EAT ruling on when there will be a series of deductions from holiday pay

In *British Airways plc v De Mello and others*, the EAT considered whether the exclusion of certain allowances from holiday pay amounted to unlawful deductions from pay. In doing so, the EAT considered when a series of deductions may be broken and whether employers are entitled to designate the order in which different types of leave may be taken.

What happened in this case?

British Airways pays its cabin crew by way of a system of basic pay supplemented by various allowances. Not all of these allowances are reflected in holiday pay. A dispute arose with members of cabin crew about whether different allowances have been included in the calculation of holiday pay. The claimants argued that the allowances represented part of their "normal pay" and so, according to previous case authorities, should be included in holiday pay. The majority of claimants eventually settled their claims, but six claimants continued with the litigation.

The claimants' claim for unlawful deductions from wages reached the Employment Tribunal in 2019. Although the Tribunal held that some of the allowances *should* have been included in holiday pay, the claim would be limited in value for two reasons. First, the Tribunal held that any gap of three months or more between consecutive deductions from holiday pay would be enough to break the "series". Second, BA

had designated the first tranche of annual leave as statutory leave, followed by contractual leave. This would likely result in a break in the series of unlawful deductions towards the end of the holiday year, since it is lawful to pay only basic pay for contractual leave as opposed to “normal pay”.

BA appealed the inclusion of one type of allowance in holiday pay and the claimants cross-appealed the decision to exclude some other allowances. The claimants also cross-appealed the Tribunal’s decisions that three months between deductions would break the series and that BA had designated the order in which types of annual leave were taken.

What was decided?

Inclusion / exclusion of allowances

The question of whether certain allowances should be included in holiday pay was remitted to a new Tribunal to consider on the basis that the original Tribunal has fallen into error.

- In relation to the inclusion of a generous meal allowance, the Tribunal had gone wrong by placing the burden of proof on BA to show that it should not be included. The burden rested on the claimants to show that the allowance formed part of their normal pay.

- In relation to the exclusion of duty-free sales commission, the Tribunal had wrongly excluded the sums on the basis that they were so small that their exclusion from holiday pay would not have deterred a worker from taking annual leave. The Tribunal was wrong to have discounted these sums on the basis of their size – this was not a relevant factor.

- In relation to the exclusion of a "Back-2-Back" allowance, the Tribunal had excluded it on the basis that it was not paid regularly enough to constitute normal pay (namely three times in a 12-month reference period). The EAT said the Tribunal was overly mechanistic in its approach to the reference period given that the claimant in question had only become entitled to the allowance in the seventh month of the year (i.e. it had actually been paid three times in a five-month period). The reference period should be fairly representative of what is the typical pattern during periods that the worker is working.

Breaking the series of deductions

The EAT overturned the Tribunal's decision that a gap of three months or more between deductions would break the series. The decision of the Supreme Court in *Chief Constable of the Police Service of Northern Ireland v Agnew* in 2023 had made it clear that the earlier authority on this point (*Bear Scotland*) was

incorrect and that gaps of three months do *not* necessarily break a series of deductions.

Whether there is a series comes down to whether there is sufficient similarity and a temporal connection between the deductions in question. Although this is a question of fact for the Tribunal to decide, the EAT noted that where there are similar features between the deductions they should be regarded as sufficiently similar, even where there is some difference in detail. In this case, all the deductions related to holiday pay, and all had occurred because BA had failed to treat one or more allowances as normal pay. The EAT substituted a finding that the payments were sufficiently similar.

However, the question of whether there was a sufficient temporal connection between the deductions was remitted to a new Tribunal to determine. Although the series was not automatically broken by gaps of three months or more, the EAT could not rule out the possibility that there might have been gaps long enough to disrupt the series. However, the EAT did appear to offer a steer on this point when it noted that the Tribunal must keep in mind that the purpose of the legislation is to protect vulnerable workers and that there will inevitably be gaps in time between holidays.

Designation of leave

The EAT accepted that in *Agnew* the Supreme Court did not exclude the possibility of an employer designating the order of annual leave, albeit that they said it could not be done retrospectively to run out a time limit for bringing a claim. However, the EAT said that the exercise of any such

power could not be relied upon to make a worker's position in relation to a time limit less favourable than it would have been if the employer had *not* designated the order of leave.

However, in this case, the Tribunal had erred in finding that BA had made such a designation. The relevant contractual documents did not give BA the power to do this and, even if they did, there was no evidence that it had been exercised. Therefore, all annual leave days were to be treated equally as part of a composite whole (i.e. part statutory leave and part contractual leave). The consequence is that a deduction would have been made every time leave was taken, since normal pay must be paid for a certain proportion of statutory leave.

