

Insights

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HISTORIC HOLIDAY PAY CLAIMS, RACE EQUALITY VIEWS OPPOSING CRITICAL RACE THEORY AS A PHILOSOPHICAL BELIEF, REFUSING SUITABLE ALTERNATIVE EMPLOYMENT, AND A GENERAL NEWS ROUNDUP

Oct 31, 2023

SUMMARY

Our October update includes a significant Supreme Court decision on how to treat historic underpayments of holiday pay, a preliminary tribunal hearing on whether a belief in race equality that opposed critical race theory was a protected philosophical belief, and another tribunal decision on when a refusal of alternative employment is unreasonable when the dismissal is unfair. We also feature a news update on the ICO's latest guidance on employee monitoring, reports on historically high levels of sickness absence, and a draft ACAS code of practice on requests for predictable working patterns.

HISTORIC HOLIDAY PAY CLAIMS AND UNLAWFUL DEDUCTIONS – WHAT A DIFFERENCE A CASE MAKES

The Supreme Court has changed the legal position on time limits when bringing claims for a “series” of unlawful deductions from pay. The case has a complex history and context, and this is only a summary of its main findings. It was also brought in Northern Ireland, but for the purposes of this article we have referenced the statutes used in Great Britain. Except in one very important respect, they are virtually identical.

The right not to suffer an unlawful deduction from pay, where the employer does not pay the employee what is properly payable to them, is provided under s13 of the Employment Rights Act 1996 (ERA). An example would be a failure to include, in an employee's pay packet, commission, bonus or, very commonly, overtime. The right to bring a claim for unlawful deductions is provided under s23 ERA and, under s23(3) ERA a worker can also bring a claim for a “series” of deductions”, where the employer makes multiple deductions over time.

In this case, over 3,000 police officers and 364 civilian employees brought claims for underpayments of holiday pay going back 25 years to November 1998, when the working time regulations (WTR) introduced statutory paid holiday. When on paid holiday, the claimants had for 25 years only received basic salary when they should have received more. What they should have received was “normal pay”, essentially what they would have received if they were at work. In the case of the nearly 4,000 claimants, they should have received basic salary plus overtime and in some cases other payments.

Broadly speaking, underpayments of holiday pay under the WTR can be brought as unlawful deductions claims under the ERA. This means that a claim for a “series” of deductions can be brought, based on 25 years of underpayment since 1998. With nearly 4,000 claimants, it was estimated that the total sums involved were between £30m-£40m.

Could the employer do anything to limit this exposure?

- If the case had been in England, Wales or Scotland, the figure would have been substantially lower. This is because of the two-year limit retrospective limit on compensation for unlawful deductions introduced in 2015 by the *Deduction from Wages (Limitation) Regulations 2014*. Under these regulations, an employee can only recover unlawful deductions going back two years. However, the 2014 regulations do not apply in Northern Ireland;
- The 2014 EAT case of *Bear Scotland v Fulton* was pivotal, as follows.
 - a. It held that each deduction in a series of deductions had to be within 3 months of the others. If there were a gap of more than three months at any time during the series, that would act as a “break”, to stop the series from running. Underpayments of holiday pay are vulnerable to this rule as an employee may not take holiday for a period of more than three months, breaking the series of deductions. One rationale for the finding was that an employee is free to bring a separate claim within three months of any single unlawful deduction, so why should employees enjoy superior rights when dealing with a “series” of deductions; and
 - b. It held that any series of deductions would be “stopped” by the employer making a correct/lawful full payment.

With these three limitations on claims, one statutory and two under *Bear Scotland* ((a) and (b) above), employers had a significant degree of protection from historical claims involving a series of deductions.

The Supreme Court’s main finding was that a “series” of deductions under s23(3) ERA do not have to be within 3 months of each other. The series still has to be linked by a common theme or rationale (see below), but the *Bear Scotland* requirement for a maximum three-month time interval between deductions was overturned. Similarly, it was also held that a correct, lawful payment would not break a series.

