Judicial Communications Office

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Court of Appeal determines that claims for holiday pay shortfall can be taken back to 1998

Summary of Judgment

The Court of Appeal, sitting today in Belfast, has held in an appeal from the Industrial Tribunal that PSNI officers were entitled to pursue claims for a shortfall in holiday pay for the period beginning with the date of commencement of the Working Time Regulations (Northern Ireland) 1998 ("WTR (NI) 1998") and were not confined, as the Chief Constable had argued, to claiming only for the most recent period of unlawful deduction ending within three months of the date of lodging of their claim with the Tribunal. A significant determining factor in the court's decision was its application of the EU's Community law 'principle of equivalence'. It had earlier been accepted by all parties that the officers had, since 1998, been unlawfully underpaid by the Chief Constable in respect of holiday pay despite judicial clarification of the law in 2014.

Background

The issues in the appeal/cross appeal involved consideration of the legal consequences of the acknowledged failure, since the commencement on 23 November 1998 of the WTR (NI) 1998, by the Chief Constable to pay appropriate amounts of holiday pay to police officers. During that period the Chief Constable had calculated the amount of holiday pay entitlement by reference to basic pay but has since conceded that this calculation should have been by reference to 'normal pay' which covers both basic pay and matters such as overtime and various allowances over a reference period prior to the holiday. The appeal proceedings also involved the implications of a similar acknowledged failure by the Northern Ireland Policing Board in respect of the holiday pay entitlement of its civilian employees.

Claims were lodged in the Tribunal against the Chief Constable by 3,380 police officers and against the Policing Board by 364 civilian employees in 2015/2016. The claims were brought under Articles 45 and 55 of the Employment Rights (Northern Ireland) Order 1996 ("the ERO") alleging that there had been unlawful deductions from their pay and, in the alternative, under Regulation 30 of the WTR (NI) 1998 and under Regulation 43 of the Working Time Regulations (Northern Ireland) 2016 ("WTR (NI) 2016") alleging underpayments. The Tribunal adjudicated on the preliminary legal and jurisdictional issues after receiving written and oral submissions in respect of selected lead cases leaving the determination of any awards for a later hearing. It is from aspects of the adjudication of those issues that the appeals and cross appeals were brought.

Determination of the Appeal

After outlining: the relevant principles of the ERO at paragraphs [13] to [18]; the relevant principles of the Directives and WTRs (NI) at paragraphs [19] to [36]; and the evolving case law in relation to normal pay at paragraphs [37] to [43], the court proceeded to consider the following six 'Remaining Issues' identified by the parties for the court's determination:

[A] Is a police officer a "worker" within the meaning of Article 3(3) of the ERO? (See paragraphs [44] to [58])

If that were the case that would allow him/her to pursue a claim under the ERO for unlawful deductions from pay rather than having to pursue a claim under the WTRs (NI). One important difference between the ERO and the WTRs (NI) is that civilian employees, who fall clearly within the ERO's definition of 'workers', may present claims for unlawful deductions/underpayment under *both* the ERO *and* the WTRs (NI). Police officer claimants, if they are not workers within the terms of the ERO, are confined to pursuing claims for underpayment of holiday pay under the WTRs (NI). That is significant because, unlike the provisions in the WTRs (NI), Articles 45 and 55 of the ERO expressly provide for claims in respect of 'a series of deductions' rather than simply the deduction made within three months before the lodging of the claim. Giving judgment Lord Justice Stephens[1] stated that the court considered that police officers do not fall within the statutory definition of a worker contained in Article 3(3) of the ERO. Police officers were, however, 'workers' within the autonomous Community law concept. For reasons given later in the judgment it was unnecessary to determine whether as a consequence of this latter finding the ERO should be 'read down' or disapplied in part.

[B] Does the principle of equivalence require that they must be treated as being entitled to the remedy provided by Article 55 of the ERO for unlawful deductions or does it require that the remedy provided by Regulation 30 of the WTR (NI) 1998 and Regulation 43 of the WTR (NI) 2016 must be applied to afford a right to present a complaint with regard to a series of underpayments of holiday pay? (See paragraphs [59] to [87])

The EU's Community law principle of equivalence requires that national remedies for breaches of Community rights (such as those found in the WTRs (NI)) must be no less favourable than those available in similar domestic proceedings (such as those found in the ERO). The Tribunal had earlier found that not to afford the rights referred to in this question amounted to a breach of the principle of equivalence. The court considered that proceedings under ERO provisions constituted 'similar proceedings' to those under the WTRs (NI) and that the national remedies for breaches of Community rights under the WTRs (NI) were less favourable than those available in the similar domestic proceedings under the ERO. This was because they did not make the same provision affording a right to claim for a 'series of underpayments' of holiday pay allowing such a claim to stretch back in time but rather curtailed the Tribunal's jurisdiction to dealing with claims under the three month rule. In

[1] Who sat to hear the appeal along with Lord Justice Treacy and Mr Justice O'Hara

consequence the court upheld the Tribunal's conclusion that words should be read into the relevant provisions of the WTRs (NI) to make them comply with the principle of equivalence in this context. It did, however, differ from the Tribunal regarding the precise form of words to be added (see paragraph [83]).

