

XpertHR Weekly Podcast

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- Clio Springer: Hello and welcome to XpertHR Weekly with me, Clio Springer. With the holiday season getting into full swing, this week we offer a reminder around some of the rules around annual leave entitlement, requesting and refusing leave and the right to payment during leave.
- The issue of how holiday pay should be calculated is particularly contentious and has seen a lot of case law activity recently, so we'll be taking this opportunity to sum up the current state of play.
- I'm joined by senior employment law editor, Susie Munro, who's going to take us around some of the basics around statutory holiday rights and holiday pay, and highlight the current position in terms of case law development. Hello Susie.
- Susie Munro: Hi Clio.
- Clio Springer: Well first of all, Susie, what is the minimum statutory holiday entitlement? [0:00:47.1]
- Susie Munro: So the statutory minimum is 5.6 weeks' paid holiday per year. So for example, that would be 28 days for somebody who works five days a week.
- Clio Springer: And how would you calculate entitlement for part-timers? [0:01:00.3]
- Susie Munro: It should be calculated on a proportionate basis. So everyone is entitled to 5.6 weeks a year, so if you only work two days a week, that would be 5.6 weeks of two days, so 5.6 times two would be 11.2 days a year. But to avoid problems with calculating partial days, you could calculate the entitlement on an hourly basis.
- Clio Springer: And something that quite often causes confusion, does that include bank holidays? [0:01:27.9]
- Susie Munro: So it depends on the wording of the contract. Until 2007, the statutory minimum annual leave was four weeks. That's the amount set under the EU Working Time Directive. But some employers were including bank holidays in these four weeks, so the minimum was increased to ensure that employees got the equivalent of eight bank holidays in addition to their four weeks minimum. Now that was done under UK legislation, the Working

Time Regulations, rather than at the European level. So the Regulations provide for an extra 1.6 weeks – or the equivalent of eight days – in addition to the four weeks minimum under European law.

- Clio Springer: But those extra eight days' leave don't actually have to be taken on bank holidays, do they? [0:02:10.0]
- Susie Munro: No. Employees don't have an automatic right to time off on bank holidays. Employers can require employees to work or to book leave as normal on bank holidays.
- Clio Springer: And some employers will include the bank holidays in the 28 days minimum, but many will be more generous and have contracts saying "28 days plus bank holidays". [0:02:27.5]
- Susie Munro: Yes, that's right.
- Clio Springer: So many employers therefore are actually providing more than the statutory minimum. [0:02:32.3]
- Susie Munro: Yes. An employer may provide contractual annual leave above the minimum and then the employee will be entitled to whichever is greater, so either the minimum statutory requirement or whatever it says in their contract.
- Clio Springer: Employers might have a number of competing requests for annual leave, particularly over the summer period. What can they do if they can't agree to an employee's request? [0:02:52.5]
- Susie Munro: They should make sure that employees are aware that they should put in their request for annual leave as soon as possible and that there's no guarantee that they'll be accepted. But if an employer does need to refuse an employee's request, it has to give the employee notice of at least the length of the leave they're requesting. So for example, to refuse an employee's request for one week's holiday, the employer has to tell the employee at least one week before that period that it's refused. That's unless the employer has made an agreement with the workforce setting out different notice periods. That might be, for example, in a collective agreement.
- Clio Springer: Well you said that employers should ask employees to submit requests as early as possible, but there's a statutory minimum notice requirement for holidays requests, isn't there? [0:03:35.6]
- Susie Munro: Yes, so the notice that an employee has to give to request holiday is twice the amount of holiday that they want to take. So for example, for one week's holiday, they have to put the request in at least two weeks' in advance. And similarly, if the employer wants to require an employee to take holiday at a particular time, it can do this by giving them notice at least twice the length of the

holiday. Again, that's unless there's a relevant agreement otherwise.

Clio Springer: So employers do have some control over when employees can take leave? [0:04:04.4]

Susie Munro: Yes. Employers can refuse a request for annual leave or they can require an employee to take leave at a particular time. It's good practice to accommodate requests from employees and allow employees to retain control over when they take their leave, but in some circumstances it's necessary for employers to restrict this 'cause you can't have everyone off on holiday at the same time and you might have times when you want people to take leave, for example where the work is seasonal.

Clio Springer: And what about new employees? Can an employer say that they can only take their holiday once they've worked long enough to accrue it? [0:04:37.3]

Susie Munro: Yes. Again this is an area where there are statutory rules that apply unless the employer has agreed something different with the workforce. So the statutory rules are that during the first year of employment, the employee accrues annual leave monthly in advance at the rate of one twelfth of their annual entitlement. So a full-time employee who has the statutory minimum of 28 days' annual leave will accrue annual leave at a rate of 2.33 days a month. That's one twelfth of their 28 days. That's rounded up, so for example in the first two months of their employment they could take five days' holiday – that's 4.66 days rounded up to five. But then any rounded-up element is then deducted from the annual leave remaining, so they wouldn't end up with more than 28 days over the year.

Clio Springer: And this system applies during the whole of the first year of employment, not just during the remainder of the holiday year in which the employee started work? [0:05:31.8]

Susie Munro: Yes, that's right.

Clio Springer: And what happens if an employee doesn't use their full entitlement in an annual leave year? Can they carry over their untaken holiday to the next year? [0:05:39.7]

Susie Munro: Well the general rule is that employers should arrange their annual leave systems to make sure that employees are able to and do take their full statutory entitlement in the leave year. So generally if the employee refuses a holiday request, they have to allow the employee to take the leave later in the year. It shouldn't be carried over.

