

Time Off In Lieu Arrangements

Some employers offer a time in lieu arrangement, giving salaried employees time off in lieu of payment for overtime hours worked. These arrangements vary enormously. They can be formally defined by a written policy for all staff, or else completely discretionary in a one-off situation.

A recent case, *Jackson v TSL Nelson Ltd*, illustrates the risks of having a loose verbal arrangement in place. Mr Jackson knew that long hours would be expected, so when he was offered employment he asked for time off in lieu (TOIL). This was not documented. The long hours that he worked meant that Mr Jackson did not have the opportunity to take enough time off to use all the TOIL hours he was accruing. After Mr Jackson resigned he claimed payment for those TOIL hours. The Employment Relations Authority was satisfied that Mr Jackson had a contractual entitlement to accrue TOIL hours, but what were the terms of the arrangement?

The Authority relied on the employer's duty of good faith to imply that the company would allow Mr Jackson a reasonable opportunity to take his accrued TOIL as leave, and that if it was not reasonably possible for him to take that TOIL as leave, the company would pay that to him at the end of employment. An hourly rate of pay was derived from Mr Jackson's salary based on a 40 hour week. The company was ordered to pay Mr Jackson almost \$20,000 for TOIL hours accrued but not taken.

To avoid uncertainty and the risk that the arrangement might later be found to be something other than you anticipated, it is preferable for both parties that a time off in lieu arrangement be clear. These questions might help you think about what is appropriate for you:

- Is TOIL a contractual entitlement or a policy that the employer can change from time to time?
- Does TOIL accrue for all hours worked over and above the standard or base hours (e.g. 40 hours per week) or only after allowing for reasonable additional hours (e.g. 50 hours per week)?
- Does TOIL accrue on a 1:1 basis, i.e. one hour off for one hour worked?
- Is there a cap, providing a maximum number of TOIL hours that can be accrued?
- Is there a time limit for taking TOIL, e.g. within three months of accruing it, to ensure that the employee has an opportunity for rest within a reasonable time after working the additional hours?
- What happens when that time limit is reached or employment ends, does the accrued TOIL expire or is a payment made?