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HOLIDAY PAY: A REAL HEADACHE FOR EMPLOYERS?

As the summer holidays approach, it is worth considering the issue of holidays and especially holiday pay, which can be a real headache for employers and HR managers.

According to Article 329d paragraph 1 CO, "*the employer shall pay the employee the full salary for the holidays and a fair indemnity to compensate for the salary in kind*".

This provision means that the employee must not be treated less well in terms of pay during the holiday than if he/she had worked during that period. In other words, the employee must be able to have the money necessary to spend his/her holidays without worrying and he/she must be able to rest without being prevented from doing so by the loss of salary (Federal Tribunal decision of 30 January 2023 4A_357/2022 and case law cited in this decision).

The principle of holiday pay is therefore that it should be paid when the holiday is taken and it is not permissible in principle to include holiday pay in the total salary.

In other words, in the ordinary situation of an employee working 100% for the same employer and receiving the same monthly salary every month, he/she receives his/her monthly salary even during the months in which he/she has taken holidays.

However, this ordinary situation does not always exist. An employee may, for example, work irregularly, or may work by the hour or on a task basis, or may be paid on the basis of a turnover.

In order to take into account cases that are "out of the ordinary", the Federal Court has accepted that holiday pay may exceptionally be included in the total salary in special situations and when the advance calculation of holiday entitlement proves difficult.

It therefore accepted that a holiday allowance in the periodic salary (in principle 8.33% for 4 weeks of holiday, or 10.64% for 5 weeks of holiday or 13.04% for 6 weeks of holiday) was possible in exceptional cases.

This exception is admitted by the Federal Court if three cumulative conditions are met.

- The first condition is **irregular activity**;
- The second condition is that the part of the total salary to be used for holiday pay should be **clearly and expressly mentioned in the employment contract**;

- The third condition is that holiday pay is **clearly stated in the salary statements**.

With regard to the second and third conditions, this means that the holiday pay must appear as such by indicating a certain amount or percentage both in the employment contract and on the salary slips.
If these three conditions are not met, the holiday pay must be paid at the time the holiday is taken.
In the above-mentioned decision of 30 January 2023, **the Federal Court tightened its position with regard to the condition of irregular activity.**

Thus, for the Federal Court, if an employee works 100% for the same employer, there are no insurmountable difficulties, due to monthly variations in working time, for a payment of salary during holidays.
The Federal Court also stated that, in view of the software and time recording systems available today, it is no longer unacceptable to calculate holiday pay in accordance with the law, even in the case of monthly salary fluctuations.
In other words, if the employee has a monthly salary fluctuation but works 100% for the same employer, the holiday salary must be calculable and it must be paid at the time the employee takes the holiday.
In the case decided by the Federal Court, the employee worked 100% for the same employer and received an hourly wage of CHF 18.00 plus an allowance of 8.33% for holidays (and then 10.64%).
In the judgment, the Federal Court also gives the following two examples :

- 1st example: the case of an osteopathic assistant hired full time and paid on a pro rata basis for the hours actually billed to clients. In this case, the Federal Court denied the existence of an irregular activity.

- 2nd example: the case of an employee working as a teacher in a public school, who gave at least 35 hours of lessons per week and was paid per lesson. In this case too, the Federal Court denied the existence of an irregular activity.

In these cases, therefore, as there is no irregular activity for the Federal Court, it is not lawful to provide for holiday pay in the form of a percentage and the employer who has provided for such pay runs the risk of actually paying holiday pay twice.
However, in an earlier decision of 8 April 2009 (ATF 4A_66/2009), the Federal Court rejected a doctor's request for payment of his holiday salary. In this case, the doctor was paid on a fee-for-service basis but received monthly instalments subject to a final statement at the end of the financial year. In addition, he was able to take his holiday in kind.

The Federal Court considered that the method of payment, which had been provided for, "is very uncertain when it is made, as in this case, in the form of instalments of a variable amount. It can be problematic for the employee, especially when an instalment is not sufficient to cover monthly expenses.

In the appellant's case, however, this was clearly not the case in view of the amount of the advance payments and the savings he had made. Since the appellant also received the advance payments when he took holidays, he was no worse off during those periods than if he had worked. He was not obliged to make holiday provisions from his income, but could use the advance payment for that purpose, knowing that he could count on a further payment the following month, which would be sufficient to cover maintenance. There was therefore no risk that the money needed for the holiday would be used up prematurely and that the purpose of the holiday would thus be compromised. In this respect, the appellant's situation differed from that of an employee who only received salary payments when he had actually worked.

In this case, the Federal Court therefore considered that the doctor had been able to take his holidays

and that he had the necessary means to do so. It would certainly have taken a different view if the advance payment was not sufficient to cover the monthly expenses.
Thus, on the basis of the judgment of 30 January 2023 and previous case law, it seems that, in “out of the ordinary” cases, there are three possible solutions for the employer.

- Holiday pay in the form of a percentage of holiday pay clearly mentioned in the salary statements and in the contract; however, this solution should be chosen with caution and can only be applied if the activity is really irregular. This will not be the case if the employee works 100% for the same employer;

- A system of monthly instalments, but of an amount sufficient to cover monthly expenses and allow for holidays to be taken without the need for the employee to make provisions.

- A holiday allowance in the form of a percentage holiday allowance as in the above solution calculated and reported periodically with the basic salary but paid when the holiday is actually taken.

However, in all “out of the ordinary” cases, the employer is strongly advised to be careful when setting holiday pay and to seek advice beforehand to avoid the risk of double payment of wages in the event of proceedings by employees.

Source : https://www.wg-avocats.ch/en/actualites/labour-law/holiday-pay-a-real-headache-for-employers/