

# Holiday Pay! Right or wrong?

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P Simon Parsons




**HOLIDAY PAY**  
IT COMES WITH  
THE JOB



# Holiday Pay! Right or wrong?



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*Disclaimer: The presentation does not provide definitive answers to individual queries, and in some places takes views on matters which are uncertain. It is not intended to be relied upon in any specific context or as a substitute for seeking advice (legal or otherwise) on a specific circumstance, as each case may be different.*







HM Government



# HOLIDAY PAY IT COMES WITH THE JOB

## Government campaign

Raise awareness amongst employees and workers of their rights to holiday pay:

Shift workers

Zero Hours Contracts

Agency workers

1.8M entitled not receiving  
(Unpaid Britain report)

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# Calculate holiday entitlement



## Working Time Directive:

- Regulation 13 = 4 paid weeks (EU directive fulfillment)
- Regulation 13A = 1.6 paid weeks (UK added extension)



# UK Minimum annual holiday entitlement



5.6

## Entitlement

Almost all [workers](#) are legally entitled to 5.6 weeks' paid holiday a year (known as statutory leave entitlement or annual leave).

This includes:

- agency workers
- workers with irregular hours
- workers on zero-hours contracts

An employer can include bank holidays as part of statutory annual leave.

# UK Minimum annual holiday entitlement



5.6

- Entitlement is based on the amount of elapsed time someone is employed.
- Not the number of hours that they actually work.
- Some casual workers may be considered to not be employed between engagements



# Zero Hours Contracts & Holiday Pay



## Shift, term-time and zero-hours workers

You must still get 5.6 weeks' holiday as a minimum if you work irregular hours, such as:

- shifts
- term-time work
- zero-hours contracts

**acas** working  
for everyone

# Bank Holidays – to pay or not to pay – that is the question?



No right to paid bank holidays

They may be included as part of statutory annual leave

Otherwise - Whether paid or not is a contract of employment choice matter.

## Working pattern

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## How a week's pay is calculated

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Fixed hours and fixed pay (full- or part-time)

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A worker's pay for a week

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Shift work with fixed hours (full- or part-time)

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The average number of weekly fixed hours a worker has worked in the previous 52 weeks, at their average hourly rate

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No fixed hours (casual work, including zero-hours contracts)

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A worker's average pay from the previous 52 weeks (only counting weeks in which they were paid)

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# What's wrong with 12.07%?



*court of appeal has 'ruled that the **calculation of holiday entitlement as a percentage of hours worked was unlawful**'*

It doesn't account for:

- Average weekly earnings
- Ignoring Zero Pay weeks
- Has no basis in law

## And holiday Pay is?

England Wales and Scotland

- 6<sup>th</sup> April 2020 moved to 52 paid weeks average
- Previously 12 weeks average

Northern Ireland contracts

- Continues with a 12 weeks average

This is where reduces or variable hours working, overtime, commission incorporated



# What does the 52 paid weeks average mean

- Instead of the former 12 paid weeks average – take 52 paid weeks to average weekly
- Do not count zero weeks – go back a further week
- Maximum weeks to go back is 104
- New starters – average over the weeks that are available if under 52 weeks





# What is a week for average weekly pay?

The whole week(s) preceding the leave with pay

For Monthly, Lunar (4 weekly), Fortnightly (2 weekly) or anything not a single week

- A whole week is specified as Sunday through Saturday

For weekly payrolls the week is Sunday through Saturday unless the payment basis is another week day as chosen by the employer. For example Thursday through Wednesday.



BEIS – employers to calculate weeks earnings by using the record of hours worked in each week. It may be necessary to use an average hourly rate to estimated a workers weekly rate of pay:

- $(\text{Monthly pay} \div \text{hours worked in month}) = \text{average hourly pay}$
- $\text{Average hourly pay} \times \text{hours worked in week} = \text{weekly pay}$

Where a week crosses two months, then data from both required to calculate a weeks pay

# Why is it so complicated?

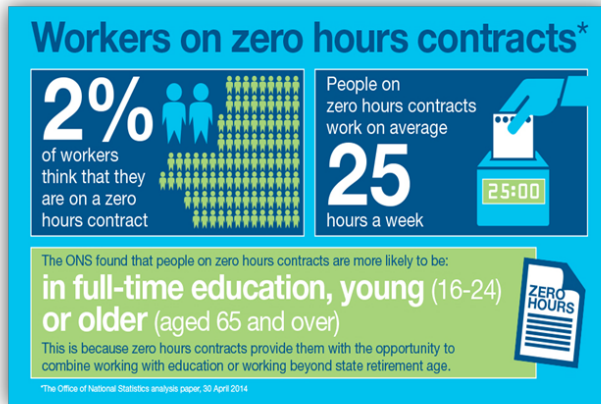


# Leaving employment and Paid Holiday

Holiday may be taken during any required notice period

Recovery of overpayment can only be deducted by written agreement

Remaining holiday payments due can be paid as 'payment in lieu'



Worker not been given any work for 4 weeks?

