Michaelmas Term
[2023] UKSC 33
On appeal from: [2019] NICA 32

JUDGMENT

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

before

Lord Hodge, Deputy President
Lord Briggs
Lord Kitchin
Lady Rose
Lord Richards

JUDGMENT GIVEN ON
4 October 2023

Heard on 14 and 15 December 2022

Appellants
Tony McGleenan KC
Philip McAteer
(Instructed by the Crown Solicitor's Office (Belfast))

1st and 3rd Respondent Groups
Jason Galbraith-Marten KC
Peter Hopkins
(Instructed by MTB Solicitors (Belfast))

2nd Respondent Group
David McMillen KC
Peter Hopkins
(Instructed by Edwards & Co (Belfast))

Unison as Intervener
Michael Ford KC
Nicola Newbegin
(Instructed by UNISON Legal Services (London))

LORD KITCHIN AND LADY ROSE (with whom Lord Hodge, Lord Briggs and Lord Richards agree):

(1) Introduction

1. The Respondents to this appeal work for the Police Service of Northern Ireland, most of them as police officers and some of them as civilian staff. They have brought claims before the Industrial Tribunal to recover sums which they should have been paid since November 1998 as part of their holiday pay when they took the annual leave to which they were entitled each year. They were not paid these sums because it was thought for many years that it was sufficient to pay the Respondents an amount equivalent to their basic pay for the weeks they were on holiday. It later became clear from case law both in England and in the Court of Justice of the European Union that, in so far as the annual leave that the Respondents took each year was leave which they had a right to take under the EU Working Time Directives, they should have been paid their "normal" pay when they were on holiday, not just their basic pay. That normal pay should have included an element for overtime because many of the Respondents regularly supplemented their pay by working compulsory overtime.

2. The Appellants, who are treated for these purposes as the employers of the Respondents, accept that the Respondents were underpaid when they took their holidays. The issue between the parties is how far back the Respondents are entitled to go with their claim to recover that underpayment. The Appellants rely on a statutory provision that states that a claim before an Industrial Tribunal can only be made in respect of payments made in the three months before the claim is brought. That would mean that most of the money claimed by the Respondents would be time barred.

3. The Respondents seek to rely on a different statutory provision which would allow them to claim underpayments which arise 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 Appellants accept that the civilian staff Respondents can rely on that alternative statutory provision but they dispute that the police officer Respondents can. They also contend that the circumstances in which payments comprise a "series" for this purpose is limited in ways which would remove many historic payments from the jurisdiction of the tribunal.

4. The dispute between the parties therefore raises two important sets of issues: first, whether all the Respondents can rely on that alternative provision which could allow them to claim underpayments going back further than three months; and secondly whether, if they can rely on it, these underpayments were part of a "series" within the meaning of that alternative provision.

5. The Respondents are lead claimants selected by the Tribunal from 3,380 police officers holding the office of constable and 364 civilian employees of the Police Service of Northern Ireland. The first of the lead claimants to present his case to the Industrial Tribunal began proceedings on 9 December 2015. The Appellants have calculated that meeting these claims in full would cost about £30 million whereas if the claims are limited to underpayments within three months of the commencement of proceedings, the cost will be about £300,000. The resolution of these issues is important not only for the parties to these proceedings, but also for many people working in Northern Ireland who were also paid only basic pay for their annual holidays and for the people who would have to make good those underpayments going back many years if the Respondents are right.

6. This appeal also has repercussions for workers in Great Britain where there are equivalent statutory provisions. However, the position in Great Britain is different because when it became apparent that many people had been underpaid for their holidays, an amendment was made to the provisions in Great Britain to create what has been referred to as a "two-year backstop". This limits any claim, even for a series of underpayments, to a period two years prior to the commencement of the proceedings before the tribunal.

7. Following case management hearings in these proceedings, the Tribunal decided to resolve certain legal and jurisdictional issues first. The Tribunal handed down a judgment dealing with various preliminary issues on 2 November 2018: [2018] NIIT 112/16IT. The Tribunal held that all the Respondents could rely on the statutory provision which allows a claim for a series of payments going back further than three months and held, further, that most if not all of these payments were in a series for that purpose.

8. The Appellants appealed to the Court of Appeal which dismissed the appeal as regards the issues which form the subject of this judgment: [2019] NICA 32.

9. Before this court, Dr Tony McGleenan KC appeared for the Appellants with Philip McAteer. Jason Galbraith-Marten KC with Peter Hopkins appeared for one group of police officer respondents and for the civilian staff and David McMillen KC with Peter Hopkins appeared for another group of police officers. The trade union UNISON intervened on behalf of the Respondents making written and oral submissions only on the issues arising as to whether the underpayments comprise a series in these circumstances. UNISON was represented by Michael Ford KC and Nicola Newbegin. We are grateful to all counsel for their helpful submissions.

(2) The Working Time Directives and Working Time Regulations

(a) Entitlement to annual leave

10. The first Working Time Directive was Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organisation of working time: (OJ 1993 L307 p 18) ("the 1993 WTD"). It was adopted using the power in the EC Treaty for the Council to take measures "to ensure a better level of protection of the safety and health of workers". The recitals included the statement that the improvement of workers' safety, hygiene and health at work is an objective which should not be subordinated to purely economic considerations. Recital 8 stated that "Every worker in the European Community shall have a right to a weekly rest period and to annual paid leave …". It was clear that the standards laid down in the 1993 WTD were minimum standards. Article 7 provided:

"**Annual leave**

> 1. Member States shall take the measures necessary to ensure that every worker is entitled to paid annual leave of at least four weeks in accordance with the conditions for entitlement to, and granting of, such leave laid down by national legislation and/or practice.
>
> 2. The minimum period of paid annual leave may not be replaced by an allowance in lieu, except where the employment relationship is terminated."

11. The 1993 WTD was superseded by Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time (OJ 2003 L299 p 9) ("the 2003 WTD"). This contained similar statements in the recitals: see recitals (4) and (5). Article 7 of the 2003 WTD was in identical terms to article 7 of the 1993 WTD.

12. The 1993 WTD was implemented in Northern Ireland by the Working Time Regulations (Northern Ireland) 1998 (1998/386) (the "WTR (NI) 1998"). Those came into effect on 23 November 1998 and all the claims which are the subject of this appeal extend back to include underpayments as from that date. There is a further issue which is not before the court as to whether the claims could extend back further to 23 November 1996. That was the date on which the 1993 WTD was required to be implemented in the Member States. Implementation was delayed in the United

Kingdom because of the Government's unsuccessful challenge to the vires of the 1993 WTD.

13. The WTR (NI) 1998 were replaced as from 27 February 2016 by the Working Time Regulations (Northern Ireland) 2016 (2016/49) (the "WTR (NI) 2016"). The relevant provisions in the two sets of regulations are materially identical so we shall refer to the provisions of the WTR (NI) 2016, meaning thereby to include the equivalent provisions in the predecessor regulations. We refer to both sets of regulations together as the "WTRs (NI)".

14. Regulation 15 of the WTR (NI) 2016 provides:

> "15.— **Entitlement to annual leave**
>
> (1) Subject to paragraph (4), a worker is entitled to four weeks' annual leave in each leave year.
>
> (2) A worker's leave year, for the purposes of this regulation, begins—
>
> (a) on such date during the calendar year as may be provided for in a relevant agreement; or
>
> (b) where there are no provisions of a relevant agreement which apply, on the date on which the worker's employment begins and each subsequent anniversary of that date.
>
> …
>
> (4) Where the date on which a worker's employment begins is later than the date on which (by virtue of a relevant agreement) the worker's first leave year begins, the leave to which the worker is entitled in that leave year is a proportion of the period applicable under paragraph (1) equal to the proportion of that leave year remaining on the date on which the worker's employment begins.
>
> (5) Leave to which a worker is entitled under this regulation may be taken in instalments, but—

(a) … it may only be taken in the leave year in respect of which it is due, and

(b) it may not be replaced by a payment in lieu except where the worker's employment is terminated."

15. Regulation 16 of the WTR (NI) 2016 is headed "Entitlement to additional annual leave" and provides that a worker is entitled to a period of 1.6 weeks' additional leave in any leave year but that the aggregate entitlement provided for by regulations 15(1) and 16 is a maximum of 28 days. The worker's leave year for the purposes of the additional leave starts on the same day as the leave year begins for the purposes of regulation 15; the additional leave may also be taken in instalments but it may be carried forward into the next leave year if a relevant agreement so provides. Further, we were told that the Respondents are entitled to an extra two days' leave per year, pursuant to their conditions of service as set out in the Police Service of Northern Ireland Regulations 2005/547, regulation 32.

16. It is accepted that all the Respondents, civilian staff and police officers, have at all times been covered by the WTRs (NI) and so have a right to the annual leave provided for there. According to regulation 38 of the WTR (NI) 1998 and regulation 50 of the WTR (NI) 2016: "the holding, otherwise than under a contract of employment, of the office of constable shall be treated as employment, under a worker's contract, by the relevant officer" for the purposes of those Regulations. The "relevant officer" was defined by regulation 38(3)(a) of the WTR (NI) 1998 as the chief constable in relation to a member of the Royal Ulster Constabulary and by regulation 50(4)(a) of the WTR (NI) 2016 as the chief constable as regards a member of the Police Service of Northern Ireland. The inclusion of police officers in the WTRs NI seems to have been a policy decision rather than the result of any EU enactment or judicial ruling requiring them to be included.

17. It is important to recognise that it is common ground in this appeal that the annual leave to which the Respondents were entitled under the WTRs (NI) can notionally be split into two kinds. Four weeks of it was annual leave to which the Respondents had a directly effective right at the relevant time pursuant to the 1993 and 2003 WTDs. The other leave, the 1.6 weeks allowed by regulation 16 and the extra two days, is not an entitlement deriving from those Directives.

(b) Calculating pay for annual leave

18. Neither the 1993 WTD nor the 2003 WTD provides for how to calculate the pay to which the worker is entitled when taking annual leave. That was left – or so it

appeared from the text of the Directives – to the Member States when implementing the Directives.

19. Regulation 20 of the WTR (NI) 2016 concerns the pay for annual leave:

> "(1) A worker is entitled to be paid in respect of any period of annual leave to which the worker is entitled under regulation 15 and regulation 16, at the rate of a week's pay in respect of each week of leave."

