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Since qualifying as a solicitor in 1973 Bill has worked in Shrewsbury dealing with a variety of legal work, including employment law, personal injury claims and civil litigation. After retiring as Managing Partner of another local firm of solicitors. Bill then joined Hatchers as a consultant solicitor working with the employment team, consolidating our expertise.

Bill is a keen scuba diver and enjoys walking in the countryside.

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Welcome to the latest issue of our free employment law update. In this month's issue we look at:

**DEDUCTIONS FROM WAGES** We provide a brief overview of the law setting out when employers can make deduction from wages. [[more...](#)]

**PROOF OF AGE** In discrimination claims, the burden of proof can pass from the claimant to the appellant in certain circumstances, requiring them to prove they did not discriminate. We look at a case that said the use of the word "younger" in a recruitment document was enough to reverse the burden of proof. [[more...](#)]

**EXCEPTION TO THE RULE** When conducting disciplinary proceedings, employers are required to apply certain "principles" of fairness to avoid a finding of unfair dismissal. We look at the circumstances in which a dismissal could still be fair even if the principles had not been applied. [[more...](#)]

**IN BRIEF** There are two recent developments in employment law that employers should know about: extended flexible working provisions and extended maternity rights provisions. [[more...](#)]

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Our specialist employment team can provide you with practical advice upon how this complex and rapidly changing area of law affects you.

- Recruiting staff
- Disciplinary and grievance procedures
- Employment tribunals
- Unfair dismissal
- Redundancy
- Compromise agreements
- Equal pay
- Employment policies and handbooks
- Drafting and reviewing contracts of employment
- Family friendly rights
- Handling disciplinary matters fairly
- Discrimination
- Harassment and bullying
- Company takeovers and their effect on the employment relationship

## DEDUCTIONS FROM WAGES

Although salaries and wages are governed by the law of contract, the 1996 Employment Rights Act (ERA) stipulates when employers can make deductions made from their wages and, equally, when they cannot.

### When can employers make deductions?

The ERA says employers can make deductions:

- if it is authorised by legislation, such as deductions for tax and National Insurance or an order made by a court
- if the deduction is authorised by a provision in the worker's contract
- if the worker has agreed in writing to the deduction in advance of it being made.

There is additional protection for individuals in retail work, making it unlawful for employers to deduct more than ten per cent from their gross wages, if the deduction is made because of cash shortages or stock deficiencies.

### What are wages?

Under the legislation, a range of payments can be counted as wages:

- any fees, bonuses, commission, holiday pay or other payments in connection with the worker's job
- statutory payments such as statutory sick pay and statutory maternity pay
- luncheon vouchers, gift tokens and other vouchers of a fixed monetary value that can be exchanged for money, goods or services.

### What are not wages?

Just as importantly, certain payments are specifically excluded from the definition of wages:

- loans or advances of wages
- payments of expenses incurred in employment
- pension and redundancy payments
- lump sums on retirement or in compensation for loss of office
- payments in kind, other than vouchers or tokens that can be exchanged and are of fixed monetary value
- tips and other gratuities.

### What are deductions?

In the case of **Delaney v Staples**, the Supreme Court ruled that it was unlawful for employers to withhold any or all of the wages that they owed to a worker. It follows therefore that any contractual reduction in pay owing to a worker constitutes a deduction.

And the Supreme Court said in the 2009 case of *Stringer and ors v Her Majesty's Revenue and Customs* that workers who are denied holiday pay can pursue a tribunal claim for unauthorised deductions from wages under the Employment Rights Act 1996.

But what about payments that are said to be discretionary or non-contractual such as some commission or bonus arrangements? Although each case will turn on its own facts, the view of the courts is that if the worker expects to receive the bonus or commission and it is the norm for it to be paid, then failure to make the payment is likely to be

unlawful.

Payments in lieu of notice are not covered by these provisions because they cover a period when the employment relationship has terminated. However, if the employer fails to make a payment in lieu of notice, a worker can bring a claim to the employment tribunal.

