



Results-Based Commission Should Be Included in Statutory Holiday Pay

The Court of Appeal has upheld the Employment Appeal Tribunal's decision in *Lock v British Gas*. Under the Working Time Regulations, workers have the right to at least four weeks' paid annual leave. European case law has now held that workers must receive their "normal remuneration" when on statutory holiday (but does not extend to the extra 1.6 weeks or any additional contractual entitlement). Normal remuneration includes results-based commission.

This decision is likely to be appealed before the Supreme Court by British Gas.

What Should Employers Do Next?

This judgment simply confirms what we already know; however, employers in industries where individual commission is the norm should consider following this area closely.

Uber Decision: Impact for Entire Gig Economy Predicted

On 28 October, the Employment Tribunal gave judgment in *Aslam (and others) v Uber*, holding that Uber drivers were workers rather than self-employed. Uber was not the drivers' customer as had alternatively been argued. Uber drivers will now be entitled to holiday pay, paid rest breaks, paid sick leave, and the national minimum wage for time spent working.

The Employment Tribunal looked past the contractual terms imposed on the Uber drivers, which purported to preclude an employment relationship. Time spent in their territory (e.g., London), with the Uber app on, is time spent working and should be remunerated as such.

Uber is set to appeal the decision.

What Should Employers Do Next?

Employers should consider seeking legal advice if they have any concerns about the validity of self-employment status.

Guidance on Judicial Assessments in Employment Tribunals

The guidance adopts a protocol for an employment judge conducting a judicial assessment of a claim and a response as part of a preliminary hearing. Judicial assessment is an impartial and confidential assessment by an employment judge to highlight the strengths and weaknesses of each party's claim.

The guidance also highlights that judicial assessments may be particularly valuable to unrepresented parties. It may help to ensure aggrieved former employees' hold realistic expectations of the court proceedings, thereby encouraging settlement.

What Should Employers Do Next?

For the first time the Tribunal process now allows for an early judicial assessment of the merits of claims. This could prove invaluable for employers faced with weak claims.

Store Workers Comparable to Depot Staff for Equal Pay Claims

A Manchester Employment Tribunal has ruled that Asda store workers (who are mostly female) can compare themselves to distribution depot workers (who are mostly male) to bring an equal pay claim under the Equality Act.

Under the Equality Act, a claimant and a comparator must work at the same establishment for the same employer, or at different establishments for the same employer but with “common terms” applying at the establishments. Although there were differences in specific terms, all the Asda roles were hourly paid and the handbooks broadly the same, such that the “common terms” requirement for comparison was satisfied.

This was only a preliminary hearing, but it has already spawned many similar claims (e.g., by Sainsbury’s store workers). It is anticipated that more than 7,000 claims will follow with a total value greater than £100 million.

What Should Employers Do Next?

Be aware that different job titles, even across different locations, will not necessarily be sufficient to prevent “common terms” being made out, opening the door to an equal pay claim. Particular thought should be given regarding roles where those with protected characteristics are clearly underrepresented.

Data Protection Act Breach as Reminder to Only Use Personal Information for Purpose Provided

In the County Court case of *Brown v Commissioner of Police for the Metropolis*, a global award of £9,000 in damages was made, split between the two defendants, the Metropolitan Police Service (MPS) and the Greater Manchester Police (GMP). The claimant had travelled to the Caribbean with her daughter while on sick leave without giving her whereabouts to her line manager.

The claimant’s actions were in breach of the police service’s absence management procedures. In order to provide evidence for disciplinary proceedings against the claimant, an officer at the MPS contacted the National Border Targeting Centre managed by GMP. The correspondence included provision of the subject’s name and passport photograph to identify her. This was an unlawful use.

The court made a global award for the breaches of the Data Protection Act and Human Rights Act, and tort of misuse of private information. However, the claimant’s proposed minimum of £10,000 for damages was deemed inappropriate in the circumstances.

What Should Employers Do Next?

Employers should make certain that staff know not only what constitutes (sensitive) personal information, but also that it must not be used for any purpose outside that for which it was obtained.

Brexit Legal Challenge Considered by High Court

On 13, 17 and 18 October, the High Court considered whether it would be unlawful for the Secretary of State for Exiting the European Union to notify the European Council of the UK’s decision to leave under Article 50(2) Treaty on European Union without an assenting Act of Parliament.

The government’s argument was focussed on its belief that it is able to use royal prerogative power to effect the June referendum result, thereby circumventing parliamentary approval for Brexit.

We now await a judgment from the court. However, whatever the result, it is likely that the decision will be appealed. In that instance, it is likely that there will be a ‘leapfrog’ appeal directly to the Supreme Court, skipping the Court of Appeal, due to the general public importance of the issue.

New Rules for Financial Services Regulatory References

Following their joint October 2015 consultation, the Financial Conduct Authority (FCA) and Prudential Regulatory Authority (PRA) published separate policy statements on 28 September 2016, PS16/22 and PS27/16 respectively. These policy statements detail the final rule changes to the regulatory references regime.

In addition, the PRA published a policy statement on 'Buy-outs of variable remuneration' designed to prevent the use of buy-outs to circumvent the existing rules on malus and clawback, as well as consultation papers proposing to extend the whistleblowing rules and introduce a unified supervisory statement on remuneration.

What Should Employers Do Next?

Although these changes will not come into force until 7 March 2017, employers should ensure they are ready to implement them at that date.

In particular, employers can use the linked [reference template](#) before then, the PRA suggests it may be good practice to do so.

For more information about these issues or if you would like to discuss an employment-related matter, please contact: [Christopher Hitchins](#) at +44 (0) 20 7776 7663 or [Sarah Bull](#) at +44 (0) 20 7770 5222.

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