20. The WTR (NI) 2016 provide further for how the amount of holiday pay is to be calculated by importing into the regulations the provisions in articles 17 to 20 of the Employment Rights (Northern Ireland) Order 1996 (1996/1919) ("the ERO"). This is imported subject to some modifications, in particular by substituting the WTR (NI) 2016 term "worker" for the ERO term "employee": see regulation 20. The ERO provides for a wide range of employment rights largely corresponding to the rights conferred in Great Britain by the Employment Rights Act 1996 ("the ERA 1996").

21. Articles 17 to 20 of the ERO form part of Chapter IV of Part I of the ERO and provide for how to calculate the amount of "a week's pay" of an employee, as that term is used in various places in the Order. Articles 17 to 20 deal with what a week's pay means where the employee works different work patterns, in particular where the employee works "normal working hours" (articles 17, 18 and 19) and where the employee has "no normal working hours" (article 20). Very broadly, for workers with normal working hours, a week's pay is what they are paid for working those hours for one week. For those with no normal working hours, a week's pay is an average of their actual weekly remuneration paid over a specified period.

22. The effect of regulation 20 of the WTR (NI) 2016 is, therefore, that for each week of annual leave taken by the Respondents they are entitled to a week's pay calculated in accordance with those articles in the ERO.

23. The question as to whether a week's pay for annual leave should include an element to reflect the fact that the worker taking leave generally works overtime when not on holiday was addressed by the Court of Appeal in England in *Bamsey v Albon Engineering and Manufacturing plc* [2004] EWCA Civ 359, [2004] ICR 1083, [2004] 2 CMLR 59 ("*Bamsey*"). In that case the employee's contract entitled him to a basic working week of 39 hours with substantial compulsory but non-guaranteed overtime. He had regularly worked on average 60 hours a week. When he took annual leave, the employer paid him on the basis of a 39-hour week so that his weekly holiday pay was less than two thirds of his average weekly pay whilst in work. The case turned on the corresponding provisions in the Working Time Regulations 1998 (SI 1998/1833) (the

"WTR (GB) 1998") which extend to Great Britain only: see regulation 1. The WTR (GB) 1998 provided for the worker's entitlement to annual leave and incorporated the provisions of the ERA 1996 for the purpose of calculating his pay entitlement (that is sections 221 – 224 of that Act), just as regulation 20(2) of the WTR (NI) 2016 incorporates articles 17 to 20 of the ERO for this purpose.

24. The Court of Appeal in *Bamsey* had to construe the phrase "normal working hours" or "a week's pay" in sections 221 – 224 ERA 1996 in order to decide what pay the claimants should receive for their annual leave under regulation 16 of the WTR (GB) 1998. The Court of Appeal decided that, looking first at the provisions of the ERA 1996, overtime worked was not included within "normal working hours" for the purposes of calculating "a week's pay" unless the contract of employment both required the employer to provide overtime and also required the employee to work overtime: para 27. Further, the Court held that regulation 16 of the WTR (GB) 1998 incorporated that limitation into those Regulations in determining "a week's pay" for annual leave and that there was nothing in the 1993 WTD that required a different interpretation: there was no basis on which it could be said that Member States were required "to ensure that workers receive more pay during their period of annual leave than that which they were contractually entitled to earn, and did earn, while at work": para 35.

25. That conclusion was in effect overturned by the case law of the Court of Justice ("CJEU"). In *Williams v British Airways plc* ((C-155/10) ECLI:EU:C:2011:588 [2011] ECR I-8409, [2012] ICR 847, [2012] 1 CMLR 23 ("*Williams*"), the CJEU addressed the different but related question of whether pay for annual leave should include an element to reflect supplementary payments made to pilots based on time spent flying and time spent away from base. The pilots had been paid an amount in respect of annual leave based only on the fixed annual sum to which they were entitled but excluding these supplementary payments. This court referred questions to the CJEU for a preliminary ruling as to whether articles 7 of the 1993 and 2003 WTDs defined or laid down any requirements as to the nature and/or level of payments to be made in respect of periods of paid annual leave: see para 14 of the CJEU's judgment. The request for a preliminary ruling also referred to the corresponding provisions of Directive 2000/79 of 27 November 2000 which concerned the working time of mobile workers in civil aviation, implemented in the UK by the Civil Aviation (Working Time) Regulations 2004 (SI 2004/756), particularly relevant to the pilot claimants.

26. The CJEU in *Williams* acknowledged that the wording of article 7 of the 1993 and 2003 Directives made no specific reference to the remuneration to which a worker is entitled during annual leave. But the CJEU held: "The purpose of the requirement of payment for that leave is to put the worker, during such leave, in a position which is, as regards remuneration, comparable to periods of work." (para 20). The worker must, therefore, enjoy, during his period of rest and relaxation, economic conditions which are comparable to those relating to the exercise of his employment. The CJEU drew a distinction between, on the one hand, payments made to workers which are intrinsically

linked to the performance of tasks which the workers are required to carry out under their contract of employment and, on the other hand, payments intended exclusively to cover occasional or ancillary costs arising at the time of the performance of those tasks: paras 24 and 25. It was for the national court to decide on which side of the line the supplementary payments to pilots fell. When the pilots' appeal came back to the Supreme Court, this court remitted the claims to the Employment Tribunal for further consideration of the appropriate payments to be made to the pilots in respect of the periods of paid annual leave in issue: [2012] UKSC 43, [2012] ICR 1375.

27. The approach to be adopted was explored further in *Lock v British Gas Trading Ltd* (C-539/12) ECLI:EU:C:2014:351 [2014] ICR 813, [2014] 3 CMLR 53 ("*Lock*"). Mr Lock's remuneration consisted of a basic salary and commission on the customer sales he achieved. His average monthly commission payments were more than his monthly basic pay. Although during his weeks of annual leave he in fact received commission based on his sales in the weeks preceding his leave, his pay in the weeks after his holiday was reduced because he did not make any sales and hence did not earn any commission when he was on holiday. The CJEU held that such a reduction in a worker's remuneration in respect of his paid annual leave was liable to deter him from actually exercising his right to take that leave. This was contrary to the objective pursued by the 2003 WTD: para 23. The CJEU then reiterated the test it had set out in *Williams* and held that the commission payments were intrinsically linked to the performance of the tasks that Mr Lock was required to carry out under his contract of employment: para 32.

28. The effect of the *Williams* and *Lock* rulings on the earlier *Bamsey* decision was addressed by the English Employment Appeal Tribunal (Langstaff J (President)) in *Bear Scotland Ltd v Fulton* [2015] ICR 221 (EAT) ("*Bear Scotland*"). It is an important authority in the present appeal both because of what Langstaff J said about the application of the CJEU case law to overtime pay and also because of his consideration of the issue about the meaning of a "series" of payments. Here we deal with the first of those points.

29. Having set out the conclusions of the CJEU in *Williams*, Langstaff P described the first issue before him: did it follow from *Williams* and *Lock* that non-guaranteed overtime and other elements of remuneration which the workers received had to be included in pay during and for annual leave provided for by the WTR (GB) 1998: para 12 (which corresponds to reg 20 WTR (NI) 2016)? He held that it did so follow and that overtime met the test of having an "intrinsic link" to the performance of the workers' tasks: see paras 44 and 45. He went on to hold that although article 7 of the 2003 WTD was not directly effective as between citizens, the domestic Regulations could and should be given a conforming interpretation: para 66. He recognised that since this only related to the annual leave derived from the right conferred by the Directives, the decision in *Bamsey* continued to apply to the additional 1.6 weeks' holiday required by domestic legislation.

30. The effect of this jurisprudence is that it was common ground before the court in this appeal that the entitlement to "normal pay" which reflects overtime worked only applies in relation to the four weeks' leave which derives from the 1993 and 2003 WTDs and not to the additional 1.6 weeks plus two days to which the Respondents were entitled under regulation 16 of the WTR (NI) 2016 and their terms and conditions. For that additional leave there has been no underpayment because they were only ever entitled to receive basic pay.

(c) Bringing a complaint

31. Regulation 43(1)(b) of the WTR (NI) 2016 provides that a complaint of a failure to pay "the whole or any part of any amount due to the worker under regulation … 20(1)" can be made to an industrial tribunal. Where the tribunal finds a complaint to be well-founded, it must make a declaration to that effect and may make an award of compensation to be paid by the employer to the worker: regulation 43(3). Where the tribunal finds that the employer has failed to pay a worker in accordance with regulation 20(1), it shall order the employer to pay to the worker the amount which it finds to be due: regulation 43(5).

32. The key provision for the purposes of this appeal is regulation 43(2):

> "(2) 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 exercise of the right should have been permitted (…) or, as the case may be, the payment should have been made; or
>
> (b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three … months."

33. Regulation 43(2) therefore sets a jurisdictional limit on the power of the industrial tribunal to hear a complaint, with the effect that a complaint under the WTR (NI) 2016 can extend back only three months from the date of claim unless the tribunal is satisfied that it was not reasonably practicable for the complaint to be presented within three months. The position was the same under the WTR (NI) 1998: see regulation 30(2) in the same terms.

34. If that were the end of the story then it would be clear that the vast bulk of the claims brought by the Respondents were time barred. It is not, however, the end of the story because of the parallel rights provided by the ERO which can extend back for a longer period for at least some of the Respondents in these appeals.

35. One of the rights conferred by the ERO is the right of a worker covered by the ERO not to have unauthorised deductions made from his or her wages. This right is conferred by article 45 in the following terms:

> "**45.— Right not to suffer unauthorised deductions**
>
> (1) An employer shall not make a deduction from wages of a worker employed by him unless—
>
> (a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or
>
> (b) the worker has previously signified in writing his agreement or consent to the making of the deduction.
>
> (2) …
>
> (3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.
>
> (4) Paragraph (3) does not apply in so far as the deficiency is attributable to an error of any description on the part of the employer affecting the computation by him of the gross amount of the wages properly payable by him to the worker on that occasion.
>
> …"

36. The term "wages" used in article 45 ERO is defined in article 59 ERO in broad terms. According to article 59(1), "wages" in relation to a worker means any sums payable to the worker in connection with his employment. There is a list of specific kinds of pay, a list that has been subject to amendment many times to include additional sums such as statutory sick pay, statutory maternity, paternity, adoption and shared parental pay within the definition. The first item in that list is "(a) any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise".