What does this mean for employers?

This decision follows the Supreme Court's ruling in *Agnew* and reminds us that gaps of three months or more between deductions will not necessarily break a series of deductions. Whether a series exists is a question of fact for the Tribunal. Although this decision concerns deductions from holiday pay, this principle will apply to all types of deduction from wages where the claimant asserts there has been a series of repeated deductions.

This decision seems to suggest that employers are entitled to designate the order in which leave is taken, although it offers no guidance on how employers should go about this. However, the EAT did seem to accept that a contractual term could potentially give the employer the power to designate, although this will not disadvantage a claimant from a time limit perspective. It is not clear how this would work

in practice. Would a Tribunal simply extend time for a claim which is out of time as a result of designation? Or would the designation be ignored for time limit purposes only? The EAT's decision does not address the mechanics of how a claim would be treated as in time in these circumstances.

The reality is that many employers would consider paying normal pay for some types of holiday but only basic pay for other types of holiday to be too administratively cumbersome. Either it involves treating each day's leave as part of a composite pot (requiring a complex calculation for each day's pay) or designating leave (without being certain of how this may be done effectively). In practice, many employers will opt to pay normal pay for all annual leave to avoid these headaches.

British Airways plc v De Mello and others

BDBF is a law firm based at Bank in the City of London specialising in employment law. If you would like to discuss any issues relating to the content of this article, please contact Principal Knowledge Lawyer Amanda Steadman (amandasteadman@bdbf.co.uk) or your usual BDBF contact.

Flexible working requests and

the dangers of overlooking menopausal symptoms

In *Johnson v Bronzeshield Lifting Ltd,* the Employment Tribunal held that an employer's failure to take into account an employee's menopausal symptoms when considering her flexible working request was an act of direct disability discrimination and a repudiatory breach of trust and confidence which resulted in her constructive unfair dismissal

What happened in this case?

The employer, Bronzeshield Lifting Ltd, is a small crane hire business with a predominantly male workforce. Ms Johnson was employed as an Administrator. She was a long-serving employee, having worked for the employer for over 25 years. In 2018, Ms Johnson began experiencing a wide range of menopausal symptoms including:

- low mood and volatile emotions;
- anxiety and low self-esteem;
- feelings of anxiety or panic when performing tasks that she had previously found easy;
- sleep problems causing tiredness and fatigue the following day; and

- “brain fog” which manifested as feelings of disorientation and made it difficult to concentrate.

These symptoms affected her general resilience and ability to cope with the stresses and strains of day-to-day work. This was exacerbated by the fact that she needed to help care for her elderly parents and uncle.

Ms Johnson’s worked 32.5 hours per week between the hours of 9am to 4pm, Monday to Friday (she had a 30-minute unpaid lunch break each day). In August 2021 she asked to changing her working hours to 9am to 5pm, four days per week, with Wednesdays off (totalling 30 hours per week). She said she would be happy to check and reply to emails from home on Wednesdays if required. The request was approved for a fixed period until 1 July 2022, after which the arrangement would be reviewed and either made permanent, or she would be expected to revert to her original working pattern.

The review did not take place in July 2022. However, around this time, Ms Johnson asked to if she could reduce her working hours further. She asked to work 9am – 4.30pm on Monday to Wednesday with no lunch break, 9am – 1pm on Thursday and to have Fridays off (totalling 26.5 hours per week). She suggested that another colleague could cover on Thursdays and Fridays. When making the request, she explained she needed the change to accommodate her caring responsibilities and her menopause issues. A meeting was held to discuss the request, during which Ms Johnson made mention of her menopause and caring responsibilities again.

The employer refused the request on the basis that it would be unfair to ask a colleague to cover and it was not feasible to recruit someone. In addition, the proposal would put the employer in breach of the rules on daily rest breaks and they would be left without cover on Fridays, which was considered to be their busiest day. No alternative proposal was put forward and the implication was that she would have to return to her original five-day week working pattern.

Ms Johnson resigned on notice, expressing her disappointment that her reasons for wanting to change her working patterns had not been taken into consideration, nor a compromise suggested. The employer wrote back offering a one-week "cooling off" period and reminded her that she could appeal the decision. Although she then submitted a letter challenging the decision, the employer failed to treat this as an appeal as she had not labelled it as an appeal letter. Therefore, Ms Johnson's employment terminated at the end of her notice period.

