

EMPLOYMENT

New Year, New Guidance on Holiday Pay?

UK Supreme Court's decision in PSNI v Agnew and others eagerly awaited

The much debated holiday pay case of Agnew has finally been heard by the Supreme Court, with a decision expected to follow in early 2023.

While the Court of Appeal's decision in this case only applies in Northern Ireland at present (the current precedent in England and Wales being the case of Bear Scotland, which itself is largely rendered as limited impact due to the GB statutory back-stop), any decision of the Supreme Court will be binding across the UK.

Although it is hoped this judgement will bring some much needed clarity to the complex issue of holiday pay calculation, it is difficult to see how it can, given the fact specific nature of the claim combined with the huge potential cost of remedy.

6 MIN READ

The holiday-pay conundrum: position pre-Agnew

In 2014, the case of *Bear Scotland* established the following rules for employers when calculating holiday pay:

- There is a distinction between annual leave entitlement under the European Working Time Directive (“**WTD leave**”), Working Time Regulations (“**domestic leave**”) and additional contractual leave.
- Holiday pay for leave taken under the WTD should be based on a worker’s “normal remuneration” including any additional payments such as shift premiums, overtime, commission or performance-related bonuses. Domestic leave and additional contractual leave can be based on basic pay only.
- A gap of three months or more between underpayments of holiday pay will ‘break’ a series of deductions (meaning employees cannot claim for underpaid holiday pay from before the break).

- Annual leave would be used in ‘sequence’, meaning that the 20 days of WTD leave is deemed to be taken first in the holiday year, followed by the additional 8 days of statutory leave. This would therefore increase the likelihood of a 3 month gap in the series of underpayments for WTD leave.

Great Britain (“**GB**”) introduced a two-year backstop for holiday pay claims brought as a ‘series’ of deductions. In practice, this means that employees can only claim underpaid holiday pay in the two year period preceding the date the claim is lodged. Furthermore, a gap exceeding three months between deductions will ‘break’ the series such that deductions before the gap cannot be claimed.

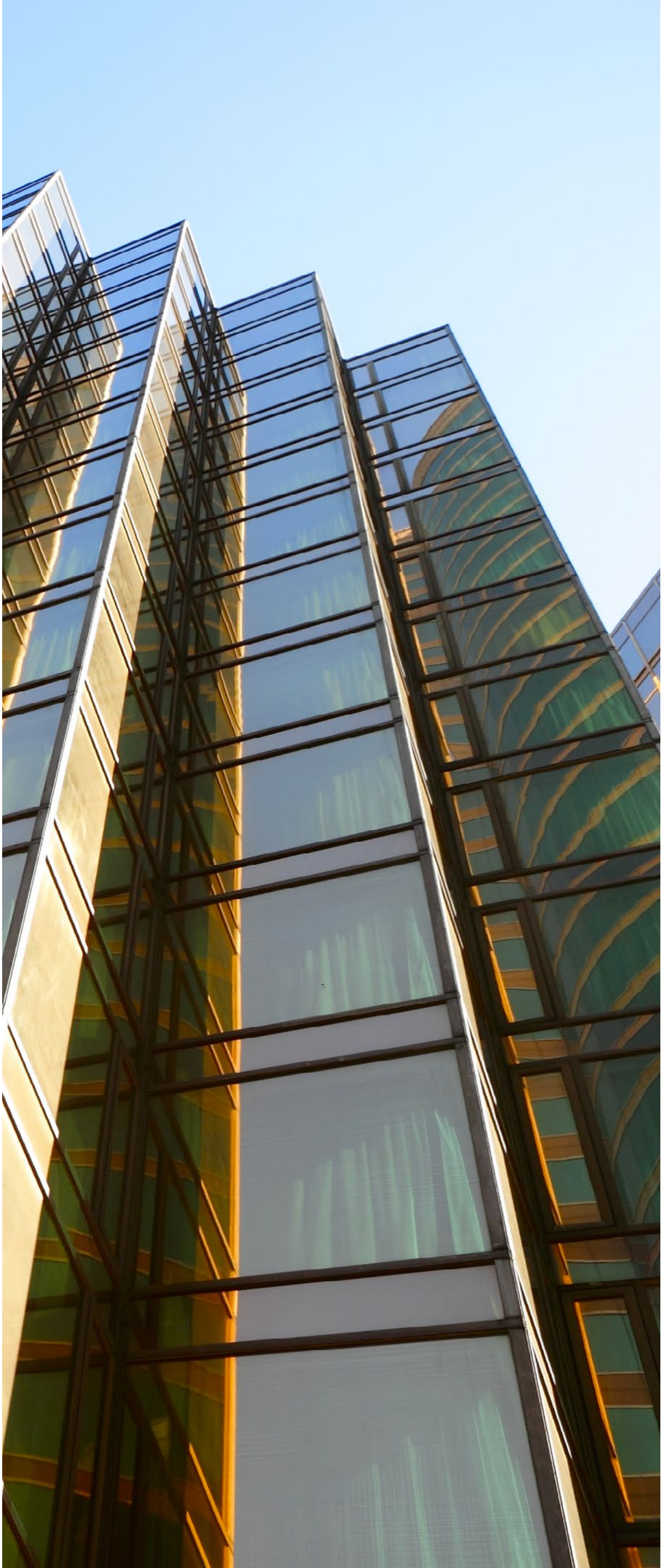
Northern Ireland has not yet introduced the two year backstop, meaning that where an employee can demonstrate a series of underpayments of holiday pay, they can potentially claim for underpayments dating back to the later of (a) the start of their employment or (b) 1998, when the WTD was implemented in the UK.



