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HOLIDAY PAY AND COMMISSION: LATEST TRIBUNAL RULING

The Leicester Employment Tribunal has this week given a decision in ***Lock v British Gas***. But anybody hoping for useful practical guidance on how commission should be taken into account for statutory holiday pay purposes will be disappointed. The Tribunal only dealt with the narrow issue of whether the Working Time Regulations 1998 can be read in such a way as to comply with European law in this area (as expected, the answer is yes) and left the bigger (and more complicated) issues for another day.

The Employment Tribunal's decision follows the ECJ's ruling last year that Mr Lock's four-week statutory holiday pay entitlement that derives from the Working Time Directive *should* take into account commission payments, as otherwise he would be worse off financially as a result of going on holiday and so might in theory have been (though actually was not) deterred from exercising his right to take annual leave.

In this week's ruling the Leicester Employment Tribunal only went so far as to say that the Working Time Regulations 1998 should be amended to include a provision that "a worker …whose remuneration includes commission ***or similar payment*** (our emphasis) shall be deemed to have remuneration which varies with the amount of work done…". This would seem to suggest that Mr Lock's holiday pay (or at least the four weeks that derive from the Directive) should be calculated by reference to his average remuneration over the 12 weeks before the calculation date, although the Tribunal also said that the correct reference period in this particular case was a matter to be determined at a later date. It is also far from clear what approach would be taken in cases where it is not found (unlike Lock) that the employee would necessarily or even probably lose out on commission by taking holiday. This question is explored further in our Labour and Employment blog posting Holiday Pay in the UK: Finding the Key to Lock.

Much was expected from this decision but in practice it does not really take us any further forward. The law remains unclear on the key issues that employers are currently facing, in particular the correct reference period for calculating holiday pay for those workers who earn commission. The Tribunal was also at pains to point out that this case did *not* concern whether any other forms of remuneration (such as discretionary bonuses) should be taken into account in determining holiday pay. However, by referring to commission "***or similar payment***" in its decision the Tribunal has raised the issue of whether bonuses will in fact also be caught for these purposes. And that is a whole other can of worms!

At this stage employers should certainly not be making any strategic decisions based on this case alone. It seems this issue has still got some way to run.