



## Employment Newsletter - Spring 2021

In this edition of our employment newsletter, the focus is on pay.

Our newsletter covers:

- [Unpaid Salaries and Bonuses](#)
- [Claims for Underpayment of Wages](#)
- [National Minimum Wage](#)
- [Holiday Pay](#)
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## Caution urged when reducing pay or bonuses!

As businesses face an extended period of economic downturn and persistent uncertainty, many employers have forced reduced working weeks and/or reduced pay on their employees. Employers may also have withdrawn or deferred bonuses and other incentives.

### Unpaid salary

Employers generally do not have a unilateral right to lay staff off, reduce their hours, or reduce their pay just because there is less work. If an employee is ready, willing and able to perform their full duties, the employer normally has an obligation to pay the employee their full contractual salary, unless there is a mutual agreement otherwise. It is a common misunderstanding that the Government's ongoing furlough scheme afforded employers a right to reduce pay; that is only the case if the employee has agreed to the arrangements.

### Bonuses

In recent times, we have seen many cases of employers withdrawing bonus schemes or deferring payments and awards.

A bonus or incentive is sometimes guaranteed by contractual terms, usually subject to achievement of certain performance criteria, such as an individual's or business's targets. More commonly, a bonus scheme is expressed as discretionary and will typically provide that there is no enforceable right to a bonus and that payments may be made (or not be made) at the employer's discretion.



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However, there is a misconception that employers can withhold discretionary bonus payments without good reason, and it has been held by the Courts that an employer's discretion is not completely unfettered. Where payment of a bonus is disputed, the Courts will look at all relevant circumstances regarding the payments of bonuses, including:

- The wording of the contractual clause or bonus scheme
- The performance of the business and the employee
- Historical bonuses
- Treatment of the other employees; and
- Industry standards

Employers are bound by duties not to breach implied terms of trust and confidence, to act honestly and in good faith and not to exercise discretion in an 'arbitrary, capricious or irrational' way.

In a well-known and rather extreme case involving a financial services business, the claimant had earned over £6.5m of profits for his employer working as an equities trader in the nine months prior to his dismissal. All traders, with the exception of the claimant, received bonuses, including those who had earned less profit or no profit at all. The Courts found that no rational employer would have decided not to provide the claimant with a bonus and, therefore, its discretion had been exercised in an 'irrational' or perverse way. The claimant was therefore awarded his bonus.

It is sometimes the case that a bonus is not set out in a contract of employment or documented scheme at all but has been historically paid to an employee. In these cases, it may be argued that the entitlement to a bonus payment has become an implied term of the contract of employment through custom and practice and that the entitlement to such bonus is enforceable.



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## Claims for underpayments

A salary deficit or unpaid bonus may be recoverable by an employee by way of a claim to an Employment Tribunal or other Civil Court. This may include claims for unlawful deductions from wages (i.e. unpaid wages or bonus) or breach of contract. In serious cases, employees may also consider resigning their position in order to additionally make claims of constructive unfair or wrongful dismissal.

There are different legal processes and time limits to observe and varying compensation levels available depending on the losses being claimed, type of claim made and whether the claims are made through the Employment Tribunal, County Court or High Court.

### Unlawful Deduction from Wages Claims

An employer's decision not to pay full pay or not to pay certain bonuses may be described as a deduction from wages. A deduction from wages may only be made where it is authorised under statute (such as income tax or National Insurance), authorised or required under the contract of employment or, with the employee's prior written consent.

An employee can make a claim for unlawful deductions from wages to the Employment Tribunal within three months of the deduction or where there have been a series of deductions, three months from the most recent deduction. The Deductions from Wages (Limitation) Regulations 2014 set out that deductions as part of a series have a two-year backstop, but, otherwise, there is no limit on the amount of deductions that can be claimed. Employees can make such claims whilst continuing in employment, and such claims are often fast-tracked in the Employment Tribunal, where no fee is charged to issue the proceedings.



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## Breach of Contract Claims

As an alternative, employees can bring claims for breach of contract in either the Employment Tribunal or the County or High Courts. Employment Tribunal claims for breach of contract can only be made after the termination of employment and must be brought within three months of the termination date. Damages for breach of contract in the Employment Tribunal are limited to £25,000.

A claim through the County or High Court may be made during employment and at any time up to six years after the payment should have been paid. Damages that may be awarded in a County Court are limited to £50,000 but are unlimited in the High Court.

