EMPLOYEE RELATIONS GUIDANCE NOTE

Holiday Pay Guidance (2026)

This ECA guidance note provides information on the relevant legislation, advice on the correct approach to the calculation of holiday pay and analysis of the impact of the most recent case law.

This guidance note provides information and advice on the following:

- Defining the different types of Holiday Entitlement
- Eligibility for holiday pay
- Applicable legislation
- Case Law developments and the impact of these on holiday calculations
- Defining general principles for holiday pay calculations
- JIB holiday pay and different scenarios
- Further Developments
- Fair Work Agency

The development of case law relating to the calculation of holiday pay continues to provide guidance on which elements of employees' remuneration should be included in the calculation of holiday pay for the four weeks' holiday pay entitlement derived from the EU Working Time Directive (referred to below as 'Euro Leave').

1.1 For workers with fixed contractual hours and pay – even if an element of that includes overtime which is **contractual** on both sides (i.e., the employer is obliged to offer and the employee is obliged to work such overtime) – calculation of holiday pay for Euro Leave is straightforward: it should be based on the fixed weekly hours, including the contractual overtime.

1.2 Recent case law has considered whether **non-contractual** overtime and other payments which are regularly payable during an employee's normal working weeks should be included in the calculation of holiday pay for Euro Leave. Whilst each case should continue to be looked at on its own merits, the general direction of travel appears to be that payments (other than genuine expenses) which are regularly made should be included in the calculation of holiday pay for Euro Leave.

1.3 The distinction between payments for Euro Leave and other types of leave has been confirmed by the Court of Appeal. A large part of this guidance is, therefore, a summary of these important employment law cases and their impact on the calculation of holiday pay.

2. Types of Holiday Entitlement

Rules on the calculation of holiday pay differ for the various types of holiday entitlement, which are:

2.1 **Euro Leave** – This is the 4 weeks of holiday entitlement derived from the EU under the Working Time Directive (EU WTD) and implemented by the UK's own Working Time Regulations (UK WTR). Calculation of holiday pay for Euro Leave must comply with the EU WTD, as interpreted by the courts, including the recent case law outlined in this guidance.

2.2 **Additional UK Statutory Annual Leave** – this is the 1.6 weeks' extra holiday set out in the UK WTR on top of Euro Leave. Additional UK Statutory Annual Leave is not subject to the EU WTD, and therefore calculation of pay for such holiday can be based solely on the relevant requirements of the UK WTR.

2.3 **Additional Contractual Annual Leave** – this is any holiday entitlement in addition to that required under UK law: so, anything above 5.6 weeks (4 weeks Euro Leave + 1.6 weeks Additional UK Statutory Annual Leave). This can include extra holiday entitlement under individual contracts of employment, or under a collective agreement such as the JIB. Additional Contractual Annual Leave sits outside both the EU WTD and UK WTR, and so calculation of holiday pay is determined by the relevant provisions of the contract or collective agreement, rather than by legislation.

2.4 **Annual Leave and Bank/Public Holidays** – For the purposes of holiday pay, the law makes no distinction between annual leave and bank/public holidays. Employers can therefore, if they wish, include some or all bank/public holidays that their employees may be entitled to in their employees' Euro Leave entitlement. This could then offset their obligations regarding pay for Euro Leave earlier in the holiday year than would otherwise be the case.

3. Eligibility for holiday pay

Whilst this guidance is focussed on the calculation of holiday pay, it is worth taking a moment to clarify that holiday entitlement applies not just to employees, but also to the wider group of **workers**. The definition of a worker is someone who is working under:

- A contract of employment (i.e., an employee); or
- Any other contract where the individual undertakes to personally perform any work or services for the other party of the contract, where the other party is not by virtue of the contract a client or customer of any profession or business undertaking carried on by the individual.

3.1 This means that as well as employees, some individuals who might otherwise be regarded as 'self-employed', could also be covered by the UK WTR, and therefore entitled to Euro Leave and Additional UK Statutory Annual Leave.

4. Calculation of Holiday Pay

The following sections set out the main factors to take into account in calculating holiday pay.

