

# [ holiday pay and sub-contractors ]

## Introduction

There is a misconception that only employees are entitled to receive holiday pay. In fact, whether a worker is employed under a contract of service, or is working on a self-employed basis under a contract for service is not a significant issue. When a contract exists, part of that contract under the Working Time Regulations 1998 allows for the payment of paid annual leave to workers, in addition to the rate of pay agreed for undertaking the works offered. If workers are being paid under CIS a dispute over holiday pay can't normally be taken to an Employment Tribunal, but any worker could take the matter to the Small Claims Court for Breach of Contract and he or she has up to six years to do this.

## Definition of a Worker

According to the Department of Trade and Industry a 'worker' is any individual person who works, whether under a contract of employment or not, and who provides a personal service e.g. a casual worker, agency worker, and some freelance workers.

The DTI states that genuinely self-employed people or businesses to whom an employer subcontracts are not defined as workers, and that all employees are workers, but not all workers are employees.

It should be noted that the DTI distinguishes between people who are genuinely self-employed, perhaps with responsibility for own plant and labour, and labour only sub-contractors or freelancers, who are considered to be workers. Labour only sub-contractors tend to operate under the Construction Industry Scheme, which was set up for genuinely self-employed people or businesses only. If the provision of labour, or personal service, was the only existent factor, these labour only workers could in fact be deemed to be an employee under H M Revenue and Custom legislation in any case.

## Entitlement to Holiday Pay

The Working Time Regulations 1998 set down the minimum annual leave provisions for workers and under these regulations, workers (including part-timers and most agency and freelance workers) have the right to:

1. four weeks paid leave each year (since 23.11.99) plus 4 days Bank Holiday (from 01.10.07)
2. payment for untaken statutory leave entitlement on termination of employment

The worker has the right to be paid for leave accrued during that time. Under section 1 of the Employment Rights Act 1996 employers should include in a written statement of employment particulars, in sufficient detail to enable the precise calculation of a worker's entitlement to accrued holiday pay on termination of employment.

## Rolled Up Holiday Pay

In the *Cauldfield v Hanson Clay Products Ltd*, the European Court of Justice ruled that holiday pay can be paid to workers, rolled up as part of an hourly or daily rate of pay, but only if this is made transparently obvious to the worker. Any system of payment which falls short of this requirement can leave a contractor with huge liabilities. If a worker is not informed of the relative amounts, i.e. the basic rate of pay and the portion which represents holiday pay, he may be entitled to an additional payment equivalent to any holiday pay due. The ruling stated that holiday pay made as part of a rolled up rate in a transparent and comprehensible way may be set off against specific leave.

## Rolled Up Holiday Pay

In translation this means that a contractor can not offer say £8.00 per hour if it includes holiday pay, in other words it must be clearly stated that the job pays £7.33 per hour plus 67p holiday pay. The advice is to create terms of agreement to show the rate of pay is e.g. £7.33 per hour with 67p per hour to be set off against any accrued holiday entitlement, and not simply expect the worker to know this is the case.

This applies to all workers who do not receive paid annual leave, (including CIS workers who have been entitled to holiday pay since 1998), such as agency and other short term workers.

## Summary

In the best possible worlds all workers, including labour only subbies, would receive paid holiday leave, but in the construction industry with workers accruing a basic 1.66 days leave per month worked, keeping track and working out accrued holiday entitlement is very difficult.

When holiday pay is rolled up in the rate of pay, and this is transparent and easily understood, the worker can be sure that he is receiving his full annual leave entitlement. A real problem has been that some contractors had disguised a worker's true rate of pay by not clearly stating the underlying rate of pay, and it is this that the legislation and organisations such as UCATT are trying to stamp out.