# UK Employment Law Round-up

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## In this edition we will bring you an update on the ongoing holiday pay issue – what should be included in the calculation of holiday pay, and how should this be calculated?

We also turn our focus to other employment law matters that have been making the headlines over the past month. This includes looking at a decision on whether childcare vouchers should continue to be provided by an employer to an employee on maternity leave. We also look at two new decisions on the implementation of work dress code policies and discriminatory issues that arise from them. To finish, we will consider how a Brexit decision could impact on UK employment law. Will the consequences of a Brexit be severe, or will the impact be less than is envisaged?

## In this issue...



## *British Gas v. Lock* – employers must include commission in holiday pay

The Employment Appeal Tribunal (EAT) has held in *British Gas v. Lock* that holiday pay must include commission payments. The EAT applied the European Court of Justice's (ECJ) ruling on this issue and interpreted domestic UK law in a way that conforms with EU law.

### Background

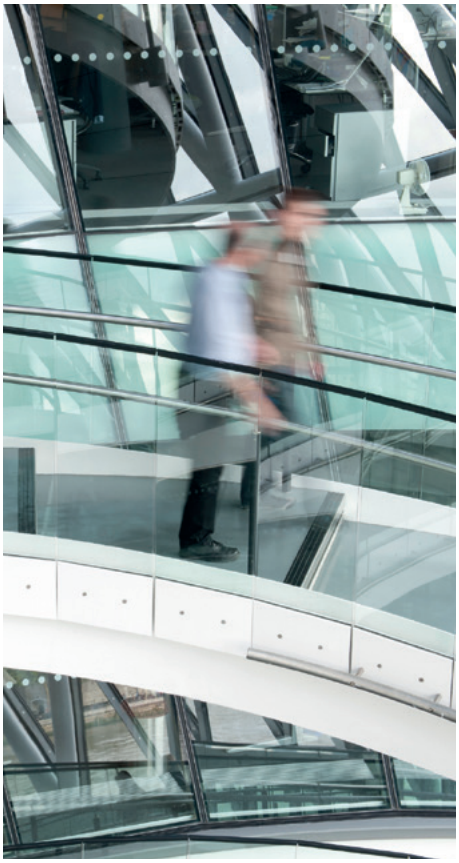
British Gas employed Mr Lock as a salesman. His salary package included a basic salary plus commission, which the employer calculated based on the number and type of contracts he secured from customers. When Mr Lock went on holiday, British Gas would only pay him basic pay, which was significantly less than his usual salary.

Mr Lock issued a claim against British Gas in 2012 and claimed that his holiday pay should include a sum representing the commission he would normally earn while at work.

The European Working Time Directive (EUD) provides that workers must have the right to at least four weeks' paid annual leave. However, it does not specify how to calculate holiday pay. In the UK, the Working Time Regulations 1998 (WTR) implement the EUD and provide that holiday pay, for a worker who works "normal working hours", is calculated on basic salary only.

Despite the clear wording of the WTR:

- in the *Bear Scotland* case, the EAT held that the WTR can and should be interpreted to conform with the EUD, and that holiday pay must reflect a worker's "normal remuneration", which includes non-guaranteed overtime; and
- on referral, the ECJ ruled that holiday pay under the EUD includes commission, to ensure workers are not discouraged from taking annual leave.



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In *Lock*, the employment tribunal (ET) adopted the approach taken by the EAT in *Bear Scotland* and held that holiday pay includes commission. The ET also held that it was necessary to read the WTR in a way that conforms with EU law, even if this requires the tribunal to imply words into the WTR.

British Gas appealed the ET's decision. It argued:

- the courts wrongly decided *Bear Scotland* – adding or implying words into UK legislation to conform with EU law amounted to "judicial vandalism"; and
- *Bear Scotland*, a case on non-guaranteed overtime, should not have been applied to a dispute about commission because "commission and non-guaranteed overtime are dealt with under different provisions which use different language".

## The EAT decision

The EAT dismissed British Gas's appeal and held that:

- the WTR can and should be interpreted in line with the requirements of the EUD and the ECJ's ruling; and
- the ET was right to adopt the *Bear Scotland* approach as there is no difference in principle between non-guaranteed overtime and commission so far as holiday pay is concerned.

British Gas has sought permission to appeal to the Court of Appeal.