4.1. Legislation

The UK WTR regulates Euro Leave and Additional UK Statutory Annual Leave entitlements, including the pay due for these types of holidays. The UK WTR defines methods for calculating holiday pay in two types of circumstances.

i. **fixed hours of work and pay**, and therefore the pay each week is the same, holiday pay should be the same as the fixed weekly pay.

ii. Where **pay varies due to the amount of work done, or (for shift workers) when the work is done**, then holiday pay is based on the average pay over the preceding 52[1] weeks. Note that when averaging is required, then the 'calculation date' is the first day of the period of leave in question. The 52-week reference period must be extended so as to ignore weeks when no remuneration was payable but should not exceed 104 weeks.

Recent case law, however, has challenged some of the UK WTR rules relating to the calculation of pay for Euro Leave, as set out below. (As discussed later some might apply to non-Euro entitlement because of the particular terms of a collective agreement.)

5. Euro Leave – Case Law

The effect of the recent case law has been to clarify that the UK WTR cannot be relied upon where it does not meet the requirements of the EU WTD for the calculation of Euro Leave.

The guiding principle under the EU WTD is that workers should receive the same pay while they are on Euro Leave as they normally receive while they are at work, and that they should not be deterred from taking holiday because they are paid less while they are on holiday.

5.1. 'Intrinsic Work'

In 2011, the European Court of Justice (ECJ) ruled in *British Airways plc v Williams* that pay for Euro Leave should include payments that are:

- 'intrinsically linked to performance of tasks and included in the total remuneration', and
- relating to the 'personal and professional status' of workers.

[1] From 6 April 2020, the reference period increased from 12 to 52 weeks.

The ECJ further clarified that payments for 'occasional or ancillary costs, which facilitate working', such as travel expenses, **should not** be included in the calculation of pay for Euro Leave.

5.2. Commission

In *Lock v British Gas Trading Ltd*, it was confirmed that commission should be included in the calculation of pay for Euro Leave. The reasoning behind this was that otherwise workers may be deterred from taking their holidays, particularly where commission represents a large proportion of the average remuneration received by the worker.

5.3. Overtime and other Payments

It has been accepted for some time that **contractual overtime** should be included in the calculation of pay for Euro Leave. More recent case law has explored the question of whether other types of overtime should be included in the calculation of pay for Euro Leave.

5.3.2 In the case of *Bear Scotland v Fulton*, it was held that **payments for travel time** and **regular non-contractual overtime** should be included in the calculation of holiday pay for Euro Leave where the employer was not obliged to provide overtime, but the employees were obliged to work the overtime if the employer did provide it.

5.3.3 The case of *Dudley Metropolitan Borough Council v Willets* concerned regular overtime which was **voluntary** on both sides. It involved a group of 56 employees, including electricians, responsible for the repair and maintenance of houses, who worked a set number of hours per week, the employees also worked voluntary overtime and once every four-to-five weeks were placed on an on-call register and worked additional voluntary hours. The employees could drop on and off the rotas to suit themselves and the employer had no right to enforce the additional work. Nevertheless, the Employment Appeal Tribunal (EAT) upheld that the following should be taken into account in the calculation of holiday pay:

(i) regular voluntary overtime
(ii) out-of-hours standby pay,
(iii) call out allowances,
(iv) mileage or travel allowance (where paid at a rate higher than that recognised by the Inland Revenue to purely recompense the cost of travel, such that there is a taxed balance above the basic travel cost (only the taxable balance is to be included)).

5.3.4 The EAT in the *Dudley* case clarified that where a pattern of work – irrespective of whether it is mandatory or voluntary – is **'sufficiently regular and settled',** it should be included in the calculation of holiday pay for Euro Leave. By the same token, voluntary overtime which is sporadic or *ad hoc* need not be included.

(i) The EAT also confirmed that there is a distinction between Euro Leave (regulation 13) and UK Leave (regulation 13A) "The significance of the distinction is that any entitlement to increased holiday pay premised on

the rights derived from EU Law applies only to regulation 13 leave." In other words, only to Euro Leave.