37. A "worker" is defined for the purposes of the ERO in article 3(3) as including an individual who works under a contract whereby the individual "undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual". There is no equivalent in the ERO of regulation 50 of the WTR (NI) 2016 providing that police officers are to be regarded as "workers" for the purpose of the ERO. Therefore, whilst it is accepted by the Appellants that the civilian staff Respondents are within the scope of both the WTRs (NI) and the ERO, the Appellants dispute that the police officer Respondents fall within the scope of the ERO.

38. Article 55 of the ERO provides, so far as relevant, that a worker may present a complaint to an industrial tribunal that his employer has made a deduction from his wages in contravention of article 45. The jurisdiction of the tribunal to hear a complaint about an unlawful deduction from wages in contravention of article 45 is limited by article 55(2), (3) and (4) of the ERO:

> "55 (2) Subject to paragraph (4), an industrial tribunal shall not consider a complaint under this Article unless it is presented before the end of the period of three months beginning with—
>
> (a) in the case of a complaint relating to a deduction by the employer, the date of payment of the wages from which the deduction was made, …
>
> (3) Where a complaint is brought under this Article in respect of—
>
> (a) a series of deductions or payments, or
>
> (b) …

> the references in paragraph (2) to the deduction or payment are to the last deduction or payment in the series or to the last of the payments so received.
>
> (4) Where the industrial tribunal is satisfied that it was not reasonably practicable for a complaint under this Article to be presented before the end of the relevant period of three months, the tribunal may consider the complaint if it is presented within such further period as the tribunal considers reasonable."

39. We shall refer to article 55(3)(a) as "the "series" extension".

40. The potential concurrent enforcement of the right not to suffer unauthorised deductions from wages and the right to holiday pay was considered by the House of Lords in *Revenue and Customs Comrs v Stringer* [2009] UKHL 31, [2009] ICR 985 ("*Stringer*"). That appeal concerned the English equivalent provisions, that is regulation 16 of the WTR (GB) 1998 (corresponding to regulation 20 of the WTR (NI) 2016) and section 13 of the ERA 1996 (corresponding to article 45 of the ERO). The issue before the House was whether a claim for underpayment in respect of periods of annual leave to which the claimant was entitled under the WTR (GB) 1998 could be brought as a complaint of an unlawful deduction from wages under the ERA 1996. The House of Lords held that it could. The primary issue was whether holiday pay was included in the term "wages" used in section 13 ERA 1996 and defined in section 27(1)(a) of that Act. Lord Rodger of Earlsferry concluded that it was and hence, at para 31, that a failure to pay a sum due as holiday pay was the kind of impermissible deduction from wages that Parliament wanted to prevent by enacting section 13 of the ERA 1996 (corresponding to article 45 ERO).

41. As far as Mr Stringer was concerned, there was no benefit to him in being able to bring his claim both as unpaid holiday pay and as an unlawful deduction since he had lodged his complaint in time and that complaint related to a single payment. But Lord Rodger described the wider importance of the point (at para 21):

> "But counsel for the employees, Mr Jeans QC, told the House that the decision of the Court of Appeal – that no complaint about a deduction of holiday pay due under the 1998 Regulations could be brought under section 23 of the 1996 Act - had led to successive applications being made to employment tribunals to avoid the time limit in regulation 30, in relation to a series of deductions of payments allegedly due under regulation 16. The claimants were incurring

> unnecessary expense and the tribunal system was being cluttered up with unnecessary applications. But for the Court of Appeal's decision, the claimants in question could have relied on the extended time limit in section 23(3) and made one application within three months of the last deduction in the series. On that narrative I accept that the point is one of practical importance which the House should decide."

42. Lord Walker of Gestingthorpe also stressed the practical import of the questions: (para 38)

> "The time limit point is of practical importance not only to employers and workers but also to those engaged in administering employment tribunals. Sometimes a point of principle about entitlement to holiday pay affects a large class of employees and arises every time any of them takes a few days' holiday. The sums involved may be relatively small on each occasion but if employees feel that they are not getting their full entitlement, and conciliation fails, they will wish to take the matter to an employment tribunal."

43. After *Stringer* decided that the "series" extension could be used to claim underpayments in respect of rights to annual leave, the jurisdiction of the employment tribunal in Great Britain was circumscribed by the making of the Deduction from Wages (Limitation) Regulations 2014 (SI 2014/3322). Those Regulations came into force on 8 January 2015 but applied in relation to complaints presented to an employment tribunal on or after 1 July 2015. They inserted new provisions into the time limits set by section 23 of the ERA 1996 (which corresponds to article 55 of the ERO). The subsections inserted read:

> "(4A) An employment tribunal is not (despite subsections (3) and (4)) to consider so much of a complaint brought under this section as relates to a deduction where the date of payment of the wages from which the deduction was made was before the period of two years ending with the date of presentation of the complaint.
>
> (4B) Subsection (4A) does not apply so far as a complaint relates to a deduction from wages that are of a kind mentioned in section 27(1)(b) to (j)."

44. The exclusion from the two-year backstop of payments mentioned in section 27(1)(b) to (j) in fact means that the "series" extension continues to apply in full to all kinds of payments included in the term "wages" except for those in section 27(1)(a), and holiday pay is mentioned only in section 27(1)(a). The Explanatory Note confirms that the changes relate in particular to complaints of underpaid holiday pay in accordance with the requirements of the WTR (GB) 1998: "The changes adjust our implementation of the on-going EU obligation to provide procedural rules governing claims in respect of rights under the Directive."

45. To conclude as to where the legislative provisions, and CJEU and domestic case law bring us in relation to the Respondents:

(i) It is accepted by the Appellant that in the light of *Stringer* the civilian staff Respondents have two routes to the industrial tribunal because they have rights both under the WTR (NI) 2016 to claim underpaid annual leave (subject to the three-month time limit in regulation 43(2)(a)) and also a claim under the ERO for unlawful deductions from their wages (subject to the three-month time limit and the "series" extension under article 55 ERO). For them the important issue in this appeal is what is meant by a "series" in article 55(3) ERO.

(ii) For the police officer Respondents, the Appellants argue that they cannot rely on the "series" extension because although they are treated as workers within the meaning of the WTR (NI) 2016 (and so have a right to paid annual leave) they are not employees or workers for the purposes of the ERO. They do not therefore have a parallel right to claim unlawful deductions from their wages under the ERO and are therefore limited by regulation 43(2)(a) of the WTR (NI) 2016 and cannot benefit from the "series" extension.

(iii) The Respondents have not sought to argue in the current proceedings that it was not reasonably practicable for them to bring their claims in time and so have not relied on the extension of time in regulation 43(2)(b) of the WTR (NI) 2016 or article 55(4) of the ERO.

46. The Annex to this judgment shows which regulations in the WTR (NI) 2016 correspond to which regulations in the WTR (NI) 1998 and which provisions of the ERA 1996 correspond to which provisions of the ERO.

47. There are therefore two sets of issues raised by this appeal. The first set concerns whether the police officer Respondents can rely on the "series" extension provided in article 55(3) of the ERO to claim underpayments going back more than three months prior to the date on which they commenced their claim before the industrial tribunal. The second set concerns how the "series" extension works in the present circumstances.

(3) Can the police officer Respondents rely on the "series" extension when bringing their claim for unpaid holiday pay before the Industrial Tribunal?

48. There are three ways in which the police officer Respondents argue that they, as well as the civilian staff Respondents, can rely on the "series" extension provided for in article 55(3) ERO. They rely first on the EU principle of equivalence to say that as a matter of EU law, the national courts must import into the WTR (NI) 2016 (and into the WTR (NI) 1998) the more favourable limitation period allowed for the unauthorised deductions claim under the ERO. The second route is the submission that they too should be regarded as "workers" within the definition of that term in the ERO so that they as well as the civilian staff Respondents can, according to *Stringer*, bring a claim for unlawful deductions under article 45 ERO. The third route is based on Article 14 of the European Convention of Human Rights. This was an argument that the Respondents had not raised before the Tribunal or the Court of Appeal but they were granted permission to raise it by this court by order of 17 October 2022. The police officer Respondents argue that if, contrary to their second route, they are not "workers" for the purposes of the ERO and so cannot rely directly on the right to claim unlawful deductions, then that amounts to unlawful discrimination against them contrary to Article 14 ECHR in conjunction with Article 1 of the First Protocol ("A1P1"). The second and third routes by which the police officers claim to be entitled to rely on the "series" extension are different from the first route in that they involve bringing a claim directly under the ERO itself rather than importing an element of the ERO procedure into their claims under the WTR (NI) 2016.

49. At the hearing of the appeal, Dr McGleenan made submissions on behalf of the Appellants opposing all three routes by which the police officer Respondents sought to rely on the "series" extension. At the close of his submissions, the court indicated that it did not need to hear submissions from the Respondents on the application of the principle of equivalence. Following that indication, the Respondents were content not to press their alternative routes based on the inclusion of police officers in the definition of the term "worker" in the ERO or on the alleged unlawful discrimination contrary to Article 14 ECHR in excluding them from that definition. We turn therefore to consider the application of the principle of equivalence.

50. The principle of equivalence is a qualification to the general principle of EU law that Member States have autonomy when it comes to setting the procedural rules governing how EU rights conferred on the citizens of the Union by EU enactments are to be enforced. There are, generally speaking, two qualifications to that procedural autonomy; the principle of effectiveness and the principle of equivalence. These principles were described by the CJEU in *Levez v T H Jennings (Harlow Pools) Ltd* (Case C-326/96) ECLI:EU:C:1998:577 [1998] ECR I-7835, [1999] ICR 521 ("*Levez*"). In that case, the female claimant had been misled by her employer who told her that she was being paid the same as her male predecessor in the job. By the time she found out she was being paid less, the two-year limitation period for bringing a claim before the

employment tribunal had expired. She would, however, have been within time to bring a claim in deceit before the county court.