## Constructive Unfair Dismissal

Employees may also have the right to resign in response to their employer's fundamental breach of either an express or implied term of the contract of employment with the employee treating themselves as dismissed.

A material breach of contract in relation to pay is likely to be considered a fundamental breach of contract. However, a claim for constructive unfair dismissal would usually be considered as a last resort for employees in cases where there has been a failure to pay salary or bonuses as employees would need to accept the employer's breach of contract and resign in response, losing the opportunity in relation to future income.

## ACAS

The ACAS Code of Practice may apply to a matter involving failure to pay salary or bonuses. Before commencing any action through the Employment Tribunal, the parties should seek to resolve the matter informally or, where that is not possible, through the employer's grievance procedure. Where either party unreasonably fails to comply with the ACAS Code, a Tribunal may increase or reduce any compensation payable by up to 25%.

Claims for unlawful deductions from wages, breach of contract and constructive dismissal in the Employment Tribunal are also subject to mandatory ACAS early conciliation in order to try and resolve the dispute at an early stage.

## Action points for employers

We recommend that employers:

- Review cases where reduced pay arrangements have been in place to check that there is an agreement to the reduction (whether in a furlough agreement or elsewhere). Consider whether the agreement is enforceable, permanent or temporary
- Review and future proof contracts of employment and consider including lay-off or flexibility provisions and terms authorising deductions from pay
- Review bonus terms to understand the nature of the bonus and the employer's discretion under the scheme
- Take caution and advice where seeking to alter pay arrangements or where exercising discretion to not pay or to delay bonus payments



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## National Minimum Wage - Naming and Shaming

The start of 2021 saw 139 household names face reputational damage and financial penalties for failing to pay the national minimum wage (NMW) to over 95,000 workers between 2016 and 2018. In addition to reputational damage, offending employers are required to pay arrears of wages and a penalty of up to 200% of the underpayment (capped at £10,000 per worker).

### What is the Naming Scheme?

The Scheme that names employers who break NMW laws was re-introduced for 2020. The Scheme was initially created to raise awareness of minimum wage and deter employers who would otherwise be tempted to pay less than the minimum wage.

From 2020 onwards, employers that fail to pay NMW (whether intentionally or not) will be named in the Department of Business, Energy and Industrial Standard's (BEIS) annual press release, including the number of underpaid workers, the period of underpayment and the amount of arrears. It appears that employers in the North West are more likely to have underpaid their workers.

BEIS commented, "Paying the minimum wage is not optional; it is the law." The re-introduction of the list should "serve as a wake-up call to named employers and a reminder to everyone of the importance of paying workers what they are legally entitled to".



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## What are the common errors?

Many employer underpayments are not intentional but a reflection of a poor understanding of the legislation, which, in some aspects, is complex. Common breaches of NMW laws occur where employers:

- Make deductions from workers' wages, for example, in relation to parking or travel costs, accommodation costs, training costs, shortages, uniform and work equipment (including PPE). Salary sacrifice schemes can also reduce the pay that counts towards NMW
- Fail to pay workers for their full working time, for example; additional time worked at the end of a shift or during travel time
- Fail to acknowledge the change in the classification/age bands; and
- Incorrectly treat a person as self-employed rather than a worker

## What are the NMW rates in 2021?

From April 2021, the NMW rates and applicable ages will change as follows:

Age	See Below	See Below	18-20	16-17	Apprentice
Current Rate	£8.72 (25+)	£8.20 (21-24)	£6.45	£4.55	£4.15
April 2021 Rate	£8.91 (23+)	£8.36 (21-22)	£6.56	£4.62	£4.20

## NMW cases to look out for in 2021

In February 2020, the Supreme Court heard the appeal in the case of Royal Mencap Society v Tomlinson-Blake. This case relates to whether National Minimum Wage (as opposed to a flat rate) is payable whilst employees are on a 'sleep-in shift'. It has now been held that sleep in shifts are not payable at NMW rates unless they are awake for the purposes of work rather than 'available for work'.

In February 2021, the Supreme Court unanimously ruled in Uber v Aslam that Uber drivers are 'workers' for the purposes of the Employment Rights Act 1996, the Working Time Regulations 1998 and the National Minimum Wage Act 1998, giving them rights to statutory entitlements, including receiving at least the national minimum wage and annual paid leave amongst other things.

