SQUIRE PATTON BOGGS

Holiday Pay: The Latest Position

With the UK Court of Appeal's ruling in *British Gas v Lock* on 7 October, the question of how to calculate holiday pay has been thrown back into the spotlight.

For those who may quite understandably have lost track of where we are on the holiday pay front, below is a short summary of the current position.

a. Under the Working Time Directive workers have the right to four weeks' "paid" annual leave. Although the Directive does not set out how holiday pay should be calculated, European case law has made it clear that, when taking statutory holiday derived from the Working Time Directive (EU Leave), workers are entitled to receive their "normal remuneration" – this includes not only basic salary, but also remuneration "intrinsically linked to the performance of the tasks". In broad terms, workers are entitled not to be left worse off for taking holidays.

b. This case law has caused problems in the UK because, under the Working Time Regulations 1998, many workers are only entitled to receive their basic weekly pay during any periods of leave, i.e. ignoring overtime, bonus, commission, allowances, etc. Hence a flurry of multi-claimant cases arguing that UK legislation is inconsistent with European law.

c. We now have UK case law which makes it clear that EU Leave must be calculated based on a worker's "normal remuneration", i.e. that "which is normally received". Non-guaranteed overtime and certain other allowances (e.g. travelling time payments) have been held to be "normal remuneration" and so should be taken into account when calculating EU Leave.

d. There are also now a number of tribunal decisions which have held that voluntary overtime can amount to "normal remuneration" and should usually also be taken into account for holiday pay purposes.

e. In terms of commission, we now have Court of Appeal authority which confirms that results-based commission must also be taken into account for holiday pay purposes, though that was no real surprise given the previous rulings and overall direction of travel on this topic.

f. Do not forget – these rulings only apply to the four weeks' leave derived from the Working Time Directive, i.e. EU Leave. They do not apply to UK Leave, i.e. the additional 1.6 weeks' leave provided under Regulation 13A of the Working Time Regulations 1998, or to any further enhanced leave.

g. The scope for workers to recover past underpayments of holiday pay by unlawful deduction from wages claims is limited. Workers have to bring their claim within three months of the alleged underpayment and any break of three months between payments could break the chain. Furthermore, there is now a two-year cap on claims for backdated holiday pay. In most cases, therefore, the focus for employers is how to manage the increased cost going forward.

h. So what should employers be doing now? There are still a number of key questions that remain unanswered, including, in particular, what the correct reference period is for calculating holiday pay and how to deal with commissions or bonuses which are occasional or irregular (see our blog on this). Accordingly, unless there are compelling business or employee relations reasons for doing so, we are still not recommending that employers change their approach to calculating holiday pay at this stage, other than to consider making financial provision for the potential additional cost. The sole exception to this might be cases where overtime and/or commissions are so even and regular that it is genuinely possible to estimate with a fair degree of precision what the employee had lost in that respect by his absence on leave. That was probably the case for Mr Lock, who earned new commission daily, but we think will not be common otherwise. If you are coming under pressure from trade unions or other employee representatives to change your current holiday pay arrangements, please speak to your usual contact or, alternatively, a member of our Holiday Pay Taskforce listed in this publication.

i. And what about Brexit? Questions have been raised about the potential impact of the UK's departure from Europe on the holiday pay issue. After all, the current difficulties for UK employers are as a direct result of the application of European case law. For now, nothing changes and the UK courts are obliged to continue to interpret the Working Time Regulations 1998 in accordance with the Working Time Directive. It is wildly unlikely that we will be out of Europe before this cases finishes, so EU law will continue to cover it.

Squire Patton Boggs has a national Holiday Pay Taskforce comprising some of the leading experts on this subject. This Taskforce is actively monitoring the situation and will update you in the event of further developments.

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