51. The CJEU held that the application of the two-year time limit was not of itself open to criticism. But the application of that rule even where the delay in bringing the claim was the result of the employer's deliberate misrepresentation and without any possible extension of the period was manifestly incompatible with the principle of effectiveness: see para 32. The CJEU then addressed the United Kingdom Government's argument that the alternative remedy in the county court meant that the two-year limitation period did not in effect bar her claim. That raised the issue whether the existence of the county court claim in deceit was sufficiently comparable to remedy the ineffectiveness of the employment tribunal claim. The CJEU addressed this by reference to the principle of equivalence: recasting the question as seeking to ascertain "whether Community law precludes the application of the rule at issue even when another remedy is available but, compared with other domestic actions which may be regarded as similar, is likely to entail procedural rules or other conditions which are less favourable": para 36. The CJEU therefore considered whether the employment tribunal claim and the county court claim would be sufficiently similar to be comparators if the principle of equivalence were in issue. They said (citations omitted):

> "[41] The principle of equivalence requires that the rule at issue be applied without distinction, whether the infringement alleged is of Community law or national law, where the purpose and cause of action are similar.
>
> [42] However, that principle is not to be interpreted as requiring Member States to extend their most favourable rules to all actions brought, like the main action in the present case, in the field of employment law.
>
> [43] In order to determine whether the principle of equivalence has been complied with in the present case, the national court - which alone has direct knowledge of the procedural rules governing actions in the field of employment law - must consider both the purpose and the essential characteristics of allegedly similar domestic actions.
>
> [44] Furthermore, whenever it falls to be determined whether a procedural rule of national law is less favourable than those governing similar domestic actions, the national court must take into account the role played by that provision in the

> procedure as a whole, as well as the operation and any special features of that procedure before the different national courts."

52. The CJEU went on in *Levez* to give guidance as to how similarity is assessed. When comparing procedures available to a claimant, it was appropriate to consider whether an action before the tribunal would be simpler and, in principle, less costly.

53. Advocate General Léger in his opinion in *Levez* considered the meaning of the expression "similar domestic actions" for the purposes of the principle of equivalence. He thought a likely comparator could be found in other claims for arrears of remuneration, for example a claim for an unpaid bonus brought because of the employer's breach of his obligations under the employment contract (para 63). Similarly, the situation of a person bringing a claim for salary arrears because of discrimination on the grounds of race would be comparable.

54. After *Levez* the CJEU returned to the issue in *Preston v Wolverhampton Healthcare NHS Trust* (Case C-78/98) EU:C:2000:247 [2000] ECR I-3201, [2001] 2 AC 415 ("*Preston*"), a request for a preliminary ruling from the House of Lords. In that case, Advocate General Léger described the principle of equivalence as embodying a requirement of non-discrimination: "the exercise of a right under Community law in the national legal context may not be subjected to stricter conditions than the exercise of the corresponding right conferred by national law alone" (para 79). He reiterated that:

> "every case in which it falls to be determined whether a procedural rule of national law is less favourable than those governing similar domestic actions must be analysed having regard to the role played by the national provision in the procedure as a whole, as well as the operation and any special features of that procedure before the different national courts."

55. In its judgment, responding to the House of Lords' request for guidance as to the criteria to be applied for identifying comparable rights, the CJEU referred back to *Levez* and continued:

> "61 More generally, it observed that whenever it fell to be determined whether a procedural provision of national law was less favourable than those governing similar domestic actions, the national court must take into account the role played by that provision in the procedure as a whole, as well as the operation and any special features of that procedure before the different national courts: *Levez*, p 545, para 44.

> 62 It follows that the various aspects of the procedural rules cannot be examined in isolation but must be placed in their general context. Moreover, such an examination may not be carried out subjectively by reference to circumstances of fact but must involve an objective comparison, in the abstract, of the procedural rules at issue.
>
> 63 In view of the foregoing, the answer to the third part of the second question must be that, in order to decide whether procedural rules are equivalent, the national court must verify objectively, in the abstract, whether the rules at issue are similar taking into account the role played by those rules in the procedure as a whole, as well as the operation of that procedure and any special features of those rules."

56. Two limitations on the principle of equivalence must be noted. First it is clear that there may be no similar action available in domestic proceedings for the purposes of the comparison: see *Palmisani v Istituto Nazionale della Previdenza Sociale* (Case C-261/95) EU:C:1997:351, [1997] ECR I-4025, 4049, para 39. The court is not therefore driven to find the nearest comparison but to decide whether there really is a similar action to enforce the rights in question. As Lord Slynn of Hadley said in the *Preston* case, following the CJEU's preliminary ruling: [2001] UKHL 5, [2001] 2 AC 455, para 21:

> "… one should be careful not to accept superficial similarity as being sufficient. It is not enough to say that both sets of claims arise in the field of employment law, nor is it enough to say of every claim under article 119 that somehow or other a claim could be framed in contract."

57. Secondly, the CJEU has made clear that the principle of equivalence is not to be interpreted as requiring Member States to extend their most favourable rules to all actions brought in the field of employment law: see *Levez*, para 42.

58. The police officer Respondents say that the principle of equivalence applies here. They are seeking to enforce their EU right to four weeks' leave derived from the 1993 and 2003 WTDs. They accept that the strict three-month limitation period set by regulation 43(2)(a) of the WTR (NI) 2016 does not prevent their rights from being effective in EU law terms. The CJEU has said in many cases that a reasonable limitation period is consistent with the effective exercise of EU rights: see for example *Rewe-Zentralfinanz eG v Landwirtschaftskammer für das Saarland* (Case C-33/76) EU:C:1976:188 [1976] ECR 1989, [1977] 1 CMLR 533 ("*Rewe-Zentralfinanz*").

However, they say that the right to claim unlawful deductions under article 45 of the ERO is a domestic right which is similar to their right under the WTR (NI) 2016 and the procedure provided for the enforcement of that domestic right, including as it does the "series" extension, is clearly more favourable than the procedure available for the enforcement of the EU right, namely a strict three month cut-off, regardless of whether the payments form a series or not.

59. This is the ground on which the Court of Appeal decided this issue in favour of the Respondents. In our judgment they were right to do so. Having set out the test for equivalence as discussed in *Levez*¸ they concluded at para 72 that the objective, purpose and the essential characteristics of the ERO and the WTRs (NI) are similar so that they must be regarded as similar domestic actions. Both are tribunal proceedings which are informal and inexpensive procedures and which confer many benefits, for example, setting a different and more favourable regime in relation to orders for costs than court proceedings, and providing the expertise of the tribunal members. Whilst the entitlement to four weeks' annual leave is in the WTRs (NI), both routes to the tribunal enable claims to be presented to recover the same amounts. Both have the same objective of enabling proper remuneration to be paid to workers; the purpose of both is to secure normal pay as holiday pay and the essential characteristics of both procedures are almost identical.

60. We entirely agree with that analysis. The comparability of the two procedures in this context is also supported by the alternative reasoning of the House of Lords in *Stringer*. We referred earlier to the decision there that a claim for underpaid wages could be made under either the WTR (GB) 1998 or as an unlawful deduction from wages under section 13 of the ERA 1996. The primary reasoning of their Lordships was that the definition of "wages" in the ERA 1996 was wide enough to include holiday pay so that section 13(3) ERA 1996 applied to treat the difference between the total amount of holiday pay actually paid and the total amount properly payable to the worker as a deduction from the worker's wages for the purposes of that provision (see the corresponding article 45(3) ERO set out at para 35, above).

61. The House of Lords also held that if it had been less clear that the definition of "wages" was wide enough, the term would need to be construed as including holiday pay in order to comply with the principle of equivalence. At para 57 of *Stringer*, Lord Walker (with whom Lord Brown of Eaton-under-Heywood, Lord Neuberger of Abbotsbury and Lord Hope of Craighead agreed) described the principle of equivalence as being that "national remedies for breaches of Community rights must be no less favourable than those available in similar domestic proceedings". Although reliance on that principle of equivalence was not, in his view, necessary for the appellants to succeed in that appeal he said:

> "consideration of the principle does to my mind serve to emphasise the substantial similarity between the Community right to paid annual leave and similar rights conferred by employment contracts."

62. The respondent in *Stringer* argued that reliance on the principle of equivalence proved too much because of the six-year limitation period available for contractual claims in a county court. Lord Walker said: "The comparison between procedure in an employment tribunal and in the county court must be made in the round, and the informal and inexpensive procedure in the employment tribunal confers many benefits". The proper comparison was therefore not between tribunal proceedings and county court proceedings but between the two routes to the tribunal, that is between the statutory right under regulation 30 of the WTR (GB) 1998 (corresponding to article 45 of the WTR (NI) 2016) and the contractual right under section 23(2) and (3) of the ERA 1996 (corresponding to article 55(3) and (4) ERO). That being the correct comparator, there was no doubt that the latter was more advantageous because of the "series" extension: para 60.

63. Lord Neuberger agreed that the principle of equivalence would be infringed if payments due under the WTR (GB) 1998 were not comprehended within the meaning of "wages" in section 27(1) of the ERA 1996 and thereby within the ambit of the unlawful deduction provisions: para 82. He went on:

> "88. It seems to me that the question of similarity, in the context of the principle of equivalence, has to be considered by reference to the context in which the principle is being invoked. On that basis, not only the substantial breadth of the reach of s 27(1), but also the purpose of Part II of the 1996 Act, comes into play. That purpose is well described by the title: "Protection of Wages." I find it very hard to see how it can be said, in the context of seeking to protect sums due to employees, provided that they can be fairly described as 'wages', that payments due under regulations 14 and 16 [of the 1998 Regulations] are other than similar to the many other types of payments described in, or covered by, section 27(1)."

64. The Appellants in the current appeal contend that *Stringer* does not help the police officer Respondents in this case because it does not permit an assumption of jurisdiction under the ERO in respect of persons such as police officers who are not workers within the meaning of article 3(3)(b) ERO. Dr McGleenan argues that the difference in treatment apparent from the ability of the civilian staff Respondents but not the police officer Respondents to claim under article 55 ERO as well as under regulation 43(1) WTR (NI) 2016 is not the result of EU rights being given less

favourable treatment than domestic rights. It arises because police officers are not "workers" and hence are entirely outside the protections conferred by the ERO regime (save in so far as those rights are conferred on them by other means). The difference is not therefore a difference in treatment between UK and EU rights but a difference in the treatment of different types of claimants.

