



A Salesperson's holiday pay cannot be limited to their basic salary.

In Case C-539-12 which issued on 12th May in a case of Lock –v- British Gas Trading Limited the ECJ had to consider the issue of how holiday pay was calculated for a salesperson. This decision will apply to any individual who received commission.

The Working Time Directive provides that every worker has a right to paid annual leave of at least 4 weeks. In this case the employee had been employed by British Gas as a consultant. His remuneration package had two main elements. He had a basic salary and commission. The commission was payable on a monthly basis in arrears. The UK Employment Tribunal referred a case to the Court of Justice asking whether the commission which a worker would have earned during his annual leave must be taken into account in calculating his holiday pay and how must it be calculated.

In the Judgement the Court pointed out that during annual leave a worker must receive their normal remuneration. They stated that the purpose of holiday pay is to put the worker during that period of rest in a situation which, as regards the employee's salary, was comparable to periods of work.

The company argued that the objective was achieved as the employee received during his annual leave a salary including not only his basic salary but also the commission resulting from sales achieved during previous weeks. The Court rejected that argument. The Court took the view that notwithstanding the payment received by the employee during his annual leave, the financial disadvantage which, although referred, is none the less genuinely suffered by the employee during the period following leave, may deter the employee from exercising the right to annual leave.

The Court held that as the worker did not generate any commission during the period of annual leave that the consequence of this is that in the period following the annual leave the worker is only paid their basic salary. The Court therefore found that such a reduction in holiday pay is liable to deter the worker from actually exercising their right to take annual leave. They held that this was contrary to the objectives pursued by the Working Time Directive.

The Court held that it would be necessary for the worker to have their pay, during the period of annual leave, determined in such a way as to correspond to the normal remuneration received by the worker.



The issue is how is this going to operate in practice.

Possibly an example might best explain the situation.

Example

Employee A received four weeks holidays.

Employee A therefore works for 11 months in the year and has one month off.
Employee A therefore earns €11,000 commission in the year.

As Employee A would normally earn €1000 commission in a month for the period of time that the employee takes holidays effectively the Court has held that the commission he would have earned during the period must be included in holiday pay.

What does this mean in practice?

This means in practice that instead of Employee A receiving commission, during the year or €11,000, Employee A will receive commission of €12,000. The reason for this is so that in the month following the leave, Employee A will not be in a position that he received no commission payment.

The result for the employee.

The result for employees who are on commission is that effectively they will receive 1-13th (as there are 52 weeks in the year) additional commission.

The result for employers is that additional commission is going to have to be paid.

Conclusion

This decision only issued on 22nd May.

How it is going to be applied here in Ireland has yet to be determined by the Labour Court. Saying this, it would appear that this most recent ruling of the European Court of Justice is going to create a significant additional cost for employers who pay commission.



Employers who pay commission need to review this decision immediately. Failure to do so could result in claims being brought to Court. It could be extremely expensive for them.

This Court decision will affect not only sales persons but anybody who earns commission. The practical implementation of this decision in Ireland will have to await a decision from the Labour Court. In the meantime, employers need to be careful and take advice about the effect of this decision.

The press release relating to this decision is available on
<http://cusia.europa.eu/jcms/upload/doc/application/pdf/2012-ot/cp14007en.pdf>