WRIGLEYS
SOLICITORS

EMPLOYMENT LAW BULLETIN

OCTOBER 2023

Welcome to Wrigleys' Employment Law Bulletin, October 2023.

We begin this month with an important judgment of the Supreme Court in relation to holiday pay claims. The decision in Chief Constable of the Police Service of Northern Ireland (PSNI) and another v Agnew and others confirms that a series of unlawful deductions from wages will not be broken by a gap of three months.

We consider the case of MXX v A Secondary School in which the Court of Appeal decided that a work experience student on an informal week-long placement at his old school was in a "role akin to employment" for the purposes of a vicarious liability claim arising from sexual assault of a year 9 pupil.

And finally, the employment tribunal decision in Miss AB v Royal Borough of Kingston upon Thames provides useful guidance for employers on policy and practice in supporting trans employees.

The next in our series of free virtual Employment Brunch Briefings takes place on 5 December 2023 and is our annual employment law update, taking a look at the key cases of the last 12 months and important upcoming changes to be aware of in 2024. We hope to see you there. Please click the link below to book your place.

– Alacoque Marvin, Editor **alacoque.marvin@wrigleys.co.uk**

Contents

How far back can holiday pay claims go?

Article published on 25 October 2023

Supreme Court: 3-month gap will not break a series of unlawful deductions.

Holiday pay continues to prove a headache for employers, particularly for those with variable hours and part year workers, with the Supreme Court confirming last year in Harpur Trust v Brazel that part year workers, such as term time only staff who are contracted across the whole year, are entitled to the full 5.6 weeks' statutory paid leave no matter how many weeks they work. See our article from August 2022 for details: Statutory minimum holiday pay cannot be pro-rated for part year staff.

We are still awaiting the Government's response to its Consultation on calculating holiday entitlement for part year and irregular hours workers which closed in March and seeks to bring holiday entitlements for term time only staff into line with full year part time workers.

A related area of uncertainty and concern for employers has been the extent of arrears which workers might be awarded in tribunal for underpaid holiday pay. We are often asked whether claims could be brought for alleged underpayments dating back to the start of employment.

Holiday pay claims for unlawful deductions from wages

Holiday pay claims are usually brought as claims for unlawful deductions from wages under the Employment Rights Act 1996. These claims must be brought within three months of the date of the underpayment. Where there is a series of deductions, the claim must be brought within three months of the last deduction in the series. This means that the three-month window for claims can re-open every time an incorrect payment is made. But the case law on what is meant by a "series" of deductions, and so how far back arrears can go, has been unclear for some time.

The Employment Appeal Tribunal in *Bear Scotland Ltd v Fulton* determined that a series of deductions would be broken by a gap of more than three months between unlawful deductions. However, subsequent cases suggested this decision was not correct.

A recent case in the Supreme Court has now brought much needed clarity, confirming that a three-month gap will not of itself break a series of unlawful deductions. This decision potential increases the level of risk for employers, particularly those based in Northern Ireland.

Case details: ***Chief Constable of the Police Service of Northern Ireland (PSNI) and another v Agnew and others***

3,380 police officers and 364 civilian staff in the PSNI brought claims for arrears of holiday pay stretching back to the date when the Working Time Regulations (Northern Ireland) 1998 (WTRNI) came into effect. Eight years after the first of these claims were brought, the Supreme Court has now confirmed that the claimants are entitled to considerable arrears dating back in some cases to 1998, which may amount to payouts totalling £30m.

This judgment is a landmark ruling which applies across the UK, but it will have a very different impact depending on where employees are based. In Great Britain, the Deduction from Wages (Limitation) Regulations 2014 act to limit awards for holiday pay brought under an unlawful deduction from wages claim to a maximum of two years before the date the claim was brought. In Northern Ireland there is no such statutory limit and such claims arising from the WTRNI can go back as far as 1998.

What is included in holiday pay?

The arrears in this case arose as the claimants were paid only basic pay when they took annual leave. European Court of Justice and UK case law made clear some years ago that pay during the four weeks' minimum leave under the European Working Time Directive should be based on "normal remuneration" rather than basic pay. This was in order to ensure that workers are not disincentivised from taking their leave, thus risking their health and wellbeing. In other words, it should include any regular payments over and above basic pay which are linked intrinsically to the performance of tasks required to be carried out under the contract. This includes regular overtime, shift allowances and on-call payments.

What is a series of deductions?

The PSNI argued that the claimants should not be awarded arrears dating back many years as the series of underpayments had been broken by a gap of three months between unlawful deductions or by a correct and lawful payment (where the worker had not earned any additional remuneration in the relevant period and so was due only basic pay for their leave). Based on this argument, the PSNI sought to limit arrears to around £300,000.

When considering what was meant by a series of deductions, the Supreme Court agreed with the Court of Appeal that a "series" means a number of things of a kind which follow each other in time. Whether particular underpayments form a "series" is a question of fact for tribunals in each case, taking into account all relevant circumstances including the similarities and differences in the deductions; their frequency, size and impact; how they came to be made and applied; and what links them together.

