

## Employment Law Questions & Answers - November 2015

**Q.** One of our employees has just booked two weeks of holiday. She works a set number of hours each week but the actual pay for those hours is based on a basic hourly rate plus commission. We normally calculate her holiday pay based on her average pay over the 12 weeks prior to her holiday. It has been suggested that we should do that for the first week of holiday, but then an additional calculation for the second week of holiday. The twelfth week in that second calculation would then be the payment that we calculated for the first week of her holiday.

**A.** Calculating holiday pay for employees with variable pay has recently become a contentious area with a number of cases considering what payments should be included when holiday pay is calculated. However, the higher courts are yet to hand down specific guidance on how exactly these calculations should be made. Without any specific guidance in that we are left with the established method set out within the Employment Rights Act 1996. This uses a calculation of pay based on a 12 week average which refers to it being the 12 week period ending with the "calculation date."

In relation to holiday pay, the Working Time Regulations state that an employee is entitled to be paid for each period of annual leave at the rate of a week's pay for each week of leave. It then goes on to confirm that the Employment Rights Act provisions apply for the purposes of payment and that the calculation date for the period of leave is taken as being the first day of the period of leave in question.

Your employee is only taking one period of leave lasting for two weeks and therefore you would simply do one calculation, with the calculation date being the first day of their holiday period.

This area is however untested and is potentially subject to more detailed guidance from the courts. In reality, the difference in actual pay due between the two methods of approaching this is likely to be very small.

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**Q.** We have an employee who works on our night shift, who has announced that she is pregnant. She has said that she would like to receive her entitlement to paid time off for antenatal appointments, but that these appointments are during the day. She has therefore asked to take the time off "in lieu". Is she entitled to do this?

**A.** All pregnant employees are entitled to take reasonable paid time away from work for antenatal care, under section 55 of the Employment Rights Act 1996. While this means that you could not prevent her from attending any appointments during her working hours, she will not be entitled to any paid time off for appointment attended outside of her working time.

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Q. Does an employee still get their car allowance while on maternity leave?

A. The Maternity and Parental Leave Regulations 1999 state that all terms and conditions of employment continue during OML and AML except for remuneration, with the definition of remuneration described as 'wages or salary'. Therefore in theory remuneration could include a car allowance unless there is a clear contractual agreement stating otherwise. Additionally HMRC treat the car allowance as remuneration for the purposes of calculating SMP.

However this position in relation to employment law has not been tested in an Employment Tribunal and there is an argument that the car allowance is in fact a benefit which they have taken in lieu of the benefit of the car, thereby making it something which should continue for the maternity leave period.

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Q. We convened a disciplinary hearing today and summarily dismissed an employee for gross misconduct. He has some company property such as a company car, laptop and mobile phone. He is refusing to return these items today and is saying we must wait until he has bought replacements for himself, which could take an indeterminate period of time. Is this the case as we feel that we should not if he has been summarily dismissed?

A. When an employee is summarily dismissed for gross misconduct, the day on which this decision is communicated to him is his last day of employment with you. The nature of a summary dismissal is that it is a dismissal without notice and therefore the rights he would have normally had during this period are no longer available to him. To that end you are able to require the company property you provided to him to be able to do his job to be returned at the point of dismissal.

As you are requiring his company car back, if the office is far from home you might consider arranging alternative transport for him, arranging for a taxi or colleague to take him home or allowing him to contact a family member or friend to collect him. The other property should be returned there and then. If he does not have it with him then a company representative could go to his home to collect it, or he could be asked to return it as soon as possible. You could also warn him that failure to do so would be considered theft and may require the need for police involvement.

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Q. I have recently been challenged by an agency worker that they are entitled to be auto enrolled onto our pension scheme in the same way as we do for all our other employees. The agency worker in question has been with us for over 12 weeks. Is this something I am legally obliged to do?

**A.** If the worker in question is provided to you via an agency and is not on a temporary contract where you are the employer, then the liability for auto enrolment falls to the agency and not you.

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**Q.** An employee called in sick on Friday night and was then seen and challenged by her colleague in a night club later that evening. She told the colleague that she had another job and would never set foot within the organisation again. Can I treat this as a resignation and issue her P45?

**A.** As you have only received this information second hand from another employee, there is the potential that the information is incorrect. Therefore unless she formally notifies you herself of her intention to resign, it is unsafe to react to the information to terminate her employment.

However, that does not mean you are unable to take any action. If she arrives for her next shift, you will need to investigate her absence and its genuineness on the Friday night with a view to formal disciplinary action. If the evidence supports that the absence was not genuine, you could take disciplinary action for unauthorised absence.

If indeed she did intend to resign and she resigns with notice, you could still investigate the issue and take disciplinary action if appropriate as she remains your employee until her last day of employment. She could decide to resign without notice to mitigate this potential issue.

If she fails to turn up for any more shifts or to communicate her decision to resign, then you will need to try to get in touch with her to establish the situation. It may be that she doesn't return and is dismissed for absence without authority, following a fair procedure.

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**Q.** I am calculating the annual leave entitlement for a new starter, who has joined the company part way through an annual leave year. I calculate that they have 0.2 of a day. We prefer employees to take their holiday as days or half days, not in hours, wherever possible. In this situation should I round up to give them 0.5 of a day, or round down?

**A.** In this instance, it would be best to round the holiday entitlement up to half a day. To round down will result in the employee losing a portion of their holiday entitlement, albeit a small one. This could have a significant impact if the employee is only given statutory minimum holiday, as giving an employee less than 5.6 weeks holiday, by however small an amount, would be a breach of the Working Time Regulations.