“where an employee can demonstrate a series of underpayments of holiday pay, they can potentially claim for underpayments dating back to the later of (a) the start of their employment or (b) 1998.

**AGNEW:
THE STORY SO FAR**

The Agnew case brought holiday pay calculation into sharp focus for both employees and employers in Northern Ireland. More than 3,700 police and civilian employees of the PSNI brought claims for underpaid holiday pay on the basis that their WTD leave was calculated with reference to their '*basic pay*' only, rather than including additional elements of remuneration *normally* received such as overtime. Anecdotally, the total number of claims (stayed) in the NI Tribunal now exceeds 50,000.



NI Court of Appeal (NICA)

In 2019, the NICA decided that:

- PSNI staff had not received the holiday pay that they were entitled to due to regular payments, such as overtime and other allowances, not being included in the calculation.
- There is nothing in the Employment Rights (Northern Ireland) Order 1996 that sets a limit on the length of gaps between unlawful deductions, and, while a series of underpayments must be factually linked, a three month gap between the underpayments would not necessarily break the series. This therefore increased the risk of claims going as far back as 1998, when the WTD was first implemented in Northern Ireland.
- Each day of annual leave taken should be considered as a 'composite whole' of available leave. In other words, WTD leave should not be deemed to be taken first but rather it should comprise a proportion of each day of leave taken throughout the year.
- The reference period for assessing '*normal remuneration*' must be decided on a case-by-case basis but it may be prudent to use 12 months.

UK Supreme Court (UKSC)

The PSNI subsequently appealed this decision to the UK Supreme Court (“**UKSC**”) and whilst it looked likely the case would settle during mediation in June 2021 – leaving the disparity between NICA’s decision in *Agnew* and the EAT’s decision in *Bear Scotland* unresolved – any attempts at compromise failed and the case proceeded to hearing on 14 and 15 December 2022.

On appeal to the UKSC, the PSNI submitted that:

- A break of three months or more between unlawful deductions should ‘break’ the series, as decided in *Bear Scotland*.
- Holiday should be taken in sequence, with 20 days WTD leave taken from an employee’s holiday allowance first, followed by the 8 days of domestic leave and finally any additional contractual leave.

For appeals to the Supreme Court, any person can apply to ‘intervene’ by oral or written submissions. In this case, Unison the trade union was permitted to make submissions on behalf of the PSNI officers

in light of the fact that it has been heavily involved in many holiday pay actions.

Unison submitted to the UK Supreme Court that:

- The finding of the NICA in 2019 was correct.
- The outcome of *Bear Scotland*, in relation to the series of deduction and sequence of annual leave, was wrong.
- The argument that a series is broken by a gap of three months or more, or by one lawful payment, must also be wrong.

Potential ramifications for employers

While the outcome of the UKSC’s decision in *Agnew* will be binding across the UK, the impact for employers in NI will potentially be much greater due to the absence of the statutory two-year backstop.

When implemented in 2014, it was estimated that the statutory backstop could achieve a cost saving of:

£300M

**FOR PRIVATE SECTOR
EMPLOYERS IN GB**

£80M

**FOR PUBLIC SECTOR
EMPLOYERS IN GB**

The PSNI submitted to the UKSC that the exposure in Northern Ireland would be “categorically different” without (a) a statutory backstop and (b) the application of the *Bear Scotland* break in the series rule.

