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EMPLOYMENT BULLETIN

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SUPREME COURT: GAPS OF MORE THAN THREE MONTHS DID NOT BREAK SERIES OF UNLAWFUL DEDUCTIONS OF HOLIDAY PAY

Summary: The Supreme Court has ruled that workers could claim for a series of unlawful deductions from wages in relation to their holiday pay because it had been calculated using basic pay only. The Court confirmed that a three-month gap in underpayments did not break a series of unlawful deductions from wages (*Chief Constable of the Police Service of Northern Ireland v Agnew*).

Key practice point: The Supreme Court's decision confirms that claims for holiday pay are no longer limited by the rule that gaps between holidays in a leave year break a series of deductions and preclude any further look-back. The Court also said that holiday should be regarded as from one composite pot rather than split between the basic four weeks' leave and the additional (1.6 weeks') statutory leave – this is likely to lead to employers having to keep more detailed records.

Background: Under the Employment Rights Act 1996 (ERA), a worker can claim for a series of unlawful deductions in respect of unpaid or underpaid holiday, provided the claim is made within three months of the last deduction or underpayment. However, there is two-year limit on retrospective holiday pay (and other unlawful deductions claims) made on or after 1 July 2015 (known as the two-year backstop). Northern Ireland law has similar provisions on deductions from wages, under its Employment Rights Order (ERO), but without the two-year backstop.

In 2014, in *Bear Scotland Ltd v Fulton*, the Employment Appeal Tribunal (EAT) held that there would be a break in a series of deductions where a period of more than three months elapsed between the deductions. The EAT also held that the four weeks' leave under the EU Working Time Directive should be taken first, and the "additional" 1.6 weeks under the Working Time Regulations (WTR) and any contractual leave should be taken afterwards. This made it more likely that there would be a three-month gap between a series of deductions, therefore breaking the series and limiting claims.

Facts: Police officers and civilian employees of the Northern Ireland Police Service made claims (worth about £30 million) that they had been underpaid holiday pay. They had received basic pay only, excluding overtime and allowances, not the "normal remuneration" which case law has established must include pay for most overtime and commission payments. The Northern Ireland Court of Appeal decided that the underpayments formed part of a series of payments and the claimants could recover underpayments going back to November 1998 when the working time legislation was introduced. The employers appealed to the Supreme Court.

Decision: The Supreme Court agreed with the Northern Ireland Court of Appeal's decision that the underpayments formed part of a series of payments, confirming that a gap of more than three months, or a correct payment, did not necessarily break a series of deductions. The provisions in the ERO (and in the ERA) were intended to provide protection for workers who suffered repeated deductions from their wages. What constituted a series was a question of fact. Although there had to be a failure within the three-month limitation period, the

complaint was not necessarily confined to that period. The EAT in *Bear Scotland* had been wrong to find that a gap of three months interrupted a series of deductions.

The Supreme Court also said that there was no legal requirement that leave derived from different sources must be taken in a particular order. Leave under the WTR, the Directive and the contract all form part of a composite whole.

Analysis/commentary: Although in theory the impact of the decision in Great Britain is not as great as in Northern Ireland, because of the two-year backstop, there has been a lingering doubt about the validity of the backstop, following *King v Sash Windows Workshop,* where the Court of Justice of the EU found that a worker who was wrongly classified as self-employed, and denied the right to paid annual leave as a result, could bring a claim for holiday pay for the whole period of his employment.

The judgment may have a bearing on the Government's decisions on proposed changes to the WTR announced earlier this year. One proposal was to merge the basic (four weeks) and additional (1.6 weeks) statutory annual leave into a single entitlement. The consultation also asked about introducing a single rate of holiday pay for the entire 5.6 weeks of entitlement. Currently, the four weeks is paid at a worker's normal pay rate (which may include overtime, commission, and allowances in addition to salary) and the 1.6 weeks at basic pay rate. For details, please see our *Employment Bulletin May 2023*.

