

UK: EMPLOYMENT INSIGHT IN-DEPTH – APRIL 2017

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In *British Gas Trading Ltd v Lock*, L was employed as an energy trader with normal working hours and his remuneration did not vary with the amount of work done. Commission earned on sales was an important part of his remuneration package, representing around 60% of his basic pay. When L took holiday, he was entitled to basic pay and continued to receive commission based on his earlier sales. However, his commission payments were lower during the months that followed because he had been unable to generate sales while on holiday.

L brought a tribunal claim, arguing that holiday pay should reflect normal remuneration and that his pay should, therefore, be enhanced to reflect the commission that he would otherwise have earned during annual leave. Faced with an apparent conflict between domestic and EU law, the tribunal made a reference to the European Court of Justice (ECJ). The ECJ held that commission payments must be taken into account when calculating holiday pay under Article 7 of the Working Time Directive (WTD). The case then returned to the tribunal, where the question was, whether the Working Time Regulations (WTR) could be interpreted so as to give effect to EU law. The tribunal held that there was no obstacle to interpreting the WTR so as to include commission payments in the calculation of holiday pay. The Court of Appeal upheld the decision of the EAT.

The fact that British Gas had around 1,000 potential claims from its workers waiting in the wings and that the Court of Appeal indicated that it had “wavered” in reaching its decision meant that it was widely expected that there would be a further appeal to the Supreme Court. Accordingly, most employers made no changes to their holiday payments while the appeal was pending. The Supreme Court, however, refused British Gas’ application for permission to appeal. The decision of the Court of Appeal therefore stands and sums in respect of results-based commission must be included in the calculation of holiday pay for the first four weeks of holiday. There is no obligation to include such payments in the extra 1.6 weeks’ UK holiday not derived from the WTD. These payments will need to be included only where they represent “normal pay” – that is they are linked to the worker’s contractual duties and are paid on a regular basis.

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Lock will now return to the Employment Tribunal to decide on compensation and, hopefully, the Tribunal will offer some general guidance on the reference period to be used. Until then, what should employers do? In *Lock*, the parties agreed that a 12-week reference period should be used. When the case was before the European Court, the Advocate General suggested that a 12-month reference period might be appropriate. However, the ECJ did not offer any guidance on this issue. Another question is, when will a payment be considered sufficiently regular to warrant inclusion in holiday pay? The Court of Appeal heard arguments about whether a decision to include commission in holiday pay might have unintended consequences. For example, a decision to include commission in holiday pay is not intended to apply to staff who receive an annual discretionary bonus based on team or organisational performance. The parties agreed that the outcome of the Court of Appeal decision should apply only to workers who have normal working hours, whose pay does not vary according to the amount of work done, but who receive individual results-based commission as part of their normal remuneration. Further, as a result of the EAT decision in *Bear Scotland v Fulton*, statutory holiday pay should also be calculated to include non-guaranteed (contractual) overtime. The situation in relation to voluntary overtime has not yet been considered at appeal level, although in non-binding cases the employment tribunal has decided that it should be included in the calculation.

Affected employers may choose to wait and see if the tribunal in *Lock* gives guidance on the reference period, and whether there is a binding decision on voluntary overtime. Even where an employer takes this approach it should make provision to cover the cost of adjustments in future. Alternatively, an employer could decide to proceed with making adjustments, notwithstanding the uncertainties. In these circumstances, the employer will need to decide what the appropriate reference period is in the context of their business and reward structure; and what payments are sufficiently regular to amount to “normal pay”.

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