

In the Know....

Do I have to include commission in holiday pay?



In *British Gas Trading v Lock*, the Court of Appeal said 'yes' but as an employer you always have options. You can either:

- Start to pay commission in holiday pay; or
- Hold off for now; it is likely that the decision will be appealed to the Supreme Court.

The following questions are only relevant where the employer decides to include commission in holiday pay.

What payments are classed as commission?

Only those which are related to an individual's results. There is no specific definition of this, but it appears to catch flat rates/percentages etc. which are paid because a worker has sold a product/reached a productivity target etc. It may also include other types of commission paid on particular achievements of a worker.

It does not include payments paid to the entire team/company regardless of individual performance.

How do I calculate how much to pay?

Where pay varies each pay period, you will need to calculate an average of earnings over a set reference period to work out what the worker should get when they are on annual leave. The Working Time Regulations 1998 set a period of 12 weeks over which the average must be calculated, and the Court of Appeal has not interfered with this. For now then, the 12 week average can still be used to determine average earnings. Because Mr Lock's commission scheme provided that commission was payable in each pay packet, the 12 week average will enable a figure representative of his normal pay. However, where commission is paid a less regular intervals e.g. annually or bi-annually, 12 weeks

may not be a representative period. Whilst it seems that employers may continue on the basis of a 12 week reference period, employers should be aware that this may be challenged in the courts in the future.

Do I have to pay the extra every time the worker takes a holiday?

No. Only the first 4 weeks of annual leave in the leave year will attract the extra payment. Once those 4 weeks have been taken, then any further holidays (including those given in excess of the 5.6 week statutory minimum) can be paid at basic pay with no addition to take commission into consideration.

Can my workers claim for holiday pay in past years?

The overall maximum on claiming holiday pay is 2 years from the date the claim was made. Workers only have 3 months to make a claim to employment tribunal (having first complied with the mandatory element of the Early Conciliation scheme) and so they must have taken a holiday within the last 3 months (and that holiday must have fallen into the first 4 weeks of annual leave in the leave year) in order to make claim. If, when you look back over the last 3 months, the worker has taken no annual leave (beware bank holidays) OR has taken annual leave but before that period of leave had already taken at least 4 weeks leave, then they will be out of time to make a claim.

Is there anything I can do to reduce my pay liability?

Workers have 3 months to make a claim to Employment Tribunal and so must make a claim within 3 months of the last 'underpayment'. Employers could artificially create that gap by making good any 'underpayment' within the last 3 months, but this would have to be accompanied by a resolution to continue to pay holiday pay including commission going forward to avoid further underpayments.

The content of this briefing is correct at the time of publishing.

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