NEW RIGHT TO REQUEST A PREDICTABLE WORK PATTERN

The Workers (Predictable Terms and Conditions) Act 2023 received Royal Assent in September. The Act introduces a new right for qualifying workers to apply for a change in terms and conditions if there is a lack of predictability in their work pattern. A fixed term contract of 12 months or less is presumed to lack predictability, but there is no other definition of "predictability". Employers will only be able to refuse a request on one of the specified grounds, similar to those for refusal of a flexible working request.

The Government Press Release says that the measures in the Act and the regulations containing the detail of how the new right to request will operate will come into force in September 2024, to give employers time to prepare for the changes. The Press Release confirms that a qualifying period, expected to be 26 weeks, will be set by the regulations, but that workers will not have to have worked for their employer continuously during that period.

There will be a limit of two applications for a more predictable working pattern in any 12-month period. This limit includes an application for flexible working, if it covers similar ground. Employers must deal with the application "in a reasonable manner", notify the worker of their decision within one month, and may only refuse a request on one of the specified grounds:

- Burden of additional costs
- Detrimental effect on ability to meet customer demand
- Detrimental impact on the recruitment of staff
- Detrimental impact on other aspects of the employer's business
- Insufficiency of work during the periods the worker proposes to work
- Planned structural changes.

A worker will be able to make a tribunal complaint if their employer has failed to fulfil their duties in relation to considering the request or has made a decision to reject the application based on incorrect facts. The tribunal could award compensation (the amount to be set by the regulations) and/or order the employer to reconsider the application. Workers will be protected against detriment and dismissal for making a request and, as with flexible working requests, employers will need to remain aware of potential discrimination claims if requests are rejected.

Analysis/commentary: Changes have also been made to the process for requests for flexible working. *The Employment Relations (Flexible Working) Act 2023*, which is expected to come into force in July 2024, makes amendments to Section 80 of the Employment Rights Act 1996:

- Employers will be required to consult with the employee before rejecting their flexible working request.
- Two statutory requests will be allowed in any 12-month period, instead of the current single request.
- The employer will have to decide on the request within two months (rather than three).
- The employee will no longer have to set out how the employer might deal with the effects of their request.

The Government has also confirmed that (unlike the new right to request a predictable work pattern) the right to request flexible working will apply from the first day of employment; this change will be made through regulations.

Once the details of both rights have been published in regulations, and a new Acas Code of Practice issued, employers will want to amend their policies to cover the new regimes for flexible and predictable working requests.

PAYMENT RECEIVED BY EMPLOYEE SHORTLY AFTER MERGER WAS TAXABLE IN FULL

Summary: The First-Tier Tribunal (Tax) decided that a payment received by an employee shortly after the employer was the subject of a merger was taxable in full as being in connection with the loss of share options rather than a payment on termination of employment, which would have attracted relief on the first £30,000 (*Hemingway v HMRC*).

Key practice point: The decision confirms what has been regarded as the correct practice – that it is not possible to use the £30,000 exemption against share option gains on a termination.

Facts: Following a takeover, share options granted to employees in the target company were cancelled in return for cash payments. The employee was paid over £19,000 in respect of a "notional share gain". He then ceased working for the company. He contended that the compensation related to the loss of the right to participate in a share option plan, his employment rights had been varied and the payment was taxable under Section 401 of the Income Tax (Earnings and Pensions) Act 2003, the provisions on payments on termination of employment, with relief available on the first £30,000. However, HMRC decided that the payment was taxable in full under Section 476 (chargeable events in connection with an employment-related securities option). The employee appealed.

Decision: The Tribunal dismissed the appeal. The share option charge in Section 476 takes precedence over the residual Section 401 charge (which gives the £30,000 exemption). The Tribunal accepted that it was arguable that the employee's employment rights had been varied but agreed with HMRC that the payment was most closely connected to the loss of the share options. The employee would not have received the payment had he not held the options. The fact that the company made the payment later and potentially of a different amount than that originally represented as payable did not alter the position. It was clear that the payment had been made for the loss of the share options.

