



Extract from the report to the
Public Accounts Committee on
the payment of unclaimed holiday pay
to pre-retirement benefit recipients

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I. Introduction and results

1. This report deals with the Ministry of Employment's amendment of the Danish Holiday Act in 2004 and its consequences for the payment of unclaimed holiday pay to pre-retirement benefit recipients. The examination by Rigsrevisionen that forms the basis of the report was initiated following a Public Accounts Committee request for a memorandum in December 2007. At its own initiative, Rigsrevisionen has chosen to publicize its findings in a report.

2. The government's 2002 Budget Agreement with the Danish People's Party (*Dansk Folkeparti*) included a provision improving access to the payment of unclaimed holiday pay. In December 2003, the Danish Folketing considered the Ministry of Employment's proposed amendment of the Holiday Act, and the amended Act took effect on 1 January 2004. The amendment gave salaried employees a better opportunity to collect any unclaimed holiday pay outstanding.

3. The amendment of the Holiday Act also meant that pre-retirement benefit recipients were given the opportunity to receive unclaimed holiday pay while receiving pre-retirement benefits, that is, the amendment enabled double income support for pre-retirement benefit recipients. Holiday pay is considered earned income, and the amendment thus enabled pre-retirement benefit recipients to both maintain an earned income in the form of holiday pay and receive pre-retirement benefits at the same time.

4. In March 2006, DaneAge Association (*Ældre Sagen*) criticized the unemployment funds' lack of guidance to pre-retirement recipients on the option to refrain from taking holidays and thereby subsequently avoid deductions in their pre-retirement benefits following the disbursement of unclaimed holiday pay. References in the media to the possibility of pre-retirement benefit recipients receiving double income support caused the Ministry of Employment in April 2006 to amend the executive order on pre-retirement benefit, thus putting an end to double income support for pre-retirement benefit recipients.

5. The Labour Market Appeals Board (*Arbejdsmarkedets Ankenævn*) subsequently received numerous complaints from pre-retirement benefit recipients claiming that the unemployment funds' guidance had been either insufficient or incorrect. In September 2006, the Appeals Board decided the first two cases concerning this issue, ruling that the pre-retirement benefit recipients had received insufficient guidance and that in both cases, the unemployment funds should have informed the recipients about the option to refrain from taking holidays and instead collect their holiday pay after the expiry of the holiday year, without any deduction in benefits. The decisions made by the Appeals Board meant that all pre-retirement benefit recipients who had taken holidays during the period 1 January 2004 – 30 April 2006 should be given the option to retroactively reverse their decision, cancel the holidays taken and instead collect their unclaimed holiday pay without any deduction.

6. The Ministry of Employment disagreed with the Appeals Board decision about the scope of the unemployment funds' duty to provide guidance, and then instituted legal proceedings before the Eastern High Court against the Board. On 31 October 2007, the Eastern High Court dismissed the case on the ground that the Ministry of Employment had insufficient

Unclaimed holiday pay
Holidays are earned in the course of a calendar year and must be taken in the holiday year running from 1 May after the holiday qualifying year to 30 April the following year. Holiday pay not disbursed to salaried employees in the course of the holiday year and therefore remaining unclaimed when the holiday year ends is named unclaimed holiday pay.

Double income support
The concept "double income support" is often applied to denote the following situations:

1. A person receives several payments for the same event.
2. A person receives a public benefit as compensation for earned income concurrently with receiving other earned income.

financial or other legal interest in the matter. Following this, the Ministry decided to reimburse unemployment fund expenses for all pre-retirement benefit recipients. Consequently, in December 2007 in a supplementary appropriation Bill to the Finance Committee, the Ministry applied for DKK 450-600 million to cover these reimbursements. The financial scale of this exercise reflected the implications of the decisions of the Labour Market Appeals Board allowing affected recipients to retroactively cancel holidays taken. Because the cases were decided 2½ years after the amendment of the Act took effect, a substantial number of pre-retirement benefit recipients had the option to cancel holidays taken.

7. The purpose of Rigsrevisionen's answer to the Public Accounts Committee questions is to provide a comprehensive clarification of the case from start to finish. On the basis of the following four questions from the Public Accounts Committee, Rigsrevisionen has examined the course of events from the date the case started in 2002 until its conclusion in 2008:

- When and how did the Ministry of Employment become aware that the 2004 Holiday Act did not require holiday pay to be offset against pre-retirement benefits?
- Which initiatives did the Ministry take to end this unintentional entitlement to double income support?
- Did the lack of clarity of the Holiday Act and the related provisions lead to the huge difference in unemployment fund administration with some failing to offer guidance to its members, while others provided guidance and others provided wrong guidance? Was there a lack of agreement between the purpose and letter of the Act?
- On which basis did the Ministry of Employment institute proceedings before the Eastern High Court against the Labour Market Appeals Board? Why did the Eastern High Court find that the Ministry had no legal or financial interest in conducting the case?