Despite the decision, the EAT's judgment does not clarify how an employer should factor commission or non-guaranteed overtime into the calculation of holiday pay. The Employment Rights Act 1996 uses a reference period of 12 weeks to calculate pay where pay varies according to the amount of work done or the time of work. The Advocate General suggested a reference period of 12 months. The ECJ held that national courts must decide a reference period that they "consider to be representative". The ET has suggested the reference period for calculating holiday pay should be the period of 12 weeks immediately before the holiday (excluding any weeks where an employer paid no salary for any reason).

The ET will now decide how much holiday pay and commission Mr Lock is entitled to in a separate hearing, which should provide helpful guidance on how and when an employer factors commission into holiday pay.

## What does this mean for employers?

The EAT's decision is not surprising and now leaves little doubt as to including both commission and non-guaranteed overtime when calculating holiday pay. Since the EAT's decision, employers should consider reviewing their current holiday pay allowances for overtime and commission. Failing to include these payments may lead to a deluge of unlawful deductions from wages claims. Fortunately, employers may benefit from some protection under:

- the Deduction from Wages (Limitation) Regulations 2014, which have imposed a two-year limit on most claims for backdated unlawful deductions from wages since 1 July 2015; and
- the "three month rule" in *Bear Scotland*, under which an employee will lose the right to claim historical arrears of holiday pay if there is a gap of more than three months between underpayments or deductions.

Hundreds of holiday pay claims issued by employees after the ET's decision in Lock were stayed pending this decision. As British Gas intends to appeal the EAT's decision, defendants of these holiday pay claims should request the stay to remain in place until the Court of Appeal has issued its ruling. Meanwhile, the EAT expects to consider an appeal by employees seeking to challenge the "three month rule" established by the ET in *Bear Scotland*.

The prospect of the EAT's decision being appealed means that this area of law is still uncertain. However, it is our view the Court of Appeal will likely uphold the current position in light of the three decisions made before it. As such, it has never been more important for employers to audit their holiday pay arrangements, identify areas of risk, and plan how to address these. Employees will no doubt feel more optimistic about issuing holiday pay claims, which could in turn cause significant costs for unprepared employers.

# Changes to salary sacrifice childcare vouchers

Employees can receive childcare vouchers either on top of their normal salary or by salary sacrifice. Under a salary sacrifice arrangement, an employee agrees to a variation to their contract terms, reducing their salary to receive the vouchers. This has certain tax and NIC advantages to both the employer and employee.

It has long been a questionable issue, without any deciding case law, whether there is a duty to pay the vouchers during maternity leave. During maternity leave an employee is entitled to all the usual benefits of her employment, except her remuneration. Statutory Maternity Pay or the employer's own maternity pay scheme replaces this. If the vouchers are a non-cash benefit, legislation provides that an employer should continue to provide them. However, if they are remuneration, legislation provides that they do not continue during maternity leave.

There are arguments for an employer needing to provide the vouchers during maternity leave as they amount to a non-cash benefit. An employer cannot convert them into cash and they are payable to a third party, and not the employee. HMRC has agreed with this view, even where the employer provides them by a salary sacrifice. This does mean that employers face extra costs in funding childcare vouchers during the whole maternity leave period.

This issue has now come before the employment tribunals. Peninsula Business Services required its employees to leave the scheme during maternity leave. Ms Donaldson objected to this and brought a claim before the tribunal alleging this amounted to discrimination. An employment tribunal found in her favour. The tribunal found that it was discriminatory to have a condition of entry to the scheme that employees have to withdraw from the scheme while on maternity leave.

Peninsula appealed against the Employment Tribunal's decision. This month, the Employment Appeal Tribunal (EAT) has decided in *Peninsula Business Services Ltd v Donaldson* that it is not discriminatory to suspend childcare vouchers paid by salary sacrifice during maternity leave. The EAT held that the vouchers represent part of the employees' salary as the vouchers are a substitution for pay under a salary sacrifice scheme. On this basis, Regulation 9 of the Maternity and Parental Leave Regulations 1999 applies and an employer can regard the vouchers as remuneration. Therefore, Peninsula was within its rights to suspend the vouchers during periods of maternity leave. The EAT held that there was no legislative basis to support the current HMRC guidance. This means that the

vouchers do not constitute a "non-cash benefit", but are instead considered to be "remuneration" when deciding what does and does not have to be continued during maternity leave.

The EAT also held that Parliament cannot have intended for employers to have to continue to provide childcare vouchers during maternity leave. This added cost for employers could discourage them from offering a childcare voucher scheme in the first place.