DATA PROTECTION GUIDANCE ON WORKERS' HEALTH AND MONITORING

The Information Commissioner's Office (ICO) has issued two sets of guidance for employers on their obligations under data protection law when processing employees' health information and monitoring their employees. This guidance is part of the ICO's updating of the Employment Practices Data Protection Code. The guidance is built around the fundamental principles of data protection law - lawfulness, fairness and transparency – and focuses on workplace scenarios. There are useful checklists to help employers review their compliance.

Guidance on information about workers' health

The starting point of the guidance on workers' health information is that health data is categorised as "special category data" and has enhanced protection. Employers must be satisfied (and record) that they have justifiable reasons for collecting health information - a lawful basis for processing and an added special category condition. Points of good practice include:

- Employers should limit how much health information they collect. For example, if an employer is commissioning a medical report on a worker, it will not always be necessary for the report to provide details of the worker's condition; it may be sufficient for the employer to know whether the worker is fit to return to work or whether adjustments are needed.

- To keep health information secure, it should be kept separate from other employment records and access limited to health professionals and others who need access to meet their obligations. For example, managers should have access only where it is necessary for them to undertake their management responsibilities and access should be limited to the information they need to meet those obligations.
- Employers should carry out a data protection impact assessment (DPIA) before processing health information. This is a requirement before any processing that is "likely to result in a high risk" to individual rights.
- As far as possible, employers should use absence records instead of sickness records, as they are less intrusive. A simple absence record, without any details of a worker's health condition, is not likely to be special category data.
- Medical testing of workers is possible only if necessary and justified, such as to prevent a significant risk to health or safety or check a worker's fitness for work. Other than in the most safety critical areas, regular drug or alcohol testing is unlikely to be justified unless there is a reasonable suspicion of use that has an impact on safety. Less intrusive methods should be considered, such as using a health questionnaire.
- As part of their transparency obligations, employers should tell workers when and what medical testing will take place, the alcohol or drug level that may give rise to disciplinary action and the possible consequences of a breach of policy.
- Employers should not submit all job applicants, or even those shortlisted, to medical examination or testing; this should be at an "appropriate point" in the recruitment process - in most cases, this will be where there is a likelihood of appointing, subject to satisfactory examination or test results.

Guidance on monitoring workers

Practical considerations for employers from the guidance on monitoring include:

- The principles of fairness, transparency and accountability require employers to have policies and procedures in place. If monitoring is to enforce policies, they must be clearly set out and brought to the attention of employees on a regular basis. Employees' legitimate expectations of privacy are based on practice as well as policy.
- As with processing of health information, employers must carry out a DPIA before undertaking any processing likely to cause high risk to employees' interests and should consider less intrusive means. Examples of high risk processing include the use of biometric data for time and attendance control, keystroke monitoring and monitoring that may result in financial loss.
- Employers must make sure workers are aware of how and what personal information they are collecting during monitoring. If employers are planning to introduce monitoring they should consult employees or their representatives.
- It is unlikely that employers will be able to justify covert monitoring, other than in exceptional circumstances such as to prevent or detect suspected criminal activity or gross misconduct. Employers should outline in their policies the circumstances in which covert monitoring might take place.
- Employers considering the introduction of monitoring should factor in the difficulty of retrieving information to respond to subject access requests from employees - it may be challenging to respond to a subject access request if the monitoring collects large amounts of information.
- The legislation restricts the carrying out of solely automated decision making that has a legal or similar significant effect. This might apply to some monitoring tools for managing performance and monitoring sickness and attendance.
- When monitoring to prevent data loss and device activity, employers need to be aware of the distinction between network data and content; they should access content in exceptional circumstances only.

HORIZON SCANNING

What key developments in employment should be on your radar?