## Action points for employers

We recommend that employers:

- Keep and retain accurate records of the amount they are remunerating their workers and the basis of calculations
- Frequently carry out audits of such records to include:
  - Identifying what work types are eligible for NMW
  - Identifying the correct rate payable to individuals, perhaps by adopting a notification system in relation to changing age bands
  - Reviewing whether any deductions made from pay affect the NMW rate paid
  - Accurately calculating hours worked by individuals
- Correct any underpayments without delay, and keep records of corrections





## The complexities of holiday pay

Full-time workers in the UK currently have a right to a minimum of 5.6 weeks (28 days) holiday. This leave is usually reduced pro-rata for part-time employees, according to the number of days they work each week. Holiday is divided into twenty days of entitlement under the Working Time Directive (WTD) and an additional eight days of additional leave, which equals the number of UK bank holidays each year – though it does not necessarily have to be taken on these days.

Workers are entitled to be paid a week's pay for each week of annual leave taken. Where a worker works regular hours and receives a set rate of pay, a week's pay is simple to calculate. However, the calculation of the amount payable is not necessarily straightforward where workers have no usual working hours or where pay may be variable based on days of the week worked, overtime or commission. It is, therefore, necessary to calculate average pay by referring to the previous 52 weeks worked by the worker. This was changed from a 12 week reference period on 6th April 2020.

To complicate matters further, the scope for determining a week's pay differs between Working Time Directive leave and additional leave.

### WTD leave

For the 20 days of Working Time Directive leave, workers must continue to receive their normal remuneration during their annual leave. However, it has been held that calculating holiday pay based purely on basic salary (without reference to overtime or commission) might discourage the worker from taking leave as their pay would likely be reduced.

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Therefore, after a series of claims regarding holiday pay, it has been held that the calculation of a week's pay for the Working Time Directive leave must include regular overtime, bonuses and commission payments.

## Additional leave

Holiday pay for the eight days of additional leave is governed by the Employment Rights Act 1996. For those with variable hours or rates of pay, commission is included in the calculation. However, overtime is only included in the definition of normal working hours, where it is both guaranteed and compulsory.

In the 2020 case of *Econ Engineering Ltd v Dixon*, it was held that a bonus or commission would only be only included in the calculation of additional leave pay if it was intrinsically linked to hours worked and not contingent on other outcomes, such as hitting targets.

## How to manage holiday pay

It is for employers to determine which type of leave (Working Time Directive or additional leave) is being taken and when. However, because of the complexities of calculating different pay for different periods of holiday, employers may choose to apply the Working Time Directive leave calculation to all holiday. If an employer does choose to calculate holiday differently for the Working Time Directive and additional leave, they should explain this to the worker.



Employers should be aware that they may not be paying their employees enough holiday pay, if they choose to disregard overtime, commission and bonuses for all annual leave and employees could pursue a claim in the Employment Tribunal for unpaid amounts.

## Action points for employers

Just like any other pay, employers should perform regular audits to ensure that holiday pay is being calculated correctly, taking into account all relevant payments to the employee (especially overtime and commission). This area continues to develop, and so employers should additionally regularly review policies and keep abreast of legal developments.



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## Equal Pay for equal work?

2020 marked the 50th anniversary of the passing of the Equal Pay Act 1970, which aimed to prevent unequal pay between men and women performing equal work. The Equality Act 2010 has since replaced the Equal Pay Act. However, despite its longevity, equal pay law is still relevant today, and equal pay cases are regularly heard in the Employment Tribunals.

As such, ACAS have published new guidance on equal pay, which sets out what counts as pay for the purposes of an equal pay claim and what counts as 'equal work'.

Broadly, work may be equal if it falls into one of the following categories:

- Like Work – work where the job and skills are the same or similar
- Rated as Equivalent – work where two distinct jobs have been rated the same using a job evaluation scheme
- Equal Value – work that is not similar but is of equal value

Equal pay claims can be costly for employers. If an employee brings an equal pay claim in the Employment Tribunal or a breach of contract claim in the County or High Courts, arrears of pay can go back up to six years before the date the claim was brought.

In 2020, BBC presenter Samira Ahmed was successful in her claim for £700,000 because of the differences in her pay when compared to male presenter Jeremy Vine. Media reports suggest that the BBC has spent more than £1.2m in legal fees defending equal pay claims, and this figure does not include awards and settlements.

