

## Holiday Pay, Commission and Brexit

The Court of Appeal has handed down its decision in the important case of Lock v British Gas.

It is a significant as it relates to the calculation of holiday pay which businesses should take note of as increasingly payments are made to employees in addition to their basic salary, such as commission, bonuses and overtime.

Mr Lock was a salesman on a basic salary with variable commission which depended not on the time worked, but the outcome of that work i.e. sales achieved. Mr Lock could not earn commission whilst on annual leave, and therefore brought a claim for his lost holiday pay after taking leave in December 2011 to January 2012.

The European Court of Justice (ECJ) ruled in 2014 that employers must ensure that a worker taking leave is paid by reference to commission payments the worker would have earned if at work. The case was referred back to the UK to determine the mechanics of calculating holiday pay.

The Court of Appeal decided that when calculating holiday pay, workers are entitled to be paid an amount which reflects the commission they would have earned if not on holiday, which is what the ECJ decided two years ago, so nothing new.

This left employers with a big unanswered question, i.e. what is the appropriate reference period for averaging a worker's commission for the purpose of their holiday pay. Some commentators have suggested 12 weeks, but ultimately it will depend on an employer's commission scheme and the industry in which they operate.

What about the implications of Brexit? As the Court of Appeal had to consider this case as a result of a ruling from the ECJ, there is a question mark over whether Brexit will make a difference to the ECJ's initial ruling.

Firstly, it is important to state that whilst we remain a member of the EU, we are required to interpret UK legislation in line with European directives and decisions of the ECJ.

However that arrangement is likely to change. The Government recently announced its intentions to end the jurisdiction of the ECJ in the UK by introducing the Great Repeal Bill which is intended to come into effect on the date we formally exit the European Union (possibly March 2019).

This will end the authority of EU law by converting all of its provisions into UK law, and will give the UK the opportunity to scrutinise, amend, repeal or improve any aspect of EU law in the future.

One possibility is that ECJ interpretations no longer bind UK courts and tribunals. That is likely to have a profound effect on a number of employment laws, such as claims relating to holiday pay which have been influenced by the ECJ.

For the time being, employers are required to include commission payments in holiday pay to staff, which could have severe financial implications for many businesses.

Now is the ideal opportunity for employers to put necessary measures in place to review their contracts, policies and procedures, to ensure that clauses relating to annual leave, holiday pay and staff benefits are compliant with the ECJ and Court of Appeal

If you have any queries regarding the above should contact Sally Morris at [sally.morris@mfgsolicitors.com](mailto:sally.morris@mfgsolicitors.com) or on 01905 610410.

