



Holiday Pay and Commission/Overtime

"I wonder if you could clarify the legal outcome on the Lock –v- British Gas case regarding (in our case) commission and holiday pay. Please could one of the team clarify what our specific legal obligations are on this, as there is some conflicting information.

Are we now legally required to average commission earnings in relation to holiday pay, or is there a further appeal taking place?

How is Brexit likely to affect it becoming UK Law?"

The leave to appeal to the Supreme Court was rejected which means that the earlier binding appellate court's decision stands, i.e. that all employers must include an average of an employee's commission when paying holiday pay.

Strictly speaking the legal requirement has been in place for some time but, commercially most employers have chosen not to act waiting on the outcome of the appeal through the Supreme Court (so you are one of many if you have not implemented any changes). The result of the present situation means therefore that employers should now be putting in place the new calculations or risk claims for backdated holiday pay. There will be no further appeal and therefore the law presently stands that holiday pay includes average salary not just basic salary.

In respect of Brexit, from an employment point of view it shouldn't really make any immediate changes. There will be the great Repeal Bill, which will incorporate the existing law into UK law. However, depending on what the Brexit deal provides, future governments may be able to amend employment law emanating from the EU. A lot of our law derives from directives which are formed from the EU. In respect of the present holiday pay position, this is governed by case law and therefore it is already UK law; we are governed by Common Law and Statutory Law.

Touching on Brexit further, the Conservative's manifesto was to "not only guarantee but enhance workers' rights and protections". The main proposed policy commitments made (and therefore to remain in place post Brexit) were:

- To get one million more people with disabilities into employment over the next ten years;
- To extend the Equalities Act protections against discrimination to mental health conditions that are episodic and fluctuating;
- To provide carers' leave for people caring for relatives with dementia and other illnesses;
- To preserve all workers' rights in the UK by domesticating relevant EU law (i.e. The Great Repeal Bill above);
- To double the penalties on company's employing migrant workers;
- To protect workers in the GIG economy, e.g. think of Uber drivers and the Deliveroo couriers;
- To ensure worker representation on boards; and

- To confront the gender pay gap, racial disparity, stigma of mental health and disability discrimination.

However we won't know just yet how many of the listed proposals will progress given the election result so it is a case of watch this space.

This advice is general in nature and it will need to be tailored to any one particular situation. As a MILS member you have access to the MILS legal advice line, as well as a number of industry experts for your assistance. Should you require further information in respect of the article above, contact the legal advice line at any stage for advice and assistance as appropriate.

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