



Holiday Pay and Commission

There has been a recent UK Employment Appeals Tribunal case which has confirmed that UK law can and should be interpreted to give effect to the decision of the European Court of Justice (ECJ). That is that result based commission must be taken into account in calculating workers holiday pay. This was held in the case of British Gas Trading Lock.

In that case the ECJ held that result based commissions should be included in the calculation of Statutory Holiday Pay.

That is the EU law on matters. In the UK the matter went back to be considered by the UK EAT as to whether their working time regulations were capable of being interpreted in line with the ECJ's decision. The decision in March 2015 is that they could be and it implied words into the regulations to that effect.

The UK EAT followed the decision in Bear Scotland Limited –v- Fulton which in similar circumstances found that the Regulation should be so interpreted.

The case of British Gas Trading –v- Lock went on appeal. The appeal was lost by British Gas.

The case may still go on appeal on a Point of Law.

The issue which is interesting here is whether the Irish legislation can be interpreted in line with the ECJ decision. If it can then there is no issue. If it cannot be then there is an issue of a potential claim against the State for failing to properly implement the working time Directive.

This issue has yet to be ruled on by the Labour Court. It would be interesting to see when the first case comes before them when the decision is. It will equally be interesting to see if the case is appealed. If a case went before the Labour Court and was lost by the employee then there would be every chance that the employee would consider bringing a case against the State. Such cases would cause a significant cost to the State as a claim against the State is a high Court claim. It will be interesting to see what happens. However, we would contend that really this issue needs to be clarified by way of a



simple piece of legislation to amend the Organisation of Working Time Act so as to be in compliance with the ECJ decision. It is probably that it would be sufficient to do so by amending the Statutory Instrument on the calculation of holiday pay.

We may however have an unusual situation which could arise which is that holiday pay would be calculated on 1 basis but that public holiday pay which is not an issue covered under the Working Time Directive would be calculated on a different basis namely that commission would not be taken into account in calculating same. There is, in our view, a need for absolute clarity on the legislation that applies in Ireland. This is important for both employers and employees. In addition, there is no reason why the State should leave itself open to a possible claim which only incurs unnecessary legal costs to the State who would ultimately then be responsible for compensating the employee in a holiday pay claim, for his / her economic loss but also for the compensation for breach of his / her rights under the Directive by way compensation for breach of that right.

Hopefully the incoming government will address this issue sooner rather than later.