[C] Is the 'series of deductions' provided for in Article 55 of the ERO ended, as a matter of law, by a gap of more than 3 months between unlawful deductions and/or by a lawful payment or is the question of what is a 'series' a question of fact to be decided on the facts of each case? (See paragraphs [88] to [110])

The Chief Constable and Policing Board, relying on the judgment of Langstaff J in *Bear Scotland Limited* v. *Fulton* at paragraphs [79] to [81], sought to argue that a gap of more than three months in a series of unlawful deductions from holiday pay would break the series. The court considered that such an approach would lead to arbitrary and unfair results. As a matter of the proper construction of the ERO the court concluded that a series is not broken by a gap of three months or more and that identification of the factual link in the alleged series is what answers the question of whether correct payments of holiday pay breaks the series. Lord Justice Stephens stated that the court considered that the factual link in these cases is the common fault of paying basic pay as holiday pay regardless of any consideration of overtime or allowances.

[D] Is one required to assume that the 4 weeks' paid leave mandated by Regulations 13 and 16 of the WTR (NI) 1998 Regulations 15 and 20 of the WTR (NI) 2016 is taken first and exhausted before the worker draws on any (additional leave) entitlement under Regulations 13A of the 1998 Regulations or Regulation 16 of the 2016 Regulations or other sources of entitlement to annual leave? (See paragraphs [111] to [120])

The Tribunal had earlier found that the 20 days' leave, the 8 days' additional leave provided for by the provisions of the WTRs (NI) noted above and, further, the 2 days' leave provided by the conditions of police service were all indistinguishable from each other. The court agreed with the Tribunal, finding that a worker has an entitlement to all leave from whatever source and there is no requirement that leave from different sources is taken in a particular order.

[E] If one is required to calculate a daily rate for overtime that forms part of a worker's normal pay in order to calculate holiday pay that is due, is the lawful approach to divide the number of working days in the four weeks leave period (20) by the number of calendar days in the reference period or the number of working days in that period? (See paragraphs [121] to [135])

In practical terms the issue was whether holiday pay should be calculated by reference to 365 days, a fixed period of 260 working days, or actual days worked to determine the daily average. The Tribunal had earlier found that 365 was the appropriate divisor for these purposes. The court, however, observing that 'weeks' is the time period noted in Regulation 13(1) of the WTR (NI) 1998 and in the EU Directives giving rise to these Regulations,

considered that if the applicable reference period is 12 months a divisor of the 4 weeks' annual leave would be 52 giving a fraction of 4/52. Using a worked example it showed that holiday pay entitlement calculated on the basis of 20/365 days would mean that the worker would receive a lesser amount than applying the 4/52 fraction which the court considered could not be correct. In overturning the Tribunal's finding on this issue it concluded that what amounted to normal remuneration was a question of fact just as the applicable reference period was a question of fact. While the court gave illustrations it emphasised that apart from establishing that point of principle the outworkings of claims are best addressed in evidence before the Tribunal in individual cases.

[F] Having regard to the fact that the parties agree that the appropriate reference period for the assessment of normal pay is a question of fact in each case, is the court in possession of sufficient information to give the parties any assistance as to what is likely to be the appropriate period in the case of a claimant whose case contains no features particular to that person (for example, maternity absence, illness, reserve duty etc.)? (See paragraphs [136] to [146])

Acknowledging the parties' agreement with the Tribunal finding that the reference period is fact sensitive in each case, the court offered an illustration of a claim for past losses in the previous year where a twelve month reference period would have unfairly operated to the detriment of a claimant as that period will have included the period of holiday pay in that year from which there have been unlawful deductions. Lord Justice Stephens emphasised that this is a question of fact in an individual case and that the court was not in possession of sufficient information to determine whether these facts do or do not apply. He did not consider it appropriate to add anything further but did 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' while accepting that there was no obligation on them to do so.

The lead cases will now continue before the Tribunal, governed by the Court of Appeal's findings, to a final determination.

NOTES TO EDITORS

1. This summary should be read together with the judgment and should not be read in isolation. Nothing said in this summary adds to or amends the judgment. The full judgment will be available on the Judiciary NI website (www.judiciary-ni.gov.uk).

ENDS

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