In this case, the Supreme Court agreed that each unlawful deduction in relation to holiday pay was factually linked to the payment before by the "common fault or unifying vice" that holiday pay was calculated by reference to basic pay rather than normal pay. Intervals of more than three months did not in and of themselves break the series or bring it to an end. And the series was not broken or brought to an end by holiday payments which happened to be correct as these still had the "common fault or unifying vice" of being calculated by reference to basic pay rather than normal pay.

Quantifying the risk of holiday pay claims

PSNI v Agnew provides some much needed clarity on the extent of arrears which might be awarded in a claim for unlawful deduction from wages. Payments which include an element of holiday pay calculated on the same unlawful or incorrect basis will form a series, and there will be no break in the series where payments are separated by a gap of three months. Claims can be brought within three months of the date of the last incorrect payment.

In Northern Ireland, arrears might go back as far as 1998. In Great Britain, awards for such claims will be limited to two years from the date the claim is brought.

If they have not already done so, employers should undertake a review of the potential risk of claims for arrears of holiday pay, seeking specialist legal advice. This review should also take into account the risk of other potential claims relating to holiday pay where arrears can go back further, including breach of contract claims and claims under the Part Time Workers Regulations, where it is alleged that the rate of holiday accrual compared to full time workers was less favourable.

If you would like advice regarding a review of potential holiday pay risks and next steps, please contact Alacoque Marvin at alacoque.marvin@wrigleys.co.uk.

Could your organisation be liable for the wrongful acts of work experience students?

Article published on 24 October 2023

Work experience student was in a role akin to employment but school was not vicariously liable for sexual assault.

We have previously reported on key cases on vicarious liability, which is where an organisation is sued in relation to harm caused by an employee or someone in a similar role.

See our recent article Could schools and charities be liable for the wrongdoing of unpaid volunteers, including trustees and governors? for more detail on the key legal questions in vicarious liability claims.

The courts will ask two key questions to decide whether vicarious liability arises:

1. Is the relationship between the organisation and the wrongdoer one of employment or "akin to employment"?
2. Is there a close connection between the wrongdoing and the acts the wrongdoer was authorised to do?

In a recent case, the Court of Appeal considered whether a school should be held vicariously liable for the sexual assault of a Year 9 pupil by an 18 year old work experience student.

Case details: *MXX v A Secondary School*

An 18 year old college student hoping to become a PE teacher (X) was given a week's work experience within the PE department of his former school. X assisted the PE teachers and worked under their supervision by, for example, running warm ups, coaching groups of students, assisting with sorting out equipment and washing bibs. X was expected to attend during each school day and there was a strong expectation that he would attend after school clubs. Pupils were told to treat X as they would any member of staff.

X came into contact with a Year 9 pupil (Y) during the week. Very soon after the work experience ended they made contact on Facebook and they began a relationship. X was arrested on charges including sexual activity with a child (Y) which took place some six months after the work experience week.

Y brought a personal injury claim in the high court seeking damages of £27,500 for psychiatric illness from the school arising from the sexual assault by X. The High Court initially dismissed the claim on the basis that X was not in a role akin to employment during his work experience, taking into account that: the school was not benefiting from the assistance of X, rather it was doing him a favour by giving him the experience; that X's tasks were "minor ancillary tasks"; and that X was supervised and closely directed by the school at all times.

On appeal, the Court of Appeal concluded that the school was not vicariously liable but disagreed with the High Court in some respects.

Work experience student was in a role akin to employment

Importantly, the Court of Appeal disagreed with the High Court and ruled that X was in a role akin to employment. In making this decision it took into account that:

- X was carrying out some of the work of the PE department and therefore the business of the

school;
- the tasks X undertook provided some benefits to the school, the staff and the pupils and there were "generic benefits" to the school from providing work experience opportunities in relation to encouraging new entrants to the profession;
- close direction and control of X by the school was suggestive of an employment type relationship;
- the requirement on X to understand and accept the school's safeguarding policy showed X was being treated in a similar way to other staff; and
- X was held out to pupils as being akin to a junior teacher or teaching assistant.

Although the Court of Appeal held (in contrast to the High Court) that X began to groom Y during the work experience week, it agreed that there was not sufficient connection between the wrongdoing and the tasks X was authorised to do. In making this decision it took into account that: X had no caring or pastoral responsibility for the pupils (an important factor in previous child abuse cases); X was or should have been kept under close supervision at all times; X held no position of authority over the pupils; no communication took place via Facebook while X was on work experience and such communication was specifically prohibited by the school.

Comment

This judgment follows the approach taken in other cases, such as that in our linked article above regarding a volunteer elder of a religious organisation. It highlights that individuals who are carrying out roles within an organisation on a voluntary / unpaid basis can be in a role akin to employment for the purposes of a vicarious liability claim. It also highlights that the role within the organisation may be fairly limited and short-lived but still give rise to a potential claim, depending on the nature of the tasks being carried out.