Finally, if employers are owed money, they cannot just deduct that sum from an individual's wages. If the worker will not agree to the deduction, then they have to bring a claim in the county court.

### **What are not deductions?**

Certain kinds of deductions are excluded from the protection of wages provisions, as follows:

- overpayment of wages or expenses
- statutory provisions - such as PAYE, National Insurance or deductions for attachment of earnings
- payments to third parties on behalf of workers, such as payments to a trade union under the check off system
- strikes and industrial action
- money owing under a court or tribunal order by the worker to the employer

If a worker has a complaint about any of these deductions, they have to bring them in the county court.

### **What happens if the employer makes an overpayment?**

If an employer has overpaid someone and wants to claw the money back, they can do so and this will not constitute a deduction under the ERA.

The courts have ruled that if the employer can show that the overpayment arose because of a mistake, such as an administrative or computer error (known as a mistake of fact) they'll be in the clear, unless:

- For instance, if the worker tried to bring the subject to their employer's attention but they reassured the worker that the money was theirs; AND
- the worker spent the money in good faith, believing that it was theirs to spend; AND
- the overpayment was not their fault.

If the error is due to a mistake in interpreting the law, such as statutory regulations, then employers cannot usually recover the money, unless the worker was well aware that they should not have received it.

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## PROOF OF AGE

In discrimination claims, the burden of proof can pass from the claimant to the appellant in certain circumstances, requiring them to prove they did not discriminate. In **Canadian Imperial Bank of Commerce v Beck**, the Employment Appeal Tribunal (EAT) said that the use of the word "younger" in a recruitment document was enough to reverse the burden of proof, as the word had been retained despite advice that it was inappropriate.

### What happened?

Mr Beck, 42, was head of marketing at the bank. In March 2008 Mr Meloche, the global head of marketing, put forward a re-structuring plan which included proposals to make Mr Beck redundant, based very much on the views of Mr Risler, head of London equities, who did not get on with Mr Beck. In November 2008 Mr Beck was made redundant.

When drawing up a brief for the recruitment agency, Mr Meloche said the bank would be looking for someone with a "younger, entrepreneurial profile". Ms Marshall, head of HR Europe, said it would be inappropriate to search for a "younger" candidate and advised him to remove the requirement. Mr Meloche said that "younger" referred not to age but to someone less "senior" who would be less expensive and kept it in the briefing.

The tribunal agreed with Mr Beck's claim for age discrimination. It took the view that the bank needed to explain its use of the word "younger", particularly as it had been told not to use it. That was enough for the burden of proof to pass to the bank. Having listened to its explanations, the tribunal decided that Mr Meloche had been influenced heavily by Mr Risler's antipathy towards Mr Beck when he decided to make the latter redundant. It also found his explanation of the word "younger" unconvincing. If it meant "less senior", said the tribunal, the document should have said so.

It concluded that Mr Beck fitted the brief for the 'replacement' job apart from being "younger" and although the successful candidate was 38 (and another favoured candidate had been 50), the tribunal held that that was irrelevant as different individuals had been involved in that decision. The tribunal was concerned with the treatment which Mr Beck has been subjected to and with the motivation of the individuals who dismissed him.

The EAT dismissed the bank's appeal, holding that the fact that the bank had deliberately included the word "younger" in the briefing document "constituted such a flagrant instance of potential age discrimination that the Tribunal was entitled to conclude that the Claimant, by placing this document before the Tribunal had proved facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the Respondent was responsible for a discriminatory act on the grounds of age".

The EAT said that the tribunal had gone through the reasons given in evidence by Mr Meloche for his view that the Claimant was "simply not right" and it concluded that Mr Meloche's evidence was not genuine and that he was rationalising after the event.

Nor was it relevant that other favoured candidates were of a similar age. The tribunal had taken this into account but had asked itself the right question - what influenced the decision to dismiss at the time of dismissal? Having asked that question, it was entitled to conclude that subsequent events were not enough to discharge the burden of proof, and that, on the balance of probability, Mr Beck's dismissal was influenced by his age.