8. Rigsrevisionen will not assess the correctness of the Appeals Board decision, the Eastern High Court's consideration of the case or the Finance Committee's approval of the supplementary appropriation Bill that provided the Ministry of Employment with the means to reimburse the unemployment funds.

RESULTS OF THE EXAMINATION

Rigsrevisionen finds that the Ministry of Employment did not handle the amendment of the Holiday Act satisfactorily because the amendment provided pre-retirement benefit recipients with the possibility of double income support. The legislative history of the amendment ought to have included a more thorough study by the Ministry of the consequences of the amended Holiday Act, including the groups that it would affect. Because the Ministry was aware that the amendment would give pre-retirement benefit recipients the option to collect holiday pay without any deduction in their pre-retirement benefits, it would have been appropriate if the Ministry had made sure the unemployment funds were aware of this.

Rigsrevisionen's overall assessment is based on the following:

During the preparatory legislative work on the amendment, the Ministry of Employment knew that the proposed amendment of the Holiday Act could provide pre-retirement benefit recipients with the option for double income support. The Ministry assumed that the double income support problem was negligible, although it did not examine the extent of the problem. Moreover, the Ministry did not take into account that the proposed amendment of the Holiday Act created an incentive for pre-retirement recipients to change their behaviour in order to take advantage of the double income support option.

- The Ministry was already aware that the amendment could provide pre-retirement benefit recipients with an option to receive double income support during the drafting of the proposed amendment of the Holiday Act in 2003.
- The government receives part of the unclaimed holiday pay as compensation for the public benefits that salaried employees receive instead of taking holidays. The Ministry calculated this compensation on the basis of daily cash benefits, social assistance benefits and leave allowance. The Ministry drafted its proposed amendment of the Holiday Act on the basis of the same three types of benefit. Rigsrevisionen finds that the Ministry could have included pre-retirement benefit in its proposed amendment of the Holiday Act or have introduced a new deduction rule in the executive order on pre-retirement benefits and thus have guarded against double income support. However, the Ministry only included set-offs against daily cash benefits, social assistance benefits and leave allowance in the Holiday Act.
- When drafting the proposed amendment of the Holiday Act, the Ministry considered the possibility of double income support for pre-retirement benefit recipients a negligible problem. This was based on assumption and not on specific knowledge of the potential scope of the problem. Furthermore, the Ministry was unaware that the amended Holiday Act created an incentive for these recipients to refrain from taking holidays and instead cash their unclaimed holiday pay after the end of the holiday year without any deduction in their pre-retirement benefits.
- The Ministry agrees that the potential financial consequences of a change in pre-retirement benefit recipient behaviour ought to have been examined. A rough estimate of the consequences might have shown that the lack of rules regarding deduction in pre-retirement benefits could cost the state millions.

The Ministry of Employment put a stop to double income support for pre-retirement benefit recipients by amending the pre-retirement benefit rules with effect as of April 2006.

- After the Holiday Act had taken effect, in January 2004 the Ministry reviewed the deduction rules governing all public benefits to assess whether there was a need to amend the rules regarding benefits not covered by the amended Holiday Act, including pre-retirement benefits. The Ministry concluded that no authority existed to make deductions in pre-retirement benefits. Similarly, the Ministry found that it was unnecessary to amend the rules at the time because it considered this a marginal problem. If pre-retirement benefit recipient behaviour changed generally or if the executive order on pre-retirement benefits was to be amended otherwise, the issue could be re-addressed.
- On the basis of its usual monitoring of the holiday pay area, the Ministry of Employment found no signs of changing behaviour among pre-retirement benefit recipients after the act came into effect.

- With effect as of April 2006, the Ministry put a stop to the right of double income support for recipients of pre-retirement benefits by amending the executive order on pre-retirement benefits, according to which the collection of unclaimed holiday pay after the expiry of the holiday year is offset against the pre-retirement benefit. Anticipating a change in recipient behaviour as a result of the media's disclosure of the double income support option, the Ministry amended the executive order in March 2006. Accordingly, the amendment was implemented before a large number of pre-retirement benefit recipients could act on the media's disclosure and refrain from taking holidays.

The Holiday Act was clearly worded and there was agreement between the purpose and letter of the Act. The rules on deductions in pre-retirement benefits clearly described when deductions in benefits were to be made following the disbursement of holiday pay. The amendment of the Holiday Act meant that these deductions were not to be made when holiday pay was paid out after the expiry of the holiday year. The Ministry failed to inform the unemployment funds of the new situation for pre-retirement benefit recipients because the Ministry generally assumed that the unemployment funds were aware of the applicable rules.

