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# Holiday pay: The implications of the Supreme Court judgment in the *Brazel* case

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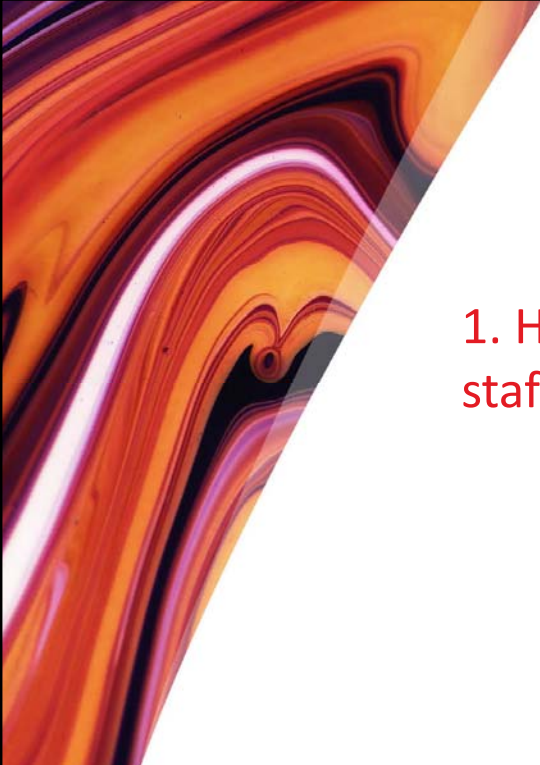


## Overview


- Staff communications
- Strategic approach to back pay
- Holiday pay calculations
- Timing considerations
- Staff contracts

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# 1. How did you communicate with staff in respect of the judgment?



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## Staff communications


- Initial correspondence with affected staff
- Substantive correspondence in respect of
  - back pay
  - holiday pay arrangements going forward
  - contracts of employment
- Proactive v reactive approach
- Consider reputational issues



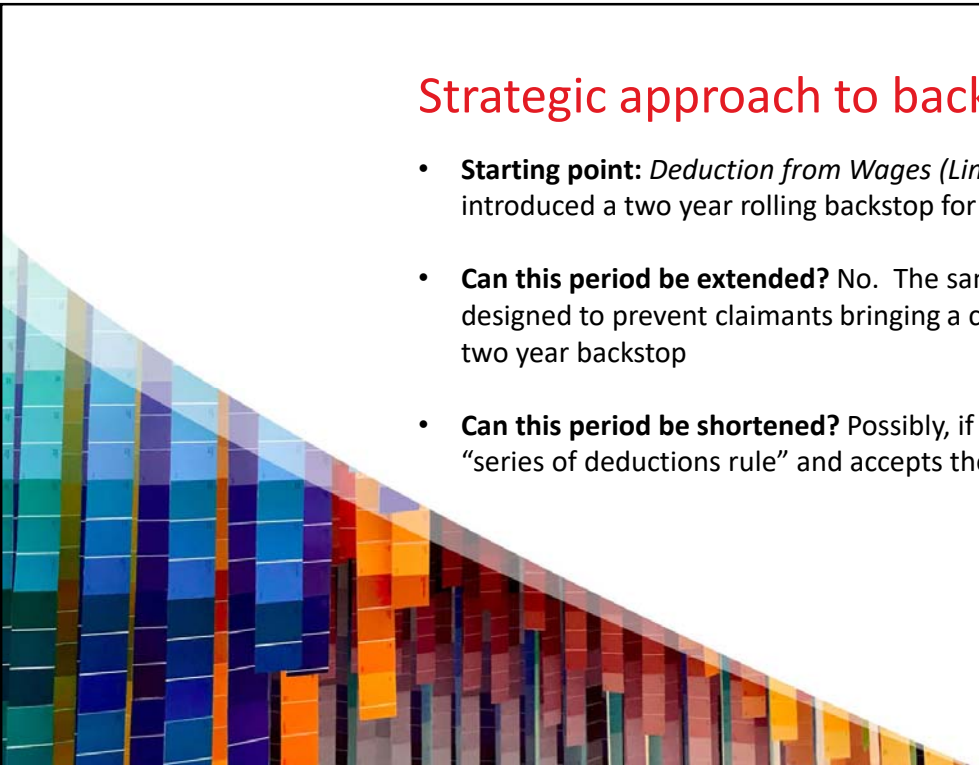
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## 2. How did you determine your approach to back pay?




