

# MASSERS

## EMPLOYMENT LAW UPDATE

February 2016

### **Statutory holiday pay to include commission**

We have previously reported on recent rulings that holiday pay ought to include overtime and other such payments which employees receive on a regular basis in the course of their employment.

This month the Employment Appeal Tribunal handed down Judgment in *British Gas Trading Ltd v Lock*, which considered whether commission should be included in holiday pay. Lock, a salesman, received a basic salary and commission. The commission was based on results and made up around 60% of his total salary. Lock argued that his holiday pay should include commission as otherwise, when he returned to work after taking annual leave, his salary was less than it would have been had he been at work during the preceding weeks.

The Employment Appeal Tribunal has ruled that statutory holiday pay (that is, the minimum 4 weeks' holiday required under the Working Time Directive) should include commission. It is anticipated that British Gas may seek leave to appeal to the Court of Appeal.

The Judgment does not provide clarity as to the correct reference period to use when calculating holiday pay and this remains a grey area for employers.

### **Gender pay gap reporting – draft regulations published**

In last month's bulletin we discussed the introduction of mandatory gender pay gap reporting. The government has now published the draft regulations and consultation is underway as to whether they should be approved in their current form.

The main points to note in the draft regulations are:

- They will apply to any employer with more than 250 employees.
- Employees in associated companies will not count for the purposes of this threshold.
- For the purposes of the regulations, "pay" will include basic salary, paid leave, maternity/paternity pay, shift premiums, sick pay and some bonuses.
- Reports will be made annually and take into account the position in the company as at 30<sup>th</sup> April. Employers will have 12 months to publish the report, with the first due in April 2018 (and based on figures as at 30<sup>th</sup> April 2017).
- For the purposes of calculating the difference in bonus payments paid to male and female employees, the relevant period will be the 12 months to 30<sup>th</sup> April.
- Employers will be required to publish both the median and mean pay gap figures.
- The information will need to be published on the employer's website and kept there for a period of 3 years.
- The information will also have to be uploaded to a government website and the government will then publish league tables of the best and worst employers.

It is advisable for employers who will be caught by the regulations to start looking at their pay arrangements now and assessing how any pay gap compares with those throughout their particular industry. Whilst there is not expected to be a financial penalty for having a large pay gap, the potential reputational damage will be a driving factor in looking to reduce any difference

in pay.

### **BBC and Jeremy Clarkson settle racial discrimination claim**

Oisin Tymon's claim for racial discrimination and injury has settled out of court for an undisclosed figure thought to be in excess of £100,000.00. It is understood that both Clarkson and the BBC have contributed towards the settlement.

Tymon brought the action following an incident at work last March where he was subjected to an unprovoked verbal and physical attack by Clarkson and further to which Clarkson was dropped by the BBC.

There is no cap on the amount of compensation which can be awarded in a successful discrimination claim and employers can be vicariously liable for any discriminatory conduct by their employees. Employers should ensure they have a robust equality and diversity policy in place and take any complaints of discrimination seriously as soon as they arise.

### **Employment tribunal fees**

Unison has been granted permission by the Supreme Court to appeal the Court of Appeal's decision to reject their judicial review of tribunal fees.

Since employment tribunal fees were introduced in 2013 there has been a significant drop in the number of claims being issued, suggesting that many employees may be prevented from exercising their employment rights in circumstances where they simply cannot afford the fees.

The question of the legality of the fees regime looks set to run for some time to come.

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