GUIDANCE NOTE

Recent Cases on Liability for Holiday Pay

July 2014

Following a large number of press reports and employee pressure on a number of our clients, we are publishing this note to set out the current position following the recent European Court of Justice ("ECJ") decision in the case of ***Lock -v- British Gas Trading Limited C539/12***. A Judgment delivered on 22nd May 2014.

This is the latest in a series of recent cases which may oblige employers to include average overtime, commission/bonuses and allowances when calculating holiday pay. This liability could be retrospective, exposing employers to potentially paying significant overtime, commission and allowances which could lead in some cases to some very substantial liabilities.

Our view at present is to wait and see what happens. We do not recommend you change how you calculate holiday pay for employees.

The ECJ decision in ***Lock -v- British Gas Trading Limited*** has stated that commission should be included within any calculation for holiday pay even for salaried employees. This case still needs to return to the Leicester Employment Tribunal where the Tribunal will need to consider whether the Working Time Regulations 1998 and, in turn, the week's pay provisions in the Employment Rights Act 1996 can be interpreted in line with this ECJ decision. (At least anyway in regard to the four weeks' leave required by the Working Time Directive.) Recent history, particularly in cases concerning sickness and holiday suggests that the Tribunal will likely find a way to make this happen. This would have wide-reaching consequences for many businesses and workers, hence the number of queries we have received.

It will also be interesting to see how the Tribunal might approach calculating any payment in respect of commission to which Mr Lock is entitled. The Advocate-General had suggested that it should be over a reference period of 12 months. However this was not repeated by the ECJ. The usual reference period to calculate a week's pay under UK legislation is to base it on the previous 12 weeks' pay before the holiday period. Therefore we shall have to wait and see how this will be applied by the Employment Tribunal.

There are also two further cases which are to be heard by the Employment Appeal Tribunal in London at the end of July 2014 which will also be considering what is classed as "normal

remuneration" during statutory holiday periods and whether in fact this should also include overtime payments. These are the cases of:-

- ***Neal -v- Freightliner Limited***; and

- ***Fulton & anor -v- Bear Scotland Limited***.

These cases are following on from the ***Williams -v- British Airways [2001]*** ECJ decision. We will therefore keep an eye on these cases and report it in our Employment E-Briefing in the normal way each month.

In the meantime, for those of you who wish to read a more detailed analysis of the law at present, we can on request provide a link to an extract from a leading employment law barrister, Caspar Glyn QC. This note is not for reproduction and purely for your use and reading.

On the basis of the above it is advisable to wait and see what decisions are made by the Employment Tribunal and Employment Appeal Tribunal before changing your Company practices. If you have any queries, please contact us.

The comments in this Guidance Note are of a general nature only. Full advice should be sought on any specific problems or issues.

ASHTON BOND GIGG
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