. If you're unsure, it may be safer to err on the side of caution and include it in the calculation.

Take care, also, with regard to casual workers – unless they're genuinely self-employed, doing business and marketing for themselves, you must pay their annual leave. If you get that wrong,

you could face arrears of holiday pay over a number of years.

You might also note that Acas has recently produced this guidance on working overtime, which addresses the various types of overtime and its effect on holiday pay.

Sellers beware – don't make claims you don't believe

You're trying to persuade a business to buy your products, which it will use to produce other products or sell on to others. You need to say how great your products are. You come up with some claims, though you don't really believe them - but you don't think you can persuade them to buy your products without making these claims. Business is business, right? No harm in making these claims?

Actually, it would be risky. As confirmed in a recent judgment, this would be fraudulent misrepresentation and if the buyer only entered the contract because of your fraudulent claims, they'd be entitled to rescind the contract and claim damages for losses caused by entering the contract.

Fraudulent misrepresentation is a statement that is made without believing it to be true. In this recent case, the statement concerned the cost of complying with regulations governing a product that the seller produced. If you do believe that the statement is true but were careless and happen to be wrong, that's more likely to be negligent misrepresentation.

If the misrepresentation induced your customer to enter a contract, the customer will be able to rescind the contract. For fraudulent misrepresentation, to induce means that the customer might have decided against entering the contract were it not for the misrepresentation. For negligent misrepresentation, the test is stronger – the customer would have to show that, were it not for the misrepresentation, they wouldn't have entered the contract.

Normally, the customer would be able to end the contract and claim from you any money paid under the contract.

What this means for you

Don't make false statements in the hope that it will get you a sale.

How we can help

We have numerous contracts, many of which include what's referred to as a 'non-reliance' clause – this says that your customer didn't rely on your pre-contract statements when entering the contract. Accordingly, the customer can't sue you for misrepresentation. As an example, see our **Agreement for the supply of goods (non-retail)**.

However, those clauses will only be effective for negligent misrepresentations. If you were fraudulent, those clauses won't help.

Employees dismissed over immigration status are entitled to appeal

You employ a foreign employee who has the right to work in the UK. However, that right expires on a certain date. If the employee applies for a further right to work in the UK by the time that the current one expires it's lawful to continue to employ them. If they don't apply in time,

then you must dismiss that employee.

But what if they apply on the day of expiry and, although they tell you of the application, they don't provide the documentary evidence before the expiry of their current right to work? Would it be fair to dismiss? And must you give a right to appeal?

In theory the dismissal would be fair – if an employee can't provide evidence of being entitled to work in the UK, you're entitled to dismiss on the basis that you genuinely believe they're not entitled to work in the UK. Further, you'd be entitled to act decisively, as continuing to employ could be considered a criminal offence. A right of appeal might seem unnecessary given that on the day of dismissal it appears the matter is clear cut and there's nothing to appeal against.

However, a recent Employment Appeal Tribunal (EAT) judgment has confirmed that you **must** allow them to appeal in these circumstances. During the appeal the employee would have shown that they were entitled to work in the UK and the employer would have been able to employ them lawfully. The EAT judge made the practical point that that period of time, as the expiry of a right to work approaches, is an anxious one for both the employee and employer. Difficult decisions must be made, and evidence is often not up to date. An appeal allows for these decisions to be reviewed.

In this case, the employer had already agreed to take the employee back. However, it would have been as a new starter without their continuous service - reinstatement after an appeal could've allowed them to keep that. Unless the employment contract said otherwise, the initial dismissal would be the effective date of termination of the employment contract even if an appeal is pending. But a successful appeal resurrects the original employment contract.

What this means for you

As a general rule, for a dismissal to be fair you must follow a fair procedure, and at the minimum you should follow Acas's Code of Practice on disciplinary and grievance procedures (opens a PDF), which says staff should have the opportunity to appeal.

How we can help

A number of our documents include disciplinary procedures, including our **Employee handbook** and **Employment agreement**. These procedures set out a standard policy for you to adopt and provides guidance. We also have 9 letters covering the various stages and potential outcomes for a disciplinary process, including an **Employee disciplinary meeting letter** and an **Employee formal appeal hearing outcome letter**. Each letter includes guidance about the best procedure to follow.