



## CASE NOTE: LOCK

### *Z.J.R. Lock v. British Gas Trading Limited (C-539/12)*

#### Introduction

The much anticipated judgment of the Court of Justice of the European Union in *Lock v. British Gas Trading Limited* was handed down today (22<sup>nd</sup> May 2014).

The request for a Preliminary Ruling (under Article 267 TFEU) concerned the interpretation of Article 7 of Directive 2003/88/EC relating to certain aspects of the organisation of working time.

#### Context

Mr. Lock is an ‘Internal Energy Sales Consultant’: he sells his employer’s energy products to businesses, and each month is paid a basic salary and commission. The commission is calculated with reference to the sales Mr. Lock achieves; it is not paid at the time the work which generated the commission was done, but rather several weeks or months following the

conclusion of the sales contract between the business and British Gas.

Mr. Lock took annual leave between 19<sup>th</sup> December 2011 and 3<sup>rd</sup> January 2012. In December 2011 he was paid his basic salary and the commission that he had earned over the previous weeks. During his annual leave, Mr. Lock did not generate any commission, with the effect that in the following weeks his salary was less.

Mr. Lock brought proceedings in the Leicester Employment Tribunal. The Tribunal stayed the case and referred the following questions to the Court of Justice for a Preliminary Ruling:

#### Questions for the Court of Justice

1. Where:
  - a worker’s annual pay comprises ... basic pay and commission



- payments made under a contractual right to commission;
- the commission is paid by reference to sales made and contracts entered into by the employer in consequence of the worker's work;
  - commission is paid in arrears and the amount of commission received in a given reference period fluctuates according to the value of sales achieved and contracts entered into and the time of such sales;
  - during periods of annual leave, the worker does not undertake any work that would entitle him to those commission payments and accordingly does not generate commission in respect of such periods;
  - during the pay period which includes a period of annual leave, the worker is entitled to basic pay and will continue to receive commission payments based on commission earned earlier; and
  - his average commission earnings over the course of the year will be lower than they would be if the worker had not taken leave, because, during the leave period, he will not have undertaken any work that would entitle him to

commission payments,

does Article 7 of [Council] Directive 93/104/EC, as amended by Directive 2003/88, require that Member States take measures to ensure that a worker is paid in respect of periods of annual leave by reference to the commission payments he would have earned during that period, had he not taken leave, as well as his basic pay?

2. What are the principles which inform the answer to Question 1?
3. If the answer to Question 1 is "Yes", what principles (if any) are required to be adopted by Member States in calculating the sum that is payable to the worker by reference to the commission that the worker would or might have earned if he had not taken annual leave?

### **The Law**

Article 7, headed 'Annual leave', is worded as follows:

*'1. Member States shall take the measures necessary to ensure that every worker is entitled to paid annual leave of at least four weeks in accordance with the conditions for*



*entitlement to, and granting of, such leave laid down by national legislation and/or practice.*

2. *The minimum period of paid annual leave may not be replaced by an allowance in lieu, except where the employment relationship is terminated.'*

Regulation 16 of the Working Time Regulations 1998 provides:

*'Payment in respect of periods of leave*

1. *A worker is entitled to be paid in respect of any period of annual leave to which he is entitled ..., at the rate of a week's pay in respect of each week of leave.*

2. *Sections 221 to 224 of the 1996 Act [(Employment Rights Act 1996)] shall apply for the purpose of determining the amount of a week's pay for the purposes of this regulation ...'*

The Employment Rights Act 1996 provides, in section 221:

*'221 — General*

(1) *This section ... [applies] where there are normal working hours for the employee when employed under the contract of employment in force on the calculation date.*

(2) *..., if the employee's remuneration for employment in normal working hours ... does not vary with the amount of work done in the period, ...*

(3) *..., if the employee's remuneration for*

*employment in normal working hours ... does vary with the amount of work done in the period, the amount of a week's pay is the amount of remuneration for the number of normal working hours in a week calculated at the average hourly rate of remuneration payable by the employer to the employee in respect of the period of twelve weeks ...*

(4) *In this section references to remuneration varying with the amount of work done includes remuneration which may include any commission or similar payment which varies in amount.'*

### **Arguments and Judgment**

The UK Government and British Gas argued that under national legislation and practice, the *objective* of Article 7 is achieved, because *during* paid annual leave Mr. Lock received a salary comparable to that earned during a period of work. This was because he received his basic pay and commission earned in the weeks preceding the annual leave.

The Court of Justice could not accept that argument.

British Gas having accepted that in the period following his annual leave, Mr. Lock was paid reduced remuneration comprising of his basic salary (because he did not earn commission when on annual leave), the Court of Justice



found that “*that adverse financial impact may deter the worker from actually taking that leave*”. [In his Opinion (dated 5<sup>th</sup> December 2013) (point 34) the Advocate General stated that a scenario such as that was all the more likely where the salary comprised of up to 60% commission, as in this case].

Noting “*The purpose of providing payment for annual leave is to put the worker, during such leave, in a position which is, as regards his salary*”, the Court of Justice concluded that notwithstanding the remuneration received by Mr Lock during his annual leave, the financial disadvantage which, although deferred, is nonetheless genuinely suffered by him during the period following that leave, may deter him from exercising his right to annual leave.

### **Answers**

#### **The Court of Justice answered Questions 1 and 2 as follows:**

*“Article 7(1) of Directive 2003/88 must be interpreted as precluding national legislation and practice under which a worker whose remuneration consists of a basic salary and*

*commission, the amount of which is fixed by reference to the contracts entered into by the employer as a result of sales achieved by that worker, is entitled, in respect of his paid annual leave, to remuneration composed exclusively of his basic salary”.*

#### **The Court of Justice answered Question 3 as follows:**

*“The methods of calculating the commission to which a worker, such as the applicant in the main proceedings, is entitled in respect of his annual leave must be assessed by the national court or tribunal on the basis of the rules and criteria set out by the Court’s case-law and in the light of the objective pursued by Article 7 of Directive 2003/88.”*

### **ADAM WILLOUGHBY**

*Barrister – Employment and Commercial law  
adam.willoughby@9sjs.com*

*No responsibility for the accuracy of the information set out above is assumed or accepted by the writer, any member of Chambers, or by 9 St. John Street Chambers as a whole. This article does not constitute legal advice.*

