When it comes to deciding which allowances should be included when calculating Holiday Pay … it is all or nothing, even if there is an element of windfall…Seven course dinner anyone?

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British Airways Plc v Mello and ors [2024] EAT 53

1. The EAT (HHJ Auerbach) has provided some useful guidance on the approach employment tribunals should take in ascertaining what allowances form part of 'normal' pay for holiday pay calculation purposes and the current legal position in relation to the concept of a 'series' of deductions following the SC decision in **Agnew [2023] UKSC 33.**

The Background Facts

2. Multiple group claims were presented by Unite back in 2007 on behalf of members of BA Cabin Crew in respect of underpayment of statutory holiday pay. In 2013 the majority of those claims were settled and a new regime implemented, however 6 claimants pursued their claims and the hearing came before EJ Lewis in February 2019.

3. In short, the issue of holiday pay arose because BA's Cabin Crew were paid multiple allowances when working in addition to basic pay in various different circumstances and thus the question arose as to which of those allowances should be taken account of in calculating the appropriate rate of holiday pay.

The ET's decision

4. The tribunal decided that a number of allowances should form part of 'normal pay' and therefore taken account of in the calculation of holiday pay. Pertinently the ET held that meal allowances should be included.

5. The EJ went through the factual situation pertaining to the meal allowance scheme noting

that an entitlement to the allowance is triggered when a member of cabin crew is on duty at any mealtime, not eating the meal and that it may occur at a time the employee is unable to spend money on a meal and is payable even though food for crew is always available on board, that it is a fixed flat rate amount but that fixed rate varies for overseas locations and the formula for calculation is for a generous full meal, described as including (for example) a seven course dinner. There is no requirement to provide a receipt or proof of purchase.

6. The EJ went on to find as follows:

> *82. A glance at the agreed schedules shows, not surprisingly, that meal allowance was paid apparently to every claimant for every month within the period of this case. That is hardly surprising: given the length of a working day, it would be inconceivable that any claimant worked a rostered day as crew without triggering at least one meal allowance. Clearly, the allowances meet any test of regularity and pattern. I accept that they are intrinsically linked to performance of duties, because without having eaten the meal, Cabin Crew could not perform their work, or perform it to a satisfactory standard of passenger safety and service.*
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> *83. In setting the meal allowances, the respondent, in its own word, has been generous. Faced with a choice between generosity, versus staff working hungry, it has erred on the side of generosity. It cannot be faulted for doing so. It has done so accepting that a receipt-based reimbursement scheme would be hugely burdensome to operate, and would generate administrative work and ill will in equal measure. It is in keeping with BA's own rationale and logic that meal allowance has been excluded from CFP, because flying duties, and payment for them, are not affected by the requirement that crew have the opportunity to eat at meal times.*
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> *84. I find real difficulty in the quoted language of the CJEU above. Individual intention is difficult enough for a judge to gauge, let alone the intention of a long-established corporation. As Ms Barsam rightly pointed out, none of the claimants is in a position to know what British Airways intended. The intention of meal allowances (whenever they were introduced) may have been one thing in the past, but may have changed or developed. It is, in theory, perfectly possible that meal allowances were introduced with the exclusive intention of reimbursing costs at a generous level, but with the passage of time, retaining them has accrued the additional intention of (as the claimants asserted) topping up basic pay; and (as Mr Ayres hinted) keeping a quiet*

industrial life.

85. The Supreme Court in Williams went on to deal further with the TAFB element of pilots' pay (emphasis added):

> *…As to the precise test, the concept "intended exclusively to cover costs" requires attention to be* ***focussed on the real basis on which the TAFB payments were made****. If they were payments that were made genuinely and exclusively to cover costs, that would, at least prima facie, be the end of the matter. The claimants' case appears to be that, although they were designated as being for the exclusive purpose of covering costs, they were in fact more than some or all Pilots might actually need for, or spend on, costs, and that the revenue has, in effect, seen through the description to a reality which the Supreme Court, or an Employment Tribunal, should also recognise.*
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> *As Counsel for BA accepted, there could be no doubt, a point at which it was obvious that payments nominally made to cover costs were not going to be required, in their entirety, to match actual costs. An employer who in such circumstances continued to make such payments in their full amount could then no longer maintain that they were genuinely and exclusively intended to cover costs. But, in using the phrase "intended exclusively to cover costs", it does not appear that the Court of Justice contemplated any detailed evaluation of the precise need for or reasonableness for payments which were so intended.* ***What matters is whether there was a genuine intention in agreeing and making such payments that they should go exclusively to cover costs. It is on that the Employment Tribunal should, in my opinion, focus.***

