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UK Supreme Court Makes It Easier for Workers To Claim Historical Holiday Underpayments

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A gap of three months or more between holiday pay underpayments does not necessarily break a "series of deductions" for unlawful deduction from wages purposes, meaning that workers can potentially make claims for holiday backpay in relation to a longer period.

In *Chief Constable of the Police Service of Northern Ireland & Anor v Agnew & Ors*, the UK's Supreme Court has given a helpful decision for workers bringing claims for historical underpayment of holiday pay. The ruling itself did not come as a big surprise, as the Court of Appeal had already expressed misgivings on the key issues in dispute. It is a significant decision for the Police Service (and other employers) in Northern Ireland – with workers potentially being able to recover sums as far back as 1998, when the Working Time Regulations (Northern Ireland) (WTR (NI)) were first introduced. It will have less impact in Great Britain, as the statutory two-year "backstop" on such claims means that even if workers are able to show there has been a series of unlawful deductions, they can only go back two years before the date of their claim. Unfortunately, no such "backstop" exists in Northern Ireland, hence why the potential financial repercussions of this ruling are more concerning for employers there that have not been paying holiday pay correctly.

Further Details

If a worker believes they have not been paid their correct holiday pay, they will usually bring a claim for unpaid holiday under the Working Time Regulations 1998 (WTR) and/or a claim for unlawful deduction from wages. A key advantage of the latter is that if there has been a "series" of alleged underpayments (almost inevitable if there is some error or disagreement as to how such pay is calculated or whether it is due at all), the three-month time limit for presenting the claim only starts to run from the final deduction in the series. By comparison, any claim under the WTR must be presented within three months of the particular underpayment, thus greatly reducing the scope for recovering historical underpayments, unless the worker brings a new claim every time there is an underpayment.

A worker's ability to recover historical underpayments by way of an unlawful deduction from wages claim was, however, significantly curtailed following an Employment Appeal Tribunal ruling in 2015 that a series of unlawful deductions would be broken if there were a gap of three months or more between any alleged underpayments. So if, for example, a worker had chosen to take periods of annual leave more than three months apart, this would break the series of deductions and they would be restricted in terms of how far back the claim could go – i.e. just to the last underpayment and not to those preceding it.

The UK Supreme Court was asked to consider this "series of deductions" point in the *Agnew* case. Police officers and civilian staff who worked for the Northern Ireland Police Service argued they had been underpaid holiday pay. They said their holiday pay should have been based on their "normal remuneration" and not just basic pay – at least in so far as their EU Leave was concerned (the four weeks' annual leave derived from the Working Time Directive). They brought claims for unpaid holiday under the WTR (NI), as well as for unlawful deductions from wages under the Employment Rights (Northern Ireland) Order 1996 (ERO).

The Police Service did not dispute that its staff had been underpaid but sought to reduce the extent of its resulting exposure by limiting how far back in time the claims could go. It ran a number of arguments, including (i) that the police officers were not entitled to bring unlawful deduction from wages claims as they were not "workers" within the meaning of the ERO; and (ii) that the 2015 case referred to above prevented them from bringing most of their historical claims because of gaps of more than three months between the underpayments which had been made. There was a lot riding on these arguments. The Police Service estimated that meeting the claims in full would cost about £30 million whereas if they were limited to underpayments within the three months prior to the commencement of proceedings, the cost was more like £300,000.

Having been unsuccessful before the lower courts, the Police Service appealed to the Supreme Court. It too has now ruled in favour of the workers. Its key findings were as follows:

- It was not necessary to consider whether the police officers were workers within the meaning of the ERO because the EU "principle of equivalence" meant that the Supreme Court was required to import the more favourable limitation periods in the ERO (including a worker's ability to recover a series of underpayments) into the WTR (NI). The EU principle of equivalence is probably not something most people are familiar with, but in very simple terms it means that Northern Ireland could not provide remedies (or the mechanical hurdles to those remedies, like limitation periods) for breaches of EU rights that were less favourable than those available in domestic proceedings. The key thing for our purposes is that the Supreme Court said the police officers could bring claims in relation to a series of alleged underpayments.
- In terms of a series of unlawful deductions, this did not come to an end just because any underpayments of holiday were separated by a gap of more than three months. And this is the key takeaway for most employers. The Supreme Court was keen to emphasise that the purpose of the unlawful deductions from wages provisions is to protect vulnerable workers. It said that for holiday pay, there will often be cases where such payments take place more than three months apart and the imposition of a mandatory cut-off after an interval of three months could produce unfair consequences.

Although not strictly required to do so in light of its findings above, the Supreme Court went on to deal briefly with some other holiday pay issues that have arisen over the years. First, it said it is not correct to say that a worker takes "EU Leave" before "UK Leave" – all leave to which a worker is entitled forms part of a "single, composite, pot". This is something that the government is proposing to clarify as part of its proposed reforms to the WTR.

It also said that what constitutes "normal remuneration" for holiday pay purposes is a question of fact, as is the correct reference period for calculating holiday pay. These are matters that should be addressed in evidence in individual cases. It did however note the Court of Appeal's encouragement to the parties in this case to agree a method for calculating holiday pay based on a 12-month reference period, which we think gives us a strong steer as to what they think the most appropriate reference period will usually be.

With the Supreme Court's decision in *Agnew*, the topic of holiday pay has been thrown back into the spotlight. For those who may understandably have lost track of where we are when it comes to holiday pay, we set out a short summary of the current position and potential future reforms.

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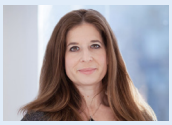

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