Rather than timing, the main factors to take into account when deciding whether a “series” of deductions met the legal test for a “series” included:

- The reason for the deduction(s), meaning there has to be a factual link to each deduction, or to use the words of the court a “*common fault or unifying vice*” that resulted in holiday pay being calculated incorrectly;
- That the “common fault or unifying vice” linked all deductions;
- The size and impact of the series of deductions on employees; and
- The frequency of deductions.

If these are all present, there is likely to be series of deductions, regardless of timing, although the inclusion of “frequency” probably means that deductions that are too remote in time might not represent a “series”.

WHY THIS MATTERS

Although the practical implications of removing the three-month rule are highly significant, the exposure of UK employers outside Northern Ireland remains limited to two years under the 2014 regulations. In Northern Ireland, however, the exposure (as in this case) is effectively unlimited, going back to November 1998 in this case, and possibly even further if the common theme in the series is based on something that pre-dates the introduction of the WTR.

The judgment is also complicated (possibly an understatement) in terms of the amount of holiday pay payable by the employer - it fails to distinguish between the three types of paid holiday available in the UK, namely (i) four weeks’ leave from the Working Time Directive, (ii) 1.6 weeks’ statutory leave unique to the UK, and (iii) extra contractual leave (if any). In *Bear Scotland*, the EAT held that these three would be dealt with in sequence, but in this case it was held that the three should be treated as a “composite pot”, and not separately.

Watch this space.

Chief Constable of the Police Service of Northern Ireland -v- Agnew and others

A BELIEF IN RACE EQUALITY THAT OPPOSES CRITICAL RACE THEORY CONSTITUTES A PROTECTED PHILOSOPHICAL BELIEF

The claimant is employed as an individual ACAS conciliator. In September 2022, he brought claims against ACAS, including discrimination on the grounds of religion and philosophical belief. The tribunal held a preliminary hearing to decide the issue of whether the claimant’s views on race and sex constituted philosophical beliefs under the Equality Act 2010 (EqA).

The claimant describes his race as white, and the race of his wife and children as black. Throughout his life, he stated he had spent large amounts of time with black people and formed close relationships with them.

He described his philosophical belief as opposing critical race theory, in particular his belief in the importance of individual character over race. Specifically, he believed the 'woke' approach to racism is misconceived and its belief in structural racism divisive. Its tendency to view white people as inherently racist can lead to separatism, segregation and ethnocentrism. The claimant prefers the approach of Martin Luther King, which he says advocates a society where people are judged by their character, not the colour of their skin. This approach, in his view, emphasises what people of all races have in common, namely their humanity and capacity to support a shared national culture.

In relation to sex/feminism, the claimant believes that it is unhelpful to view social problems through feminist eyes, such as the initial view of at least one feminist that high male suicide rates were unimportant.

The claimant's views on critical race theory, which he expressed openly, and posted on ACAS's internal communications/message board "Yammer", were not popular with his colleagues. His posts included criticism of the Black Lives Matter movement. Some colleagues complained to managers that the claimant's views were at best unfavourable towards black and minority ethnic people challenging racism and might even promote racist ideas.

The tribunal, in what might be seen as a controversial decision, found that the claimant's beliefs on race constituted a bona fide philosophical belief and a protected characteristic under the EqA. However, it was held that his philosophical belief relating to sex and feminism did not satisfy the relevant test.

The legal test under the EqA for a philosophical belief was established in the 2010 case of *Nicholson v Grainger* and this is the accepted benchmark as to whether a philosophical belief qualifies for protection. The five "Grainger criteria" are as follows:

- the belief must be genuinely held;
- it must be a belief and not an opinion or viewpoint based on the present state of information available;
- it must be a belief as to a weighty and substantial aspect of human life and behaviour;
- it must attain a certain level of cogency, seriousness, cohesion, and importance; and
- it must be worthy of respect in a democratic society, not be incompatible with human dignity and not conflict with the fundamental rights of others.

All five criteria must be satisfied.

