

May 2018

Position Statement - Accounting for Overpayments through Holidays Act Re-calculations

This statement sets out the Labour Inspectorate's position on historical re-calculation of leave entitlements, including how historical overpayments can be considered when performing Holidays Act 2003 remediation.

Key Points

- When there are overpayments¹ identified these cannot be unilaterally offset or deducted from an employee's wages².
- The gross earnings figures used through re-calculations do not have to include the amounts which are genuine and mistaken overpayments in excess of contractual or statutory entitlements.
- Employers should consult with their employees, on the identification and treatment of any such overpayments before any readjustments or reductions to historical gross earnings figures occurs.

Background

Through exercises undertaken by employers to re-calculate Holidays Act entitlements, historical genuinely mistaken overpayments (in excess of contractual or statutory requirements) to employees (as well as underpayments) can be identified. Where such overpayments are identified there are two aspects to consider.

1. Treatment of the overpayment itself

Employers are generally prohibited from unilaterally offsetting the value of any overpayment against any underpayment (sometimes referred to as 'netting'). The exceptions are set out in the *Wages Protection Act 1983*³, which allows employers to make deductions for certain types of overpayments in limited circumstances.

An employer may deduct an overpayment from wages if they have sought and received the written consent of the employee in advance of making the deduction^{4 5}. In the absence of written consent to make a deduction, an employer who wishes to recover overpayments may seek independent legal advice about debt recovery options.

¹ Outside of an overpayment that occurred due to absence without leave, strike, lock out or suspension.

² As per section 86 of the *Holidays Act 2003*, holiday and leave pay is treated as wages.

³ Section 6 of the *Wages Protection Act 1983*.

⁴ Permitted by section 5 of the *Wages Protection Act 1983*.

⁵ Note (in addition to the requirement for the employee's written consent) any deduction must not be unreasonable and where it is a general deductions clause in the employee's agreement there must also be consultation before the deduction is made.



2. Treatment of the overpayment in Holidays Act Re-calculations

Gross earnings are the basis for many of the calculations under the *Holidays Act 2003*. Gross earnings are defined in section 14 of the *Holidays Act* as “...all payments that the employer is required to pay the employee under the employee’s employment agreement...”.

The Labour Inspectorate’s position is that the gross earnings figures used for remedial holiday pay calculations may be adjusted so that genuine mistaken overpayments in excess of contractual and statutory entitlements are not included in the ongoing calculations.

There is no case law on the practice of leaving overpayments out of gross earnings for re-calculations. While employers may, after consultation, adjust gross earnings figures to account for overpayments, employers are not required to make such re-calculations.

Duty of Good Faith and Consultation

The duty of good faith applies to dealings under the *Holidays Act*, including the assessment of defining and adjusting gross earnings. Adjusting historical gross earnings figures to account for overpayments impacts the future value of holiday entitlements and so, is of significance to affected employees.

The Labour Inspectorate’s position is that the duty of good faith requires employers to consult with affected employees before any overpayments can be said to be genuine and mistaken and, accordingly, before any proposed adjustment of gross earnings to account for overpayments is carried out.

Employers who do not address this issue in good faith, including consultation, face an increased risk of action being taken against them by affected employees.

Consultation should involve:

- informing affected employees that there is an apparent overpayment and the reason for it
- discussing what any proposed adjustment might look like for the employee
- listening to what the affected employees have to say
- considering the responses
- and then deciding what will be done, including seeking to reach agreement with the affected employees, and any dispute resolution processes that may be needed.

Note for Employees

If your employer seeks your consent to deduct a genuine mistaken overpayment from your wages you are not obliged to give your consent. If you have provided written consent to your employer, you may vary or withdraw that consent at any time by giving written notice to your employer.