Equal pay cases have been in the news for some time, first with public sector bodies such as local councils and later with large private employers. The BBC have faced several successive claims in recent years, with more possible following the Ahmed decision.

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Most large supermarkets are also involved in equal pay claims against them. A recent example of an 'equal value' work claim is the case of Brierley v Asda. This involved predominantly female supermarket checkout staff, comparing themselves to predominantly male warehouse staff. The in-store staff have argued that their work is of equal value and any difference in pay is due to the historical gender imbalances between the two groups. This case was heard by the Supreme Court in July 2020, and judgment was made stating that shop floor workers could be considered as equal to warehouse staff and the claims will continue.

The combination of continuing equal pay claims and gender pay gap reporting obligations can cause ongoing reputation damage for employers as well as costly settlements or awards.

## Action Points for Employers

ACAS guidance sets out how to avoid equal pay claims, including:

- Having an equal pay policy
- Carrying out equal pay audits or reviews
- Taking legal advice where it appears that there may be equal pay discrepancies



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## Gender and Ethnicity Pay Gap Reporting

Gender pay gap reporting originally came into force in April 2017. Large employers (250 or more employees) are required to report pay gap figures at a particular date, known as the 'snapshot date'. This is 5th April each year for private sector employers.

Employers must publish the following gender pay gap information on their own website and upload the information to a government website before the next snapshot date.

- Gender pay gap as a mean average
- Gender pay gap as a median average
- Bonus gender pay gap as a mean average
- Bonus gender pay gap as a median average
- The proportion of males receiving a bonus payment and the proportion of females receiving a bonus payment
- The proportion of males and females in each of four groups or quartiles

Due to the coronavirus pandemic, the reporting requirements were suspended last year, and as such, employers were not required to report their 2019 gender pay gaps by the April 2020 deadline. The result of this was that only 50% of relevant employers reported their gender pay gaps.

On 14 December 2020, the government published a series of documents concerning employer's obligations in relation to gender pay gap reporting, which is set to be required in 2021. However, in February 2021, it was confirmed that companies that failed to report their 2020 gender pay gap by the April 2021 deadline would not have any enforcement proceedings taken against them by the Equality and Human Rights Commission until 4 October 2021, effectively extending the deadline.

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Employees are excluded from gender pay reporting if they were receiving less than their full pay due to being “leave” on the snapshot date. This would usually include employees on sick leave or family-related leave. However, the extensive usage of the Coronavirus Job Retention Scheme means employees whose pay was reduced to 80% on 5 April 2020 would not be included in some of the pay gap requirements. Employees whose pay was topped up by their employer would be included, as usual. The exclusion of furloughed employees is likely to artificially affect the results, and the data will not show the actual picture.

## Expansion of pay gap reporting?

The Equal Pay Information and Claims Bill 2019 – 2020 had its first reading in Parliament on 20 October 2020. The bill aims to expand gender pay gap reporting to employers with 100 or more employees and increase transparency by giving employees the right to know what their colleagues are paid as well as introducing ethnicity pay gap reporting.

Ethnicity pay gap reporting would require employers to publish information about the differences in pay between employees of different ethnic origins.



Between October 2018 and January 2019, the government consulted on ethnicity gap reporting for the same large employers. Demand for ethnicity pay gap reporting increased following a petition, which closed in September 2020 and was signed 130,567 times.

## Action Points for Employers

Employers need to be aware of the following:

- whether gender pay reporting applies to their business
- how to calculate gender pay gaps
- where to publish the gender pay gap reports
- dates for reporting

These above steps may also be required for the ethnicity pay gaps and employers should prepare themselves by gathering ethnicity gap data, which may not have been produced to date.

# Stop the Press

In April 2021, statutory payment rates are set to increase:

- Statutory redundancy payments and unfair dismissal basic awards are calculated on the basis of an employee's age, years of service and weekly pay, which is capped. These payments may be higher due to the cap on a week's pay being increased from £538 to £544
- There are also increases in the maximum statutory redundancy payments and basic award from £16,140 to £16,320. The compensatory award in unfair dismissal claims is also increasing from 88,519 to £89,463
- Statutory sick pay is to increase from £95.85 to £96.35 per week
- The following family-related payments are to increase from £151.20 to £151.97:
  - Statutory maternity pay
  - Statutory paternity pay
  - Statutory adoption pay
  - Shared parental pay
  - Statutory parental bereavement pay

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Event 2 of 4

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