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Holiday Pay and Commission

In the know

The Supreme Court has refused British Gas Trading Ltd leave to appeal the most recent decision on their employee's entitlement to be paid commission in holiday pay. This essentially means that the case can now go no further. Below, we take a look at the case in detail:

Last Year's Court of Appeal Decision

- Mr Lock was a salesman whose pay was made up of approximately 60% commission. However, when he took annual leave, his pay was based on his basic rate plus any commission payments which fell to be paid at that time as usual;
- He argued that his holiday pay should not be based on his basic rate, but should include an element of commission earned in order to properly reflect a week's pay;
- The Court of Appeal decided last year that, in effect, Mr Lock was entitled to have an element of commission earned factored into his holiday pay;
- British Gas Trading Ltd confirmed they would appeal to the decision to Supreme Court.

Supreme Court Says No

- The Supreme Court recently refused to give British Gas Trading leave to appeal; essentially, this case can now go no further;
- This means that we are left with the Court of Appeal's decision that holiday pay should be increased to factor in commission earned by the employee;
- There remains plenty of unanswered questions, however, concerning the details of including commission in holiday pay.

What Should Employers Do Now?

- Because the Court of Appeal's decision is binding on lower courts, it is likely that a worker who makes a claim to an Employment Tribunal similar to that of Mr Lock would be successful;
- This means employers may need to consider including commission in holiday pay for affected workers to avoid an

Employment Tribunal claim.

- Employers should take specific advice on their exact situation as there are many factors that may influence an employer's decision on how to move forward.

Important Considerations

- The type of commission involved was "individual results based commission". This appears to exclude profit share or other group payments where an employee could personally perform poorly but still earn commission;
- Including commission in holiday pay is likely to require an average of pay to be calculated. The period over which the average is to be calculated is theoretically 12 weeks, but this may not be sufficient to capture infrequent commission pay outs. Employers should consider an appropriate reference period;
- It is possible that the Government will reverse the effect of this decision after the UK leaves the EU. However, this is still some time off yet and employers need to deal with the issue now;
- Only 4 weeks of the worker's annual leave would need to include commission in holiday pay. Payment for the remaining annual leave entitlement could be made at basic pay.

Croner Tips

Employers may be able to better calculate their potential liability to back pay in an ET claim by looking back at workers' annual leave records for any gaps. A gap of 3 months or more since their last period of annual leave which fell into the first 4 weeks of leave in that leave year.

Please contact the Business Support Helpline for advice on your specific situation before acting on the information in this article.



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PHONE 08445618133

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