

## Holiday pay: Lock v British Gas

### Questions and Answers

**Q:** Why does this case affect my business, as a motor industry employer?

**A:** For all employers the cost of paying workers whilst on holiday has just become more expensive. Previously case law in the United Kingdom enabled employers to argue that *basic* pay only was payable and when calculating holiday, and other elements of remuneration could be excluded (such as bonuses, overtime and commission). Lock makes clear that regular commission payments should be included and calculated in holiday pay. Other recent case law has also suggested that any overtime payments, which are intrinsically linked to the performance of the job role, should be included.

**Q:** Should I wait for the Government to legislate, or is this now law?

**A:** The Court of Justice of the European Union (better known as the ECJ) is the highest Court, which UK Courts and Tribunals are bound to follow. It follows that the Lock decision is now effectively law in the UK. Note however that the UK Courts still have to decide how to interpret Lock under the Working Time Regulations (WTR) so some private sector employers are at the moment waiting to see what happens next. It is *likely* that the UK Courts and Tribunals will apply Lock and that holiday pay will become more expensive, as above.

**Q:** What should I do now following the Lock case?

**A:** Businesses are faced with a commercial decision on whether to now adjust holiday pay. If they comply with Lock they are likely to have to adjust holiday pay calculations and are likely to be paying more in holiday pay to workers. And the following will also have to be considered:

- Which commissions and bonus payments should be included? Essentially payments which are intrinsically linked to the performance of the individuals duties (whether commission, bonus, or overtime) should

be included, but it may be arguable that other types of payment are not included.

- Employers may be able to differentiate between statutory minimum holiday entitlement and additional holiday entitlement. This however could prove an administrative burden for small employers.
- Inevitably, if holiday pay increases, then businesses may have to find savings elsewhere.

**Q:** Is this just an issue in respect of *future* holiday payments?

**A:** In a word: no. Employers need to be aware of the possibility of historic claims. The main remedy available to employees is to bring a claim for unlawful deduction from wages in respect of holiday pay. Claims of this nature must be brought within three months of the underpayment complained of or of the last in a series of deductions (i.e. within 3 months of an employee's last holiday where holiday pay was calculated incorrectly). In theory employees with long service may have claims stretching back to when the Working Time Regulations were introduced in 1998, although it has been argued that the Courts should impose a limitation period of 6 years. This could be potentially expensive if your current work force is long serving.

Employers will therefore have to consider when they will change the holiday pay arrangements. Changing your holiday pay arrangements sooner rather than later may cost more, but may mean that some workers, who delay in bringing claims, are out of time for past claims.

**Q:** Will many employees bring claims in Tribunals?

**A:** At this early stage it is difficult to assess. For some employees, the sums may not be worthwhile pursuing, particularly when faced with Tribunal fees to pay at current rates of £160 to issue a claim and £230 for the hearing. However it is anticipated that there will be a number of group claims, in some

cases backed by Unions, and that those claims will be lodged and 'stayed' pending clarification of the position by the UK Courts.

It may also be difficult for some employees to bring claims, where there is not good documentation available, to prove how much commission is owed for past holiday.

If you have questions about this issue you are advised to seek specific legal advice. This can be obtained through the RMIF legal helpline, provided by Motor Industry Legal Services.

*Motor Industry Legal Services (MILS Solicitors) provides fully comprehensive legal advice and representation to UK motor retailers for one annual fee. It is the only law firm in the UK which specialises in motor law and motor trade law. MILS currently advises over 1,000 individual businesses within the sector as well as the Retail Motor Industry Federation (RMI) and its members.*