

Calculators at the ready: ECJ rules that commission should be taken into account when calculating holiday pay

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In recent years there has been a flurry of case law relating to the calculation of holiday pay. The European Court of Justice (the 'ECJ') delivered a judgment last week in *Lock v British Gas Trading Limited* adding to this already complex area by deciding that contractual commission should be included when calculating the holiday pay due to Mr Lock.

The *Lock* facts

Mr Lock (employed by British Gas) received remuneration via two components: (i) basic salary and (ii) a monthly contractual commission payment based on the sales he made. The commission element of Mr Lock's pay varied from month to month, but on average made up 60% of his total remuneration.

When Mr Lock went on annual leave, he was unable to generate commission for that period, meaning the payments that followed his holiday were reduced as a result. He brought a claim in the Employment Tribunal for unpaid holiday pay, which in turn referred questions on the calculation of holiday pay to the ECJ.

The ECJ judgment

British Gas attempted to argue that Mr Lock received commission payments during his annual leave for sales he had made before he went on holiday, as well as his basic salary, so no further payment was due. The ECJ dismissed this as 'irrelevant', as the key fact was that Mr Lock suffered a reduction in remuneration on his return to work – his future payments were affected by his inability to generate sales whilst on holiday. This could act to deter Mr Lock from taking annual leave due to its financial implications, and as such was contrary to the EU Directive on Working Time.

Accordingly, the ECJ held that where variable elements of pay were intrinsically linked to work done under the contract of employment, remuneration paid to the worker should be calculated to include those payments. In other words, commission payments may need to be taken into account when calculating how much pay is due to an employee whilst they are on holiday if the commission is 'intrinsically linked' to the work done. The judgment follows the ECJ's decision in *Williams v British Airways* that the 'normal remuneration' used in calculating the annual leave of British Airways pilots should include their flying allowances – an approach also seen in the UK employment tribunal case *Neal v Freightliner Limited* where the tribunal has held that non-guaranteed overtime payments should be included in holiday pay. The decision in *Neal* is subject to an appeal in the UK Employment Appeal Tribunal in July.

Practical implications

The ECJ left the question of how to calculate holiday pay for individual member states, and in the UK it will be the employment tribunal hearing Mr Lock's case that has to decide how this task should be approached. It will be interesting to see whether the tribunal feels able to interpret the UK's Working Time Regulations in a way that is compatible with the ECJ's ruling. The UK courts and tribunals have increasingly shown themselves to be willing to do this, but within limits. In any event, the Working Time Regulations will need to be amended in time to bring them into alignment with EU law. It may be that the UK decides to use a 12 week reference period for calculating commission and other variable payments which is the period used elsewhere under the Working Time Regulations, for example where working hours are irregular.

The key questions for employers are:

- to what extent this ruling could translate into expensive claims for under-paid holiday pay from large numbers of workers; and
- whether and to what extent employers can and should attempt to mitigate the potential effects of the decision by taking immediate steps to amend their policies on holiday pay and variable remuneration.

Any employer concerned about the implications should take advice about how to tackle the problem, whether to do so immediately or await further developments and whether revisions to terms and conditions would be advisable.

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