



Press Summary

4 October 2023

Chief Constable of the Police Service of Northern Ireland and another (Appellants/Cross-Respondents) v Agnew and others (Respondents/Cross-Appellants) (Northern Ireland)

[2023] UKSC 33

On appeal from [2019] NICA 32

Justices: Lord Hodge (Deputy President), Lord Briggs, Lord Kitchin, Lady Rose, Lord Richards

Background to the Appeal

This appeal concerns the entitlement of police officers and civilian staff in Northern Ireland to recover sums which their employer should have paid to them as holiday pay when they took paid annual leave.

The Respondents are lead claimants selected from 3,380 police constables and 364 civilian employees of the Police Service of Northern Ireland who have brought claims relating to underpaid holiday pay against their employer. The Appellants, the Chief Constable of the Police Service of Northern Ireland and the Northern Ireland Policing Board, accept that the Respondents were underpaid but dispute the period for which the Respondents are entitled to recover.

The relevant legislation is the Working Time Regulations (Northern Ireland) 1998 and 2016 (together, “the **WTRs (NI)**”) and the Employment Rights (Northern Ireland) Order 1996 (“the **ERO**”). The WTRs (NI) implemented the EU Working Time Directives 1993 and 2003 in Northern Ireland (“the **WTDs**”). These required Member States to ensure that every worker is entitled to at least four weeks’ paid annual leave. The view for many years was that holiday pay should be equivalent to a worker’s “basic pay”. However, it has since been established that holiday pay should be calculated by reference to a worker’s “normal pay”, and this should include an element to reflect the overtime that the worker usually works.

The Respondents, who were only paid their basic pay as holiday pay but who regularly worked overtime, now seek to recover the amount by which they were underpaid. The Appellants rely on a provision in the WTRs (NI) that would restrict the police officer

Respondents to recovering sums underpaid in the three months before their claims were brought before the Industrial Tribunal. The Respondents rely on an alternative provision in the ERO which would allow them to claim underpayments arising from a series of payments, provided that the last underpayment in the series was not more than three months before the claim was brought before the Industrial Tribunal (“the **Series Extension**”).

The Respondents brought a claim before the Industrial Tribunal, which held that all the Respondents could rely on the Series Extension and that most if not all the payments were in a series for that purpose. The Appellants appealed to the Court of Appeal which dismissed the appeal as regards the issues which are the subject of the present appeal. The Appellants now appeal to the Supreme Court.

Judgment

The Supreme Court unanimously dismisses the Appellants’ appeal. Lord Kitchin and Lady Rose give a joint judgment with which the other members of the Court agree.

Reasons for the Judgment

The statutory provisions

There are two statutory routes through which a worker can bring a claim relating to underpaid holiday pay. First, the WTRs (NI) provide that a worker may bring a complaint before an Industrial Tribunal that an employer has failed to pay statutory holiday pay [31]. A complaint brought under the WTRs (NI) can ordinarily only extend back three months from the date of claim [33].

Second, the ERO confers a right on workers not to have unauthorised deductions made from their wages [35]-[36]. “Wages” are defined to include holiday pay. The ERO provisions regarding limitation are more favourable to a claimant and include the Series Extension [38].

The Appellants accept that the civilian staff Respondents can bring a claim under the ERO but contend that the police officer Respondents cannot because they are not employees or workers for the purposes of the ERO, although the rights under the WTRs (NI) are expressly extended to them [37].

Can the police officer Respondents rely on the Series Extension when bringing their claim for unpaid holiday pay before the Industrial Tribunal?

The EU principle of equivalence requires that national procedural rules applicable to EU rights must not be less favourable than those governing similar domestic actions [50]-[57]. The police officer Respondents argue that the principle of equivalence applies in this case: the remedy under the ERO is more advantageous than the remedy they have to enforce their EU-derived right to four weeks’ paid leave under the WTRs (NI) [38].

The Supreme Court holds that the EU principle of equivalence is infringed by the inability of claimants under the WTRs (NI) to benefit from the Series Extension available to claimants under the ERO [78]. The Court of Appeal was right to determine that the objective, purpose and essential characteristics of the ERO and WTRs (NI) are so similar that they should be regarded as similar domestic proceedings [59]-[61]. When considering whether a claimant should be able to rely on the procedural rules applicable to a comparable action, there is no requirement that the claimant must be within the class of people who could bring a claim under that comparable provision [67].

The appropriate remedy for the breach is to construe the WTRs (NI) so that they comply with the EU principle by reading the Series Extension into the relevant part of the WTRs (NI) such that all the Respondents can rely on it [75].

What is the scope and meaning of the Series Extension?

The purpose of the ERO provisions regarding unlawful deductions is to protect workers, some of whom may be vulnerable, from being paid too little for the work they do [87], [112]. The Series Extension provides protection against the operation of the short limitation period for a worker who suffers repeated deductions from their wages such that they are paid too little on a series of occasions [90], [117].

What constitutes a series is a question of fact that must be answered in light of all relevant circumstances [127]. The Court of Appeal was right to find that each unlawful underpayment was linked by the common fault that holiday pay had been calculated by reference to basic pay only [130]. A series does not require a contiguous sequence of deductions and a gap of more than three months between deductions does not necessarily bring a series to an end [117]-[125], [128]. A correct payment of holiday pay does not break a series if that correct payment was calculated by reference to basic pay [130].

Remaining Issues

There is no legal requirement that leave derived from different sources must be taken in a particular order [132]-[138]. It is inappropriate to use the number of calendar days in the reference period when calculating a worker's normal pay [139]-[142]. The appropriate reference period in any case is a question of fact [143].

References in square brackets are to paragraphs in the judgment.

NOTE:

This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at: [Decided cases - The Supreme Court](#)