

News

Brexit means holiday pay ruling 'may never become law'

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By Annie Makoff

British Gas loses right to appeal in long-running commission payments case

British Gas has lost its final right to appeal a ruling in the long-standing and highly significant case over commission payments in holiday pay – but employment lawyers have warned that the findings may never become part of UK legislation, thanks to the effect of the country exiting the European Union.

The decision in the Supreme Court to refuse an appeal effectively ends the judicial process, following a ruling which found in favour of ex-employee Mr Lock regarding the company's rates of holiday pay.

Lock launched a legal case against British Gas in 2012 when his former employer failed to include commission in holiday pay, resulting in an 'underpayment' for the 2011 Christmas break of £1,500.

Lawyers argued that the pay policy was a disincentive to taking holidays and went against the EU Working Time Directive, which protects workers' health and safety by requiring employers ensure staff take breaks and time off. The company's failure to take commission into account when setting holiday pay rates was also found to be in breach of EU law.

The case had been heard by the employment tribunal, the Employment Appeal Tribunal (EAT), the European Court of Justice (ECJ) and the Court of Appeal before it reached the Supreme Court.

The latest ruling means other British Gas employees who regularly earn commission could benefit. Employers across a range of sectors whose staff work normal hours but whose normal remuneration includes individual results-based commission had previously been warned to prepare to change their reward structure and potentially make back payments to affected employees.

But some experts have voiced concerns that a hard Brexit may jeopardise the ruling, which is based on EU law. Unison general secretary Dave Prentis welcomed the Supreme Court's decision, describing it as a ruling which "puts right the wrong" which saw some commission-dependent employees unable to afford a holiday.

But he added: "This is an employment right based on a European directive, something that could well disappear once the UK finds itself outside the EU."

Joseph Lappin, employment law solicitor at Stewarts Law, told People Management that it was right to sound a note of caution over Brexit, warning that the government has a "clear desire" to end the jurisdiction of the ECJ in the UK. He argued that post-Brexit, the government could introduce new

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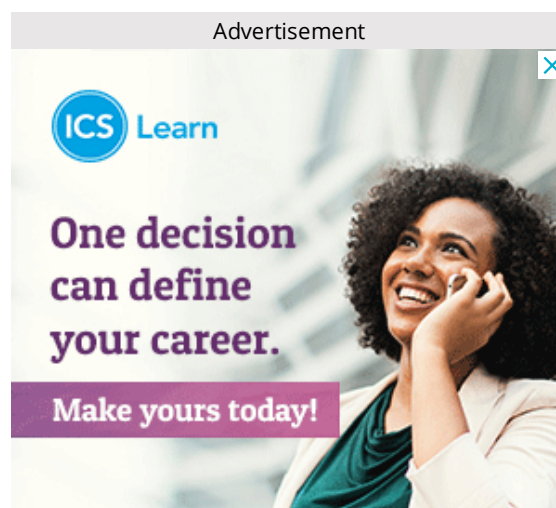
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She added: "This is very speculative crystal-ball gazing and employers are advised to assume the decision will stand, at least for the foreseeable future. We also know the government supported Mr Lock in the appeals, so it is unlikely that the government would seek to change the Court of Appeal decision on including results-based commission in holiday pay."

However, Lindsay Cartwright, partner and specialist in employment law at Morton Fraser, insisted that although the Working Time directive originated from Europe, it was brought into force by UK domestic legislation. UK courts and tribunals would therefore be bound by the legislation as drafted by the UK government.

If so, the case is likely to have wider implications for employers, especially those who have been handling holiday pay for years and are now at risk of historic liability. Michael Ryley, partner in the employment, pensions and immigration group at law firm Weightmans, advised businesses to "review" whether they should alter their practice in terms of holiday pay and set aside funds to handle any potential historic liability. Those choosing not to change policies were at risk of "opening themselves up to claims", he said.

Susan Thomas, legal director at Charles Russell Speechlys LLP, said: "Undoubtedly, employers operating bonus and commission schemes will need to assess and understand if they are exposed to claims for under-paid holiday pay, but the vast range and variety of such schemes means each case needs to be scrutinised on its facts. Similarly, companies purchasing other companies who will be inheriting employees will need to scope out any potential historical claims and factor this into their commercial negotiations."





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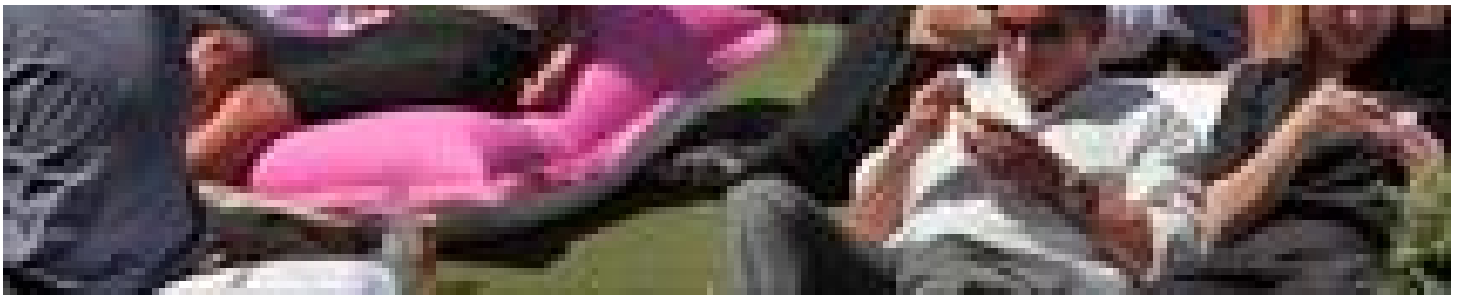


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