EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: S/4110817/2015

Held in Glasgow on 19 April 2018

Employment Judge: Emma Bell

Mr James Paton	**Claimant** **In Person**
Enable Scotland (Leading the Way) Ltd	**Respondent** **Represented by:-** **Mr Meechan – Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Employment Tribunal has no jurisdiction to deal with the claimant's claims of unlawful deduction from wages except for those claims arising within the 3-month period prior to the date of lodging of the claim and accordingly those claims are dismissed.

ORDERS OF THE EMPLOYMENT TRIBUNAL

1. **The Parties shall prepare a list of issues to be determined by the Employment Tribunal in respect of the remaining claims, to be received no later than 6 June 2018.**

2. **On or before 3 May 2018, the claimant shall advise the respondent which documents he requires to be included in the joint bundle of documents to be produced by the respondent for the Hearing, setting out the relevance of each document to the issues to be determined.**

3. The respondent shall produce a copy of all documents requested (insofar as it accepts the relevancy of those documents) to the claimant no later than 17 May 2018.

4. The respondent shall produce a joint bundle of documents for the Hearing no later than 6 June 2018.

5. A Hearing shall take place to determine the claimant's claims on 20 and 21 June 2018.

REASONS

1. Mr James Paton lodged a claim with the Employment Tribunal on 30 June 2015 for unlawful deductions from wages ('UDW') of various kinds. The claim was sisted on 31 March 2016 until 22 August 2017 pending the outcome of the appeals in the cases of *Bear Scotland Limited & others* and *Lock v British Gas Trading Ltd.* The claimant's claims are resisted by the respondent.

2. The respondent argues that the Employment Tribunal does not have jurisdiction to hear claims in respect of certain of the periods during which Mr Paton contends that unlawful deductions were made from his wages. This case called before me for an Open Preliminary Hearing ('OPH') to determine the respondent's pleas as to time-bar. The respondent lodged an inventory of productions, which I shall refer to with the letter 'R'. The claimant also lodged productions, though he did not refer to them during the hearing. The claimant appeared on his own behalf and the respondent was represented by Mr Meechan, solicitor.

3. At the outset of the Hearing I sought from the claimant clarification of the particular claims he makes. Those are;

    3.1 That the holiday pay he has received throughout his employment with the respondent was less than the remuneration he would have been paid had he been at work. The respondent ought to have

included sums in respect of overtime and sleepover allowance within his holiday pay.

3.2 That the sick pay he has received throughout his employment with the respondent is less than the remuneration he would have been paid had he been at work. The respondent ought to have included sums in respect of overtime and sleepover allowance in his sick pay.

3.3 The payments made by the respondent in respect of sleepover allowance are less than the sum to which the claimant is entitled in terms of the National Minimum Wage Regulations.

4. In furtherance of the Overriding Objective I spent some time at the outset of the OPH seeking to ascertain what facts could be agreed. The outcome of that discussion is that the following facts are now agreed;

4.1 In relation to the UDW claim relating to holiday pay;

4.1.1 The claimant took holidays during September 2014. The claimant was paid in respect of holidays taken during that month on 30 September 2014

4.1.2 The claimant took no holidays in the period from 30 September 2014 to 19 December 2014.

4.1.3 The claimant was absent by reason of sickness from 19 December 2014 to 6 April 2015.

4.1.4 It is the practice of the respondent to make payment for normal hours worked during a certain month, at the end of that month.

4.1.5 The claimant took holidays during April and was paid in respect of that leave on 28 April.

4.1.6 There was a gap of more than three months between the alleged unlawful deduction made on 30 September 2014 and the alleged unlawful deduction made on 28 April 2014.

4.2 In relation to the UDW claim relating to sick pay;

4.2.1 The document at R6 accurately sets out the sick leave of the claimant from 19 June 2012 up to the date of his claim, save for the period of 2 weeks sick leave taken on 27 June 2012.