Ms Johnson argued that the employer had directly discriminated against her because of her disability and/or sex by:

- failing to take into account her menopause when determining the flexible working request; and
- refusing to grant the flexible working request.

She also claimed that both matters amounted to serious breaches of trust and confidence, meaning she had been constructively unfairly dismissed.

What was decided?

Shortly before the Employment Tribunal hearing, the employer conceded that Ms Johnson was disabled for the purposes of the Equality Act 2010, meaning this question did not have to be determined by the Tribunal.

In relation to the first discrimination complaint, the Employment Tribunal found that the employer had failed to take into account the fact that Ms Johnson was going through the menopause when determining her flexible working request. Given that she had explicitly referred to it in her written flexible working request, and in the meeting, it was not something that should have been missed. The Tribunal found that the employer would have treated an employee with a different but serious medical condition (e.g. cancer) in a different way. It would have made efforts to find out whether such a person would have needed treatment and what the link was between the condition and the working pattern. More generally, it would have taken the condition into account when determining the application. Therefore, the Tribunal concluded that Ms Johnson had suffered less favourable treatment because of the particular disability of menopause. However, it rejected the claim that she had been treated less favourably because of her sex.

In relation to the second discrimination complaint, the Employment Tribunal found that the employer had refused the flexible working request, but this was not because of her

menopause (indeed, her menopause had not been taken into account when considering the request). Nor would the employer have treated an employee with a different but serious medical condition in a different way – their request would also have been refused. The Tribunal accepted the employers reasons for refusing the request were that it would mean they would be in breach of rules on daily rest breaks, and that it was not practicable for the business for Ms Johnson to have Fridays off. Accordingly, this disability discrimination complaint failed. The sex discrimination complaint failed for the same reasons as the first complaint.

Finally, the Tribunal held that the employer had committed a breach of contract by failing to take into account her menopause when determining her flexible working request. The Tribunal notes that *"All that was really required was to ask the Claimant a few questions, listen to her answers and factor it all into the reasoning when coming to a decision upon the application."* The Tribunal considered this amounted to be a repudiatory breach of trust and confidence for the following reasons:

- the hours an employee works has a major impact on their life – all the more so where they have health problems and other commitments as was the case here;
- it matters how a flexible working application is dealt with – the outcome is not the only thing of importance;
- here, the employee had put her menopause "front and centre" of her request;

- the menopause was affecting the employee in a profound way but there was an absence of effort to try and understand how menopause was affecting her and its relevance to her application – there was no good reason for leaving this important factor out.

The refusal of the flexible working request itself was not a breach of trust and confidence – there was reasonable and proper cause for the refusal.

The Tribunal found that Ms Johnson had resigned in response to the repudiatory breach of contract, meaning her constructive unfair dismissal claim succeeded.

What does this mean for employers?

The employer in this case appeared to have sound reasons for refusing the flexible working request on the facts. Where they went wrong was in the process leading up to that decision.

If an employee signposts their motivations for making a flexible working request, an employer should explore this with them when discussing the proposal. This is all the more important where the employee has highlighted a health reason, including those that the employer may not immediately understand as being relevant to the request. Here, it was found that the employer would have taken other serious health conditions into account when considering the request. But

because the employer did not properly understand the potential impact of the menopause, it failed to make the necessary connection and explore the issue further. This underlines the need for appropriate disability training, which includes menopause, to be given to appropriate staff.

As the Tribunal made clear, taking the underlying reason into consideration is not an especially onerous task. It could have required as little from the employer as discussing the matter with the employee and factoring this into their decision in a fair way. In cases where symptoms are unclear, it may mean medical advice is needed before a fair decision can be made.

In this case, the failure to get the process right amounted to direct disability discrimination and was also a repudiatory breach of contract. The latter finding should be of concern to employers when dealing with *all* flexible working requests – not just those motivated by health reasons. The Tribunal's comments about the major impact of working patterns in employees' lives, and the importance of how flexible working applications are dealt with, suggests that shortcomings in such processes could open the door to constructive dismissal claims. Not only would this be costly to deal with, it risks the loss of a valuable employee.

Although not argued in this case, employers should also remember that a rejection of a flexible working request by a disabled employee could attract other types of disability discrimination claim including failure to make reasonable adjustments, indirect disability discrimination and disability arising from discrimination.

Johnson v Bronzeshield Lifting Ltd

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What really matters to younger workers?

Deloitte has recently published the results of its Global 2024 Gen Z and Millennial survey. Over 22,800 respondents from 44 countries participated in the survey, which aimed to uncover their attitudes to work and the wider world. In this briefing, we distil the key points of interest for employers and consider what really matters to younger workers.