65. Dr McGleenan argues further that a difference in treatment between police officers and workers within the ERO regime is well established and within the bounds of national procedural autonomy respected by the EU general principles. He relies on the classic statement of that autonomy principle by the CJEU in *Rewe-Zentralfinanz eG and Rewe Zentral AG v Landwirtschaftsjammer Für Das Saarland* (Case 33/76) [1977] 1 CMLR 533. [1976] ECR 1989:

> "5 … Applying the principle of co-operation laid down in Article 5 of the Treaty, it is the national courts which are entrusted with ensuring the legal protection which citizens derive from the direct effect of the provisions of Community law. Accordingly, in the absence of Community rules on this subject, it is for the domestic legal system of each Member State to designate the courts having jurisdiction and to determine the procedural conditions governing actions at law intended to ensure the protection of the rights which citizens have from the direct effect of Community law, it being understood that such conditions cannot be less favourable than those relating to similar actions of a domestic nature. Where necessary, Articles 100 to 102 and 235 of the Treaty enable appropriate measures to be taken to remedy differences between the provisions laid down by law, regulation or administrative action in Member States if they are likely to distort or harm the functioning of the Common Market. In the absence of such measures of harmonisation the right conferred by Community law must be exercised before the national courts in accordance with the conditions laid down by national rules. The position would be different only if the conditions and time-limits made it impossible in practice to exercise the rights which the national courts are obliged to protect."

66. The Appellants seek, therefore, to distinguish *Stringer* on the ground that there was no doubt in that case that the claimants were within the scope of both the WTR (GB) 1998 and the ERA 1996. The only argument preventing them from using the ERA route to claim underpaid holiday pay was the argument that holiday pay was not "wages".

67. We reject the Appellants' submissions on this point. They seek to import into the test of equivalence an additional criterion of comparability, namely that in order to rely on the procedural rules applicable to that comparable action, the claimant must be within the class of people who could bring a claim under that comparable provision. There is no indication in the case law of the CJEU that such a requirement applies. Although the principle of equivalence may be described as preventing Member States from discriminating against claims based on EU law, the test described in *Levez* and *Preston* does not depend on the existence of any discriminatory motive or intention on the part of the legislature in providing for different procedures for EU and domestic rights. In neither judgment does the CJEU refer to any need to explore the legitimacy of the reasons for the difference. On the contrary, in *Preston* the CJEU stated that the national court "must verify objectively, in the abstract," whether the rules at issue are similar, taking into account the role played by those rules in the procedure as a whole, as well as the operation of that procedure and any special features of those rules: para 63.

68. The absence of any such additional comparability criterion is also clear from the decision of this court in *Totel Ltd v Revenue and Customs Commissioners* [2018] UKSC 44, [2018] 1 WLR 4053. *Totel* concerned the application of the principle of equivalence in the context of a taxpayer's obligation to pre-pay disputed VAT before appealing against HMRC's assessment as to its liability for that VAT. The taxpayer sought to compare its position under the VAT legislation with the regimes for certain domestic taxes where an appeal could be brought without first paying the disputed tax. Lord Briggs JSC (with whom the other Justices agreed) held that there was no breach of the principle of equivalence because there were other domestic taxes which also imposed a "pay first" requirement. Lord Briggs noted, citing *Levez*, that the CJEU has repeatedly stated that it is for the courts of each Member State to determine whether its national procedures for claims based on EU law fall foul of the principle of equivalence, both by identifying what if any procedures for domestic law claims are true comparators for that purpose, and in order to decide whether the procedure for the EU law claim is less favourable than that available in relation to a truly comparable domestic claim. This is because the national court is best placed, from its experience and supervision of those national procedures, to carry out the requisite analysis. He said that identifying true comparators will depend critically upon the level of generality at which the process of comparison is conducted: para 8. The domestic court must focus on the purpose and essential characteristics of the allegedly similar claims. He said, "it is no part of the purpose of the principle of equivalence to prevent member states from applying different procedural requirements to different types of claim, where the differences in those procedural requirements are attributable to, or connected with, differences in the underlying claims" (para 11). However, alternative types of claim for compensation for exactly the same loss are a common example of true comparators.

69. The court held in *Totel* that none of the domestic tax regimes was a true comparator because a trader seeking to appeal a VAT assessment is typically in a significantly different position from a taxpayer seeking to appeal an assessment to any

of those other taxes. This was because the paradigm VAT trader will already have collected the VAT from the consumer whereas taxpayers seeking to appeal an assessment to, for example, income tax would have to pay any disputed tax from their own resources. What is significant for our purposes in the present appeal, is that there was no reference in *Totel* to it being relevant, let alone determinative, that the particular taxpayer could not have been subject to an assessment for one of the domestic taxes relied on because it was excluded from that particular regime.

70. We therefore consider that a worker with rights to holiday pay under the WTR (NI) 2016 who is not also a worker for the purposes of the ERO is not precluded from relying on comparator procedures in the ERO for the purposes of applying the principle of equivalence to his or her enforcement of the rights he or she has.

71. As we have explained, this court does not need to address the issue as to whether the police officer Respondents are also workers within the scope of the ERO. The Appellants argue that they have lawfully been excluded from that regime and for that reason it is not permissible to treat ERO procedures as comparable with WTR (NI) 1998 procedures. Those arguments in our view mischaracterise the consequence of applying the principle of equivalence. It does not allow the police officer Respondents to bring a claim under article 55 ERO but imports into their undoubted entitlement to bring a claim under regulation 43 of the WTR (NI) 2016 the more favourable limitation period from the ERO. The Respondents did seek to argue that they had a direct claim as workers under the ERO but the Court of Appeal rejected that argument and this judgment does not address that conclusion.

72. Once one has concluded that claims brought under article 55 ERO are comparable to claims brought under regulation 43(1) WTR (NI) 2016, there can be no doubt that the former are more favourable than the latter because of the advantage of the "series" extension.

73. Finally on this aspect of the appeal, the Appellants argue that even if the Court of Appeal was right to find a breach of the principle of equivalence, it erred by regarding it as permissible to read words into regulation 43(2)(a) of the WTR (NI) 2016 and regulation 30(2)(a) of the WTR (NI) 1998 to remedy that breach. At para 83 of the judgment, the Court of Appeal concluded that the words in italics below should be added to both regulations:

> "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; or (b) …;"

74. The Appellants argue that this goes further than is possible in accordance with the well-known principle set out in *Marleasing SA v La Comercial Internacional de Alimentacion SA* (C-106/89) [1990] ECR 1-4135, [1992] 1 CMLR 305 and *Ghaidan v Godin-Mendoza* [2004] UKHL 30, [2004] 2 AC 557. They contend that such an amendment goes against the grain of the WTRs (NI) and conflicts with a fundamental feature of the legislation, because it disapplies the short three-month time limit, compatible with the principle of effectiveness, for bringing holiday pay claims under the WTRs (NI).

75. We do not accept that the absence of the "series" extension is a fundamental feature of the right to claim underpaid holiday pay under WTR (NI) 2016. The fact that a three-month time limit is a feature of the enforcement of other employment rights or that it does not breach the principle of effectiveness is not relevant in this context. The words that the Court of Appeal held should be read into the relevant regulations seem to us entirely appropriate and in accordance with the *Marleasing* test.

76. We reject, further, the Appellants' argument that importing the "series" extension into the WTR (NI) 2016 is contrary to the principle of legal certainty which is met by having a short but strict limitation period (subject to the "reasonably practicable" extension). Dr McGleenan argued that the principle of equivalence has to be balanced against other EU general principles such as the principle of effectiveness and the principle of legal certainty. We do not accept that there is a balancing exercise to be carried out here. If an enactment infringes EU law then it must be corrected and if it is possible for the court to correct it by revising the wording in accordance with the *Marleasing* principle then the correction must be applied. If it is not possible to correct it then the court's remedy is limited to declaring the incompatibility, leaving it to Parliament to legislate to put matters right.

77. It also, it is submitted, strays into areas of policy as illustrated by the policy choice made to introduce a two-year backstop in Great Britain. The principle of legal certainty cannot be relied on to preclude bringing the law into compliance with the United Kingdom's EU obligations. Whatever policy lay behind the promulgation of the Deduction from Wages (Limitation) Regulations 2014 does not appear to have extended to Northern Ireland.

78. We therefore uphold the Court of Appeal's conclusion that the inability of claimants under the WTR (NI) 1998 and 2016 to benefit from the "series" extension

available to claimants under article 55(3) ERO infringes the EU principle of equivalence and should be remedied by incorporating the wording proposed by the Court of Appeal into regulation 43(2)(a) of the WTR (NI) 2016 and regulation 30(2)(a) of the WTR (NI) 1998.

(4) Issues concerning the scope and operation of the "series" extension

79. We must now address a number of issues concerning the meaning and scope of the "series" extension available to claimants under article 55(2) and (3) of the ERO and, for the reasons we have given, under the WTRs (NI) 1998 and 2016. This in turn depends on the meaning of the word "series" in the context of article 55 ERO and whether a series of payments from which deductions were made comes to an end as a matter of law if two such payments are separated by a gap of more than three months or if a lawful payment is made between them.

80. This is a matter of considerable importance for the claims the subject of this appeal. As we explained at the outset of this judgment, the Respondent claimants have only been paid their basic pay for their annual leave, that is to say without regard to overtime and certain other allowances, for a considerable period of time. It is also accepted that throughout the relevant period the calculation and payment of holiday pay at the rate of basic pay, so far as basic pay is less than normal remuneration, involved making a deduction from the wages of the civilian staff Respondents contrary to article 45 of the ERO, and an underpayment of the holiday pay to which they were entitled under the WTRs (NI). This aspect of the appeal is therefore concerned with the extent of the remedy available to the Respondents to recover the underpayments they have suffered in respect of their annual leave and the proper way of calculating normal remuneration.

81. The meaning of the term "series" and the operation of the "series" extension may also affect many other claims in respect of deductions from wages and its relevance is not restricted to claims in respect of holiday pay. We will refer to some of these and explain why this is so a little later in our judgment. Further, as all parties have emphasised, the sums involved in any particular claim may not be great but the answer to the legal question now before us may have a bearing on thousands of claims each year and so have a cumulative impact which is very significant indeed.

(a) The legal framework

82. We have set out important parts of the legal framework relevant to this aspect of the appeal at paras 35 to 38 above and, in particular, the substance of articles 3, 45, 55 and 59 of the ERO.