But it's a bit more complicated than that. We mentioned earlier that there's a difference between the four weeks minimum under

the Working Time Directive and the extra 1.6 weeks under the Working Time Regulations. You can't carry over the four weeks, but employers can reach an agreement with the workforce to allow them to carry over the extra 1.6 weeks, but that can only be carried into the next leave year.

- Clio Springer: So the employer can decide its own rules in relation to any contractual leave over and above the statutory minimum of 5.6 weeks? [0:06:29.6]
- Susie Munro: Yes, employers can allow employees to carry that over, if it's over and above the 5.6 weeks. That will just depend on what the contract says about whether they can carry it over or not.
- Clio Springer: And what about employees on, say, sick leave, for example? [0:06:43.0]
- Susie Munro: So there's been lots of case law on holiday and sick leave in recent years. The position under the case law of the European Court of Justice is that employees who've been unable to take their holiday because they've been on sick leave should be able to carry it over, but this conflicts with the Working Time Regulations which don't allow the carry over in the first four weeks. The Government consulted on this ages ago with a view to amending the Working Time Regulations but that consultation closed in August 2011 and nothing has been heard since.
- Clio Springer: And it's a similar position with maternity leave, isn't it, where carry-over's not allowed under the Working Time Regulations but the European Court of Justice has decided that employees shouldn't lose their entitlement to annual leave if they've been unable to take it due to being on maternity leave. [0:07:28.3]
- Susie Munro: Yes, so ideally employers should arrange with employees to take their annual leave before they go on maternity leave or to add it onto the end, which may involve allowing them to carry it over. The least risky option for employers is to allow carry-over in this situation, and the same applies for employees on sick leave. The employer can decide to allow the employee to carry over leave that they haven't been able to take.
- Clio Springer: And it's not an option to pay employees in lieu of their annual leave in these circumstances when they've not been able to take it during the year? [0:07:58.6]
- Susie Munro: No, you can only pay in lieu of holiday on termination. So if the employee hasn't taken all of their annual leave entitlement for the year when their employment comes to an end, the employer can make a payment in their final pay packet, and then if they've taken more than their accrued entitlement, the employer can recover the overpaid holiday pay from the employee's final pay, but only if

they've made provision for this in the contract or in another agreement, like a collective agreement.

Clio Springer: Well on the question of holiday pay, there have been a number of cases recently dealing with how to calculate an employee's holiday pay, and in particular where the employee's pay includes overtime payments or commission. So what's the current position there? [0:08:37.5]

Susie Munro: Yes, so when you're calculating holiday pay, you need to know what an employee's normal remuneration is, and there've been a number of cases on what should be included as normal remuneration. In 2011 there was the European Court of Justice decision in *Williams v British Airways* and that decided that any aspect of pay that is intrinsically linked to the performance of the tasks that the worker is required to carry out has to be included in the calculation of their normal remuneration.

Then there was the case of *Lock v British Gas*. Again a European Court of Justice case, and that decided that commission has to be included when you're calculating holiday pay. Now that case went back to the employment tribunal after the ECJ decision and the tribunal decided that it could read some additional wording into the Working Time Regulations to make them comply with the EU law. But that tribunal decision is now being appealed and an Employment Appeal Tribunal hearing is expected later on this year.

Clio Springer: So that case is still ongoing, and that deals with whether commission should be included in holiday pay, but there've been some other cases that look at whether overtime should be included, haven't there? [0:09:50.1]

Susie Munro: Yes. So the main one is *Bear Scotland v Fulton*, which is an Employment Appeal Tribunal case, and that decided that overtime that an employee was required to work, even where this wasn't guaranteed, should be included when calculating holiday pay.

Clio Springer: So that was about where an employee was required to work any overtime that the employer offered, but what about if an employee can volunteer to do overtime? Should holiday pay be reflecting that as well? [0:10:16.3]

Susie Munro: So this is the most recent case, *Patterson v Castlereagh Borough Council*. It's a Northern Ireland Court of Appeal case and that addressed the question of whether the same principle applied to purely voluntary overtime, so should that be included in holiday pay? The tribunal had decided that purely voluntary overtime need not be included in holiday pay, since it was not part of normal remuneration, but the Court of Appeal rejected this on the basis that there was nothing in principle that meant that voluntary overtime doesn't count as normal remuneration. It's a question of

fact whether or not voluntary overtime was normally carried out by the employee and whether it's a permanent enough feature of their remuneration. So that case is going to go back to the tribunal in Northern Ireland.

Clio Springer: Okay, so that's a Northern Ireland case, which isn't binding on England, Wales or Scotland, but it does continue the trend of the recent cases. [0:11:08.6]

Susie Munro: Yes, it shows that courts are moving away from the idea of calculating holiday pay on base pay only and they're applying a much wider definition of 'normal remuneration'. But the issue isn't finally decided yet in relation to all aspects of pay, in particular voluntary overtime, and there is the latest appeal in *Lock v British Gas* to look out for.

Clio Springer: Thank you, Susie.

Susie Munro: Thanks, Clio.

Clio Springer: So there's plenty going on there and you can keep up-to-date with developments and read about the cases that we talked about today in the law report tool on XpertHR. We also provide a more detailed look at the working time rules on holiday entitlement and holiday pay in the employment law manual and there are numerous other resources on XpertHR to help you manage your employee's annual leave.

And that brings us to the end of this week's XpertHR Weekly, which you've been listening to with me, Clio Springer. We're back next Friday but until then, it's goodbye from us.