5.3.5 *East of England Ambulance Service Trust v Flowers* considered the impact of holiday pay in light of the NHS Collective agreement (Agenda for Change (AfC)). The AfC clause stated, "pay during annual leave will include regularly paid supplements, including…payments for work outside normal hours…Pay is calculated on the basis of what the individual would have received had he/she been at work." Given this wording the Court held that both forms of overtime were covered, that it replicates the approach for Euro Leave and therefore mandates the same approach be adopted for all of the holiday pay calculation. It should be noted that this does not mean that the Euro Leave approach must be adopted for all employment contracts. For example, the JIB agreement does not state a requirement for holiday pay to be calculated on the basis of "what the individual would have received had he/she been at work", but instead refers to the definition under the 1996 Act.

5.3.6 The Court of Appeal (2019) upheld the Employment Appeal Tribunal (EAT) decision in *Flowers v East of England Ambulance Trust*. It confirmed, in this instance, that clause 13.9 of Agenda for Change (AfC), which deals with pay during annual leave, gives a contractual right for voluntary overtime to be included in holiday pay. Further, the Court considered that *Dudley MBC v Willetts* was correctly decided and that the EAT had been right to follow it in this case. This established that the calculation of an employee's entitlement to paid annual leave depended on whether their pattern of work was sufficiently regular and settled. Subsequent Courts are likely to emphasise the need for the employer to prove that overtime was 'exceptional' before allowing those overtime payments not to be included. This remains the most authoritative judicial decision in this area for now.

6. Additional UK Statutory Annual Leave

Additional UK Statutory Annual Leave is not bound by the requirements of the EU WTD, and therefore the UK WTR provisions can be applied for the calculation of holiday pay, without any reference back to the EU WTD or the recent case law on non-contractual and voluntary overtime.

In summary, the UK WTR provides that where there are fixed weekly hours of work and fixed pay for the hours of work, pay for Additional UK Statutory Annual Leave is the same as the fixed weekly pay. Where pay varies with the hours of work done or when the work is done (e.g., shift work), then a weeks' holiday pay will be the average weekly pay over the preceding 52 weeks. Unless a contract of employment or applicable collective agreement provides otherwise, it is acceptable, when calculating pay for Additional UK Statutory Annual Leave, to rely on the basic pay and other contractual payments and exclude any non-contractual payments such as pay for non-contractual overtime.

7. Additional Contractual Annual Leave

There is less employment law to wrestle with on how to calculate pay for Additional Contractual Annual Leave as this can be whatever is agreed between the parties, as reflected in an individual contract of employment or applicable collective agreement. It can be the same as that for other types of holiday entitlement; or it can be a fixed amount per hour/day; or it can, if agreed between the employer and employee, be unpaid (albeit that such arrangements are uncommon).

There are sometimes disputes where the parties have not agreed what the pay should be in writing before the holiday is agreed and taken. This is a particular risk when holidays are agreed at the last minute to cover unforeseen circumstances. Employers are therefore advised to clarify in writing whether any leave in addition to that required by law or collective agreement will be paid and, if so, how that pay will be calculated.

8. Guidance

The following sections of this guidance summarises the main points employers can choose to take from the recent case law, both in terms of general principles for calculating holiday pay and specifically in relation to the JIB collective agreement. As always, facts can vary from case to case, and new case law may emerge that challenges or qualifies the previous case law. Nevertheless, this guidance is offered to assist employers in making decisions applicable to their own circumstances in the light of recent cases.

8.1. Holiday Pay Calculations (general Principles)

These cases are widely understood to indicate a 'direction of travel' on the calculation of holiday pay for Euro Leave. The overarching principle appears to be that workers should receive their 'normal remuneration' when they are on Euro Leave. In other words, for Euro Leave employers should consider whether to include any payments a worker would 'normally' receive while working. In particular, employers who regularly allow voluntary overtime and/or operate a voluntary standby/call out rota are advised to review the way in which they calculate holiday pay for Euro Leave days. Other regular payments which may need to be incorporated (depending on the circumstances) include payment for time spent travelling, shift premia, commission, responsibility payments, and regular overtime payments. Euro Leave holiday pay need not include sporadic or *ad hoc* overtime, however, or the reimbursement of expenses such as travel allowance and lodging allowances under the JIB agreement.