Pay them holiday pay - For holiday purposes, a payment is required as if they have left

Court of Justice of the European Union (CJEU) – C-131/04 – Robinson-Steele v RD Retail Services Ltd (2006)

***rolled-up holiday pay schemes are contrary to the Working Time Directive. Such schemes are unlawful.***

*The Court went on to say that if it was transparent and comprehensible that the sums in question were in respect of annual leave then those sums could be set off against the employer's holiday pay liability.*

CJEU – C-155/10 – Williams and others v British Airways plc (2011)

***holiday pay entitlement should not be limited to basic salary but instead correspond to “normal remuneration”.***

CJEU – C-539/12 – Lock v British Gas Trading Ltd (2014)

***results-based commission must be included when calculating holiday pay so that the worker received their normal pay whilst on holiday.***

# Case



# Case



Employment Appeal Tribunal (EAT) – UKEATS/0047/13 - Bear Scotland Ltd v Fulton (2014)

*regular overtime, obliged to perform, **should be included***

EAT – UKEAT/0334/16 - Dudley Metropolitan Borough Council v Mr G Willets and others (2017)

*voluntary overtime should be included if regular enough to constitute “normal pay”*

EAT – UKEAT/0102/17/LA – Mrs L Brazel v The Harpur Trust (2018)

*term- time worker, working 32 weeks a year. The school calculated holiday on a 'pro-rata' 12.07% calculation. EAT ruled **should be paid on the basis of section 224 of the Employment Rights Act – i.e averaging pay over the last x weeks where the worker has actually worked.***

*Aug 2019 update – court of appeal has ‘ruled that the **calculation of holiday entitlement as a percentage of hours worked was unlawful**’*



# Supreme Court Appeal

The Harpur Trust v Mrs Brazel has been listed at the Supreme Court for 9 November 2021.

Permission was granted in June 2020 to appeal the Court of Appeal decision regarding how employers calculate holiday pay.

In accordance with the Court of Appeal decision, an employee who is employed under a permanent contract, but who only works for part of the year, should receive the same 5.6 weeks' holiday entitlement as an individual who works all year round. They would also receive a proportionately higher rate of pay for their holiday than full year workers.

This decision from the Court of Appeal is currently binding.

If the appeal is successful, the principle of pro-rating the 5.6 weeks' holiday entitlement for those who work part of the year could be re-instated.



# Good Work Plan

December 2018

## Good Work Plan

Progression of the Taylor Report proposals

New single government enforcer / agency proposed for employment rights - including:

- Holiday Pay
- National Minimum / Living Wage
- Etc

# Where to find out more?

<https://www.gov.uk/calculate-your-holiday-entitlement>

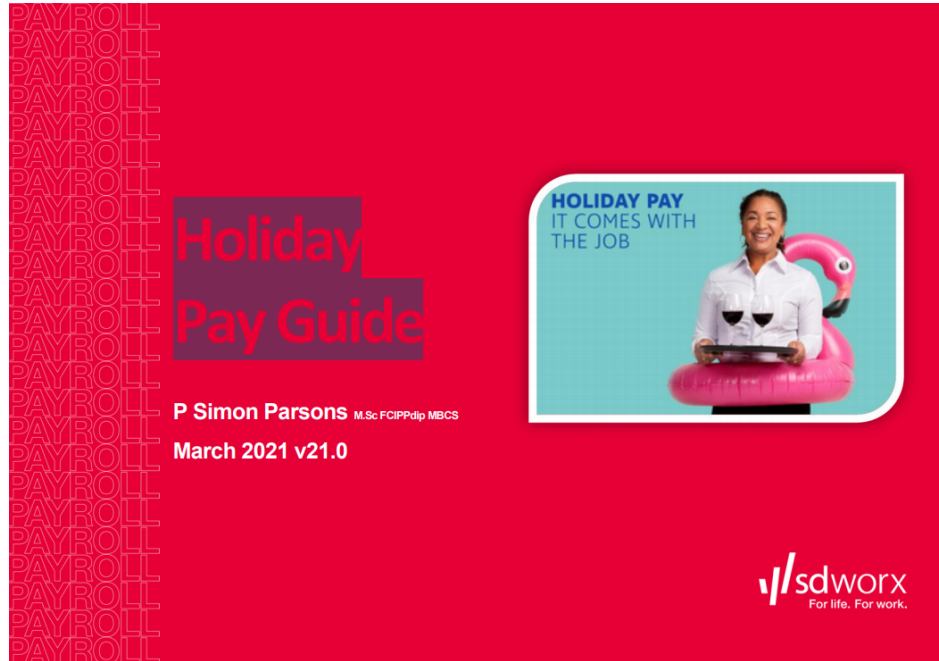
<https://www.gov.uk/holiday-entitlement-rights>

<https://www.gov.uk/holiday-entitlement-rights/holiday-pay-the-basics>

<https://www.gov.uk/government/publications/calculating-holiday-entitlement-for-workers>

<https://www.gov.uk/government/publications/calculating-holiday-pay-for-workers-without-fixed-hours-or-pay>

# Where to find out more?



<https://www.sdworx.co.uk/-/media/sd-worx-uk/resources/sd-worx--holiday-pay-v210.pdf>



# Time for any further questions...

Is there anything you'd like to ask?

