RPC

Some holiday pay reading

A new decision on holiday pay and commission.

As many of you know, the task of calculating holiday pay has been fraught with difficulty over the last couple of years – recent case law, far from clarifying the issue, has caused a great deal of confusion. This week, the EAT has issued its long-awaited judgment in *Lock v British Gas*.

A recap

You will remember that this particular case was referred to The Court of Justice of European Union (CJEU) back in 2015. The case itself is about whether commission earned on sales ought to be included when calculating holiday pay. The CJEU's decision was that under European legislation, such commission should be taken into account when calculating holiday pay (which is contrary to what the UK Working Time Regulations 1998 said). The case was remitted back to the UK courts so that they could decide whether or not the Working Time Regulations could be interpreted in accordance with European legislation. However, in its judgment the CJEU left various question unanswered: specifically, it did not specify **how** commission should be calculated in the context of holiday pay (and in particular, what reference period employers must use in their calculations). Many of us hoped that the UK courts would provide some clarification on these unanswered questions.

The case went first to the Leicester Employment Tribunal (from where it had originated), which confirmed that commission must be taken into account by UK employers for the purposes of holiday pay, and that it was possible to interpret the Working Time Regulations in accordance with European legislation to achieve this result. This decision was unsurprising given the CJEU decision and other UK case law since the original Tribunal case. Unfortunately, the Leicester ET failed to answer the various questions that the CJEU had left unanswered (including in relation to reference periods). The employer appealed Leicester ET's decision and so the case was then heard by the Employment Appeal Tribunal (EAT), so that it could determine the position on holiday pay and commission. Once again, hopes were high that the EAT would provide some much needed clarity.

The EAT case

The EAT agreed with Leicester ET (and the CJEU) that commission should be included in holiday pay and that it was possible for the Working Time Regulations to be interpreted in accordance with European legislation to achieve this result. It said that the principles set out in *Fulton v Bear Scotland* (another high profile holiday pay case from 2015) applied in respect of holiday pay calculations. That case was about non-guaranteed overtime rather

Any comments or queries?

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than commission, but the EAT saw no reason to depart from its principles. The EAT said that if it was wrong about this (ie that *Fulton* ought not to apply) then this was for the Court of Appeal to confirm. In the meantime, the Working Time Regulations should be read as requiring commission to be included in calculating holiday pay. The EAT has decided that no new legislation is required to amend the law to achieve this.

Unfortunately, once again, this leaves us with no further clarification on those unanswered questions. Our view is that the most recent judgment from the EAT does not move the position forward much or provide any (much needed) clarification on calculating commission in the context of holiday pay.

So where are we now?

We suspect that this case will be further appealed to the Court of Appeal. But for the time being, and assuming the EAT is right and the principles set out in the *Fulton* case apply, then this is the position (in summary):

- Should non-guaranteed overtime/ commission be included in pay for "**Directive Leave**" (ie the 4 weeks leave given to workers under the European Working Time Directive)? – YES.
- Should non-guaranteed overtime/ commission be included in pay for "**Additional leave**" (ie the additional 1.6 weeks' leave given to workers under the Working Time Regulations)? – NO.
- Should allowances for travel time be included in pay for Directive Leave? – YES.
- Can the worker decide which leave is Directive Leave and which leave is Additional Leave? – NO.

The following questions remain unanswered.

- Should voluntary overtime be included in holiday pay?
- What is the reference period for calculating holiday pay? Is it acceptable to use a 12-week reference period (reflecting other parts of the Working Time Regulations)? This may be non-compliant if that period is not representative of "normal" pay.
- In relation to claims brought prior to 1 July 2015, what is the long stop date for back-dated holiday pay claims where a series of deductions can be traced back without a break in the chain?

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