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HOLIDAY PAY - ANOTHER PIECE OF THE PUZZLE

Readers will be familiar from our previous eBulletins with the controversy (and confusion) surrounding the correct calculation of holiday pay. To recap, the European Court of Justice has confirmed that workers on holiday must receive "normal remuneration", which has been held to include sales commission payments (*Lock v British Gas Trading Ltd* - [2014] IRLR 648) and, following the Employment Appeal Tribunal's decision last November, compulsory non-guaranteed overtime (*Bear Scotland Ltd and others v Fulton and others* [2015] IRLR 15).

What none of the domestic or European decisions has definitively addressed is how precisely employers should calculate normal remuneration. This is now answered, for the time being, in the latest decision in the *Lock v British Gas* case. UK law typically provides for a complicated averaging mechanism over a 12-week reference period. The Leicester Employment Tribunal (which originally referred the commission issue in *Lock* to the ECJ) has now decided that the simplest way of doing so is to apply that 12-week averaging mechanism to workers who receive commission.

Despite the EAT's clear finding in *Bear Scotland* that UK legislation could and should be read in a way that is compatible with the underlying European principles as set out by the ECJ, British Gas again sought to argue that the differences in drafting between the Employment Rights Act and the EU Working Time Directive made such a task impossible and that, as the existing UK rules were clear, they should be followed without amendment. Unsurprisingly, given the very recent examination of these same arguments by the EAT, these arguments failed and the Tribunal instead ruled that the Working Time Regulations should be amended to apply 12-week averaging in order to calculate the commission due whilst on holiday.

Notwithstanding the *Lock* decision, calculating average commission over a 12-week reference period is in practice likely to be problematic for many businesses that operate a monthly payroll. Adopting a three-month or 13-week period instead may well be the nearest approximation that can be commercially achieved in many cases, despite the technical risk of failing to apply a strict 12-week average.

The decision does not deal with whether voluntary overtime or other forms of remuneration, such as discretionary bonuses, should be included in holiday pay. Those remain difficult areas for which a detailed examination of each factual circumstance is usually required. If you would like to discuss your own circumstances, or holiday pay more generally, please feel free to get in touch with me or your usual Macfarlanes contact.

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