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EUROPEAN COURT RULES THAT COMMISSION MUST BE TAKEN INTO ACCOUNT WHEN CALCULATING HOLIDAY PAY

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In a hotly anticipated decision, the Court of Justice of the European Union (CJEU) has ruled that when calculating holiday pay for the purposes of the Working Time Directive, employers must take into account commission payments if these form part of a worker's normal remuneration.

Lock v British Gas Trading Limited involved an employee who received a basic salary, plus regular commission payments based on sales. During his annual leave, he was paid his basic salary, together with the commission payments that fell due during that period for previous sales. British Gas argued that this meant he had been paid both salary and commission over his holiday period and so had no claim. However, because Mr Lock did not make any sales during his annual leave he received less income in the months following his holiday. He therefore brought a claim in the Employment Tribunal for outstanding holiday pay and it promptly referred the matter to the CJEU. In 2013, the Advocate General ruled that Mr Lock should have received remuneration in respect of his annual leave that reflected the commission he would have earned had he not taken annual leave, even though it might be received only at a point after his holiday was over. It said that the commission payments were intrinsically linked to Mr Lock's role as a salesman and as such should form part of his normal remuneration.

The CJEU has now upheld this approach and ruled that Mr Lock's holiday pay should have taken into account commission payments, as otherwise he "may be deterred from exercising his right to annual leave" (though in fact he was not, hence the claim). Unfortunately the CJEU did not go so far as to say how Mr Lock's holiday pay should now be calculated, concluding that the detail of this was something for the UK Courts to determine, in accordance with the principles identified in European case law. It did, however, suggest that this meant assessing notional commissions by use of a reference period long enough to be "representative" of what his earnings from that period would probably have been.

So where does this leave employers and what should they be doing now? There is no doubt that this case is hugely significant and has wide-reaching implications for many employers, at least in respect of the basic four weeks' leave entitlement derived from the Directive.

Bear in mind that this is not technically a change in the law, but merely clarification of it, and therefore that strictly-speaking the new position has always applied. To the extent they have not already done so, employers should now be reviewing their holiday pay arrangements if they have workers who are entitled to variable payments such as commission to determine whether or not changes may need to be made to them. Future claims seem inevitable, both where existing pay practices are not amended and in respect of underpaid holiday going backwards potentially some years.

In the meantime, we are waiting for the EAT's decision in the cases of ***Neal v Freightliner Ltd*** and ***Fulton v Bear Scotland Ltd*** which are due to come before the EAT on 30 and 31 July 2014. These deal with the separate but related issue of whether holiday pay should take into account overtime pay. It is hard to conclude that the outcome will be different since overtime, like commission, is intrinsically linked to the performance of employment duties.

We are currently involved in a number of cases in this difficult area so if you would like to discuss the potential implications for your business, please contact your normal contact in the Labour & Employment team.

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