7. The EJ in light of the above concluded that:

- **the burden of proving exclusive intent rests on the party who asserts it, which in this case (as probably in every other case) is bound to be the respondent. I find that it has failed to discharge that burden.**
- **that meal allowances in principle are included within the allowances which are to be considered as part of pay for holiday pay purposes.**
- **But, I have not heard submission on the precise question of whether the whole meal allowance is to be taken into account; or, if not, what proportion and how**

it is to be calculated. I consider that those points must be adjourned to a further hearing.

The Appeals:

8. The Respondent raised 4 grounds of Appeal all of which related to the ET's conclusion that meal allowances should in principle be included for the purposes of calculating holiday pay. The two principle grounds being (1) the ET applied the wrong legal test as the CJEU in Williams required the ET to focus on the genuine intention of the respondent and the ET had (in fact) focused on the potential effect of meal allowances and the need for reasonableness of the payments and (2) the ET had erred in its application of the burden of proof as the onus was on the claimants that meal allowances should be counted as part of normal pay, it was not for the respondent to prove allowances were intended to exclusively cover costs.

9. The Claimants also raised 4 grounds of Counter Appeal, the fundamental one of note relating to time limits and that the ET had erred by interpreting a 'series' for the purposes of section 23(3) of the 1996 Act as being broken when a time gap between two deductions was more than 3 months (the Bear Scotland principle) which the claimants contended had been overruled in light of the SC subsequent decision in **Chief Constable of the Police Service of Northern Ireland v Agnew [2024] ICR 51.**

The EAT's decision:

10. The EAT essentially upheld both the Appeal and Counter Appeal. In this brief summary I focus on the main / key findings and grounds of appeal and deal with each in turn.

The Meal Allowance issue - Normal Pay?

11. HHJ Auerbach usefully summarised the authorities and then set out the key principles that are worthy of note and are summarised as follows:

- the overriding principle is that holiday pay must reflect normal pay (para 41);
- there are two components to the test whether a given payment or allowance forms part of normal pay. The first relates to the 'nature of the payment' the second is what EAT in **Willets** called a 'temporal component' (para 41);

- The general test for the 'nature of the payment' is if it is 'intrinsically linked to the performance of the tasks which the worker is required to carry out under his contract of employment'. (Para 42);
- Either the payment is 'linked intrinsically to the performance of the tasks', or it is not, but is instead, a payment in respect of 'costs' which 'need not be taken into account' (Para 45);
- There is a single issue for the tribunal in such cases. What is the real basis for the payment? Is it a performance payment or was it made genuinely and exclusively to cover costs? The Court of Justice and Supreme Court have eschewed the approach taken by HMRC to such issues, of hypothecating a percentage or proportion of such an allowance as being a performance payment and a percentage or proportion as being an expenses payment, by making some general assessment or adjudication of what would be a reasonable amount to allow. Rather, either the payment is one side of the line or the other. (Para 47);
- The burden of proof is on the worker who asserts that a payment forms part of normal pay to show that it does. But the tribunal is unlikely to need to resort to the burden of proof to decide the issue as whether the payment is a performance payment or an expenses payment should be decided by identifying all the relevant facts and circumstances (from whatever source) and then standing back and assessing the overall picture, including by drawing appropriate reasoned inferences from the primary facts to decide which side of the line the payment falls (Para 48);
- The fact that a payment is in a fixed amount is not as such fatal to the conclusion that it is an expenses payment. But if, in the given case, it is at a very high level that is "obviously" not wholly required to cover expenses, that may be treated as decisively tipping the scales in favour of the conclusion that the real basis on which it has been made is that it is a performance payment. But I note that the answer in such a case is not for the tribunal to split or apportion the payment. Rather, the employer may avoid this conclusion by bringing the level of the payment down below such a very high level (Para 49).

12. HHJ Auerbach accordingly held the ET did fall into error, firstly because the ET had proceeded from the analysis that expenses payments are an excluded subcategory of performance payments which they are not, rather they are one or the other. This error then led the ET to err in its application of the burden of proof.