The tribunal held that the claimant's beliefs on both race and sex/feminism satisfied the first criterion in that they were genuinely held. The claimant's evidence was consistent, and backed by his own lived experience, by careful thought and consideration and by considerable research and reading.

However, whilst the tribunal held that the claimant's beliefs on race satisfied the second Grainger criterion, it held that the claimant's beliefs on sex/feminism did not. The tribunal considered that the claimant's beliefs relating to sex and feminism, whilst genuine and understandable in light of his personal experience, to be an opinion rather than a philosophical belief. The tribunal held that the claimant's views on sex/feminism were based on a very narrow foundation – comments made by one particular individual about male suicide, and the claimant was unable to articulate in more detail the basis of his views.

Looking at the third criterion the tribunal concluded that the claimant's views on race and sex/feminism satisfy this as they concern a weighty and substantial aspect of human life and behaviour. On the question of cogency, seriousness etc relating to the fourth criterion, the tribunal held the claimant's beliefs are coherent and possess consistent internal logic and structure.

Turning finally to the fifth of the Grainger criteria, the tribunal noted the 2022 decision of *Forstater -v- CGD Europe Limited*, which holds that a philosophical belief will only fail to satisfy this criterion "if it [is] the kind of belief...which would be akin to Nazism or totalitarianism". This is a high bar, and the tribunal found that the claimant's beliefs on race could not be described as incompatible with human dignity or conflicting with the fundamental rights of others, even if they are not universally shared and were objected to by some of his colleagues. The tribunal considered that the claimant's beliefs relate, in essence, to the best way of eliminating racism in society, and are clearly worthy of respect.

WHY THIS MATTERS

This decision, albeit a first instance decision not binding on other tribunals, is a bold one, establishing that free speech in a contentious and widely contested area of opinion is protected by law. Despite the controversial nature of the views held by the claimant, the tribunal applied the relevant legal tests rigorously and let the legal test run its course.

It also illustrates the need for employers to be respectful and to adopt a balanced approach when dealing with potentially controversial and competing beliefs.

Mr S Corby -v- Advisory, Conciliation and Arbitration Service

REDUNDANCY DISMISSAL IS UNFAIR BUT EMPLOYEE'S REFUSAL OF ALTERNATIVE EMPLOYMENT IS UNREASONABLE

The claimant was employed at the respondent's farm shop in Faversham, Kent from November 2015. The respondent took the decision to close the Faversham shop in Autumn 2022 as it was not profitable enough. The respondent owned another farm shop in Stockbury, 14 miles away.

The respondent wrote to the claimant to explain to her that the Faversham shop would be closing and that she was at risk of redundancy. The claimant's colleague, Miss Powley, received a letter in similar terms. Both the claimant and Miss Powley met separately with Mr Brown (the respondent's owner) on 23 September 2022, during which they discussed transferring to roles at Stockbury which were the same as and on the same terms and conditions as their roles at Faversham.

The Stockbury role was not suitable for Miss Powley - it would require her to use public transport every day, which was 90 minutes each way, whereas the Faversham farm shop was within walking distance of where she lived. She was dismissed by reason of redundancy and received a statutory redundancy payment (SRP).

The claimant wrote to the respondent on 4 October 2022 refusing the offer of alternative employment. She was concerned about the commute. She was an anxious driver, and in thirty years of driving she had only ever driven to and in Faversham. She was concerned about driving to Stockbury, particularly in bad weather. Mr Brown assured the claimant she would not be expected to travel if it was too risky, and confirmed he would pay her reasonable mileage and fuel expenses. He also agreed to give her a trial period in the new role. The claimant still refused. The respondent expressed the view that the role was a suitable offer and the claimant's refusal of it would be unreasonable. As a result, she would not receive an SRP if dismissed.

Following this, the claimant requested a further meeting with Mr Brown. At this meeting, on 18 October 2022, it appeared that the claimant had reassessed the situation and was willing to reconsider her refusal of the alternative role.

