

ECJ: Inclusion of commission in holiday pay?

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Headnote

Where a sales consultant receives remuneration composed of a basic salary and commission whose amount is linked to the number of sales contracts that are concluded as a result of tasks he performs personally, this commission must be taken into account for the purposes of calculating the holiday pay to which he is entitled during his annual leave. In such cases, the holiday pay may not be restricted to his basic salary, even if the experienced reduction in remuneration actually occurs after the period of annual leave.

(ECJ, judgment of 22 May 2014 – C-539/12)

Facts

The British plaintiff in the original proceedings has been employed by British Gas as an Internal Energy Sales Consultant since 2010, and still is. His task is to persuade business clients to buy his employer's energy products. His remuneration consists of two main components: In addition to a monthly basic salary, which currently totals GBP 1,222.50, the plaintiff receives a monthly variable commission which is calculated by reference to the sales actually achieved and therefore depends not on the amount of time worked but on the outcome of his consultancy work in the form of newly concluded agreements. The commission is always paid in arrears several weeks or months following the conclusion of the respective sales contract between British Gas and the customer. In 2011, the plaintiff earned on average monthly commission of GBP 1,912.67.

In the period from 19 December 2011 to 3 January 2012, the plaintiff was on paid annual leave. Given that he did not carry out any work during this period of approximately 2 weeks, he was not able to make any new

sales or follow up on potential sales. Accordingly, he was also not able to generate commission in that period. This had adverse effects on the plaintiff's salaries in the following months during which he essentially only received remuneration reduced to his basic salary. As the plaintiff was not prepared to accept this situation, he brought an action before a British employment tribunal for the outstanding holiday pay which he believed to be owing to him for the period from 19 December 2011 to 3 January 2012. Thereafter, the court seized of the matter ordered a stay of proceedings and referred the matter to the ECJ for a preliminary ruling on the question of whether, in the circumstances of the present case, the commission which the worker would have earned during his annual leave had to be taken into account in calculating his holiday pay.

Decision

The ECJ answered yes to this question. In its view, it has to be ensured that if a worker takes paid annual leave that he continues to receive for the duration of the annual leave his normal remuneration for that period of rest. The purpose of providing paid annual leave is to put the worker, during such leave, in a position which is, as regards his salary, comparable to periods of work. Otherwise there is a risk that the worker may be deterred from actually exercising his right to paid annual leave, given the financial disadvantage which he would suffer as a result of the annual leave.

The ECJ stated in its reasoning that it would be contrary to these principles if – as in the present case – a worker whose remuneration consists of a basic salary and performance-based commissions were only entitled in respect of his annual paid leave to a salary consisting of his basic salary. The court acknowledged that the total amount received by the plaintiff during his annual leave

period was comparable to that earned during periods of work because of previously achieved sales. However, it recognised that the actual financial loss was suffered in the period following the plaintiff's annual leave. This delayed reduction in remuneration was just as much an unreasonable disadvantage as reductions which occurred directly during the annual leave period. The court thus held that holiday pay in this situation could not be limited to a worker's basic salary.

Whether or not an employer has properly taken commission into account in calculating holiday pay in an individual case is a matter for the national courts to decide in compliance with the case law of the ECJ.

Comments

In its judgment, the ECJ strengthened the rights of workers for whom commissions from the successful arrangement of sales make up a significant part of their monthly salary. This is based on the correct assumption that such workers would possibly forego their leave entitlement if they had to endure a significant financial loss during the leave period. Accordingly, workers must also be entitled to commission payments during this period. The amount of such payment is a matter for the employer or, in the event of dispute, the national courts.

According to § 11(1) sentence 1 of the Federal Leave Entitlement Act (Bundesurlaubsgesetz – BurlG), the amount of the holiday pay is calculated on the basis of

the average remuneration during the 13 weeks preceding the commencement of leave. "Remuneration" in this context means all components of remuneration which the worker has received during the reference period as consideration for his work in the relevant assessment period (Federal Labour Court, judgment of 17 January 1991 - 8 AZR 644/89, NZA 1991, 778). According to the case law of the Federal Labour Court, there can be no doubt that commission paid for sales achieved by the worker are a component of the remuneration that must continue to be paid during leave according to § 11(1) sentence 1 of the Federal Leave Entitlement Act (Federal Labour Court, judgment of 19 September 1985 – 6 AZR 460/83, NZA 1986, 471). Thus, unlike one-off bonuses, these should be taken into account in calculating holiday pay. Thus the judgment of the ECJ reinforced what Germany's highest labour court had already decided in its case law.

When calculating holiday pay, it is necessary in these cases to ask what commissionable transactions the worker could have concluded during the period in which he was absent on holiday or what delays in the conclusion of such transactions were caused by his holiday. Using the commissions achieved in the past as a basis, the employer will have to estimate the amount of regularly recurring commissions in addition to fixed payments. For these purposes, it will have to determine average earnings during a longer reference period, which may possibly be longer than 13 weeks.

Note

This overview is solely intended for general information purposes and may not replace legal advice on individual cases. Please contact the respective person in charge with GÖRG or respectively the author himself: Patrick Klinkhammer, LL.M. on +49 221 33660-544 or by email to pklinkhammer@goerg.de. For further information about the author visit our website www.goerg.com.

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