83. For the purposes of this aspect of the appeal, it is necessary to focus, first, on article 45 ERO which confers on a worker a right not to suffer unauthorised deductions from his or her wages.

84. Wages are themselves defined in article 59 ERO as any sums due to the worker in connection with that employment. As we have foreshadowed, they include, under article 59(1): bonuses, commission and holiday pay (all in article 59(1)(a)); statutory sick pay (article 59(1)(b)); statutory maternity pay, paternity pay, adoption pay, shared parental pay, parental bereavement pay (article 59(1)(c)-(cd)); and any pay for time off under Part VII (article 59(1)(e)) for such matters as the performance of public duties (article 78), having ante-natal care (articles 83 and 84), performing duties as a pension scheme trustee (article 86); acting as an employee representative on transfers or redundancies (article 89); and for time taken on official trade union duties and training (articles 92 and 93).

85. Article 55 ERO provides that the worker may present a complaint to an industrial tribunal that his employer has made a deduction from his wages in contravention of article 45 ERO but, subject to article 55(3) and (4), may not do so unless it is presented before the end of the three months beginning with (in the case of a deduction by the employer) the date of payment of the wages from which the deduction was made or (in the case of a complaint relating to a payment received by the employer), the date the payment was received.

86. All of these provisions have a parallel in Part II of the ERA 1996 as we will explain more fully in addressing the questions to which the "series" extension gives rise. In broad terms, the right not to suffer unauthorised deductions (section 13 ERA 1996) may, if contravened, confer a right to present a complaint to the tribunal (section 23 ERA 1996) subject to the three-month time limit unless the complaint is brought in respect of a series of deductions (section 23(3)). There is one further and important aspect of the ERA 1996 which is not reflected in the ERO, and this is the two-year backstop contained in section 23(4A) ERA 1996 and to which we have already referred.

87. There can be no doubt that a purpose of this scheme is to protect workers, some of whom may be vulnerable, from being paid too little for the work that they do. Indeed, Part II of ERA 1996 and Part IV of the ERO are concerned with deductions and are entitled "Protection of Wages".

88. Another important purpose of article 55 ERO and section 23 ERA 1996 is to exclude from the jurisdiction of tribunals complaints that are not made promptly, and the limitation period is therefore short. In general, a complaint or claim in respect of a deduction must indeed be made within three months of the date of payment of the

wages from which the deduction was made (article 55(2) ERO and section 23(2) ERA 1996). However, this general rule is subject to two important exceptions.

89. The first exception applies where the tribunal is satisfied that it was not reasonably practicable for a complaint to be presented before the end of the relevant period of three months, and here the tribunal may consider the complaint if it is presented within such further period as the tribunal considers reasonable (article 55(4) ERO; section 23(4) ERA 1996).

90. The second exception, which is of central importance, applies to a complaint in respect of a series of deductions or payments. In such a case, the complaint must be made before the end of three months from the day of payment of the wages from which the last in the series of deductions was made (article 55(3) ERO; section 23(3) ERA 1996). The broad purpose of this aspect of the scheme and the "series" extension is to provide a measure of protection against the operation of the short limitation period for a worker who suffers repeated deductions from his or her wages with the consequence that he or she is paid too little, not just on one occasion, but on a series of occasions. However, this analysis does not of itself answer the questions to which this aspect of the appeal gives rise, for the ERO does not provide a definition of the word "series"; nor does it explain how such a series may be brought to an end.

(b) The Court of Appeal

91. The Court of Appeal held, in summary and essentially in agreement with the Tribunal, that:

(i) whether there has been a series of deductions through time is a question of fact (para 99);

(ii) a series of deductions can be constituted by deductions with a sufficient frequency of repetition but at different time intervals and in different amounts (para 100);

(iii) a contiguous sequence of deductions is not a requirement of a series (para 101);

(iv) there must nevertheless be a sufficient similarity of subject matter between each of the deductions in a series such that one can see that each deduction is linked to its predecessor and successor by a common fault or unifying or central vice (para 103); and so

(v) a series is not necessarily broken by a gap of three months or more between the deductions; nor is a series broken by a lawful payment if that lawful payment comes about by virtue of the common fault or unifying or central vice that underpins the series (paras 104-106).

92. The Court of Appeal then applied these principles in the circumstances of the claims the subject of these appeals and decided in relation to each of them that it was necessary first, to identify the alleged series of unlawful deductions upon which reliance was placed. Here it was a series of unlawful deductions in respect of holiday pay. That being so, it could be seen that each unlawful deduction was factually linked to its predecessor by the common fault or unifying or central vice that holiday pay had been calculated by reference to basic pay rather than normal pay. That method of calculation provided a factual link between all payments of holiday pay whether to police officers or to civilian employees, and it did so consistently from 23 November 1998. The unlawful deductions in respect of holiday pay therefore constituted a series and that was so even though they were all of different amounts, and even though the time interval between the deductions varied and on occasion extended to more than three months. Further, the series was not broken by a lawful payment of holiday pay if the lawful payment came about, as it did from time to time, because the worker concerned was not paid overtime in the reference period and so did not receive any relevant allowance.

(c) The issues on this further appeal

93. The issues raised by this further appeal as to the scope and operation of the "series" extension are helpfully encapsulated in the challenges made by the Appellants to the Court of Appeal's conclusions. They contend that the Court of Appeal failed properly to interpret the word "series" in this context and that its decision would permit claimants to pursue claims for past losses in respect of payments for periods of annual leave dating back over many years, even to the commencement of the WTR (NI) 1998. This would be to disapply any reasonable concept of time limits for claims of these kinds.

94. The Appellants argue, first, that the word "series" connotes a succession of payments with a factual and a temporal link between them. The purpose of the legislation and the policy behind all time limits in any tribunal, is that claims should be brought promptly and nearly always within three months.

95. Secondly, they continue, a series of unlawful payments is brought to an end, as a matter of law, by a gap of more than three months between any two of those payments, or by the making of a lawful payment, which may of itself break a series of unlawful payments. The word "series" requires contiguity or succession and regularity. Payments

in respect of annual leave which are irregular in time or interrupted by compliant annual leave payments of various kinds cannot form part of the same series.

96. The Appellants contend, thirdly, that the focus of the term "series" in this context is on payments of or deductions from wages which have been made or will be made at specific and identifiable moments in time, and not simply on the subject matter of the payments or the reasons why the payments were or were not made.

97. Overall, the Appellants continue, these provisions call for a sufficient temporal link between each of the payments in the alleged series and so, for example, Parliament cannot have intended that the right to bring a claim which had been extinguished by passage of time could later be reignited after the relevant limitation period had expired. To hold that such acts may constitute part of the same series would be to undermine the principle of certainty. Further, the Court of Appeal was wrong to find that a series of unlawful deductions in relation to holiday pay is not necessarily broken by a lawful payment of such pay, and that is so for the simple reason that a correct and lawful payment cannot have been made by fault or flaw. A payment about which no complaint has been or could be made, perhaps because there was never any relevant deduction from it, could never have formed part of any relevant series of unlawful deductions or payments.

98. The Appellants conclude that the combination of the Court of Appeal's findings as to how the WTRs (NI) should be read (that is to say, by reading into the relevant regulation the extension of time for presenting a claim in respect of a "series" of payments of wages from which deductions were made), together with its findings as to the meaning of the word "series", means that there may no longer be any effective time limit in respect of these claims. All that a claimant has to do is to present his or her claim before the end of a period of three months beginning with the date of the last impugned payment. This approach may lead to a build-up of claims and is antithetical to the purpose of a statutory limitation period.

99. The Respondents, on the other hand, and UNISON, commend the reasoning and the decision of the Court of Appeal.

100. The range of the issues raised by the parties reflects the profound differences between them about the meaning and application of the "series" extension and serves to emphasise the importance of the questions to which this part of the appeal gives rise.

(d) The history and broader relevance of the "series" extension

101. We have referred earlier in this judgment to the similarity between the relevant provisions of the ERO and those of the ERA 1996 and explained how the ERO confers a wide range of employment rights which largely correspond to the rights conferred in Great Britain by the ERA. More specifically and as UNISON argues, Part IV of the ERO, which deals with unlawful deductions from wages, is closely modelled on the equivalent provisions of Part II of the ERA; and article 55(3) ERO, which deals with the "series" extension, is expressed in essentially the same terms as section 23(3) ERA. Hitherto it has not been suggested the material parts of these provisions should be interpreted differently from each other, save for the two-year backstop to which we have already referred.

102. The ERA 1996 itself repealed and consolidated a range of legislation concerned with the protection of the rights of employees, including the Wages Act 1986 ("the WA 1986"). Similarly, the ERO repealed and re-enacted the employment legislation in Northern Ireland listed in Schedule 3, including the Wages (Northern Ireland) Order 1988 (1988/796) ("the 1988 Order").

103. The WA 1986 and the 1988 Order had themselves repealed the various Truck Acts in Great Britain and Northern Ireland, respectively, and were intended to provide an important measure of protection to workers in relation to the payment of wages.

104. Section 5 of the WA 1986 (and article 7 of the 1988 Order) introduced the exclusive remedy of a complaint by a worker to a tribunal in respect of, among other things, deductions from pay and demands for payment. But these provisions also introduced the relatively short limitation period of three months from the date of payment or deduction for the making of a complaint, subject to an extension where it was not reasonably practicable to bring a complaint in time (section 5(2); and article 7(2)). In this context, the expression "reasonably practicable" did not mean "reasonable", as the Court of Appeal explained in *Palmer v Southend-on-Sea Borough Council* [1984] ICR 372, per May LJ, at pp 384-385 in considering other legislation imposing a similar time limit for making a complaint of unfair dismissal.

105. Nevertheless, another mitigation measure (section 5(3) of the WA 1986; corresponding to article 7(3) of the 1988 Order) was also introduced and this allowed a claim to be brought within three months of the last in a "series" of deductions or payments.

106. The word "series" was not defined in the WA 1986 or in the 1988 Order but the phrase "series of similar actions" has been used in other limitation provisions, such as those contained in sections 23 and 24 of the Employment Protection (Consolidation) Act 1978 ("EPCA 1978") concerning complaints by employees to an industrial tribunal that they had been subjected to action for the purpose of preventing or deterring them

from being members of an independent trade union or taking part in trade union activities. In particular, section 24(2) EPCA 1978 required a tribunal not to consider a complaint unless it was presented to the tribunal within three months beginning with the action complained of or, where the action was part of a series of similar actions, the last of those actions, or such further period as the tribunal considered reasonable in a case where it was not reasonably practicable for the complaint to be presented within the period of three months.