- There was agreement between the purpose and letter of the Act, and the Act stated clearly which groups were covered. Part of the purpose of the new Holiday Act was to improve access for salaried employees to collect unclaimed holiday pay. The Holiday Act does not expressly require measures guarding against double income support and, accordingly, it was not contrary to the purpose of the Act that the amendment entitled pre-retirement benefit recipients to double income support. Nor, however, was the amendment intended to make double income support a possibility.
- The executive order on pre-retirement benefits in force at the time clearly stated the cases in which deductions were to be made in pre-retirement benefits in connection with holiday pay disbursements. Although the Holiday Act and pre-retirement benefit rules individually were clear, neither the Ministry nor the unemployment funds focused sufficiently on the interaction between these sets of rules, i.e. that changing one set would affect the administration of the other. In certain cases this interaction enabled pre-retirement benefit recipients to collect holiday pay without simultaneously incurring a deduction in pre-retirement benefits.
- Basically, the Ministry failed to point out to the unemployment funds the options the new Holiday Act afforded to recipients of pre-retirement benefits because the Ministry assumes unemployment funds are aware of the applicable rules and because the Ministry normally only supplies information to unemployment funds when the rules on unemployment insurance, including pre-retirement benefits, change, which was not the case in this situation.
- The Ministry's assessment of when unemployment funds must be informed of rule changes within the Ministry's field of responsibility ought basically to depend on whether the change will affect unemployment fund administration of the services within the scope of the Danish Unemployment Insurance Act. Rigsrevisionen is of the opinion that this does not exempt unemployment funds from keeping up to date on and handling cases according to the rules in force.

The Ministry of Employment instituted proceedings against the Labour Market Appeals Board because it considered that the Appeals Board decision was incorrect and that it would change the perception of the scope of the unemployment funds' duty to provide guidance. Moreover, the Ministry believed there was a risk that the decision might establish a precedent in other areas of the law. The Eastern High Court dismissed the case because it found the Ministry had no legal interest in conducting the proceedings. The High Court found partly that the Ministry was under no obligation to indemnify unemployment funds against financial losses, partly that the case had no significance for the Ministry's future case processing as the rules had already been changed.

- In 2006 the Ministry of Employment decided to institute proceedings against the Labour Market Appeals Board on account of the Board's decision in a pre-retirement benefit complaint. The decision meant that all pre-retirement benefit recipients who had taken holidays during the period from the adoption of the amended Holiday Act until the Ministry changed the pre-retirement benefit rules were entitled to retroactively reverse their decision to take holidays.
- The Ministry found that the Labour Market Appeals Board decision was incorrect and established that the Appeals Board had come to a different conclusion in a similar field. The Ministry believed that the Appeals Board decision would change the perception of the scope of the unemployment funds' duty to provide guidance and that it might establish a precedent in other areas of the law. Therefore, the Ministry instituted proceedings against the Appeals Board claiming that the Board be ordered to acknowledge that the decision was invalid.
- The Eastern High Court did not find that the Ministry of Employment had any financial interest in the decisions made by the Labour Market Appeals Board that could justify the Ministry's commencement of legal proceedings against the Appeals Board. The High Court was of the opinion that the Ministry was under no obligation to indemnify the unemployment funds against losses resulting from the Appeals Board decision. The High Court also found that any wish of the Ministry to indemnify the unemployment funds against losses was not a legal obligation but expressed the Ministry's wish to accommodate the unemployment funds.
- The Eastern High Court found that in addition to having no financial interest in the matter, the Ministry of Employment had no other legal interest in the case against the Appeals Board either, because the Appeals Board decision had no direct significance for the Ministry's future case processing because the legislation had already been amended before proceedings were instituted before the High Court. Consequently, the High Court decision would have no significance for future unemployment fund guidance about the holiday legislation. In addition, the High Court did not find that in the circumstances, the Ministry's general duty of supervision in relation to authorities within the Ministry's field of responsibility could justify the Ministry's legal interest in a judicial review of the question of the scope of the guidance obligation.

- In December 2007, the Finance Committee approved a supplementary appropriation Bill, in which the Ministry of Employment asked for DKK 450-600 million to reimburse unemployment fund expenses for the repayment of pre-retirement benefits to members opting to collect holiday pay without taking holidays. The Ministry has stated that at end-July 2008, some DKK 420 million had been disbursed, of which some DKK 90 million was default interest and that at present these figures do not provide a basis for changing estimated total costs to the state. The Ministry oversees the unemployment funds' handling of the complaints. The Ministry expects unemployment fund repayments to be completed in late autumn 2008.