Although unconfirmed, it is indicated that exposure for the PSNI is potentially up to £30m.

The UKSC’s judgement will be eagerly anticipated. If the UKSC agrees with the findings of the NICA, UK employers could be subject to new claims for underpaid holiday pay that would previously have been deemed to be out of time. Such claims could be limited by the two-year backstop in GB, but could stretch back to 1998 or the start date of employment (whichever is later) for employers in Northern Ireland. Moreover, even the two year ‘backstop’ may be considered unlawful.

Agnew is a landmark employment case in Northern Ireland and the UKSC’s decision will undoubtedly garner media attention. This in turn might open the floodgates and result in a spate of complaints being lodged by employees which could be administratively and financially burdensome for employers.

Tips for employers

In light of the above, it would be prudent for employers to:



Review their holiday pay practices now to ensure that holiday pay is calculated based on remuneration that employees routinely receive. This may require using a 12 month reference period.

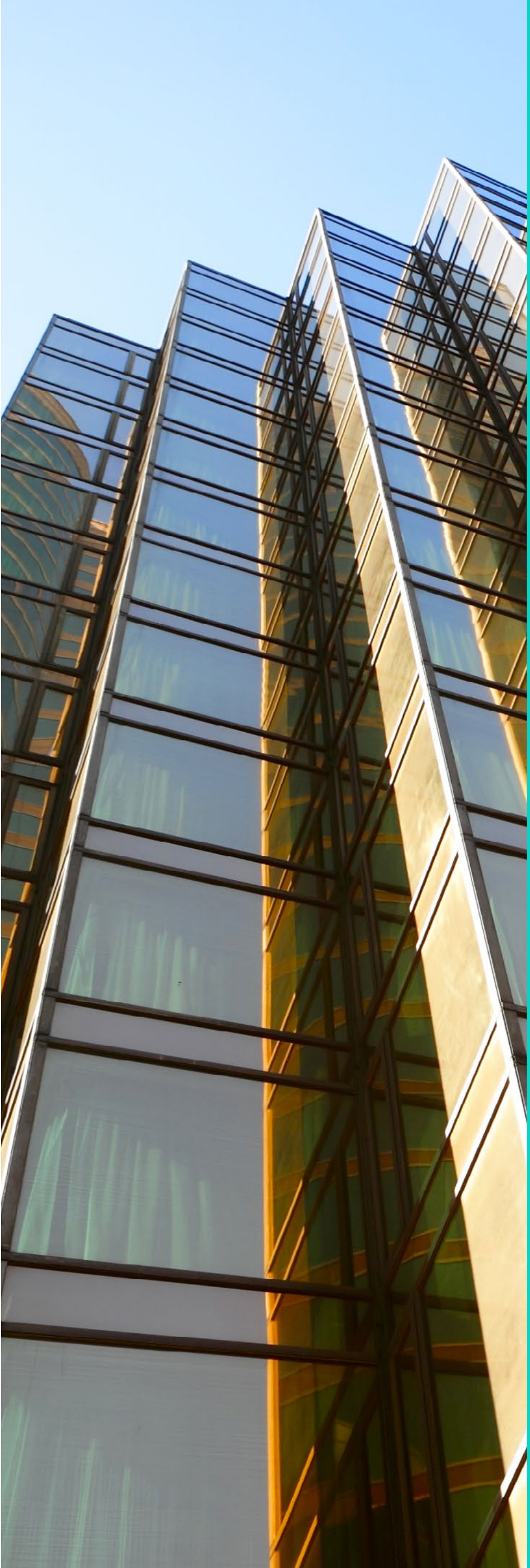


Pro-actively identify possible instances of underpayments and explore a sensible compromise with the employee(s) to rectify this.



Review their current and historic annual leave records to ensure that information on holiday entitlement, leave and pay is up-to-date. This will make any internal audit following the UKSC’s decision easier to carry out.

If you have any queries on this case, or would like to discuss how to implement best practice for holiday pay, please do not hesitate to get in touch with a member of our team.



Key contacts



Gareth Walls
Partner
+44 28 9072 7402
gwalls@algoodbody.com



Johanna Cunningham
Associate
+44 28 9072 7481
jcunningham@algoodbody.com



Rob Tubman
Associate
+44 28 9072 7441
rtubman@algoodbody.com



Christopher Leneghan
Solicitor
+44 28 9072 7492
cleneghan@algoodbody.com