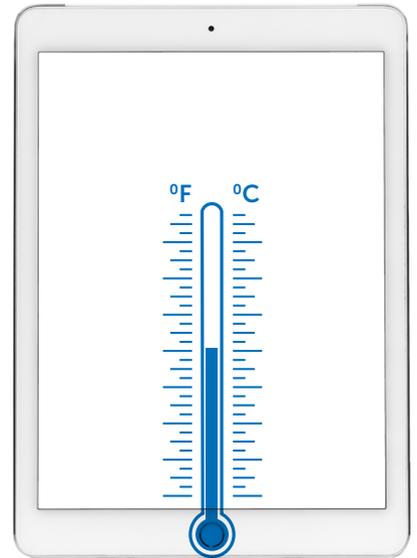


## Hot topic

### Holiday pay latest: Northern Ireland Court of Appeal responsible for employers' holiday blues?



As we approach the summer holiday period, the Courts also continue to have the topic of holidays, or rather holiday pay, on their mind. The Northern Ireland Court of Appeal (NICA) has given judgment in the case of *Chief Constable for the Police Service of Northern Ireland -v- Agnew & Others* last week.

Four of the grounds of appeal are of general interest to all who have been following the holiday pay developments. They were:

1. what is a series of deductions for the purposes of an unlawful deductions of wages claim? And does the three month rule set out in *Bear Scotland* apply?
2. is annual leave entitlement to be taken in a particular sequence?
3. what is the method of calculation of holiday?
4. what is the appropriate reference period?

From a Northern Irish employer's perspective the conclusions reached by the NICA will be far from welcome. The decision of the NICA is not formally binding on tribunals in Great Britain who are required to follow *Bear Scotland Ltd*. This said, the wording of the legislation in Northern Ireland interpreted by the NICA (the Employment Rights (Northern Ireland) Order 1996 (ERO)) is identical to the wording in the equivalent British legislation, the Employment Rights Act 1996. No doubt this decision of the NICA will provide strong persuasive authority on any future appeal in Great Britain which may also seek to argue that Mr Justice Langstaff was wrong in *Bear Scotland*.

#### The three month rule – background

The three month rule was identified by the Employment Appeal Tribunal (EAT) in 2014 when the case of *Fulton v Bear Scotland* was first appealed. The 'three month rule' meant that workers would usually lose the right to claim back pay for underpaid holidays where there is a period of three months or more between underpayments.

This is because the legislation says workers who want to make a claim for underpaid wages (including holiday pay) must do so within three months of the underpayment or, if there is a series of underpayments, then within three months of the latest underpayment. A claim could only be made outside this time limit if it was not reasonably practicable to bring the claim in time.

Until the 'three month rule' was identified, claimants were able to argue that any holiday underpayments were part of the same series and that they were, therefore, entitled to claim arrears dating back, in some cases, to 1998. The 2014 ruling in the *Bear Scotland* case, however, severely restricted the scope for back-pay claims spanning long periods much to the relief of many employers.

#### NICA decision on the three month rule

The NICA determined that a series of deductions is not ended by a gap of more than three months between unlawful deductions nor was it ended by a lawful payment. The NICA identified the relevant series of deductions as being 'a series in relation to holiday pay', meaning that lawful payments made whilst the claimants were at work (and not taking holiday) did not interrupt the series of deductions.

The NICA held that the claimants in this case were entitled to holiday pay payments going back to 1998, being the date on which the Working Time Regulations were implemented in Northern Ireland. It is of note that there is no legislation in place in Northern Ireland which limits arrears claims to two years as is the case in the rest of Great Britain.

The total bill for the PSNI in relation to this finding is reported to be in the region of £30million.

## Implications for employers with employees based in Northern Ireland

It appears that employees and workers in Northern Ireland will now be able to argue that any holiday underpayments were part of the same series and that they are, therefore, entitled to claim such arrears in pay dating back possibly as far as 1998, or to the date on which they commenced employment if after 1998.

There may still of course be some potential time issues from a jurisdictional perspective to be considered if the last in a series of underpaid holiday entitlements was some time ago, and such claims have not been issued until now.

## Is annual leave entitlement to be taken in a particular sequence: background

The Working Time Directive gives workers a basic entitlement to four weeks holiday each year. Regulation 16 of the Working Time Regulations (Northern Ireland) 2016 provided for an entitlement to eight days additional leave.

Recent case law has considered this question and concluded (previously) that the payment of 'normal pay' for holiday should only apply to the four weeks of the worker's total annual leave entitlement – in other words the Regulation 15 holiday, or the EU holiday. This approach was accepted by the EAT in *Bear Scotland* and the PSNI sought to rely on this principle. The NICA considered whether or not it was the case that the first four weeks of leave are taken first and exhausted before the worker draws on any other leave entitlement.

The Chief Constable submitted that when annual leave was taken the workers used up their minimum entitlement under the Directive first in the holiday year, and then the 'additional' Regulation 16 leave. The practical significance sought to be relied on being an increased chance of a gap of three months or more between underpayment.

## Did the NICA agree with the Chief Constable?

No. The NICA did not agree with the *Bear Scotland* approach or accept the PSNI's submissions. Rather it stated that a worker has an entitlement to take a day's holiday without reference to the 'type' or category of leave. The NICA agreed with the Tribunal that leave was not chosen or taken from sources (whether Directive leave, Regulation leave or contractual leave), but that holiday was holiday and that there is no requirement that this be taken in a particular order.

## What is the method of calculation of overtime to be taken into account in holiday pay?

Case law is clear that holiday pay should equate to normal pay. This question was a point of detail in relation to how that objective is achieved.

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The Tribunal at first instance considered whether average overtime or allowances to be calculated in relation to holiday pay should be calculated by reference to 365 days, or a fixed period of 260 working days, or by reference to actual days worked to work out the per day average. The Tribunal concluded 365 days, but this aspect of the Tribunal's decision was overturned by the NICA.

## What is the appropriate reference period?

The NICA accepted that the appropriate reference period for the assessment of normal pay is a question of fact in each case. It did not consider it appropriate to add anything further to this statement of principle.

The Court did however go on to encourage the parties to agree a pragmatic, administration-friendly method for calculating and paying 'normal pay' based on averages taken over a rolling 12 month period immediately preceding the period of leave. Although making this recommendation the NICA did note that there was no obligation on the parties to follow this advice.

## Comment

This decision will be a cause of concern to employers in Northern Ireland who have yet to address the manner in which they calculate and pay holiday, particularly given the potential of claims to be made going back over 20 years. We suspect that this case will also generate interest in Great Britain and may well be quoted in future cases seeking to challenge the Employment Appeal Tribunal decision in *Bear Scotland*.

Employers would be well advised to take specialist legal advice before making changes to the way holiday pay is calculated or compromising actual or potential back pay claims for holiday pay. Ensuring that any internal audits have the benefit of legal professional privilege may provide employers with some additional time in which to assess the potential financial liability and the approach to be taken. What is clear from this decision is the fact that the financial liability which many employers in Northern Ireland may face in unpaid holiday pay could be sizeable. We would expect to see a renewed focus on the topic of holiday pay from unions in Northern Ireland in light of this decision.

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