However, in the meantime and following the claimant's initial refusal of the alternative role on 4 October, Mr Brown had quickly enquired about possible new recruits. By 18 October 2022, the role was still vacant but had been offered to a new employee. Mr Brown did not tell the claimant this. Accordingly, after the 18 October meeting, the respondent sent a letter to the claimant informing her that (despite her change of heart) it had made alternative arrangements for the Stockbury role. As a result, the claimant was dismissed, and her last day of employment would be 29 October 2022. It was also reiterated that, because of her "unreasonable refusal" of the Stockbury role on 4 October, she would not be entitled to an SRP.

The claimant claimed for both an SRP and unfair dismissal.

SRP

The tribunal considered s141 Employment Rights Act 1996 (ERA) which states that an employee who is made redundant may lose their entitlement to an SRP if they "unreasonably turn down a

suitable alternative offer of employment that is made to them". In this case, the tribunal considered that, even though the Stockbury farm shop was in a different location, there was nothing to suggest that the job was unsuitable. The claimant's pay and terms and conditions were the same, Stockbury was in fact a shorter commute for the claimant, and the respondent had offered to pay for her reasonable travel costs. The offer was held to be a reasonable one.

The tribunal then applied the literal wording of the ERA when considering whether the claimant had unreasonably refused the offer. S141 ERA states that the right to an SRP is lost if a suitable position has been offered and has been unreasonably refused. The tribunal held that the offer was unreasonably refused on 4 October when the claimant wrote to Mr Brown to turn it down - nothing that happened afterwards, including a change of heart, could reinstate the right to an SRP.

UNFAIR DISMISSAL

With regard to the unfair dismissal claim, the tribunal had to consider whether (1) the respondent had a potentially fair reason for dismissal and (2) if so, whether the respondent acted reasonably in all the circumstances in deciding to dismiss the claimant for that reason (ss98(2) and (4) ERA). The tribunal found that there was a genuine redundancy situation, so the first limb was satisfied. However, the tribunal found that, while the process the respondent had undertaken was fair in terms of selection and consultation, on the whole the respondent's decision to dismiss the claimant was unreasonable. Her unfair dismissal claim was upheld.

The tribunal considered the point that the reasonableness of a redundancy dismissal is assessed at the date the decision to dismiss is taken. In this case it was held that the decision to dismiss was taken on 18 October (at the latest), and that it was unreasonable at that date for the respondent to have dismissed the claimant without considering her for the alternative role when she said that she was willing to reconsider it. This was the case even though her initial rejection of the offer on 4 October was sufficient to disentitle her from an SRP.

As at 18 October she was still in her notice period, the vacancy had been described as not being filled, Mr Brown had given evidence that he considered the claimant to be a good and reliable employee and he had been keen for her to move to Stockbury. He also did not say on 18 October that the opportunity for the claimant to work at Stockbury no longer existed because the role had been offered to a third party. As a result of the decision to dismiss being made without any consideration by the respondent of the claimant's willingness to (re)consider the role, the tribunal held that the dismissal was unfair.

WHY THIS MATTERS

This is a reminder of the quite complicated legal issues around timing in redundancy situations relating to (a) offers/refusals of alternative employment and (b) the decision to dismiss. On (a), the claimant's initial refusal on 4 October of alternative employment, even though she later

reconsidered, was determinative and her initial refusal disentitled her to an SRP. Her subsequent reconsideration made no difference.

However, on (b), the claimant's reconsideration made all the difference, and the respondent not taking proper account of her subsequent reconsideration of alternative employment on 18 October during her notice period made the dismissal unfair.

Love -v- MB Farm Produce Limited

NEWS ROUNDUP

ICO PUBLISHES GUIDANCE ON THE LAWFUL MONITORING OF EMPLOYEES

Earlier this month the Information Commissioner's Office (ICO) published its guidance, *Employment practices and data protection – Monitoring workers*, to assist employers monitoring employees to do so in compliance with the UK General Data Protection Regulation (UK GDPR) and the Data Protection Act 2018 (DPA 2018).

