



Commission and Holiday Pay - the saga rolls on...

How do you pay somebody commission amounts when they have not worked or earned that commission? This is the question which the employment tribunal in Leicester have not answered although they have now made it crystal clear that employers must find a way of paying a notional commission amount for holiday pay. Last week the Leicester employment tribunal handed down its judgment in *Lock v British Gas*, the much talked about case which was considered by the Court of Justice of the European Union (CJEU) last year. The CJEU established a principle that any holiday pay an employee receives should take account of commission payments. This principle already applies to overtime (other than purely voluntary overtime) and will also apply to other aspects of variable pay, such as standby allowances.

The purpose of holiday pay is to put a worker "in a position, which is, as regards salary, comparable to periods of work". It is a simple principle which is easily understood. However, what is not so easily understood is how it actually works in practice? The CJEU set out the principle (the easy part) and handed it over to the local courts to sort out how exactly it should work (the hard part).

According to the Leicester employment tribunal, the way to solve the problem set by the CJEU was to change the wording of the UK regulations which deal with holiday pay (the Working Time Regulations) by adding some new wording to make the UK law consistent with the principle set down by the CJEU. This was much predicted and is not really a surprise.

So we know that employers have to include commission in their holiday pay calculations. However, for businesses, this is not as simple or straightforward as it sounds. For example, how do businesses go about working this out? What is the correct reference or look back period to determine a worker's average pay? Can the payroll system handle the necessary administration?



Sadly the judgment of the Leicester employment tribunal does not give any guidance on what the correct reference or look back period is for calculating average commission to be included in a week's pay. Neither does it say if a commission scheme is deliberately structured to compensate employees for holiday pay where there is still a requirement to include commission in the holiday pay calculations. The Leicester employment tribunal simply stated that that these points will be considered at a later date.

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