8.1.2 Unless an employment contract or applicable collective agreement provides otherwise, holiday pay for Additional UK Statutory Annual Leave need only take account of an employee's basic rate and other contractual payments, including contractual overtime.

8.1.3 Any pay for Additional Contractual Annual Leave should be paid in line with the details previously agreed between the parties and, for the avoidance of doubt, confirmed in writing.

8.1.4 For simplicity, ECA advises member companies to define the first 20 days of holiday taken each year as Euro Leave, including any bank/ public holidays. The 'definition' should ideally be incorporated as a written term in the worker's contract.

9. JIB Holiday Pay Calculations

9.1 Under Rules 12 and 13 of the JIB Agreement National Working Rules, there is an entitlement to a total of 32 days holidays, including 8 bank/ public holidays.

9.2 The JIB agreement provides that 'All annual and public holidays are to be paid at the normal earnings level, as defined in the Working Time Regulations and Sections 221-224 of the Employment Rights Act 1996'.

9.3 Therefore, under the JIB agreement, four weeks of annual holidays should be calculated with reference to the guidance set out for Euro leave in paragraph 30 above. The remaining holidays under the JIB Agreement should be paid in accordance with the detailed wording of the JIB agreement and the guidance for Additional UK Statutory Annual Leave set out in paragraph 31 above.

10. JIB Scenarios for Non-Euro Days

10.1 **If the employee is paid a set rate for work in normal hours, and those normal hours do not include a premium for the time of day** worked then holiday pay for non-Euro days will be the basic rate of pay for a normal working week (37.5 hours under the JIB agreement).

10.2 **If the employee works a standard number of hours per week under his normal contract and all of those hours are at the night rate or a shift rate** under NWR 9.1.2 and shift rates under 9.2 – 9.4 and 9.6, then that rate will be his normal hourly rate (i.e., the shift or night rate) and will be the rate for calculation of his holiday pay

10.3 **If the employee works shifts (whether night or otherwise) whereby some of his 37.5 standard hours are at the basic JIB rate and some are at another rate**, then his non-Euro Day holiday pay rate will be calculated by the average rate for the normal hours worked over the 52-week reference period. This will apply to workers under 'Flexible Working' category at NWR 9.7 where the subsections provide for different rates for work at different times/days. However only the first 37.5 hours per week will need to be taken into account for the non-Euro-Days calculations – so the additional payments under 9.7.2 will not be included in the averaging process.

10.4 **If the employee is paid a rate which varies according to the amount of work done within those hours**, e.g. if there are payments based on the amount of work done, under **NWR 6.4**, productivity or incentive schemes, then the amount of a week's pay is the amount of remuneration for the number of normal working hours in a week (37.5 unless the individual contract does not comply with that aspect of JIB) calculated at the average hourly rate of remuneration payable by the employer

to the employee in respect of the 52-week period. The remuneration averaged should include the progress/productivity bonus.

10.5 **NWR 6.4** also refers to **a premium being payable for progress towards completion of a project.** If that premium arises directly from the amount of work done by the worker, then that should be included but if the premium is not directly linked to the amount of work done by the worker, then it could be excluded unless there is already custom and practice of including it.

11. Further Developments

11.1 The **Working Time (Coronavirus) (Amendment) Regulations (2020)** amend the WTR by allowing workers to carry over up to 4 weeks of annual leave where it was not "reasonably practicable" to take this leave as a result of the effects of coronavirus. The unused leave can now be taken in the 2 leave years immediately following the year in respect of which it was due to be taken. Detailed advice is available here

11.2 The **EU Retained Law (Revocation and Reform) Act 2023** was originally set to repeal all EU derived law from 31 December 2023, but this was amended to specific measures none of which impact holiday pay.

