Historic holiday pay claims: the Supreme Court reaches its decision in Agnew

By Mathew Gullick KC

3PB Barristers

Chief Constable of the Police Service of Northern Ireland and another (Appellants/CrossRespondents) v Agnew and others (Respondents/Cross-Appellants) (Northern Ireland) [2023] UKSC 33

The Appeal

1. The claimants in this litigation are 364 civilian workers and 3,380 police officers in Northern Ireland. They made claims to the Northern Ireland Industrial Tribunal in respect of underpayment of statutory holiday pay; the basis of the underpayments being that only their basic pay (and not overtime) had been used to calculate their statutory holiday pay. Their employers accepted that they had been underpaid in this respect but contended that they were only entitled to recover underpayments of holiday pay in respect of the period of three months prior to their claims being brought in the Industrial Tribunal. The employers relied on the limitation provisions to that effect in the Working Time Regulations for Northern Ireland, which implemented the EU Working Time Directive and contains the statutory right to paid holiday. Similar regulations have been made in relation to Great Britain – the Working Time Regulations 1998.

2. The claimants argued that they could rely on the more generous (from their perspective) limitation provisions in the Northern Ireland Employment Rights Order, which provide for a three-month limitation period from the end of a "*series*" of deductions from wages (including, for this purpose, holiday pay). These provisions mirror those for wages claims made in Great Britain in the Employment Rights Act 1996.

3. The employers argued that: (1) although the civilian workers could make claims for underpayments of holiday pay under the "*series*" provisions in the Employment Rights Order, the police officers could not (because they were not "*workers*" as defined there), and (2) relying on the EAT decision in *Bear Scotland Ltd v Fulton* [2015] ICR 221, that any

"*series*" of deductions is broken where there is a gap of more than three months between them.

4. The Industrial Tribunal and the Northern Ireland Court of Appeal decided these issues in favour of the claimants. The employers appealed to the UK Supreme Court, which has now dismissed their appeal.

5. The UK Supreme Court held that the police officers could rely on the "*series*" provision in the Employment Rights Order, based on the application of the EU law principle of equivalence (requiring the national procedural rules which apply to EU law rights must not be less favourable than those governing domestic law claims). It achieved this result by applying the *Marleasing* principle of interpretation to "*read in*" the relevant words of the "*series*" extension to the limitation provision in the Northern Ireland Working Time Regulations. The Supreme Court declined to decide two alternative arguments raised by the police officers, which were that (1) they should be treated as coming within the definition of "*workers*" in the Employment Rights Order, so being able to make claims directly under the Employment Rights Order under the "*series*" provision, and (2) that not permitting them to do so would breach their rights under Article 14 of the ECHR.

6. The Supreme Court held that a "*series*" of deductions is not necessarily broken by a gap of more than 3 months, and that the EAT's *Bear Scotland* decision was wrong on this issue. What constitutes a "*series*" of deductions is a question of fact in each case, to be decided in the light of all relevant circumstances. The Supreme Court held that the Northern Ireland Court of Appeal had correctly held on the facts of the cases before it that there was a "*series*" of deductions because the common reason why deductions had been made (even if there was a break of more than three months between them) was a failure to include overtime payments in the calculation of holiday pay.

Analysis

7. This decision provides helpful clarity on what amounts to a "*series*" of deductions from wages. It overrules the EAT decision in *Bear Scotland Ltd v Fulton* [2015] ICR 221, where Langstaff J held that any "*series*" of deductions is broken by an interval of more than three months between deductions (three months being the primary limitation period for bringing a claim for unlawful deductions from wages). Although this is not a surprising result given the terms of the Court of Appeal's *obiter* criticism of *Bear Scotland* in its recent judgment in *Pimlico Plumbers Ltd v Smith (No 2)* [2022] EWCA Civ 70, [2022] ICR 818, it does mean that Employment Tribunals will no longer be bound to apply the *Bear Scotland* decision on

this issue. The terms of the Supreme Court's judgment are equally applicable to claims under section 23 of the Employment Rights Act 1996, which applies in Great Britain and whose wording is materially identical to the Northern Ireland legislation.

8. The Supreme Court's conclusion that what constitutes a "*series*" of deductions is a question of fact to be determined in the circumstances of each particular case may mean that it will be difficult for parties to overturn the conclusions of Employment Tribunals on that issue on appeal. Equally, however, Employment Tribunals will need to pay close regard to the guidance given by the Supreme Court on how to approach the evaluation of that issue, at paragraph 127 of the judgment, which emphasises that "*all relevant circumstances*" must be taken into account when deciding this question:

   "*… including, in relation to the deductions in issue: their similarities and differences; their frequency, size and impact; how they came to be made and applied; what links them together, and all other relevant circumstances.*"

   But, in principle, the Supreme Court appears to have accepted that a "*series*" of deductions can take place not only over many years but also with significant gaps (of more than three months) between deductions in the series. This judgment will therefore enable workers who would otherwise have been affected by the *Bear Scotland* decision to bring claims for historic underpayments of wages (including holiday pay) going back much further than previously.

9. For employers and workers in Great Britain, the judgment will not have as wide-ranging an impact as in Northern Ireland. That is because the maximum period over which even a series of deductions can be claimed in Great Britain is (and has been since 2015) the period of two years prior to the date of the claim to the Employment Tribunal – the so-called "*two-year backstop*" introduced by the Deduction from Wages (Limitation) Regulations 2014. As the Supreme Court's judgment points out, there is no such provision in the law of Northern Ireland: with the result that the difference in terms of the claimants' potential recovery in this litigation based on whether or not the approach in *Bear Scotland* was correct is in the region of £30 million.

10. Although the question of whether *Bear Scotland* would be disapproved was eagerly awaited by employment lawyers, the judgment deals with a number of other issues which are likely to be of interest. The Court's decision to allow the appeal on the first issue based on the application of the EU law principle of equivalence only (rather than the alternative arguments raised by the claimants relating to the definition of "worker" or under the ECHR)

may mean that the issues raised in this appeal which have resulted in the "*reading in*" to the Northern Ireland Working Time Regulations of the provisions permitting claims for a series of underpayments are revisited in the future. The general principles of EU law will cease to have effect, as a matter of UK domestic law, at the end of 2023 – see section 4 of the Retained EU Law (Revocation and Reform) Act 2023. The appeal to the Supreme Court in this case was argued in December 2022, many months before that Act was passed by Parliament, and there is no reference to that Act's possible effect in the judgment. Quite what the effect of that provision will be on situations, such as this one, where the courts have applied the principles of EU law to "*read in*" provisions to a statute remains to be seen.

11. The judgment is also of value for its detailed discussion of the general approach to statutory construction in the employment rights context, at paragraphs 111-119, building on the earlier analysis in *Uber BV v Aslam* [2021] UKSC 5, [2021] ICR 657. The Supreme Court places considerable emphasis on the purpose of the legislation being to protect workers from exploitation.

12. The judgment also addresses several questions which are specific to the field of holiday pay, including: (1) whether the part of the overall 5.6 weeks' statutory annual leave deriving from EU law (4 weeks) and the part deriving solely from domestic law (1.6 weeks) must be treated as being taken in a particular sequence (to which the answer is: "No", see paragraphs 132-138); (2) whether, when calculating the element of statutory holiday pay which arises from the payment of overtime, the calculation should be based on the number of calendar days in the holiday reference period or the number of working days (to which the answer is the number of working days, see paragraphs 139-142).

5 October 2023

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Mathew Gullick KC

Barrister
3PB Barristers

0330 332 2633
mathew.gullick@3pb.co.uk

3pb.co.uk