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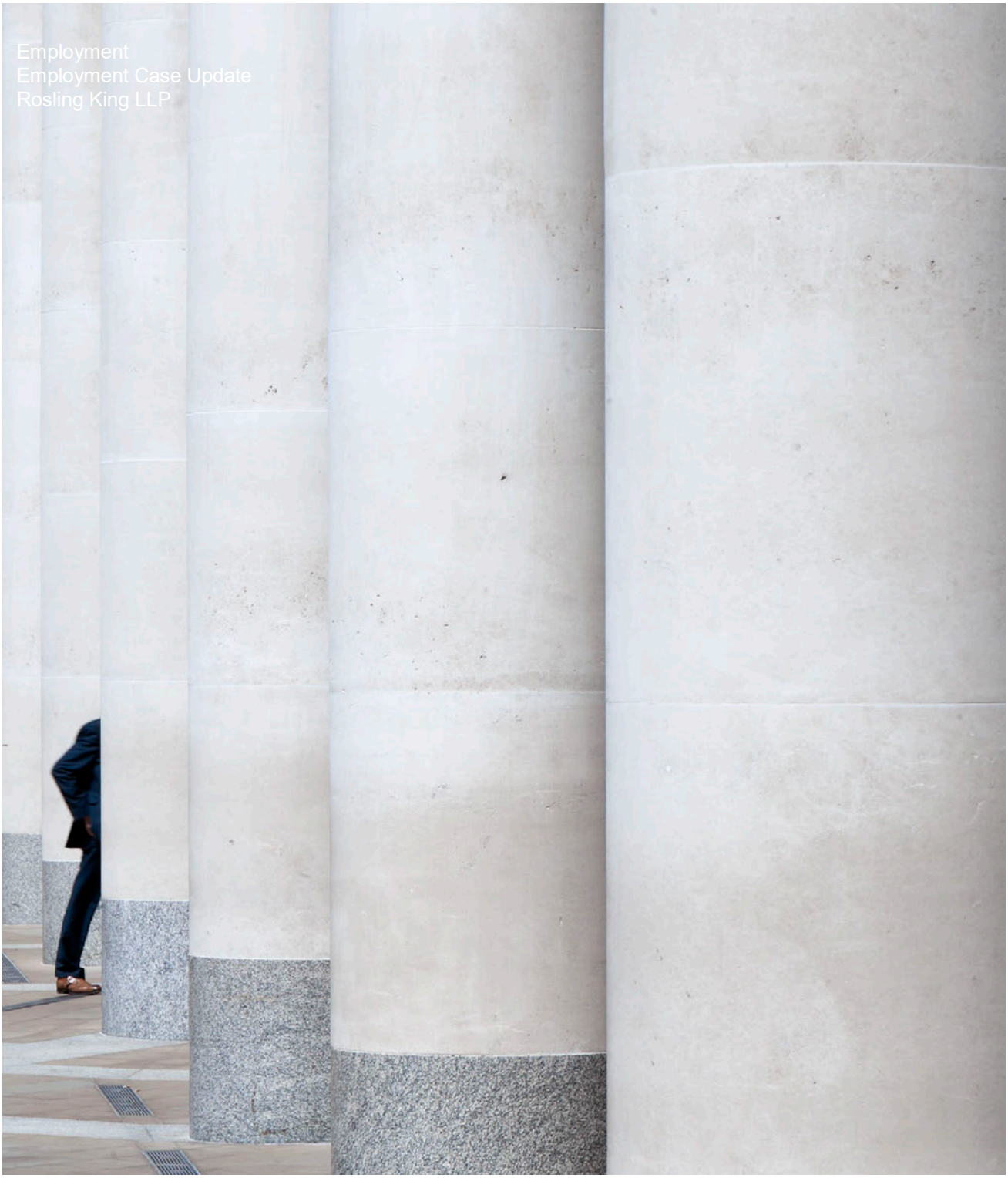

The recent decision of the European Court of Justice in Lock v British Gas on holiday pay confirms the continuing pattern of interpretation in favour of the employee's holiday protection.

You would be forgiven for thinking that much of the law in respect of holidays and holiday pay should be settled and transparent. After all, in terms of statutory employment law it is almost elderly. The Working Time Directive was enacted in 1998 in order to effect UK compliance with the EU regulations governing holiday in all EU member states. How then can there still be cases where the UK gets a rap on the knuckles for failing to interpret the legislation in a compliant manner?

Is it the result of a fundamental cultural difference? In the UK holidays are seen as either an unexpected bonus or an aggravating cessation in the normal order of things. The recitals of the legislation itself indicate that its purpose is to guarantee the safety and health of the worker; the concept that workers need holidays underpins everything but is it actually accepted in the UK?

The conflict started in 2001 when R v Secretary of State for Trade and Industry ex p BECTU reached the European Court of Justice. The UK had made the right to holiday dependent on 13 weeks' service. This was struck down and the judgment made clear that the right to paid annual leave is a particularly important principle of community social law. The words "social law" are key to comprehending their approach then and now. Following the decision the Court of Appeal happily rewrote the legislation and the judgment stated "the drift of the general direction…was unmistakeable".

Then followed the idea of rolled up holiday pay, most useful for bank or agency staff, who could thereby choose either to take their holiday pay as an additional sum at the end of their working period and then have a rest or pocket the additional cash and go straight to their next role. Social law means that this level of self-determination is too much for the worker and not in the interests of their health and safety. The case of Robinson-Steele destroyed that approach and made clear that there had to be two parts to the right: being paid and being away from work.

That case was followed by decisions that:

- Required untaken holiday to be carried over at the end of a year where it had not been taken because of illness;
- Allowed the Pereda tow truck driver to cancel his planned holiday and take it as sick days; and
- Stated the retail staff in ANGED could replace their holiday, while on holiday, with sick leave, giving the possibility of phoning in sick while on holiday and allowing you to take the holiday at another point.

On the plus side Neidel said the right to carry over holiday only applied to the 20 days required by the Working Time Direction, not the eight extra UK public holiday days.

However, the BA flying staff case of Williams pushed things further still. BA holiday pay was based on basic pay and the argument was around the flying allowance paid when flying and the time away from base payment. Although under a different directive, this opened the door to "normal pay and away" as the court decided that basic pay alone was not enough.

The next attack centred on overtime and the most recent decision of Lock v British Gas where the court decided that the calculation of holiday pay should include overtime, otherwise taking holiday might be disincentivised, to the detriment of the person's health and safety. The court made clear that it was not whether he chose or was compelled to undertake overtime work, rather it was the intrinsic link between his work and the payments he received for it. This has left the door open for a number of claims, which are waiting to be heard, on whether commission should be included in the calculation of overtime.

So what can employers do in order to ensure that they are not caught up in the ongoing conflict?

Any employer with any form of bonus, commission or overtime structure should take advice now on what the potential liability may be. A continuing failure to pay holiday pay which includes the additional pay reflecting overtime means that an employee with, for example, five years' service, could claim for the difference in holiday pay for the last five years. Depending on the court's decision the same could be true for those who pay commission or a bonus. It may be worth simply breaking the chain for claims going back many years by making the additional pay calculation and paying the sum now. Thus, creating a break and starting the limitation period for such claims.

For further information, please contact Jacqueline Kendal or the Partner with whom you usually deal.