

calendar days including vacation pay but excluding overtime by the days worked in that period. An employee who works the holiday is entitled to receive 1 1/2 times the employee's wages for the day (double the wage for hours over 12). The employee is also entitled to an average day's pay, but is not entitled to another day off with pay.

An employer may substitute another day off for a statutory holiday if the employer and an individual employee agree to the substitution. Such a substitution may also be made for a group of employees if the majority of the group of employees agree.

Part 5 does not apply to a "manager" or a "fisher" (see ss. 36 and 37 of the Regulation). Part 7 (Variances and Exclusions) of the Regulation (ss. 30 to 45) describes other occupations that are exempt from Part 5 and other portions of the Act.

## II. SECTION 44—ENTITLEMENT TO STATUTORY HOLIDAY [§5.2]

44. An employer must comply with section 45 or 46 in respect of an employee who has been employed by the employer for at least 30 calendar days before the statutory holiday and has

- (a) worked or earned wages for 15 of the 30 calendar days preceding the statutory holiday, or
- (b) worked under an averaging agreement under section 37 at any time within that 30 calendar day period.

[am. 2002-42-23, effective November 30, 2002 (B.C. Reg. 307/2002).]

### A. ANNOTATIONS TO SECTION 44 [§5.3]

If an employment contract contravenes the Act by purporting to give the employee no right to statutory holiday pay, then the employee may pursue a remedy under the Act, and failure to do so bars the employee from seeking damages in a civil action.

*Morgan v. Monk Office Supply Ltd.*, 1993 CanLII 669 (BC SC).

If other employees are given a specific day off, such as Boxing Day, the complainant employee will also be presumed to be entitled to that day off, absent specific evidence to the contrary.

*Re 639549 Alberta Ltd. (c.o.b. Comtec Communications)* (20 December 1996), BCEST #D375/96 (Stevenson).

Paid vacation leave does not count towards satisfying the requirement that an employee have “worked or earned wages” during 15 of the 30 calendar days preceding the statutory holiday.

*Re Krakiwsky (28 April 2016), BCEST #RD072/16 (Gandhi).*

### III. SECTION 45—STATUTORY HOLIDAY PAY [§5.4]

45 (1) An employee who is given a day off on a statutory holiday, or is given a day off instead of the statutory holiday under section 48, must be paid an amount equal to at least an average day's pay determined by the formula

$$\text{amount paid} \div \text{days worked}$$

where

amount paid	is the amount paid or payable to the employee for work that is done during and wages that are earned within the 30 calendar day period preceding the statutory holiday, including vacation pay that is paid or payable for any days of vacation taken within that period, less any amounts paid or payable for overtime, and
days worked	is the number of days the employee worked or earned wages within that 30 calendar day period.

(2) The average day's pay provided under subsection (1) applies whether or not the statutory holiday falls on the employee's regularly scheduled day off.

[am. to 2002-42-23, effective November 30, 2002 (B.C. Reg. 307/2002).]

### A. COMMENTARY AND ANNOTATIONS TO SECTION 45 [§5.5]

#### COMMENTARY

Section 45 explains how pro-rated statutory holiday pay is calculated. Essentially, total wages are divided by the number of days worked.

The method by which an employee is paid (for example, salary, commission, or piece rate) does not affect the employee's entitlement to statutory holiday pay.

**ANNOTATIONS**

An employer cannot calculate an hourly rate to be inclusive of statutory holiday pay.

*Re Knight Piesold Ltd.* (5 March 1999), BCEST #D093/99 (Petersen).

An employer may pay a global commission rate that includes a portion for statutory holiday pay so long as the system is clearly explained to the employee at the beginning of the employment relationship, and the portion is clearly identified on the employee's wage statement.

*Re Monarch Beauty Supply Co. Ltd.* (12 March 2002), BCEST #D090/02 (Petersen).

It is contrary to the Act to pay statutory holiday pay as a percentage of the employee's commissions. Commission earnings can vary widely from month to month. The Act prescribes that at a minimum, employees who are given a day off on a statutory holiday must be paid in accordance with their average earnings in the previous 30 days. If the employee had a high-earnings month prior to a statutory holiday, the minimum standard is that they must be paid an average daily wage based on that good month. The converse is true in the event of a low-earning month. Unlike the Act's provisions regarding vacation pay, there is no ability for an employer and employee to "opt out" of this minimum standard, in writing or otherwise. The Tribunal accepted that the employee had been paid some statutory holiday pay and referred the matter back to the Director to calculate how much the employee should have been paid.

*Re Advantage Plumbing and Drainage Inc.* (7 April 2005), BCEST #D047/05 (Lawson), further ruling (6 July 2005), BCEST #D092/05 (Lawson).

It is a violation of the Act to give "unlimited free movies" to employees in lieu of statutory holiday pay.

*Re Sanpreet Enterprises Inc. (c.o.b. Xanavision)* (14 December 1998), BCEST #D556/98 (Crampton).

An employee (here, a "residential caretaker" of a building) who works on statutory holidays with the tacit approval of the employer is entitled to be paid appropriately for that work.

*Re Harrison* (21 August 1996), BCEST #D224/96 (Stevenson).

The Act, with minor exceptions, requires wages to be paid relative to the time they are earned. Section 17 requires an employer to pay its employees at least semi-monthly and within eight days of the end of a pay period all wages the employee earned in the pay period. The only exceptions to this requirement are banked overtime wages, banked statutory holiday pay, and vacation pay.

*Re Fabrisol Holdings Ltd. (c.o.b. Ragfinder)* (19 December 1996), BCEST #D376/96 (Stevenson).

No provision in the Act requires that statutory holiday pay be calculated and paid to the employee on their payday.

*Re Specialty Motor Cars (1970) Ltd.* (2 February 1999), BCEST #D570/98 (Thornicroft).

The employer submitted that the complainant was paid the greater of a bi-weekly salary or commissions earned, and was paid for statutory holidays at that time. However the employer did not provide any payroll records or details to support that assertion. The employer failed to discharge its onus in this regard, and the Tribunal decided in favour of the complainant.

*A.F. Carpet Services Ltd.* (1 May 1996), BCEST #D056/96 (Crampton).

An employer cannot defend a claim from a part-time employee for statutory holiday pay by arguing that it only pays statutory holiday pay to full-time, regular employees.

*Re A-Star Doors & Mouldings Ltd.* (8 November 2013), BCEST #D087/13 (Bhalloo).

In the absence of a record of daily hours worked and wages paid for statutory holiday pay, the assertion that the employee “always received the same salary each pay period and therefore received an average day’s pay for the statutory holidays” was not sufficient evidence to show the employer complied with the Act.

*Re 312892 B.C. Ltd.* (20 October 2023) 2023 BCEST 86 (Bhalloo) at para. 27.

#### **IV. SECTION 46—IF EMPLOYEE IS REQUIRED TO WORK ON STATUTORY HOLIDAY [§5.6]**

46. An employee who works on a statutory holiday must be paid for that day

- (a) 1 1/2 times the employee’s regular wage for the time worked up to 12 hours,
- (b) double the employee’s regular wage for any time worked over 12 hours, and
- (c) an average day’s pay, as determined using the formula in section 45(1).

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