

Calculating holiday pay – change on the horizon?

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In the UK, many employers calculate holiday pay based on basic salary alone – even if an employee usually receives commission. However, a landmark court case seems set to change this.

Last year the Court of Appeal in *British Gas v Lock* held that employers must take commission payments into account when calculating holiday pay under the [Working Time Directive](#) (WTD). However, the Court remained silent on whether the same rule would apply in other cases, for example where employees receive a single, results based commission, or annual bonus.

Summary of the case

Mr Lock was a sales consultant for British Gas, and was paid commission which greatly exceeded his basic salary. While on holiday, he was paid at the rate of his basic salary – and claimed this was an unauthorised deduction from his wages. An Employment Tribunal and the Employment Appeal Tribunal (EAT) agreed with him, finding that under the WTD, ‘normal remuneration’ included his commission and should be included in his holiday pay.

“COMMISSION MUST BE INCLUDED IN HOLIDAY PAY IF IT IS INTRINSICALLY LINKED TO THE PERFORMANCE OF TASKS IN AN EMPLOYEE’S OR WORKER’S EMPLOYMENT CONTRACT”

How could the ruling affect UK employers?

The ruling sets a precedent for commission to be included in holiday pay if it is intrinsically linked to the performance of tasks in an employee or worker’s employment contract.

While the calculation is left up to national courts to determine under national law, it must be based on the average commission earned “over a reference period which is considered to be representative”. At the time of writing this article, the appropriate reference period to be applied to calculate Mr Lock’s commission had not yet been considered by the Tribunal, although it was likely to be based on average earnings over the 12-week period before holiday is taken.

In the light of *Lock* and other recent case law, employers are advised to review their calculations of holiday pay to ensure they comply with the changes. As it’s not yet clear how such payments should be calculated, tribunals will likely approach the issue on a case-by-case basis.

In short

- Following a landmark court case, employees must consider commission when calculating holiday pay
- Holiday pay must include commission if it’s part of an employee’s ‘normal remuneration’
- Pay will be calculated based on the amount of commission earned in a representative period.

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Note: This is not legal advice; it is intended to provide information of general interest about current legal issues.

