# HR in the East Midlands

November 2022

## In Deep with Darren

This month Darren's article looks at the potential implications of the Retained EU Law (Revocation & Reform) Bill on rights related to annual leave. He also covers a pending Supreme Court case on restricting back pay claims.

Earlier this year, the Supreme Court cleared up some key issues around the calculation of holiday pay (Harpur v Brazel Trust – don't worry I'm not going over that again). But this subject just won't stand still. The Government's **Retained EU law (Revocation and Reform) Bill** which is currently making its way through parliament has the potential to cause absolute chaos. As currently drafted it will abolish the Working Time Regulations – including the right to paid annual leave – at the end of 2023.

I can't quite believe that the Government will actually go through with this. Ministers have the power under the Bill to choose to keep specific laws in place that would otherwise be repealed.

I would assume that even if the Government was keen to see the 48-hour week and rules on rest breaks being abolished, it would intervene to keep the right to paid annual leave. I remember when the Working Time Regulations first came in and at that time about 3 million workers – mostly part-time – were not entitled to any paid annual leave at all. Surely the Government does not intend to return to those days? We will have to wait and see.

But even if the right to annual leave is retained, the Bill creates a whole new level of uncertainty about what that right consists of. The Bill abolishes the supremacy of EU law and gives the Court of Appeal and the Supreme Court the right to depart from decisions of the European Court of Justice. That could chaos when it comes to annual leave because so many of the established rules – from the carry-over of annual leave when the employee is sick, to the inclusion of overtime and allowances in the calculation of holiday pay – depend entirely on ECJ decisions. If the Retained EU Law Bill goes through as it is, I can foresee years of confusion while we argue about these issues all over again.

It is with that context in mind that we can look at the next case on annual leave to be considered by the Supreme Court. This is **Police Service of Northern Ireland v Agnew and others**.

This has taken some time to come before the Supreme Court since it was decided by the Northern Ireland Court of Appeal back in 2019 but it is now scheduled to be heard on 14 December. The case is about the inclusion of overtime in the calculation of holiday pay but the key area of interest that it holds is in the question of back pay.

If an employer has failed to calculate holiday pay correctly then that will lead to an unlawful deduction from wages every time there is an underpayment. The time limit for bringing a claim is three months from the date of the deduction or, where there is a series of deductions, the latest deduction in the series. That means that if a worker is subjected to a series of deductions stretching over an extended period then they can bring a claim provided they do so within three months of the last deduction even if the claim is made more than three months after the first and subsequent ones.

The Agnew case is concerned with a different limitation that was imposed by the EAT in 2014 case of Bear Scotland v Fulton where in a series of deductions there is a gap of more than three months between two of the deductions.

Before 2014 it was taken for granted that a series of deductions could stretch back over an indefinite time period. The Government sought to limit the scope of back pay claims in the **Deduction from Wages (Limitation) Regulations 2014** which provided that a series of deductions could not stretch back more than two years. At almost the same time the EAT added another restriction. In **Bear Scotland Ltd v Fulton** the EAT held that a series would be broken if two deductions were separated by a gap of three months or so. The logic was that the law intended that a worker who left it for more than three months before claiming for a deduction from wages should lose the right to claim and it didn't seem right that an out-of-date claim could be revived just because another deduction was made some time later.

The result was that back pay claims for holiday pay were severely restricted as many workers would take three months or more between periods of annual leave that might result in an underpayment. At the very least, claims brought by groups of workers would be complicated by the fact that the period between each individual payment of holiday pay for each individual worker would have to be analysed to make sure that they formed a continuous series.

The Bear Scotland approach was widely criticised – in my view, rightly so. The problem with the EAT's approach was that it was completely made up. There is just no suggestion in the legislation itself that the time limit works in this way the EAT said it did. The 'three-month gap rule' is just plain wrong. The Northern Ireland Court of Appeal in Agnew also thought it was wrong and ruled that the question of whether a number of underpayments form a single series is a question of fact for the Tribunal to decide. The fact that more than three months passes between two deductions does not mean that the series is broken.

Decisions from Northern Ireland are not binding on the rest of the UK so as things stand the Bear Scotland approach is still binding on Tribunals even if most employment lawyers think it is wrong. However, a ruling from the Supreme Court will put the issue to rest – one way or the other.

If, as I expect, the Supreme Court rules that the 'three-month gap' rule does not exist, then that leaves those whose holiday is underpaid able to claim up to two years of backpay even if there are significant gaps between the holidays that they have taken. Large scale group back pay claims will be easier to bring.

The two-year limit may also be challenged. It is not entirely clear that it complies with EU law and that still matters – even after Brexit. Earlier this year, the Court of Appeal in **Smith v Pimlico Plumbers** accepted that when an employer is not providing proper paid leave to a worker then they can't lose their right to claim for unpaid annual leave while they are still employed. They can carry over their entitlement until their employment ends. On that basis it is hard to see how someone claiming for unpaid annual leave can have that claim limited to two years' worth of backpay.

Whether anyone will have time to bring a case on that point before the Retained EU Law Bill comes in and plays havoc with our understanding of how the law on paid annual leave works, we will have to wait and see. Unless the Government changes course, 2023 is going to be an action-packed year for employment law.