2023/24	• Regulations under the Protection from Redundancy (Pregnancy and Family Leave) Act 2023, to extend the circumstances in which employers must offer suitable alternative employment to parents at risk of redundancy • Implementation of the Strikes (Minimum Service Levels) Act 2023: minimum service levels on specified services • Proposed removal of the bonus cap applicable to banks, building societies, and PRA-designated investment firms
31 December 2023	Retained EU Law (Revocation and Reform) Act 2023: abolition of general principles of EU law and changes to UK courts' approach to retained EU case law ("assimilated case law")
April 2024	Carer's Leave Act 2023 expected to come into force: entitlement to one week's unpaid leave per year for employees caring for a dependent with a long-term care
May 2024	Employment (Allocation of Tips) Act 2023 expected to come into force: obligations on employers to deal with tips, gratuities and service charges, including having a written policy and keeping records
July 2024	Employment Relations (Flexible Working) Act 2023 expected to come into force: amendments to the flexible working request process; separate secondary legislation to make the right to request a "day one" right
September 2024	Workers (Predictable Terms and Conditions) Act 2023 expected to come into force: right to request a more predictable working pattern
Late 2024	Worker Protection (Amendment of Equality Act 2010) Bill (to come into force one year after Royal Assent): duty to take reasonable steps to prevent sexual harassment of employees
April 2025	Neonatal Care (Leave and Pay) Act 2023 expected to come into force: entitlement for eligible employees to 12 weeks' paid leave to care for a child receiving neonatal care
Date uncertain	• Proposed three-month limit on non-compete clauses in employment and worker contracts • Proposed amendment of TUPE to allow small employers, and all employers where a transfer of fewer than 10 employees is proposed, to consult directly with employees if there are no employee representatives • Proposed amendments to the Working Time Regulations, including to provide that employers do not have to keep a record of daily working hours, to allow the use of rolled-up holiday pay and to merge the basic and additional statutory annual leave into a single entitlement

- Statutory Code of Practice on Dismissal and Re-engagement
- Economic Crime and Corporate Transparency Bill: offence of failure to prevent fraud
- Changes to paternity leave to allow it to be taken in two separate blocks of one week, and at any time in the first year after birth or placement for adoption

We are also expecting important case law developments in the following key areas during the coming months:

Employment status: *HMRC v Professional Game Match Officials Ltd* (Supreme Court: whether referees were employees for tax purposes); *Lutz v Ryanair DAC* (EAT: whether a pilot was a worker and an agency worker and not a self-employed contractor)

Discrimination / equal pay: *Rollet v British Airways* (EAT: whether the Equality Act 2010 protects against indirect associative discrimination); *The Royal Parks Ltd v Boohene* (Court of Appeal: whether end-user had indirectly discriminated against contract workers on grounds of race by paying them a lower minimum level of payment compared to direct employees); *Bailey v Stonewall Equity Limited* (EAT: whether a campaigning group had instructed, caused or induced religion or belief discrimination by the employer

Redundancies: *USDAW v Tesco Stores Ltd* (Supreme Court: whether implied term prevented employer from dismissing and re-engaging employees); *R (Palmer) v North Derbyshire Magistrates Court* (Supreme Court: whether administrator could be prosecuted for failure to notify Secretary of State of collective redundancies)

Industrial action: *Secretary of State for Business and Trade v Mercer* (Supreme Court: whether protection from detriment for participating in trade union activities extends to industrial action); *Independent Workers of GB v CAC* (Supreme Court: whether Court of Appeal was correct to find that Deliveroo riders did not fall within the scope of the trade union freedom right under Article 11 of the European Convention on Human Rights because they were not in an employment relationship)

Unfair dismissal: *Fentem v Outform* (Court of Appeal: whether bringing forward the termination date on payment of a contractual PILON was a dismissal); *Hope v BMA* (Court of Appeal: whether dismissal for raising numerous grievances was fair); *Accattatis v Fortuna Group (London) Ltd* (EAT: whether it was automatically unfair to dismiss for concerns about attending the office during lockdown)

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