107. Reverting now to the ERA 1996 and the ERO, they too are concerned with the protection of wages from unauthorised deductions. Part I of WA 1986 now became Part II of ERA, and section 5(2)-(3) WA 1986 was re-enacted substantially unchanged in section 23(2)-(4) of ERA. Similarly, in Northern Ireland, Part II of the 1988 Order became Part IV ERO, and article 55(2)-(4) of ERO replicated section 23(2)-(4) of ERA.

108. At this point it is necessary also to explain that Part V of the ERA replaces and re-enacts other schemes established by earlier legislation, and these gave further protections to workers subjected to some form of detriment. Relevant here is the protection given to any worker subjected to a detriment because he or she performed as a health and safety representative (section 44), a pension scheme trustee (section 46) or an employee representative in redundancies or transfers (section 47). We should also refer to the right of a worker not to be subjected to any detriment by any act or any deliberate failure to act by his employer done on the ground that the worker has made a protected disclosure (section 47B).

109. A claim by an employee that he has been subjected to a detriment in contravention of one of these provisions may be the subject of a complaint to an employment tribunal: section 48 ERA. But section 48(3) contains a corresponding three-month time limit in providing that the tribunal shall not consider a complaint unless it is presented before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates, subject to the important exceptions we have already highlighted, namely where that act or failure is part of a series of similar acts or failures, the last of them, or within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.

110. Similar protections are available under the ERO and again, in an appropriate case, a worker may present a complaint to a tribunal, for example under article 74 or 77 ERO, on the ground that he has been subjected to a detriment by his employer in breach of a provision of the ERO, in all cases subject to a time limit but including an equivalent series extension.

(e) Interpretation

111. Focussing now on the particular provisions which lie at the heart of the issues to be decided in this appeal, the approach to be adopted to their interpretation is well established and there can be no real dispute about it. It is necessary to have regard to the purpose of article 55(3) ERO and section 23(3) ERA 1996, in context, and to interpret their language, so far as possible, in the way which best gives effect to that purpose.

112. An important general purpose of the legislation we are concerned with in this appeal is to give workers a measure of protection from exploitation and, as Lord Leggatt explained in *Uber BV v Aslam* [2021] UKSC 5, [2021] ICR 657, at para 71, it is, among other things, to protect vulnerable workers from being paid too little for the work that they do. Indeed, this has been a feature of all of the legislation to which we have referred. As Lord Atkinson explained in *Williams v North's Navigation Collieries (1889) Ltd* [1906] AC 136 at 146, in considering the interpretation and application of the Truck Act of 1831, the entire amount of the wages earned by a workman had to be paid and no portion withheld, without the consent of the workman or save as authorised by the statute, even if the amount deducted in that case represented an equivalent sum owed to the employer by the workman. The principle on which the legislation was based was that the workman required protection and that if not protected, he might be "over-reached".

113. Similarly, in *Bristow v City Petroleum Ltd* [1987] 1 WLR 529, one of the questions was whether a contract which provided for a deduction from the employee's wages was a deduction for or in respect of a "fine" for the purposes of section 1 of the Truck Act 1896. Lord Ackner explained (at page 532) that the purpose of the legislation was to protect the worker who, as an individual, was deemed to be weaker than his master and liable to oppression.

114. We consider this protective purpose also finds expression in the reasoning of the Court of Appeal in *Arthur v London Eastern Railway Ltd (trading as One Stansted Express)* [2006] EWCA Civ 1358, [2007] ICR 193 in addressing a complaint brought by an employee that he had been subjected to continuing detriment by his employer contrary to section 47B of the ERA 1996 because of public interest disclosures he had made to the police and his employer concerning assaults which he claimed to have suffered. The question arose as to whether a series of apparently unconnected acts could be shown to be part of a relevant series or to be similar in a relevant way because they had all been done to the claimant because he had made protected disclosures. Mummery LJ, with whom Sedley LJ agreed, explained, at para 29:

> "Parliament considered it necessary to make exceptions to the general rule where an act (or failure) in the short three-month

> period is not an isolated incident or a discrete act. Unlike a dismissal, which occurs at a specific moment of time, discrimination or other forms of detrimental treatment can spread over a period, sometimes a long period. A vulnerable employee may, for understandable reasons, put up with less favourable treatment or detriment for a long time before making a complaint to a tribunal. It is not always reasonable to expect an employee to take his employer to a tribunal at the first opportunity. So an act extending over a period may be treated as a single continuing act and the particular act occurring in the three-month period may be treated as the last day on which the continuing act occurred. There are instances in the authorities on discrimination law of a continuing act in the form of the application over a period of a discriminatory rule, practice scheme or policy. Behind the appearance of isolated, discrete acts the reality may be a common or connecting factor, the continuing application of which to the employee subjects him to ongoing or repeated acts of discrimination or detriment. If, for example, an employer victimised an employee for making a protected disclosure by directing the pay office to deduct £10 from his weekly pay from then on, the employee's right to complain to the tribunal would not be limited to the deductions made from his pay in the three months preceding the presentation of his application. The instruction to deduct would extend over the period during which it was in force and the last deduction in the three months would be treated as the date of the act complained of."

115. The court in this way recognised that a strict three-month time limit for making a complaint in respect of each of a number of acts would impose a wholly unreasonable burden on a worker if the acts formed a series because they were connected together in a relevant way. Acts may be connected because they involve, for example, a practice adopted by the employer, the continuing application of which to the employee subjects the employee to ongoing or repeated acts of discrimination or detriment.

116. In our view the same considerations are relevant to the protection of workers who suffer unauthorised deductions from their holiday pay or from any of the other forms of wages to which they may be entitled, and which are detailed in article 59 ERO.

117. As for holiday pay, there will often be cases where such payments (and corresponding deductions) take place more than three months apart and where each of those failures is the consequence of the employer failing properly to meet its obligations. If, as may well be the case, those deductions would otherwise constitute a series, the imposition of a mandatory cut off after an interval of three months might

indeed produce unfair consequences. It would permit what UNISON described as a canny operator to game the system by spacing out the payments (from which deductions had been made) over a period of more than three months. It would also mean that an employee who chose to take holiday leave on occasions more than three months apart would break the series; and any claimant concerned about these matters would have to keep issuing a new claim after each relevant limitation time interval, if only to preserve his or her position. That would make no sense at all. It would also impose a wholly unnecessary burden on the employee for whom each individual deduction is relatively small, but where the aggregate is substantial.

118. Many of the same points emerge on consideration of the other forms of wage from which deductions may be made on more than one occasion, and where the intervals between deductions may be irregular and largely out of the worker's control. So, for example, a worker who suffers from an ailment may have no control over when he or she falls sick and needs to take sick pay (article 59(1)(b) ERO). The employer, on the other hand, may routinely make unauthorised deductions from those payments. On some occasions, the interval between such payments may be less than three months, on others it may be more. But on the interpretation for which the Appellants contend, any interval of more than three months would be enough to interrupt the series for which the worker can claim compensation.

119. A worker claiming commission (article 59(1)(a) ERO) may be in much the same position. Commission may be payable at irregular points in the year, for example when a particular result is achieved. Yet an employer who fails to calculate or account for the commission on the correct basis, may consistently make underpayments. Those deductions may take place at intervals of more than three months or they may be more frequent. In the one case the series would be broken and in the other it would not, and without any sufficient justification. It is not difficult to imagine similarly harsh and arbitrary results from the application of the interpretation for which the Appellants contend to, for example, overtime payments, bonuses, bank holiday pay and to unlawful deductions applied to wages on account of cash shortages or stock deficiencies.

120. It therefore comes as no surprise to learn that prior to the judgment of Langstaff J in *Bear Scotland*, it had not been suggested that a series of unlawful deductions for the purposes of section 23(3) ERA would necessarily be broken by an interval of more than three months between successive deductions. Indeed, we were referred to a number of decisions which proceeded on the assumption that a series could extend over such an interval: see, for example, *List Design Group Ltd v Douglas* [2002] ICR 686. Nevertheless, in *Bear Scotland*, Langstaff J took a contrary view.

121. The issue before the EAT in *Bear Scotland* was whether underpayments to which the claimants were entitled under regulation 13 of the WTR (GB) 1988 constituted a series of deductions within the meaning of section 23(3) ERA. In answering that

question, Langstaff J reasoned that whether there is in any case a series of deductions is a question of fact, "series" being an ordinary word with no particular legal meaning. In the present context, that is to say a series through time, it involved two particular matters: first, a sufficient similarity of subject matter, such that each deduction was factually linked to the next in the same way as it was linked to its predecessor; and secondly, a sufficient degree of repetition. Thus far, Langstaff J's approach is unimpeachable.

122. It is the next step in Langstaff J's reasoning that has been questioned. He explained, at para 81, that the legislation provides that a tribunal loses jurisdiction to consider a complaint that there has been a deduction from wages unless it is brought within three months of the deduction or the last of a series of deductions being made (section 23(2) and (3) ERA), unless it was not reasonably practicable for the complaint to be presented within the three-month period. It followed that jurisdiction could not be regained simply because another non-payment, occurring more than three months later, could be characterised as having such similar features that it formed part of the same series. The sense of the legislation, in his view, was that any series punctuated from the next succeeding series by a gap of more than three months was one in respect of which the jurisdiction to consider a complaint had been extinguished by the passage of time. This reasoning forms a foundation for the Appellants' arguments on this further appeal.

123. We are satisfied that Langstaff J fell into error in this second part of his reasoning. Of course, there will be cases where a failure by a worker to bring a claim within three months of a particular act or failure to act will extinguish the jurisdiction to consider that claim. The limitation period is short and deliberately so. The purpose of protecting potentially vulnerable workers is not uncontrolled. In general, the claim must indeed be made within three months of any act or failure to act of which complaint is made. But to assume that a gap of more than three months between an act of which complaint is made and any acts which preceded it will necessarily extinguish the claimant's ability to recover in respect of the earlier acts would be largely to ignore the exception to the general rule which the "series" extension provides and the protection it is intended to confer.