4.2.2 The claimant was paid in respect of sick leave taken during January 2014, on 30 January 2014.

4.2.3 The claimant took no sick leave between January 2014 and 19 December 2014.

4.2.4 The claimant was paid for the sick leave taken between 19 December 2014 and 6 April 2015 at the end of each month in which the absence fell.

4.2.5 There was a gap of more than three months between the alleged unlawful deduction made on 30 January 2014 and that made on 30 December 2014.

4.3 In relation to the UDW claim relating to sleepover allowance;

4.3.1 The claimant was paid a sleepover allowance on 30 January 2015

4.3.2 The claimant was next paid sleepover allowance on 28 May 2015.

4.3.3 There was no entitlement to be paid sleepover allowance in between these two dates.

4.3.4 There was a gap of more than three months between the alleged unlawful deduction made on 30 January 2015 and that made on 28 May 2015.

5. These facts having been agreed, Mr Meechan confirmed that he did not propose to call witnesses on behalf of the respondent. Mr Paton gave evidence on the question of whether it was reasonably practicable for him to have lodged a claim within the normal time limit and, if not, whether he had done so within a reasonable period thereafter. Mr Paton made an application to return to the witness table to give further evidence. Mr Meechan accepted that any prejudice in Mr Paton being allowed to do so could be balanced by the opportunity to cross-examine and to make supplementary submissions, and so did not oppose that application. I allowed Mr Paton's application on that basis.

6. Issues to be determined

6.1 Did Mr Paton lodge his claims within the normal time limit in accordance with 23(2) of the Employment Rights Act 1996 ('ERA")?

6.2 If not, was it reasonably practicable for Mr Paton to bring his claim within the normal time limit?

6.3 If not, did Mr Paton bring his claim within such further period, as the Tribunal considers reasonable?

7. Findings of Fact

In addition to the agreed facts set out above, the Tribunal makes the following findings of fact;

7.1 The claimant took holidays on 7, 8, 10, 13, 14, 24, 26, 27 and 28 April and 5 and 6 May. These were the only holidays taken by him in the period between returning from sick leave on 6 April and lodging his claim with the Employment Tribunal on 30 June 2015.

7.2 In 2013, the claimant was a member of Unison. He was aware of concerns being raised at that time about the rate of pay for sleepover allowance being made by the respondent to members of staff.

7.3 In 2014 the claimant saw information about a female employee who had won an award of money in connection with a claim about rates paid for sleepovers. That prompted him to speak again with his Union. He asked whether he could take action to seek the right to more money for sleepovers. He was told that the claim would not be 'clear cut' and he was given a copy of a couple of cases on the issue which were making their way through the courts. He was told to await the outcome of those cases to get more clarity on his entitlement to claim.

7.4 On 4 December 2014 the claimant wrote to the respondent's HR representative, Ms McGlinchey by email (R10). In that email he states; *" Firstly, I would like to raise a grievance in relation to sleepovers not being paid at the national or living wage rates, also to include overtime and sleepovers not being paid when holidays are taken."* In essence, this refers to the first and third claim made by the claimant (above).

7.5 Ms McGlinchy responded to that email on 15 December 2014 by stating *"As you are aware, I have met with both Laura Crichton and Fiona Kyle to discuss the issues you have highlighted below. I understand you met with Fiona Kyle on Friday 12 December and a further meeting has been scheduled for Friday 19 December.*

Please read my responses to each point below." The response referred to states – "*I cannot answer this issue, I have raised it with Senior Management and will feedback their response as soon as possible."*

7.6 In March 2015, while on sick leave, the claimant sought advice from his Union about the way forward. He was told that by working a sleepover and taking a holiday he would trigger the entitlement to lodge a claim for underpayment of sleepover allowance and UDW in relation to holiday pay.

7.7 The claimant took holiday immediately upon his return to work on 7 April (as well as other dates in that month) for which was paid on 28 April. He also worked a sleepover for which he was paid on 28 May.

7.8 The claimant understood that the 'trigger' for lodging a claim had occurred on 28 April and 28 May respectively. He did not know (and had not been told by his Union) that there was a time limit of three months for doing so. He had been told by his Union that any claim he did make would cover deductions made throughout his employment.