There are heightened risks of vicarious liability claims relating to abuse where the role includes care or responsibility for children and vulnerable adults. This is because it is likely to be found that the wrongdoing was closely enough connected to the role in those cases.

Organisations should ensure that volunteers, including work experience students of any age, are provided with clear guidance at the outset on relevant policies and codes of conduct, including e-safety and social media policy.

Communicating the remit of a work experience student's role to them clearly, and asking them to sign a written document setting out that remit, will help to clarify the role for all parties and evidence the tasks they were asked to do.

Organisations should be alive to the risks of entering into less formal arrangements with individuals who are known to them as these could give rise to unclear boundaries and the lack of an evidential papertrail.

Transgender employee wins direct discrimination claim for deadnaming

Article published on 31 October 2023

Employee received £25,000 in compensation for repeated incidents over more than two years.

Trans rights in the UK have been hotly contended over the last few years and we continue to see useful judgments from the employment tribunal and courts covering trans rights in an employment context.

Last month we highlighted the case of *Fischer v London United Busways Limited* in our article

'Employment Tribunal indicates that offensive term is not 'gender-neutral' in consideration of gender reassignment discrimination' where an employee unsuccessfully brought claims for discrimination because of their transgender status. A recent decision provides an example of where the claims of a transgender employee were upheld against their employer.

Case details: ***Miss AB v Royal Borough of Kingston upon Thames [2023]***

The claimant, AB, gave eight months' notice of her intention to transition before eventually doing so in July 2020. In September 2020 AB raised several concerns that she had about proposed highway lighting. Her managers were initially split on her view, with some of the managers insisting they did not want to hear 'no' and that her role was to get on with finding solutions.

This led to a worsening relationship between AB and her managers, until in December 2020 she wrote to one of them claiming that she had been singled out and raised the prospect that she was subject to discrimination. The manager in question demanded an apology from AB for making this allegation, and the claims were not investigated.

Eventually AB raised a formal grievance in Summer 2021 which, among other things, claimed she had suffered detrimental treatment because of her transition. This treatment included how the Council had responded to her initial complaints and concerns and how she had seen a reduction in her role and responsibilities over time.

Against this background, AB experienced what the tribunal described as a 'long and painful struggle' with the Council's systems to change her name. The tribunal established that, amongst other incidents, AB suffered deadnaming (where a trans person's pre-transition name is used post-transition) in respect of the following:

- She was unable to change her name on her pension records until August 2022;
- She could not update her name on a highways complaint system until February 2022;
- The Council's IT systems, in particular directories and emails, were not fully changed until March 2023; and
- It took the Council two years from AB's transition to issue a correct door pass that gave her access to the offices and to operate printers. When AB did get into the building, she found her locker had a post-it note on it with her deadname crossed out and her post-transition name written on it, in full view of everyone. This was not rectified until April 2022.

On the evidence presented, the tribunal upheld AB's claims of direct gender reassignment discrimination for the following events:

- The various deadnaming incidents set out above;
- The incident whereby the manager demanded an apology from AB for making allegations against him; and
- AB's removal from various areas of work and responsibility.

Whilst the tribunal noted that the Council had made significant strides forward in regards to updating policies, procedures and training around supporting transgender people, it noted that the policies were significantly out of date at the time of the claimant's transition and it was critical of the failure of the Council to deal with AB's complaints when they arose. In particular, between December 2020 and the investigation of AB's grievance in mid-to-late 2021, the tribunal noted that no proper investigation into the issues complained of was made and the evidence provided suggested that AB's managers did not take her claims seriously.

The tribunal awarded the claimant £21,000 as compensation for injury to feelings, with £4,443 awarded in interest, calculated from the date of the earliest incident of direct discrimination.

Comment

This case is a first-instance decision and as such creates no precedent for other cases. However, there is much here for employers to learn from.

The tribunal was critical of the Council's failure to grapple with AB's complaints and, on the balance of probabilities based on the evidence presented, it was minded to find the failure to investigate linked to her gender reassignment. In a similar vein, the tribunal found that the Council's decision to remove her from certain roles and responsibilities was also because of her gender reassignment.

This case underlines the risks presented by the burden of proof in discrimination claims where, if a claimant can establish a prima facie case of discrimination, the burden shifts to the respondent to prove they did not take their action for discriminatory reasons. In this case it seems that, by failing to investigate AB's complaints, the Council was unable to evidence any lawful reason for the less favourable treatment.

The other key lesson here sits parallel to the Fischer case we reported on last month, in that the Council were also shown to have outdated policies and had failed to properly incorporate the Equality Act 2010 into either its policies or working practice. In addition, the Council did not have adequate training or protocols to deal with the practicalities of the claimant's transition.

Employers would be wise to learn from these two cases which have appeared in quick succession. It is advisable to ensure that policies and protocols for supporting trans employees are in place and kept up to date, rather than waiting until the time a trans employee actually needs that support.

If you would like to contact us please email
alacoque.marvin@wrigleys.co.uk

www.wrigleys.co.uk