124. An important purpose of the "series" extension in section 23 ERA 1996 (and article 55 ERO), just as it is in section 48(3) ERA (and article 74 ERO), is to allow workers or employees, in an appropriate case, to complain about acts or failures which occur outside the three-month period preceding the complaint. In the case of article 55 ERO, there must be a relevant act or failure to act which has occurred within that three-month period, but the complaint is not necessarily confined to that act or failure. If, for example, it is shown to be the latest in a series of deductions, all of which are relevantly connected with each other, the worker or employee may complain about them all, for they are all comprised in one series which for this purpose is "in time". In this way, the purpose of the scheme is given proper effect.

125. It follows that we also agree with the provisional view expressed by the Court of Appeal most recently in *Pimlico Plumbers Ltd v Smith (No 2)* [2022] EWCA Civ 70, [2022] ICR 818, on this issue. In the end it was not necessary for the Court of Appeal to decide the question. Nevertheless, Simler LJ, with whom Elisabeth Laing and King LJJ agreed, expressed the strong provisional view, consistent with the conclusion which we have reached, that this aspect of the reasoning in *Bear Scotland* derives no support from the express words in section 23(3) ERA, and that the period during which a claim can be brought is three months from the date the last payment was made, but that this three-month limit does not restrict or qualify the meaning of a "series" of deductions.

(f) Conclusions on the "series" extension issue

126. Drawing the threads together, we are satisfied, first, that the language of article 55(3) ERO (and section 23 ERA 1996) does permit the court to give effect to what we have discerned to be the purpose of this legislation, namely, to temper the rigour of the short limitation period by providing the two exceptions to which we have referred (see paras 89 and 90 above).

127. Secondly, we agree with the Court of Appeal that the word "series" is an ordinary English word and that, broadly speaking, it means a number of things of a kind, and in this context, a number of things of a kind which follow each other in time. Hence, whether a claim in respect of two or more deductions constitutes a claim in respect of a series of deductions is essentially a question of fact, and in answering that question all relevant circumstances must be taken into account, including, in relation to the deductions in issue: their similarities and differences; their frequency, size and impact; how they came to be made and applied; what links them together, and all other relevant circumstances.

128. Thirdly, we also agree with the Court of Appeal that a contiguous sequence of deductions of a particular kind is not a requirement of a series, though it may be a relevant factor in deciding whether the deductions constitute a series. That is not to say that deductions which do follow each other in time necessarily constitute a series; nor does it mean that a series of unlawful deductions remains intact when they are interrupted by a lawful payment. All will depend on the nature and reason for the deductions of which complaint is made, and whether and, if so, how any lawful payment has anything to do with them.

129. Fourthly, it is helpful and important to identify the alleged series of unlawful deductions upon which reliance is placed and the fault which is said to underpin it. In these appeals, the series is a series of deductions in relation to holiday pay. Each unlawful deduction is said to be factually linked to its predecessor by the common fault or unifying vice that holiday pay was calculated by reference to basic pay rather than

normal pay, and so regardless of any overtime or allowances during the reference period. As the Court of Appeal observed, there would have been appropriate payments of pay between the holiday payments while the claimants were at work which would not have been subject to unlawful deductions. But identifying the alleged series as a series of deductions in relation to holiday pay meant those lawful payments whilst the claimants were at work did not of themselves interrupt the series.

130. More specifically, we are also satisfied that the Court of Appeal made no error in finding:

> (i) that each unlawful deduction in relation to holiday pay was factually linked to its predecessor by the common fault or unifying vice that holiday pay was calculated by reference to basic pay rather than normal pay;
>
> (ii) this method of calculation linked all payments of holiday pay, and it did so consistently from 23 November 1998;
>
> (iii) it mattered not that the interval between these payments was from time to time in excess of three months; and these intervals of more than three months did not, in and of themselves and as a matter of law, break the series or bring it to an end; and further,
>
> (iv) the series was not broken or brought to an end by any correct and lawful payment of holiday pay in so far as that payment came about (in common with the other payments in the series) by virtue of the application of the common fault or vice that holiday pay was calculated by reference to basic pay rather than normal pay. In these cases, each payment was still linked to its predecessor by the common fault or vice that holiday pay was calculated by reference to basic pay rather than normal pay.

(5) Remaining issues

131. The foregoing analysis addresses most of the issues arising in connection with the application of the "series" extension in the context of these appeals. But there are three further issues before this court: whether the annual leave to which the Respondents are entitled must be taken or must be deemed to have been taken in a particular order or sequence; how overtime should be taken into account in calculating normal pay, and so the holiday pay to which a worker is entitled; and how the appropriate reference period for calculating normal pay should be identified. We will address them in turn, albeit relatively briefly in light of the conclusions we have already

reached and a measure of agreement between the parties, for which they are to be commended.

(a) Whether annual leave must be taken in a particular sequence

132. The issue here concerns the finding of the Court of Appeal, at para 119, in agreement with the Tribunal, that a worker is entitled to enjoy leave from whichever legal source it may be derived and that there is no requirement as a matter of law that the leave derived from different sources must be taken in a particular order.

133. The Appellants contend that the Court of Appeal ought instead to have distinguished between the types of annual leave to which police officers and civilian workers are entitled, and ought to have held that the minimum entitlement to annual leave, based on EU law, must be or be treated as having been taken first, followed by any additional leave such as the additional 1.6 weeks allowed by domestic law and the two days allowed by the Respondents' terms and conditions. They rely in support of this submission on the approach described by Langstaff J in *Bear Scotland*, at paras 115-118, and his observation that the description of leave as "additional leave" suggests that the dates of it should be the last to be agreed upon during the course of a leave year. They continue that the Court of Appeal's failure to do that has implications for:

> (i) time limits, because compliant payments of annual leave or substantial gaps between the taking of WTD derived leave may interrupt a "series" of payments for the purposes of article 55(3) ERO; and
>
> (ii) quantum because of the "series" point, and in any event because annual leave taken at different times throughout the year will attract a different level of payment depending on the "normal" pay leading into such leave.

134. There can be no doubt that the significance of this issue is considerably diminished by our conclusion that a series of deductions or underpayments does not come to an end, as a matter of law, simply because it has been interrupted by a lawful payment. Nor does an interval of more than three months between deductions or underpayments necessarily mean that the relevant series has been broken. Be that as it may, we are satisfied that the Court of Appeal came to the right conclusion, as did the Tribunal.

135. First, we agree with the Court of Appeal that the fact that some of the leave to which a worker is entitled under domestic law may be described as "additional" says nothing about when and how it must be taken relative to other leave to which the worker

is entitled in that same period under the WTRs (NI) and for which the worker is entitled to be paid his or her normal pay including an amount to reflect overtime worked.

136. Secondly, the ultimate source of the entitlement to leave, whether it be in EU or purely domestic law, has no bearing on the importance of that leave to workers who are likely to look at their annual leave entitlement as a composite whole.

137. Thirdly, if and in so far as it is not practicable to distinguish between different types of leave then all the leave to which the worker is entitled must form part of a single, composite pot, and the Tribunal and Court of Appeal were right so to conclude.

138. Finally, we accept the submission made on behalf of the Respondents that for the Appellants now to contend that a worker was taking leave from a particular entitlement at a particular time and so argue that the series of deductions they suffered was interrupted and brought to an end, would be to deny them sums which they ought to have been paid, and looking forward, antithetical to the purpose of the entitlement to paid leave, which is to ensure that they take the holidays they need to maintain their health and wellbeing.

(b) The correct mode of calculation

139. The Court of Appeal considered these issues at paras 121-134 in addressing this question posed by the parties: if one is required to take a daily rate for overtime that forms part of a worker's normal pay in order to calculate holiday pay that is due, is the lawful approach to divide the number of days in the four weeks' leave period (20) by the number of calendar days in the reference period or the number of working days in that period?

140. The Court of Appeal concluded, at paras 133 and 134, that it was wrong in principle to use the divisor 365 in relation to 20 working days, and that was because it was not appropriate to divide the number of working days in the four weeks' leave period (20) by the number of calendar days in the reference period (365). That did not compare like with like. We have no doubt that the Court of Appeal was right on this issue, and the adoption of calendar days rather than working days (where the two are not the same) has a significant impact on the outcome and we can see no justification for its adoption as a matter of course in cases such as these.

141. The Court of Appeal continued that the maintenance of remuneration and what constitutes normal remuneration is a question of fact, just as the reference period is a question of fact, and both should be addressed in evidence in individual cases.

142. We respectfully agree. The parties to this appeal are also agreed that the matter is now best left to the tribunal and that the Court of Appeal's discrete conclusions on these questions need not be disturbed.

(c) The appropriate reference period in these cases

143. We mention this only to record what we understand now to be common ground, namely that the appropriate reference period in any case is a question of fact, and to note that, essentially for pragmatic reasons, the Court of Appeal encouraged the parties to agree a method for calculating pay based on a 12-month reference period.

(6) Overall conclusion

144. For the reasons we have given, this appeal must be dismissed.

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

ANNEX

Provision	**Employment Rights (Northern Ireland) Order 1996**	**Employment Rights Act 1996**
Definition of "worker"	article 3(3)	section 230
Right not to suffer unauthorised deductions	article 45	section 13
Right to present a complaint before the tribunal	article 55(1)	section 23(1)
Limitation period including the "series" extension	article 55(3)	section 23(3)
Reasonably practicable extension	article 55(4)	section 23(4)
Definition of "wages"	article 59(1)(a) – (j)	section 27(1)(a) – (j)
Definition of "a week's pay"	articles 17 - 20	sections 220 - 224
	Working Time Regulations (Northern Ireland) 2016	**Working Time Regulations (Northern Ireland) 1998**
Entitlement to four weeks' annual leave	reg 15	reg 13
Entitlement to additional 1.6 weeks' leave	reg 16	reg 13A
Payment for annual leave	reg 20 (incorporating "a week's pay" from articles 17 to 20 ERO)	reg 16 (incorporating "a week's pay" from articles 17 to 20 ERO)
Right to present complaint	reg 43(1)	reg 30(1)
Three-month time limit on claims	reg 43(2)(a)	reg 30(2)(a)
Reasonably practicable extension	reg 43(2)(b)	reg 30(2)(b)
Application of regulations to police officers	reg 50	reg 38