8. Observations on the Evidence

8.1 Mr Paton asked to be recalled. That application was made twice. The first occasion was prompted by Ms Hay (who was accompanying him) when apparently reminding Mr Paton of a number of things he could have said in evidence but did not. The first time the application was made it was withdrawn. Mr Paton attempted to give additional evidence whilst making submissions. When I explained to him that I could not take account of these 'submissions' because what he was asking me to accept had not been given in evidence, he renewed his application to be recalled.

The basis of the application was that he had not appreciated what was relevant when giving evidence and he had omitted matters that were material. Mr Meechan accepted that any prejudice to the respondent could be balanced by allowing additional cross-examination and submissions. I therefore granted the application. Mr Paton then gave evidence about historical health issues and made certain allegations about treatment at the hands of his employer, neither of which appeared to me to be relevant to the issues to be determined. He attempted to suggest that the delay in lodging his claim was because 'of the state (he) was in'. When pushed on this point in cross-examination he said 'I can't answer why I delayed. It's not anything I thought about.'

8.2 Whilst I found Mr Paton to be generally credible and reliable, I did have the impression that, on being recalled, he was trying to create an impression that the delay in lodging the claim was vaguely linked to health reasons. However, he had expressly denied that that was the case when the point was earlier put to him in cross-examination. I therefore do not accept the evidence he gave on this point because it was given without specificity about what the health issue was and how it caused the delay and because it contradicted his earlier evidence.

9. Submissions

9.1 The respondent made reference to the relevant provisions of the ERA. By reference to *Bear,* it was submitted that any more than a 3-month temporal break prevents deductions from forming part of a series. The claims are not sufficiently factually connected to form a single series in their own right. The respondent urged that the time limits are there for a reason and both parties are entitled to rely on them. I was referred to the relevant caselaw on the question of whether it was reasonably practicable for the claimant to have lodged his claim within the normal time limit, and if not, whether he did so within a reasonable period thereafter. Mr Meechan did not

refer to any authority on the question of whether a claimant is entitled to rely on erroneous advice having been given by an advisor (including a Union)

9.2 Mr Paton understandably made no legal submissions but set out some of the facts he saw as key to my consideration of the issues.

10. The Relevant Law

10.1 There is a three-month time limit for presenting a complaint to a Tribunal under section 23 of the ERA. If the complaint relates to a deduction by the employer, the operative date from which the time starts to run is 'the date of payment of the wages from which the deduction was made.' (s.23(2)(a)).

10.2 Guidance for employment tribunals on the question of time limits for protection of wages claims was provided by the EAT in Taylorplan Services Ltd v Jackson and others 1996 IRLR 184. The correct approach, said the EAT, was for the Tribunal to ask itself the following questions:

10.2.1 Is this a complaint relating to one deduction or a series of deductions by the employer?

10.2.2 If a series of deductions what was the date of the last deduction?

10.2.3 *Was the relevant deduction within the period of three months prior to the presentation of the complaint?*

10.2.4 *If not, was it reasonably practicable for the complaint to be presented within the relevant three-month period?*

10.2.5 *If not, was the complaint nevertheless presented within a reasonable time?*

10.3 Where a claim is made in respect of a 'series of deductions' the three month time limit starts to run from the date the last deduction in the series was made (s.23(3))

10.4 In *Bear Scotland Ltd and ors v Fulton and ors 2015 ICR 221, EAT*, Mr Justice Langstaff held that whether there is a 'series' of deductions is a question of fact, requiring a sufficient factual and temporal link between the underpayments. This he said, meant that there must be a sufficient similarity of subject matter, so that each event is factually linked, and a sufficient frequency of repetition.

10.5 President Langstaff stated the following on the issue of when there is a gap of more than three months between deductions:

> *'Since the statute 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, I consider that Parliament did not intend that jurisdiction could be regained simply because a later 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 is that any series punctuated from the next succeeding series by a gap of more than three months is one in respect of which the passage of time has extinguished the jurisdiction to consider a complaint that is was unpaid.'*

10.6 The Deduction from Wages (Limitation) Regulations 2014 SI 2014/3322 introduced a two-year limit on the backdating of unlawful deduction from wages claims presented on or after 1 July 2015. The claimant's claim was made just inside that date.

