

European Court decides holiday pay includes commission

What did the case decide?

The European Court of Justice has held that a worker is entitled to be paid in respect of periods of annual leave by reference to the commission payments he would have earned during the period of absence (*ZRJ Lock v British Gas Trading Limited*)

Case facts

Mr Lock's income consisted of a base salary together with commission payable monthly in arrears. Commission was paid by reference to sales resulting from his work. Commission payments made up approximately 60% of Mr Lock's income.

Mr Lock complained that he had been financially disadvantaged as a result of taking holiday because he would not receive any commission in respect of the period of holiday. He would not be make new sales during his holiday and would not receive commission in respect of those "lost" sales. This would have an adverse impact on his income during the months following his annual leave, as commission was paid in arrears. Given that commission made up the majority of his income, the impact of not earning commission over periods of holiday was significant.

ECJ decision

The European Court of Justice held that it was not open to an employer to pay only basic salary in respect of periods of holiday. The employer was required to take into account commission in the calculation of the total remuneration to which an employee is entitled in respect of annual leave.

Unhelpfully, the Court failed to give any firm guidance in relation to how commission should be calculated for this purpose. The court stated that this was a matter for the national court or tribunal to assess. It did, however, indicate that the calculation should be based on average commission received over a reference period which is considered representative under national law.

What this means in practice will have to be determined by the tribunal when the matter is remitted to the English courts. The most obvious reference period is the 12 weeks period used under the working time regulations to calculate the income of those without normal working hours.

Accordingly, whilst it is clear that commission payments need to be included in the remuneration payable to workers in respect of paid leave, the basis for doing so is not.

What action do employers need to take?

Our view is that employers will decide not to take any action at present. Any clarification provided by the UK courts in the future would be likely to result in changes to the working time regulations. As there is no date yet set for the hearing of the case by the English courts, clarity is unlikely to be achieved for some time. In the meantime, employers might wish to review the basis on which commission schemes operate to assess the likely impact of the decision on current practice in relation to payment of commission in respect of paid holiday.

Where schemes are renewed on an annual basis or give the employer the right to make changes to a scheme, consideration could be given to altering the scheme to build in an additional amount to be paid in respect of annual holiday. This need not result in a larger overall payout from a scheme as the level of commission payable could be adjusted downwards to take account of the additional amount payable in respect of periods of holiday. However, any such alteration to a scheme would need to assume an average amount of commission to pay in respect of periods of holiday and as the lawful method of doing this is not clear, it is possible that changes made at this point would not be compliant with any future changes to the working time regulations.

One benefit that may flow from making changes to a scheme at this point is that a change in practice could assist an employer in defeating a claim for backdated holiday pay. Such a claim could be based on the argument that the employer had been making a series of unlawful deductions by not paying commission in respect of periods of holiday. Where

the chain of deductions is broken by paying an element of commission in respect of holiday, the employee might become time barred from claiming in respect of earlier periods.

If pressed by an employee to pay an additional amount of holiday pay in the light of the decision, an employer could push back, saying that the legal position is unclear and that guidance from the English courts is required before any additional payment can be made.

Will the decision have a wider impact?

The decision is unlikely to have any impact on the operation of annual discretionary bonus schemes or to the operation of bonus pools where a percentage of revenues is allocated to a pool to be distributed amongst eligible employees at the end

of a scheme year. The actual impact of the decision is likely to turn on the terms of the particular scheme which will need to be carefully reviewed before drawing any conclusions.

There are two further cases due to be heard by the EAT at the end of July which will examine the extent to which overtime payments need to be factored in to the calculation of holiday pay so this issue is likely to remain in the spotlight for the foreseeable future.

If you have any questions or require specific advice on the matters covered in this Update, please contact your usual Mayer Brown contact or:

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