

Is Agnew the
last word on
holiday pay?

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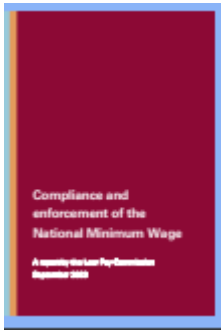
Introduction



‘ Enforce for good’ – effectively enforcing labour market rights in the beyond

[GOV.UK](https://www.gov.uk)

name and shame non payment of NMW



Enforcement of the NMW

Claims for holiday pay and UDW in the ET's

Year /No.s	UDW	Working Time
2013/2014	51,981	70,865
Success rate	6%	4%
2020/2021	16,049	13,858
Success rate	9%	7%

Recap – Entitlement to holiday

- 4 weeks paid holiday Reg 13 of the Working Time Regulations (WTR) 1998 implementing the 4 weeks leave under Art 7 of the Working Time Directive (WTD)
- 1.6 weeks holiday Reg 13A of the WTR introduced by the Working Time (Amendment) Regulations 2007
- Equivalent provision in Northern Ireland – the Working Time (NI) Regulations 2016 which replace the Working Time (NI) Regulations 1998

Calculating holiday pay

- A worker is entitled to be paid in respect of any period of annual leave to which he is entitled under reg 13 and reg 13A at ***the rate of a week's pay*** in respect of each week of leave [Reg 16 WTR]
- A week's pay is calculated in accordance with the “complicated” provisions of s.221 to 224 of the Employment Rights Act 1996.
- Broadly depends on whether a worker has a contract for
 - Normal working hours or
 - No normal working hours
- *Bamsey v Albon Engineering and Manufacturing plc [2004]* – Court of Appeal held that only compulsory and guaranteed overtime was included within normal working hours under the domestic provision

Calculating holiday pay - 2

- Bamsey was overturned by subsequent cases:
 - ***Williams v British Airways [2012]*** – normal pay includes payments linked to the task the worker is required to carry out under their contract and payments for seniority and length of service
 - ***Lock v British Gas [2014]*** – holiday pay at normal pay so as not to deter workers from taking holiday
 - ***Bear Scotland v Fulton and anor [2015]*** – normal pay includes voluntary overtime worked over a sufficient period of time
- Result = in broad terms elements of pay directly linked to the workers work or contractual duties (excluding genuine expenses) count towards calculating the 4 weeks holiday pay

Enforcing the right when holiday pay is underpaid

Two routes to enforcing rights:

1. Under the WTR 1998

A claim can be made for non payment or an underpayment under reg 30(2) within 3 months less one day of the date payment should have been made.

2. Section 23 of the ERA 1996

A claim for unlawful deduction from wages can be made within 3 months less one from the date of the payment from which the deduction or where there are a series of deductions the date of the last deduction applied since ***Revenue and Customs Commissioners v Stringer [2009] UKHL***

BUT...

Limits on the right to claim an unlawful deduction from wages

- ***Bear Scotland v Fulton [2015]*** – two tests 1, series is factually linked where there is “sufficient similarity of subject-matter” and 2. “there is a sufficient frequency of repetition” – A gap of three months breaks the chain in the series – handed down 4 November 2014
- Section 23(4A) ERA 1996 limits the amount of back pay that can be claimed for holiday pay owed to two years from the date a claim is presented to the employment tribunal in force since 8 January 2015
- ***King v Sash Window Workshop and anor [2018]*** – a worker’s entitlement to 4 weeks holiday must not be interpreted narrowly and beyond what was strictly necessary – those denied the right can carry over entitlement to termination
- ***Smith v Pimlico Plumbers Ltd [2022]*** – applied ***King*** so that a worker who takes holiday but is not paid for it can carry the right to be paid over until termination

The facts in Agnew

- Brought by 3,300 police officers and 364 civilian employees
- Claim that employer had failed to include overtime pay in the calculation of holiday pay under:
 - The Working Time Regulations (NI) 2016 – similar to the WTR 1998 in GB
 - The Employment Rights (NI) Order 1996 – similar to ERA 1996
- The Chief Constable of the Police Services of Northern Ireland (PSNI) admitted that holiday pay was paid at basic rate in respect of the 4 week's leave
- PSNI did not admit that police officers were workers under the ER(NI) Order

Issues

1. Whether police officers were entitled to claim back pay?
2. How far back the claimants claims for underpaid holiday could go?
 - 2.1 Whether a three month gap broke the chain in a claim for a series of deductions?
 - 2.2 Whether a series of deductions could be broken by a lawful payment?
3. Whether there was a particular order the different types of leave under reg.13 (4 weeks) reg 13A (1.6 weeks) and any additional contractual holiday should be take?
4. How the daily overtime rate should be calculated?

What was decided?

1. That the police officers could claim backdated holiday pay as a series of deductions under the WTR(NI) 2016 by adding the following wording to reg 30(2)(a):

An industrial tribunal shall not consider a complaint under this regulation unless it is presented(a) before the end of the period of three months ...beginning with the date on which it is alleged that...the payment should have been made or if presented in respect of a series of payments of wages from which deductions were made, before the end of the period of three months beginning with the date on which it is alleged that the last in the series of such payments was made

What was decided?

2. A gap of three months does not automatically break a series of deductions so workers can claim underpaid back pay even if there is a three month gap between underpayments of holiday pay

2.1 Whether a deduction forms part of a series is a question of fact taking into account all relevant circumstances, incl.

- the similarity/differences of the underpayments
- how and when the payments came to be made
- what links the payments together
- the frequency of the payments
- the size and their impact

2.2 A lawful payment does not break the series

What was decided?

3. There is no legal requirement that holiday derived from different sources (Reg 13, Reg 13 A and contract) have to be taken in a particular order.
4. The number of days in the 4 week holiday period should be divided by the number of working days in the reference period and not the calendar days.

What are the implications for future claims for holiday pay?

- The judgment which applies to England, Scotland and Wales and should make it easier for workers to claim back pay where they have been underpaid not just holiday pay but other claims for unlawful deduction from wages under s, 23 ERA 1996 (and subject to the two year limit).
- That wording should be read into the Working Time Regulations to enable workers to claim holiday pay as a series of failures to pay holiday pay raises the question as to whether this provides a potential work around the two year limit for some workers.
- As all holiday (i.e. the 4 weeks basic holiday leave under reg 13 WTR, the 1.6 weeks holiday leave provided by reg 13A WTR and contract holiday leave) should be regarded the same even though they may be calculated differently is an issue which was considered in the consultation on Retained EU Law reforms which set out proposals for reform on the Working Time Regulations.

Government changes

- The Employment Rights (Amendment, Revocation and Transitional Provision) Regulations 2023 were published on 8 November 2023 following the Government's response to the consultations on Working Time Regulations (WTR). These propose to make the following amendments to the WTR :
 - Clarify the requirement that businesses do not have to keep a record of daily working hours if they are able to demonstrate compliance (with max wkly working time, length of night work etc) without doing so
 - Reg 13 (4 weeks holiday) and Reg 13A (1.6 weeks holiday) will not be amalgamated into a single entitlement of 5.6 weeks leave
 - Clarify what payments should be included in holiday pay for Reg 13 holiday
 - Repeal the provisions which allowed WTR holiday to be carried over as a result of COVID-19
 - Implement new rules for irregular hours and part year workers
 - Allow for rolled up holiday pay for irregular hours and part year workers
 - Provide for a right to carry over leave for those on maternity and other family leave, where worker unable to take leave due to sickness, where employer failed to recognise right to 4 weeks holiday or failed to pay

Any Questions?

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