10.7 The onus of proving the presentation in time was not reasonably practicable rests on the claimant. *'That imposes a duty upon him to show precisely why it was that he did not present his complaint'* (Porter v Bandridge Ltd 1978 ICR 943, CA).

10.8 In *Palmer and another v Southend on Sea Borough Council 1084 ICR 372, CA,* the Court of Appeal concluded that 'reasonably practicable' does not mean reasonable, which would be too favourable to employees, and does not mean physically possible, which would be too favourable to employers. Instead it means something like 'reasonably feasible'. Lady Smith in *Asda Stores Ltd v Kauser EAT 0165/07* described it as '*the relevant test is not simply a matter of looking at what was possible but to ask whether, on the facts of the case as found, it was reasonable to expect that which was possible to have been done.'*

10.9 Any substantial fault on the part of the claimant's adviser that has led to the late submission of his claim may be a relevant factor when determining whether it was reasonably practicable for the claimant to present the claim within the prescribed time limit.

10.10 Trade union representatives count as 'advisers' if they are helping a claimant with his case and they are generally assumed to know the time limits and to appreciate the necessity of bringing claims in time. In *Times Newspapers Ltd v O'Regan 1977 IRLR 101, EAT* the claimant knew of her rights and knew of the three month time limit when she was dismissed. However a union official advised her incorrectly that the three months did not start to run while negotiations were taking place about her possible reinstatement. The EAT held that the claimant was not entitled to the benefit of the 'escape clause' because the union official's error had caused her to lodge her claim outwith the time limit.

10.11 In *Alliance and Leicester plc v Kidd EAT 0078/07*, the EAT held that the Tribunal was bound by authority to find that the claimant could not rely on the trade union official's negligent advice to excuse the late submission of her claim.

10.12 Where the claimant is generally aware of his rights, ignorance of the time limit will rarely be acceptable as a reason for delay. In *Trevelyans (Birmingham) Ltd v Norton 1991 ICR 488*, EAT held

that when a claimant knows of his right to complain of unfair dismissal, he is under an obligation to seek information and advice about how to enforce that right. Failure to do so will usually lead the Tribunal to reject the claim.

11. Decision and Reasons

11.1 The first question is whether I should treat each of the three UDW claims together (as one) or separately. Mr Meechan urged me to treat them separately because they are not sufficiently factually connected and should therefore not be treated together.

I agree. The subject matter of each claim is distinct from the other. President Langstaff stated in *Bear:*

> *'Whether there has been a series of deductions or not is a question of fact. 'Series' is an ordinary word, which has no particular legal meaning. As such, in my view it involves two principal matters, in the present context, which is that of a series through time. These are first of a sufficient similarity of subject matter, such that each event is factually linked with the next in the same way as it is linked with its predecessor: and second, since events might either be stand-alone events of the same general type or linked together in a series, a sufficient frequency of repetition. This requires both a sufficient factual and a sufficient temporal link.'*

The claims made by the claimant arise from distinct subject matters; the first arises from holiday pay, the second from sick pay and the third from sleepover allowance. The events giving rise to the alleged entitlement are different; the first is holidays being taken, the second is sickness absence and the third is being required to sleep over on duty.

11.2 Each claim relates to a series of deductions. It is accepted that the claim was lodged within 3 months of the last deduction in each case. The issue is what the effect of the *Bear* ratio is in this case. In my view the effect is clear. Where there is a gap of more than three months between the each deduction in a series of deductions, those deductions occurring prior to that gap are, on the face of it, out of time.

11.3 If those earlier claims of UDW are out of time, then the question is whether it was reasonably practicable for the claimant to lodge the claim within the normal time limit. The questions in Taylorplan then become relevant.