11.3 **Chief Constable of the Police Service of Northern Ireland and another v Agnew** on 4 October 2023 the Supreme Court determined that historical holiday pay claims can be brought where there are gaps of three months or more between periods of underpayment. A three-month period where the employee had been correctly paid would not break a series of deductions and prevent claims. It indicated that if the underpayments could be linked, then they could form a series, even if they were more than three months apart. England, Wales, and Scotland, unlike Northern Ireland, have legislation (Deduction from Wages (Limitation) Regulations 2014) to limit how far back individuals can bring unlawful deduction from wages claims to two years. This potentially increases the cost of historic pay claims significantly and is binding.

11.4 Despite a consultation to look at creating one approach to holiday pay the most recent government advice 'Holiday pay and entitlement reforms from 1 January 2024 maintains the current rates of holiday pay where 4 weeks is paid at normal rate of pay and 1.6 weeks paid at basic rate of pay whilst retaining the 2 distinct pots of leave. This advice also contains information on rolled-up holiday pay and irregular hour or part-year worker accrual.

11.5 **Afshar & others v Addison Lee** **(Employment Tribunal (January 2025))**
This is the most recent decision directly addressing the two-year backstop. The tribunal held that the two-year limit on unlawful deductions claims is unlawful, because the 2014 Deduction from Wages (Limitation) regulations claims were ultra vires, therefore the Government did not have the legal power to impose the two-year cap through secondary legislation.

- **What this means:**

Workers could claim unpaid holiday pay going back further than two years. This may open the door to significantly greater liability for employers.

- **Is this Binding?**

This is not binding legislation because if it a first-instance Employment Tribunal decision. However, it is persuasive and widely expected to be appealed and could become binding if confirmed by the Employment Appeal Tribunal (EAT) or higher courts.

12. Fair Work Agency

From 7 April 2026, a Fair Work Agency (FWA) will bring together enforcement of key employment rights into one place. This agency will consolidate enforcement of rights through enforcement officers. They will also be able to bring Employment Tribunal claims on behalf of workers.

The Fair Work Agency will take on enforcement of rights such as National Minimum Wage, **holiday pay** and Statutory Sick Pay. The agency will have powers to investigate breaches, issue civil penalties and act against labour exploitation.

The FWA will be able to recover underpayments going back 6 years from the date of the enforcement notice.

12.1 What does this mean for employers?

The Fair Work Agency will not create new legal obligations. However, they will have powers to inspect and enforce, including:

- Powers to inspect workplaces and require employers to produce relevant documents and evidence to demonstrate compliance with employment law.
- A penalty regime – where enforcement officers find that employers have underpaid their workers, they will be able to issue Notices of Underpayment that require the employer to pay workers their due and pay a penalty to government. The penalty could be up to 200% of what's owed per worker, reducing for early payment.
- A civil proceedings power – the power to bring proceedings in the employment tribunal on a worker's behalf, and to offer legal advice and assistance where someone is, or may be, party to civil legal cases related to employment or trade union law
- Cost recovery - the Secretary of State will be able to set out, in regulations, how the Fair Work Agency can impose charges to recover enforcement costs from employers against whom enforcement action has been taken for non-compliance

12.2 Actions for Employers

- You should review your holiday pay and ensure it is compliant with employment law.
- You need to keep statutory holiday/holiday-pay records for a minimum of 6 years
- Failure to comply could be a criminal offence.
- Penalties can be significant and include underpayments going back 6-years + 200% penalty, payable within 28 days.

13. Further Advice and Assistance

The last advice from the government entitled 'Holiday pay and entitlement reforms from 1 January 2024' is available here.

Further advice is available on the Government Website including guidance on "how to calculate holiday entitlement for workers on different contract types" and "guide to calculating statutory holiday entitlement for workers". These can be accessed here.

If you would like to discuss holiday pay, please contact Employee Relations on 020 7313 4800 or email employeerelations@eca.co.uk.

There is also support for Employment Law through several upcoming **Growth Hub** courses – visit ECA's website for more details.

ACAS have guidance on holiday entitlement which can be accessed here.

ECA members with detailed queries not fully answered here or our other guidance notes are encouraged to contact the ECA Employee Relations Helpline (details below).

- Email: employeerelations@eca.co.uk
- Tel: 0207 313 4800

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