



## XpertHR Podcast

### Original XpertHR podcast: 18 March 2016

- Susan Dennehy: Hello and welcome to this week's podcast with me, Susan Dennehy. This week we look at two topics – the outcome of the appeal in *Lock v British Gas* on whether or not commission must be included in the calculation of holiday pay, and we look at the steps employers should be taking to prepare for modern slavery and human trafficking statements.
- On hand to go through these two topics this week is Susie Munro. Hello Susie.
- Susie Munroe: Hi Sue.
- Susan Dennehy: Shall we start by looking at the case of *Lock v British Gas*? It's a long-running case, isn't it? What's just happened? [0:00:38.4]
- Susie Munroe: Yes, it is a long-running case. It was heard in the tribunal for the first time in 2012. The tribunal referred it to the European Court of Justice (ECJ). It went to Europe and then back to the tribunal, then British Gas appealed to the Employment Appeal Tribunal (EAT) and that's what's just happened. We've just had the decision of the EAT in February.
- Susan Dennehy: And can you remind us, what was the issue in this case? [0:01:00.4]
- Susie Munroe: So Mr Lock is a salesperson for British Gas and a significant portion of his income is commission. So the question for the tribunals and the courts is, "When he went on holiday and wasn't earning commission, should his holiday pay include an amount to reflect the commission that he would have earned had he been at work?"
- Susan Dennehy: There've been a number of cases, haven't there, looking at what should be included in holiday pay in the last few years? [0:01:24.2]
- Susie Munroe: Yes, so there have been cases looking at certain allowances, different types of overtime and commission, and if anybody wants to see the relevant cases, we've got a hot topic on holiday pay, which you can find through the XpertHR home page. But the main principle is that holiday pay should be normal pay, so somebody who goes on holiday shouldn't be disadvantaged financially by taking leave.
- In the *Lock v British Gas* case, it was found that not getting commission could deter somebody from taking leave, so the ECJ held that there was an "intrinsic link" between the commission that the workers received and the performance of the tasks that were required

under their contract, so such commission must be taken into account in the calculation of their holiday pay.

So, when it went back to the tribunal, the tribunal added wording into the Working Time Regulations to comply with that ECJ decision, and then that's what the appeal to the EAT was about.

Susan Dennehy: And what has the EAT held? [0:02:26.7]

Susie Munroe: So the EAT upheld the tribunal's decision. It held that commission should be included in holiday pay and that wording can be read into the Working Time Regulations to achieve this.

So the EAT went along with the previous EAT decision in *Bear Scotland v Fulton*, which was the case about overtime pay.

Susan Dennehy: And is that likely to be the end of the matter? [0:02:47.5]

Susie Munroe: Probably not. We don't know for sure, but it's likely that British Gas will appeal to the Court of Appeal. But we do know that recent case law has all been going in the same direction, and that's to say that holiday pay should include aspects of pay that are normally received by the worker. So if they've not already done so, employers should be looking at their own holiday pay calculations now.

Susan Dennehy: Moving on then, something else that some employers should be working on – the preparation of a modern slavery and human trafficking statement. Who does this requirement apply to? [0:03:17.6]

Susie Munroe: This applies to businesses operating in the UK with a turnover of at least £36 million. The definition of who it covers is "a body, corporate or partnership that carries on a business or part of a business in any part of the UK and supplies goods and services". So, in theory, it could include a public body or a charity, if it has the required turnover and is carrying on a business and meets those other elements of the definition.

Susan Dennehy: And can you tell us when the requirement comes in? [0:03:45.4]

Susie Munroe: The legislation came in in October 2015, but the duty applied only to financial years ending on or after 31 March 2016. So it depends when the organisation's financial year runs from. If it's April to March, they would have to produce a statement covering the year 2015/16. There's no timescale set out in the legislation about how long after the end of the year a statement has to be published, but there's statutory guidance on this, and that says that the Government expects organisations to publish their statements as soon as reasonably practicable after the end of each financial year. And the guidance goes on to say that it encourages publication within six months of the end of the financial year. So, if a financial year runs from 1 January, the organisation will have to publish a statement covering this financial year beginning 1 January 2016 and that has to be published as soon as reasonably practicable after the year end on 31 December 2016.

Susan Dennehy: So what should the statement cover? [0:04:50.1]

Susie Munroe: So, the legislation requires the statement to set out the steps the organisation has taken during the financial year to ensure that slavery and human trafficking is not taking place in any of its supply chains and in any part of its own business. So, it's about explaining what the organisation has done to investigate and to take action. They don't actually have to make a guarantee that there is no slavery or human trafficking in the organisation or the supply chain.

The Act sets out some examples of what a statement could cover, and that's things like due diligence processes, where an organisation has identified a particular risk, and the steps it's taken to manage that risk, and details of any training that it provides to staff.

Susan Dennehy: And what kind of things are the Government trying to prevent? Have you got any examples? [0:05:34.9]

Susie Munroe: Yeah. So, a good example involves Nestle. Obviously, a massive global company. Nestle was facing allegations of forced labour and human rights abuses in its supply chain. Specifically, these were about the fishing trade in Thailand and it was alleged that shrimp and prawns were being caught by boats using forced labour and were entering Nestle's supply chain.

So Nestle hired some specialist consultants to do a report and they made a public announcement in November 2015 to say that Nestle was launching an action plan on sourcing seafood in Thailand. And the plan, they said, was designed to protect workers from abuses, improve working conditions and tackle unacceptable practices, including juvenile and teenage working.

So that statement was a voluntary statement by Nestle in response to campaigns and allegations against it. So, it's an example of a very large company that is going to have a huge supply chain. So businesses really need to know who they're dealing with at every level of the supply chain.

Susan Dennehy: And where will the company need to publish that statement? [0:06:37.9]

Susie Munroe: The statements have to be published on the company's website and there has to be a link to the statement in a prominent place on the home page. If a company doesn't have a website, then it has to provide a copy of the slavery and human trafficking statement within 30 days to anybody who makes a written request for one.

Susan Dennehy: What if an organisation hasn't done anything in relation to slavery and human trafficking? [0:06:59.8]

Susie Munroe: Well, if that's the case, they need to start investigating their supply chains and identifying any risks. But ultimately, if an organisation doesn't do anything in the financial year, it has to publish a statement saying so. So it has to say it hasn't taken any steps to ensure that slavery and human trafficking is not taking place in its supply chain or business.

So we should say that if anybody is preparing a slavery and human trafficking statement now or in the future, we have got a model

statement on XpertHR and you can find that through the modern slavery statement hot topic, which is on the home page.

Susan Dennehy:

Thank you very much for that, Susie. That's it for this week's podcast, which you've been listening to with me, Susan Dennehy. We're back again next Friday but until then, it's goodbye from us.