



News Story  
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## Advocate General says rolled-up holiday pay can be lawful

In the joined cases of *Caulfield v Marshalls Clay Products Ltd*, *Clarke v Frank Staddon Ltd* and *Robinson Steele v Retail Services Ltd*, the European Court of Justice's Advocate General has delivered his opinion on whether or not an arrangement between an employer and a worker providing that a specific part of the wages paid to the worker represents that worker's holiday pay violates the worker's right to annual leave under the Working Time Directive. In the Advocate General's opinion, rolled-up holiday pay arrangements **can** be lawful **provided** there is some other system in place for ensuring workers take the minimum amount of annual leave.

The workers' argument in these joined cases was that the legislation requires payment to be given while the worker is actually on leave. Arrangements to the contrary would constitute either a payment in lieu, or a mechanism that entails restrictions on taking ! leave and is prohibited for that reason. Furthermore, the rolled-up holiday pay system discourages workers from taking their annual leave. The employers argued that neither the wording nor the purpose of the Working Time Directive require payment for annual leave to be made in a particular way or at a particular time.

In the Advocate General's opinion, rolled-up holiday pay arrangements can be lawful only if the possibility for the worker of taking annual leave is ensured in some other way. It is for the national courts to examine to what extent workers have an effective possibility of actually taking the minimum annual leave to which they are entitled. Arrangements that are limited to providing for payment of leave without regulating the taking of the leave itself are likely to be in breach of the Directive. Finally, in the Clarke case, the employee's contract stated that pay included holiday pay. However, the actual proportion of pay representing the leave ! entitlement was only agreed during the course of the employment. This proportion was subsequently noted on payslips, but there was no corresponding increase in pay. According to the Advocate General, such an arrangement would not meet the requirements of the Directive. For rolled-up holiday pay arrangements to be lawful, it is essential that they are sufficiently transparent.

What happens now is that the joined cases will be heard by the ECJ next year and their decision on the subject of rolled-up holiday pay will be definitive and binding on the EU Member States. Although the Advocate General's opinion is not binding on the ECJ, in practice they do follow it in the majority of cases and it is unusual for them to take a different view. Watch this space!

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