The *Peninsula* case has at last provided some long-awaited clarity in this area. Since childcare vouchers provided by a salary sacrifice scheme amount to remuneration, an employer need not provide them during maternity leave. This will be welcome news to some employers. However, those employers that provide enhanced maternity pay may find the decision has less of a cost impact. This may mean that they continue to provide them in any event. Caution should be exercised before relying on this case however. The EAT was tentative in its findings and we do not know if Ms Donaldson will appeal. Issues with contractual entitlements may also arise.

# To wear, or not to wear: that is the policy

Workplace dress codes are once again in the spotlight. British Airways' dress code policy came under scrutiny for requiring female cabin crew to wear skirts. Two dress code policies of employers in France and Belgium caused employers to dismiss two Muslim employees who wanted to wear a hijab (Islamic headscarf) for religious reasons.

## Who wears the trousers?

Under British Airways' uniform policy, female cabin crew, employed since 2010 as part of the airlines' "mixed fleet", were required to wear a skirt unless exempt on medical or religious grounds. However, the crew's union, Unite, said that 83 per cent of its members at the airline wanted the option of wearing trousers for warmth and protection.

After a two-year dispute between British Airways and Unite, the airline has now agreed to allow all female cabin crew to wear trousers. Unite says that female crew members no longer have to shiver in the cold climates, and can be afforded the protection of trousers at destinations where there is a risk of malaria or the Zika virus.

## Dismissed for wearing a hijab

On 15 March 2016, the European Court of Justice (ECJ) heard two controversial cases on Muslim women wearing hijabs at work. Both involved a third party objecting to the employees' religious dress while working on that third party's premises.

In the French case, *Bougnaoui and another v. Micropole Univers*, a Muslim IT engineer who wore a hijab was told by her employer that she must remove it while visiting clients, following a complaint from a client about the engineer's appearance. The engineer refused to comply with the request from her employer, on the basis of religious grounds, and her employer dismissed her as a result. The French court asked the ECJ whether the wish of the client for a visiting IT engineer not to wear a hijab could be a "genuine and determining occupational requirement" of the job.

In the Belgian case, *Achbita and another v. G4S Secure Solutions NV*, a Muslim receptionist who was permanently contracted out to work for a third party, told her employer that she would start wearing a hijab. The employer told her that the wearing of any visible religious symbols was contrary to its rules on neutrality. This policy, it said, also applied during any contact with clients.

The Belgian employer then moved to amend its policy so as to ban employees from wearing any visible symbols expressing their political or religious beliefs. The employee subsequently refused to go to work which, similarly to the French case above, resulted in her dismissal. The Belgian court asked the ECJ whether a rule preventing all employees from wearing any political or religious symbols could lead to direct discrimination against a Muslim's wish to wear a hijab.

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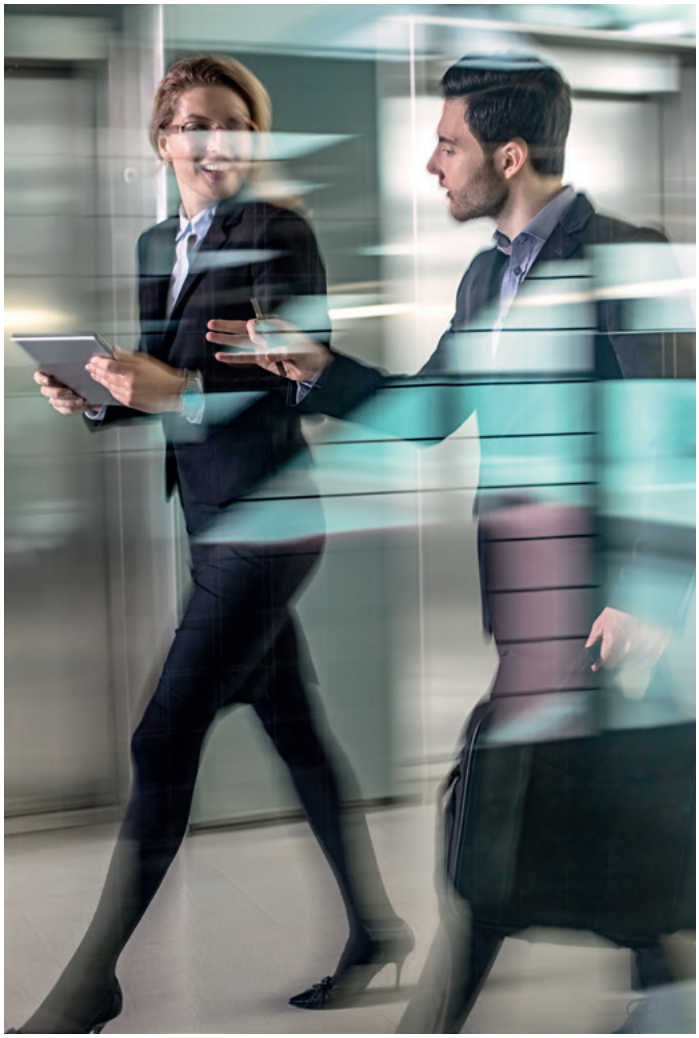
Clearly, the above cases are evidence of workplace dress code policies that haven't perfected the balance between the employees' and employers' interests, opening up the possibility of discrimination claims against the employers.