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## EXCEPTION TO THE RULE

When conducting disciplinary proceedings, employers are required to apply certain "principles" of fairness to avoid a finding of unfair dismissal. In **Bashir and anor v Sheffield Teaching Hospital NHS Foundation Trust**, however, the Employment Appeal Tribunal (EAT) said that, in exceptional circumstances, a dismissal could still be fair even if the employer had not applied those principles.

### What happened?

Mr and Mrs Bashir had worked in the Trust's finance department for some years. In December 2006, they raised multiple grievances against some of the Trust's most senior employees, alleging race discrimination. As a result of a series of procedural disputes and delays, a hearing date was set for 9 July 2007. It was agreed that this was to be a final stage hearing (and could not therefore be appealed) because of all the previous delays.

On 9 July, however, Mr Bashir asked for another postponement. The panel decided the hearing should proceed without either Mr or Mrs Bashir in attendance. The panel dismissed all the grievances and decided that they had been made in bad faith.

Mr Bashir was then suspended from his job on 18 July and a few days later Mrs Bashir was informed that disciplinary proceedings would be taken against her. Both subsequently went off sick. The disciplinary panel dismissed the Bashirs, again in their absence, for acts of serious misconduct, raising grievances in bad faith and an irreparable breakdown in their relationships with other staff.

The Bashirs lodged tribunal claims for race discrimination, victimisation and unfair dismissal. But the tribunal did not agree. It found that a comparable white employee would have been treated the same way, and did not think that the disciplinary hearings constituted an act of victimisation as a result of their complaints of race discrimination.

It said that the dismissal was fair for two reasons - some other substantial reason (their colleagues could no longer work with them); and gross misconduct on the part of the Bashirs. The tribunal also considered that their behaviour had been unreasonable in that they consistently refused to cooperate with the investigations into their grievances and had delayed the hearings on endless occasions. It found that the panel's decision to proceed in their absence on two occasions was reasonable, given the excessive delays and the effect on the running of the finance department.

And the EAT agreed, albeit with some "unease", given that many of the decisions had been made in their absence. At first sight and without reference to the "factual context", therefore, it said that the tribunal's decision that the dismissals were fair seemed "surprising". However: "we all agree that it is likely to be only in an exceptional case that a summary dismissal, in circumstances where principles [of natural justice] have not been applied, will be upheld as a fair dismissal". This, it said, was just such a case.

The facts were crucial and the principles of fairness had to be applied within the factual matrix. They did not exist in a vacuum. The Bashirs had behaved unreasonably throughout, obstructing the investigation and raising endless grievances. When considered as a whole, therefore, the tribunal's decisions did not constitute an error of law nor were they perverse.

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## IN BRIEF

Although not yet law, there are two recent developments in employment law that employers should know about.

### **Extension to flexible working provisions**

The first is that the government has announced its intention to extend the right to request flexible working to parents of children under 18 from April 2011.

It will also consult later this year on extending the right to all employees, along with the design of a new system of flexible parental leave.

Currently employees with children aged 16 or under (18 if disabled) or someone who cares for an adult and who has worked for the same employer for 26 weeks can ask their employer to change their terms and conditions of service so they can care for that dependant.

### **Extension to maternity rights provisions**

The second is that the European Parliament voted last month to extend minimum maternity leave from 14 to 20 weeks on full pay.

Parliament also agreed the following measures:

- Giving women who are breastfeeding the right to two separate periods of leave from work of at least an hour each (pro rata for part time workers but not less than 30 minutes; and increased by 30 minutes for each child in the case of multiple births), unless they have agreed something different with their employer
- Ensuring that workers do not have to do night work or work overtime during the ten weeks prior to their due date and during the entire period of breastfeeding
- Banning the dismissal of pregnant workers from the beginning of a pregnancy to at least six months following the end of the maternity leave.

These amendments to the EU Pregnant Workers Directive (92/85) have to be approved by a qualified majority of the Council of the European Union before they can become law.

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