

## Legal update - Happy Holidays (Act)

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Do you pay holiday pay on payments of redundancy compensation and notice in lieu? Most employers would say 'no' to the first question, and opinions are divided on the second. An Employment Court judgment earlier this year has triggered the debate, and we lend our views to that.

### *Howell v MSG Investments Limited*

In the *Howell* case, the Court found that MSG had to pay holiday pay of \$256,000 on a (very large) incentive payment paid to Mr Howell more than a year after the parties' employment relationship had ended. It said the incentive payment formed part of his 'gross earnings' for the relevant period.

The parties' employment agreement provided that Mr Howell was entitled to an incentive payment if he was employed on a specified target date, or if his employment was terminated earlier by MSG unjustifiably or for redundancy.

Mr Howell's employment was terminated for redundancy in February 2012, well in advance of the target date. The incentive payment itself was not paid until January 2013. Mr Howell later claimed that he was entitled to holiday pay on the payment.

The Court agreed with Mr Howell. It reasoned:

- The Holidays Act aims to ensure that an employee's holiday pay appropriately reflects all income earned over a 12-month period, and that the employee is appropriately reimbursed on termination for untaken leave.
- Mr Howell would have received holiday pay on the payment had he been employed until the target date. It would be incongruous for him not to receive holiday pay simply because it could not be calculated and would not be paid until after his employment ended.
- The Holidays Act focuses on payments the employer is *required* to pay under the employment agreement, rather than payments *received* during employment.

The difficulty with this decision is that it was Mr Howell's redundancy that triggered his entitlement to the incentive payment. Some commentators are saying that payments of redundancy compensation should be treated in the same way and be subject to holiday pay - although we don't take that view.

### Holiday pay payable on entitlements that arise during employment

The relevant provision in the Holidays Act (gross earnings) requires holiday pay to be paid on all payments the employer is required to pay under the employment agreement "*for the period during which the earnings are being assessed.*"

In other words, it applies to entitlements that arise during employment, not after the employment relationship has ended. This is consistent with the principle that holidays are an entitlement that an employee earns while working.

### Applying the law

We agree with *Howell* that holiday pay is payable on payments made after the employment relationship has ended, including payments where the amount is not able to be calculated until after the employment relationship has ended. In this event, however, holiday pay should be payable only when the employee has become **entitled** to the payment during his or her employment.

For payments such as redundancy compensation and notice in lieu, the employee does not typically become entitled to payment until the employment relationship has ended, in which case holiday pay is not payable on these payments in our view.

This is a widely accepted view in the case of redundancy compensation. There isn't however the same consensus around notice in lieu, and employers should be aware that there is conflicting case law.

How does this view sit with the decision in *Howell*?

We disagree with the *Howell* case, but employers don't have to take a controversial position.

Payments such as redundancy compensation and notice in lieu are different to the incentive payment Mr Howell received. In a very real sense, Mr Howell 'earned' his incentive payment during his employment. By comparison, redundancy compensation and notice in lieu payments do not relate to the work done by employees, and the ending of the relationship is the key event that gives rise to the entitlement.

Thanks!

We'd of course be happy to assist if you are beset with a difficult holiday pay (or other) issue before the end of the year. And thanks as ever for your support throughout the year. Have a great Christmas and break, we look forward to working with you again in the New Year.

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