



Tribunal confirms that holiday pay should include commission

The Leicester Employment Tribunal has issued its judgment in *Lock v British Gas* confirming that commission should be included in the calculation of holiday pay. This is an important development in the growing line of European and UK cases that have determined that workers are entitled to their normal remuneration when they are on holiday.

What issues did the Tribunal determine?

Last November the EAT in *Bear Scotland v Fulton* held that compulsory, non-guaranteed overtime should be included in the calculation of a worker's holiday pay (please see our previous [alert](#)). The Tribunal in *Lock* saw no difference in principle between payment for non-guaranteed overtime and payment in respect of commission so far as annual leave is concerned.

In *Lock*, the European Court of Justice (ECJ) had already previously held in May 2014 that commission should be included in the calculation of holiday pay (see our previous [alert](#) on the ECJ's decision). The case was then remitted to the Leicester Employment Tribunal in order to determine whether the UK Working Time Regulations (WTR) can be interpreted in such a way to give effect to the ECJ's decision.

The Tribunal concluded that the WTR can be interpreted in line with EU law. The Tribunal chose to read into the WTR an amendment which determines that "commission or similar payments" must be included in holiday pay for the four weeks' holiday pay under the EU Directive but not the additional 1.6 weeks under the Working Time Regulations (WTR).

What is still to be decided?

The decision is only the first hurdle in the *Lock* case as various points of detail will be determined at the next tribunal hearing (a date for which has not yet been set). The key question which is still unresolved is how the commission element of holiday pay should be calculated. The following points will be considered in answering this question at the next tribunal hearing:

- (a) **Reference period** – What reference period can be used to determine the average level of commission to be included in holiday pay was not a point which fell to be decided at the first tribunal hearing. However, the particular statutory amendment adopted by the Tribunal appears to trigger the same 12 week averaging calculation for workers who receive commission as is required under the WTR to calculate the holiday pay for workers whose pay varies with the amount of work done. It is not clear whether or not the Tribunal intended to limit the options for the reference period to 12 weeks and we expect further clarification on this point at the next hearing.
- (b) **Retrospective liability** – There may be further guidance at the next hearing on how far back retrospective claims could go if there has not been a three month gap in underpayments (please see our previous [alert](#) regarding the EAT's rule in *Bear Scotland v Fulton*) and if a claim were issued prior to 1 July 2015 when a two year cap on backdated claims will be introduced.
- (c) **Scheme structure** – The Tribunal explicitly left open the question of whether or not British Gas' commission scheme was in fact already structured to compensate Mr Lock for holiday periods.

"Commission or similar payment"

The Tribunal's decision also leaves open the question of what sorts of payment could come within the scope of the wording "commission or similar payment"? Whilst the Tribunal expressly confirmed that it was not considering whether any other form of remuneration, such as discretionary bonuses, ought to be included in holiday pay calculations, its proposed amendment to the WTR does leave open the possibility that group-performance commissions or wider performance related bonuses could be caught by the new wording.

continued overleaf

Where next?

The Tribunal's decision was largely as anticipated and is consistent with the recent developments in holiday pay case law. However, given it is only a first instance decision and as it could well be appealed by British Gas, the difficult question for employers will be whether to start including commission in holiday pay calculations now or to wait for further clarification from the Tribunal and/or the appeal courts. We suspect that most employers will seek to wait until the next tribunal hearing in the Lock case, particularly given that the key question as to how the commission element of holiday pay should be calculated remains unresolved.

For more information on how we can help you assess your legal and financial risk in relation to holiday pay or for specific advice on this issue, please contact:



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