Stereotypes of Gen Z and Millennial workers (those born between 1995-2005 and 1983-1994 respectively) tend to present them as demanding, entitled, disengaged, lacking in loyalty and obsessed with technology. Like most stereotypes, these labels are unfair and are likely to lead to unjustified negative views of younger workers. Deloitte's Global 2024 Gen Z and Millennial survey seeks to cut through the labels, by using data to find out what actually motivates workers from these generations.

The survey made six key findings, which will be of interest to all employers of Gen Z workers and Millennials.

- **Work/life balance is the top priority:** work/life balance topped the list of priorities for when choosing a new job role. Conversely, poor work/life balance or feelings of burnout were commonly cited reasons for leaving a job. Two thirds of respondents had been mandated to return to office working post-pandemic. There were mixed feelings about this. On the plus side, respondents liked the improved engagement, connection, collaboration and routine. Yet others reported increased stress levels, a drop in productivity and a negative financial impact. Overall, these workers prized flexibility in both where and when they worked and wanted employers to offer part-time working opportunities and four-day working weeks. Last year, a pilot scheme in the UK trialled a four-day working week – you can read more about this in our article here. More recently, UK flexible working laws have been overhauled to improve access to flexible working – you can read more about the reforms in our article here.

- **The cost of living is a major concern:** although just under half of respondents expected their personal finances to improve within the next year, financial insecurity was still a major concern for many. Around a third reported feeling financial insecure and over half

were living from pay day to pay day. The cost of living remained the top concern for these workers, ahead of other concerns such as unemployment, climate change, mental health and crime. In our recent article, we explored way that employers support workers facing financial difficulties – you can read that article here. These concerns were exacerbated by social and political uncertainty, particularly in countries (including the UK) facing elections over the next year.

- **Stress and mental health at work needs to managed properly:** only around half rated their mental health as either good or very good, and stress levels remain high. Around 40% reported feeling stressed all or most of the time. Financial and family matters are major stressors, as are job-related factors such as long working hours, lack of recognition, overwork and not feeling decisions are made in a fair or equitable way. Although many reported that their employers took mental health at work seriously, only around 40% said they would feel comfortable discussing mental health with their manager or would be confident that the manager would know how to respond if they did raise it. Concerningly, around 30% said they feared their manager would discriminate against them if they raised concerns about mental health. Acas has recently published guidance on making adjustments for mental health, with specific guidance aimed at managers – you can read more about the guidance in our article here.

- **Purpose and values at work are important:** the vast majority of respondents (almost 90%) say having a sense of purpose is important to their overall job satisfaction and wellbeing. So much so, that around 40% of these workers had rejected roles with prospective employers who did not align with their values or beliefs on issues such as the environment, inclusivity and work/life balance. Others reported turning down specific tasks or projects with their current employer for the same reason – although around a fifth said they were not listened to and made to complete the task anyway, while others reported that detrimental treatment followed. Emphasis was also placed on an employer's purpose beyond making profit, with three-quarters of respondents reporting that societal impact was an important factor when considering a future role. Respondents wanted businesses to champion protection of the environment, ensure that Generative AI was used ethically, and influence social equality, for example by creating inclusive employment opportunities.

- **Environmental sustainability affects career decisions:** in keeping with the focus on purpose and values, respondents also reported environmental sustainability as a top concern. Around 60% reported feeling worried or anxious about the environment in the past month. This group want employers to take more action to protect the environment and make sustainable choices. The actions that these workers wanted employers to take included educating staff about sustainability, renovating the workplace to become greener and committing to net-zero greenhouse emissions

in the next decade. Again, workers in these groups were prepared to choose job roles which aligned with these values, with 20% saying they had changed jobs for this reason, and another 25% reporting that they intended to do so in the future. And around 70% said environmental credentials and policies were important when assessing a potential employer.

- **There are mixed feelings about the rise of Generative AI in the workplace:** only around a quarter of respondents use Generative AI all or most of the time at work, the remainder used it rarely or not at all. Less frequent or non-users were more likely to feel uncertainty about such tools, with women being more uncertain than men. In contrast, frequent users were more likely to feel trust and excitement about such tools, believing that they will free up time, improve work/life balance and enhance the way they work. However, such users also had concerns that Generative AI drive automation would eliminate jobs and make it harder for young people to progress in their careers. In response, some are focusing on reskilling and/or applying for roles that are less vulnerable to automation. Overall, only half of respondents felt their employer was providing sufficient training on the capabilities, benefits and value of Generative AI.

You can read the full results of the survey here.

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