With an increase in remote working and improved technology, more employers are monitoring employees more closely. The ICO is clear that, in doing so, organisations need to take into account their legal obligations and employees' rights. The guidance provides practical advice and checklists.

ICO research reveals that almost one in five (19%) of people surveyed believe that they have been monitored by an employer, over two-thirds (70%) would find monitoring in the workplace intrusive and fewer than one in five (19%) would feel comfortable taking a new job if they knew that their employer would be monitoring them. Monitoring can include tracking calls, messages and keystrokes, taking screenshots, webcam footage or audio recordings, or using specialist monitoring software to track activity.

The ICO uses in the guidance the word "worker" rather than "employee" to capture a larger group of individuals, including many who are self-employed.

If an organisation is going to monitor workers/employees, it must (amongst other things):

- Ensure that workers are aware of the nature, extent and reasons for monitoring;
- Have a clearly defined purpose for monitoring;
- Use the least intrusive method of monitoring;
- Tell workers about monitoring in a way that is comprehensible;
- Only keep information relevant to the purpose of monitoring; and

- Carrying out a Data Protection Impact Assessment for any monitoring that is likely result in a high risk to workers' rights.

EMPLOYEE SICKNESS ABSENCE AT HIGHEST LEVEL FOR OVER A DECADE

This was revealed by the CIPD's Health and wellbeing at work survey for 2023. Some key points were:

- The average level of employee sickness absence is 7.8 days per employee, which is the highest level for over a decade. In 2019, the rate was 5.8 days. Interestingly, Covid-19 is the fourth highest reason for short-term absence, and 50% of organisations reported employees experiencing Long Covid in the last 12 months;
- Around 76% of organisations reported some level of stress-related absence, most commonly caused by heavy workloads and management style. Mental health remains the most common focus of wellbeing initiatives, including employee assistance programmes, mental health first aid training, access to counselling services and access to flexible working;
- 87% of organisations reported "presenteeism" (employees attending work when unwell) and 63% reporting "leaveism" (using time off such as annual leave to work or when unwell, or working outside contracted hours).
- Only 30% of organisations surveyed provide guidance or training for managers regarding how to support employees with health conditions to remain at work. Organisations are more likely to train support staff to be mental ill health first aiders than managers (66% compared to 43%); and
- 46% of organisations make provision for menopause to a large or moderate extent. Nearly a quarter (24%) have a standalone menopause policy, 16% deal with menopause as part of a wider policy and 29% plan to introduce a menopause policy. 37% make provision for pregnancy loss to a large or moderate extent. Only 15% have a policy for menstrual health, but 19% plan to introduce one. Figures in this specific area have all substantially increased from previous years.

Over a quarter of the organisations surveyed reported that work had a negative impact on the mental health of employees.

DRAFT CODE OF PRACTICE FOR PREDICTABLE WORKING PATTERN REQUESTS

ACAS has this month launched a consultation on the draft Code of Practice to sit alongside the *Workers (Predictable Terms and Conditions) Act 2023* which received Royal Assent in September 2023 and is expected to come into force in September 2024.

The 2023 act will introduce a new statutory right for workers (including agency workers) to request a more predictable working pattern. The process for making a request will (broadly) be similar to flexible working requests - requests must be made in writing and may be refused on one of a series of specified grounds. There are currently six listed in the 2023 act, including additional costs, detrimental impact on recruitment of staff/other aspects of the employer's business, or there being insufficient work during the periods the worker has asked to work.

The draft Code sets out good practice principles including:

- Allowing workers to be accompanied to predictable work meetings;
- That organisations should set out any additional information which is reasonable to help explain their decisions; and
- That organisations should allow an appeal where a request has been rejected.

The Code, when in final form, will not be legally binding but, as with most ACAS Codes will be taken into account by courts and employment tribunals when deciding cases.

This article was written with Trainee Solicitor Rhea Ava Patel.

RELATED PRACTICE AREAS

- Employment & Labor

MEET THE TEAM



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