13. HHJ Auerbach further noted the ET's conclusion (as I have set out above) had been that the meal allowance was 'in principle' included in holiday pay but whether the whole or what

proportion of that allowance remained to be determined. This suggested that the tribunal did consider that *some further exercise was required to evaluate what was reasonably required to cover the cost of a meal* – that HHJ Auerbach concluded was the very thing the SC had indicated the ET should not be drawn into. HHJ Auerbach accordingly found the ET had erred in the approach they had adopted and remitted the question of whether meal allowances did (or did not) form part of normal pay to the ET for a fresh determination.

The Series of Deductions Issue

14. It was accepted and held that the ET decision (further to **Bear Scotland v Fulton**) that a gap between two successive deductions of more than three months would break the series had been overruled by (and accordingly the ET decision was in error) in light of the SC decision in **Agnew.**

15. A further (and more contentious) sub issue had however arisen on the series point, namely whether the ET had erred in treating each allowance separately when considering a series of deductions as the claimants claimed all deductions were deductions from holiday pay and thus on all occasions in respect of which the ET concluded a claimant had not received the proper amount of holiday pay should be treated as part of an unbroken series.

16. HHJ Auerbach referenced **Group 4 Nightspeed v Gilbert** where the EAT said that the claims *""formed a series by virtue of their connection to the same contract, the same commission scheme…. the fact that there were various different reasons why in the case of each deduction the appellants declined to pay cannot alter the fact that, for jurisdictional purposes, the claims were being made in respect of a series of deductions."* HHJ Auerbach went on to cite the EAT's reasoning in **Bear Scotland** that survived **Agnew** and was described by the SC as unimpeachable as well as quoting extensively from **Agnew** itself before concluding as follows:

> *It is certainly clear, at least, that it would be open to the tribunal in this case, when considering whether there was sufficient similarity of subject matter between the impugned deductions, to hold that there was, because they were linked by the common fault or vice that holiday pay was not calculated by reference to normal pay, and that this was so, even though the particular allowances which might count as part of normal pay for the purposes of the holiday pay calculation, might, for a given claimant, vary as between different particular occasions. (Para 80)*
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> *In the present case the undisputed and found facts are that all of the payments from which the claimants claim that there were unlawful deductions were of holiday pay,*

and in all cases they claim that the deductions came about because of a failure to factor in one or more allowances that should have counted towards normal pay. Taking the foregoing approach, I consider that, applying the law correctly to the facts found, the tribunal would have been bound to conclude that the requirement for the impugned payments to be "sufficiently similar" was satisfied in this case. I therefore substitute a conclusion to that effect. (Para 83)

17. HHJ Auerbach accordingly not only found that the ET had erred in finding that a 3-month gap would break the series, but that the ET should not distinguish between or address each allowance separately as each deduction was of holiday pay and thus formed part of a series and thus were sufficiently similar to each other. HHJ Auerbach therefore only remitted the 'temporal' connection question to the ET for determination but in so doing he also provided further guidance as to the approach the ET should take, namely:

I make two points about the approach which the tribunal should take to deciding such issues. The first is that, once again, the statutory purpose must be kept firmly in mind. The second is that the tribunal should not assess whether the "sufficient similarity" and "temporal" tests are satisfied in silos, but in the overall context of the relevant factual matrix, and recognising that one may have a bearing on the other. In particular, if all of the complaints by a given claimant are of deductions from holiday pay, proper account must be taken, when considering temporality, of the fact that there will inherently be gaps in time between successive holidays. (Para 85)

Commentary

18. This decision of HHJ Auerbach provides a useful summary and guidance that ETs are likely to be directed to in respect of claims of underpayment of holiday pay. The fact that an allowance must fall one side of the line or the other is now clear though it is readily understandable as to why and how the ET fell into error in this particular case.

19. Furthermore, given **Agnew** and the sentiments and guidance contained herein from HHJ Auerbach in respect of holiday pay it would seem that it may prove difficult in many cases to convince an ET that they should find that there is no series (or the series is broken) of deductions pertaining to holiday pay. Perhaps this is only right, especially given the 2-year backstop provisions in force since 2015, but it is certainly something representatives should heed when considering their likely lines of defence to such claims.

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26 April 2024

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