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## Strategic approach to back pay

- **Starting point:** *Deduction from Wages (Limitation) Regulations 2014* introduced a two year rolling backstop for back pay
- **Can this period be extended?** No. The same Regulations are designed to prevent claimants bringing a civil claim to circumvent the two year backstop
- **Can this period be shortened?** Possibly, if an employer relies on the “series of deductions rule” and accepts the risk of challenge



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## Strategic approach to back pay

### Series of deductions rule

- Claims for underpaid holiday must be submitted within three months of the last of a “series of deductions” (s.23(3) ERA 1996)
- The series will be broken where a period of more than three months has elapsed between deductions
- Requires a fresh claim to be issued every three months where there are ongoing deductions
- However, the rule has been criticised and is open to challenge



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## Strategic approach to back pay

### Chief Constable of Northern Ireland v Agnew [2019] – NICA

- What constitutes a series of deductions will be a question of fact
- Lawful payments of correct amounts between incorrect payments will not necessarily break the series
- Northern Ireland Court of Appeal case – not binding in England and Wales but nevertheless influential
- Supreme Court appeal did not proceed so the law in Northern Ireland now differs from the law in England and Wales



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## Strategic approach to back pay

### Smith v Pimlico Plumbers [2022] – EWCA

- Employer **refused** to allow worker to take paid annual leave over whole course of employment
- Right to paid annual leave accumulated from year to year and crystallised on termination of employment. **The claimant could therefore go back the whole course of his employment and was not limited to two years' recovery**
- CA expressed “strong provisional view” that a series of deductions will not automatically end where there is a gap of more than three months between deductions.



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## 3. How did you approach holiday pay calculations?



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## Holiday pay calculations

### How must holiday pay be calculated?

**At the rate of “a week’s pay in respect of each week of leave”.**

- The calculation of a week’s pay will depend on the worker’s hours and how they are paid
- Multiply one week’s pay by 5.6 to calculate a year’s holiday pay entitlement



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## Holiday pay calculations

### What is a week’s pay under the Employment Rights Act 1996?

#### Normal working hours with pay that does not vary

The amount payable under the contract of employment if the employee works his normal working hours in a week

#### Method

- Annual working weeks + at least 5.6 weeks = total paid weeks
- Average out over 12 equal monthly payments
- Example:  $39 + 5.6 = 44.6$  weeks pay



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## Holiday pay calculations

**Staff with normal working hours with pay that varies, and staff with no normal working hours**

- Calculate average weekly pay over last 52 worked weeks (substituting unworked weeks with worked weeks going back a maximum of 104 weeks)
- Multiply this amount by 5.6 weeks



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## Holiday pay calculations

### Practical considerations


- Resourcing the calculations
  - Time commitment
  - Manpower
- Accessing pay data through payroll




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## 4. What factors informed your approach to timing holiday payments?




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## Timing considerations

- When to pay back pay?
- Deductions on back pay
- National Minimum Wage considerations
- Options for timing holiday pay going forward
  - Will you be shifting from monthly to termly holiday pay payments, or similar?
  - If so, consider how to manage practical impact on staff
  - Ensure contractual wording reflects the new approach



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## 5. Are you contracting with staff differently as a result of the judgment?



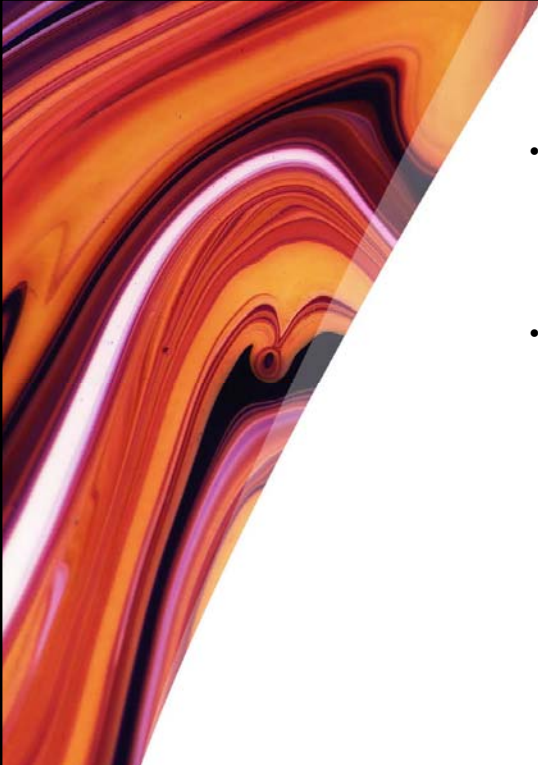
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## Staff contracts

- Existing staff contracts – issue variation letter to cover holiday pay entitlement?
- Contracts for new starters – opportunity to update templates
  - All staff are entitled to 5.6 weeks' statutory holiday (this can be expressed in equivalent working days/hours for part-time staff)
  - Contractual holiday (and other benefits) can be pro-rated




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## Staff contracts

- Will the use of certain types of contract change?
  - Require “TTO” staff to work more weeks per year?
  - Consider use of casual staff contracts – year round v “assignment” model
- Safer recruitment considerations
  - Some checks should be repeated if using “assignment” model:
    - DBS (via the DBS Update Service);
    - Children’s Barred List; and
    - Any other checks the School considers necessary
  - Individual can be asked to sign declaration of medical fitness and suitability to work with children



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## Questions?

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