

Those who are regular readers of Recruitment Consultant will be very familiar with the continuing saga of cases involving rolled-up holiday pay.

On 27 October 2005 we had yet another chapter written in the on going story. The European Court of Justice's (ECJ) advocate general, Christine Stix-Hackl, handed down her opinion on the lawfulness of "rolled-up" holiday pay. This opinion relates to the ECJ case of *Marshalls Clay Products v Caulfield*.

Stix-Hackl gave her opinion to provide guidance to the court case and it is expected that the ECJ will agree with her.

What did she consider "rolled-up" holiday pay to be

Rolled-up holiday pay was used to describe the practice in which agencies make an additional payment to workers whilst they are working, to pay for their holidays, as opposed to paying workers when they take time off.

Rolled-up holiday pay - an area of dispute

Rolled-up holiday pay has been an area of dispute in the UK due to the split view taken by the Scottish and English Courts as to its legality.

The decision of the Scottish Courts in *MPB Structures Ltd v Munro* held that rolled up holiday pay was unlawful, even where an employer specifies that a certain portion of the salary is holiday pay.

However, in the case of *Marshalls Clay Products Limited v Caulfield*, the court of Appeal approved the legitimacy of rolled up holiday pay, provided that certain specific criteria were met.

A referral to the ECJ

The issue of "rolled-up" holiday pay was referred to the ECJ, asking the following questions:

- does the practice of rolling-up holiday pay involve a violation of a worker's right to be paid for annual leave as required by the Working Time Directive;
- is it necessary, in order to comply with the Directive, to require that

Holiday pay saga



The legal saga over 'rolled-up' holiday pay for temps continues. Nicholas Lakeland looks at the latest developments

- would it make any difference if the worker was paid the same before and after agreeing to rolled-up holiday pay; and
- if rolled-up holiday pay arrangements are not permissible, does the worker receive a windfall by effectively being paid twice or can the employer set off the holiday pay element of rolled up holiday pay against the worker's legal entitlement.

The arguments

In the ECJ the workers argued that payment must take place during their annual leave for their right to be given paid annual leave under the Directive to be satisfied. They also argued that having to save up for leave was deterrent to taking holiday, particularly for lower paid employees not to mention that an employee could earn more by not taking their annual leave.

The respondents argued that so long as there was payment the structure of rolled-up holiday pay would not conflict with the wording or purpose of the Directive. The UK government supported this view.

The opinion

The Advocate General's opinion is that rolled up holiday pay can be lawful and consistent with the Directive's objectives.

However, a number of hurdles need to be met to ensure that the

workers affected actually take holidays and it will be for the UK courts to examine in each case whether workers have an effective possibility of taking annual leave. This may pose problems for agencies where temporary workers are on the books for only part of a year. Perhaps agencies are going to have to demand evidence that holidays have actually been taken or are booked to be taken.

The opinion goes on to confirm that for rolled up holiday pay to be effective there must be a genuine increase in the rate of the workers pay to take into account the holiday element of the pay. In addition the breakdown of their pay must be sufficiently transparent for workers to be able to identify what amount of their pay is holiday pay.

The Advocate General took the view that if the employers current arrangement for rolled-up holiday pay does not comply with the Directive, the employer should be able to receive a credit for the sums already paid to workers under that arrangement. This prevents workers receiving a windfall by receiving their holiday pay twice.

What next?

The ECJ now has to make a preliminary ruling. A final decision from the judges is expected by summer 2006. The ECJ is not bound by the Advocate General's opinion but it is expected that the ECJ will agree with her thinking. Therefore ECJ judges should rule that sensibly structured "rolled-up" holiday pay arrangements are lawful.

What does this mean for Temp Agencies?

Temp agencies are probably able to continue to provide "rolled-up" holiday pay provided agencies show how much of a temps wages is holiday pay.

Agencies must also ensure that temps take their holiday entitlement, a minimum of four weeks per year, on health and safety grounds. How to police this is going to be the real practical problem faced by agencies.

Nicholas Lakeland is the head of the employment unit at Silverman Sherliker LLP. For more information, visit www.silvermansherliker.co.uk call 020

The Advocate General's opinion is that rolled up holiday pay can be lawful and consistent with the Directive's objectives