- *Was the relevant deduction within the period of three months prior to the presentation of the complaint?*
- *If not, was it reasonably practicable for the complaint to be presented within the relevant three-month period?*
- *If not, was the complaint nevertheless presented within a reasonable time?*

11.4 In relation to holiday pay, the normal time limit expired on 29 December 2014. The claimant did not lodge his claim until 30 June 2015. It was therefore not lodged within the normal time limit. The claimant raised a grievance about it in his email of 15 December 2014. He was consulting with his Union about the matter at that time. He received advice about how to trigger the entitlement to lodge a claim in March 2015. He followed that advice. He was told by his Union that any claim he did make would cover deductions made throughout his employment. That advice was erroneous in that it did not flag up the issue of time-bar. I do not accept that the Trade Union's error entitles Mr Paton to the benefit of the 'escape clause'. I find that it was reasonably practicable for Mr Paton to have lodged a claim within the normal time limit because he knew

he potentially had a claim in respect of those earlier alleged UDW (before he took the advice in March 2015) as evidenced by his earlier discussions with the Union and his lodging a grievance about the matter. He took no positive steps at the time when he believed he potentially had a claim to ascertain what time limits may apply.

11.5 In relation to the sick pay claim, the normal time limit in respect of the alleged UDW on 30 January 2014 expired on 29 April 2014. Mr Paton did not lodge his claim until 30 June 2015. Mr Paton did not receive advice from the Union about this claim. However, simply by reason of the amount of time that elapsed between the date the potential claim arose and the date of lodging the claim – some 17 months – I find that it was reasonably practicable for him to have lodged his claim on time, and even if it was not, he failed to lodge it within a reasonable time thereafter.

11.6 In relation to the claim of UDW relating to sleepover allowance, the normal time limit expired on 29 April 2015. The claim was therefore lodged outwith the normal time limit. Mr Paton lodged a grievance about the matter on 15 December 2014. He had been in discussions with the Union about the issue over the course of 2013 and 2014. He received advice about how to trigger an entitlement to lodge a claim in March 2015. He followed that advice. He had been told by his Union that any claim he did make would cover deductions made throughout his employment. That advice was erroneous in that it did not raise the issue of time-bar. I do not accept that the Trade Union's error entitles Mr Paton to the benefit of the 'escape clause'. I find that it was reasonably practicable for Mr Paton to have lodged a claim within the normal time limit because he knew he potentially had a claim in respect of those earlier alleged UDW (before he took the advice in March 2015) as evidenced by his earlier discussions with the Union and his lodging a grievance about the matter. He took no positive steps at the time

when he believed he potentially had a claim to ascertain what time limits may apply.

11.7 The Employment Tribunal accordingly has no jurisdiction to deal with the claimant's claims of UDW except for those claims arising within the 3-month period prior to the date of lodging of the claim.

12. Case Management Preliminary Hearing

12.1. At the conclusion of the OPH, parties agreed that it would be further to the Overriding Objective to discuss how the case should be managed. Regardless of my determination of the preliminary pleas, parties agreed that the case should proceed to a Hearing. Having regard to availability of parties and witnesses, a Hearing was set down for 20 and 21 June.

12.2 Mr Paton will give evidence on his own behalf. The respondent will be calling a witness (yet to be identified) from Human Resources, who will give evidence about the methods of calculating pay, and the amounts paid to the claimant.

12.3 There was a discussion about outstanding documents required by the claimant. He said he would identify what he would like to have included in the bundle and why those documents are relevant, and Mr Meechan undertook to produce them to the claimant within 14 days. Mr Meechan also undertook to produce the joint bundle for the Hearing. I have issued an Order in those terms.

12.4 It occurs to me that it would be of assistance to the Employment Tribunal hearing this claim to have a note of the claims now to be determined and what questions are to be considered in doing so. I have therefore issued an Order to that effect. I suggest that the respondent do the first draft because Mr Paton is not represented.

Thereafter the parties can come to a final version through discussion and agreement.

Employment Judge: Emma Bell
Date of Judgment: 09 May 2018
Entered in register: 15 May 2018
and copied to parties