An employer, when implementing a dress code policy, should consider:

- the standards that are appropriate in relation to an employee's appearance, in order to protect the employer's image;
- whether or not it is appropriate to adapt any rules to accommodate employees whose cultural or religious needs make it difficult for them to comply with a dress code policy; and
- whether a dress code policy that might be indirectly discriminatory to certain employees can be legitimately justified.

Once a decision from the ECJ is handed down in the French and Belgian cases, this will give an indication as to how the UK courts may decide similar cases, subject of course to a decision on a Brexit.



# How would a Brexit impact on employment law in the UK?

On 23 June 2016, the UK will vote on whether to remain a member of the EU. The possibility of the UK leaving the EU raises some fundamental questions, the answers to which could have significant implications on employment law in the UK.

Much of the UK's employment law stems from the EU, including working time regulations, transfer of undertakings regulations, discrimination rights, family leave, collective consultation obligations and duties to agency workers. In theory, departure from the EU would allow the UK to repeal or amend any employment legislation derived from EU law. However, it is unlikely that a so called Brexit would lead to a wholesale overhaul of all such legislation for several reasons, namely:

- fully repealing existing employment laws implementing EU requirements would be unworkable for employers. It would cause doubt, confusion and potential high costs to comply with a new regime;
- the UK would remain in a significant trade relationship with the rest of Europe. It may structure the relationship either through bilateral trade agreements or as an EFTA member of the EEA. If it structures the relationship in the former way, the price of the trade agreement may be keeping a certain level of EU employment law. In the latter, the UK would remain subject to most aspects of EU social and employment policy as EEA member states are bound by, for example, the Collective Redundancies, Working Time and Agency Workers Directives;
- UK law already provided some protections incorporated by EU employment laws. For example, UK equal pay, race and disability discrimination laws preceded EU anti-discrimination obligations. Similarly, the UK right of return from maternity leave existed before the EU implemented the maternity leave right; and
- particular parts of UK employment law fall outside EU competence (such as unfair dismissal rights), or exceed the minimum EU requirements (for example, family leave rights). These employment rights are therefore not likely to be affected by a Brexit.

## Piecemeal reform

Therefore, rather than a sudden move away from the UK's existing employment law regime, a more probable result of a Brexit for UK employment law is piecemeal reform. The government may repeal or amend some of the existing regulations which are unpopular with British employers (for example, the more burdensome

aspects of the Working Time Regulations or the inability to harmonise employment terms and conditions after a TUPE transfer).

In the financial services sector, a potential target for change may be the Capital Requirements Directive IV provisions regulating variable remuneration. The UK laws implementing the CRD IV have been characterised as restricting financial institutions' ability to attract and keep top talent. The government may come under pressure to repeal or amend them.

## ECJ jurisprudence

The UK's departure from the EU would also have an impact on the standing of ECJ case law. Previous decisions of UK courts which have followed rulings of the ECJ, such as those about collective redundancy consultation and holiday pay, would remain binding on UK courts. However, the ECJ would no longer have jurisdiction over the UK courts and its future decisions would not be binding. Nonetheless, if the UK courts are interpreting EU-derived legislation which is retained, it may view judgments of the ECJ as being persuasive in authority, although not binding.

## Departure from the EU

Separating the UK from its EU commitments will be a lengthy process (there is a minimum two-year notice period). There will be complex negotiations of the terms of the withdrawal and new trade arrangements will need to be drawn up. A vote to leave the EU would not result in overnight change to UK employment law; piecemeal change is a much more realistic possibility in the medium and short term.

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