THE EMPLOYMENT TRIBUNALS

Claimant Mr B Paterson

Respondent Cooperative Group Ltd

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT NORTH SHIELDS ON 27th June 2018
EMPLOYMENT JUDGE GARNON (sitting alone)

For Claimant in person
For Respondent Mr D Bayne of Counsel

JUDGMENT

The Judgment of the Tribunal is
1 the name of the respondent is amended to that shown above
2. the claim of unlawful deduction of wages is not well founded and is dismissed.
3 I refuse the respondent's costs application

REASONS (bold print is my emphasis)

1. This is a claim of unlawful deduction of wages with two issues (a) whether I am precluded from considering the claim due to it being issued outside the time limit for doing so (b) whether the claimant is contractually entitled to the sum he claims .

2. Part II of the Employment Rights Act 1996 (the Act), so far as relevant, provides

Section 13

(1) An employer shall not make a deduction from wages of a worker employed by him

(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.

3. The essential facts are not disputed. The claimant started employment on 4th August 2003. He was dismissed, and the reason is irrelevant, on 8th August 2017. Pay is reviewed under the respondent's Annual Salary Review (ASR) the outcome of which has to go to a ballot by two unions USDAW and Unite.

4. On 12th January both unions accepted a pay offer which was "implemented" with effect from 15th February 2018. The pay increase was backdated to 1st February

2017. The ASR Rules say in a section headed " frequently asked questions" an employee whose final salary fell before the implementation date does not receive the increase. The claimant says he should have it from 1st February 2017 to 8th August 2017. The respondent submits the increase is only contractually payable to staff employed at the implementation date.

5. Section 23 of the Act includes
(1) A worker may present a complaint to an employment tribunal—

(a) that his employer has made a deduction from his wages in contravention of section 13

(2) Subject to subsection (4), an employment tribunal shall not consider a complaint under this section 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,** or

(3) Where a complaint is brought under this section in respect of—

(a) a series of deductions …,

the references in subsection (2) to the deduction .. are to **the last deduction .. in the series ….**

(3A) Section … 207B (extension of time limits to facilitate conciliation before institution of proceedings) apply for the purposes of subsection (2).

(4) Where the employment tribunal is satisfied that it was not reasonably practicable for a complaint under this section 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.

6. Section 230 includes

(1) In this Act "employee" means an individual who has entered into or works under **(or, where the employment has ceased, worked under**) a contract of employment.

(3)In this Act "worker" .. means an individual who has entered into or works under (or, **where the employment has ceased, worked under**)—

(a) a contract of employment, or

7. Dealing with the time limit point, the claimant is entitled to claim as an ex-employee. The better view is that he is claiming a payment which became due to him and others on the implementation date. If that is so, the claim is in time. An alternative view is that he is claiming for a series of underpayments ascertainable only with hindsight but due in the months from February – August 2017. In Palmer v Southend on Sea Borough Council 1984 IRLR 119 the Court of Appeal held to limit the meaning of "reasonably practicable" to that which is reasonably capable physically of being done would be too restrictive a construction. The best approach is to ask "Was it reasonably feasible to present the complaint within three months?" The question is one of fact for the Tribunal taking all the circumstances into account. It cannot conceivably have been feasible to issue within three months of termination for sums which may never have become due if agreement with the unions had not

been reached and which, at that time, could not be quantified. The respondent's argument of time limit is wholly misconceived.

8. On the other issue, the phrase "properly payable" in section 13 means properly payable under his contract. The EAT in Agarwal v Cardiff University 2017 ICR 967 suggested in a wages claim the tribunal does not have jurisdiction to construe a contract. Another division of the EAT in Weatherilt v Cathay Pacific Airways Ltd 2017 ICR 985 held tribunals are entitled to determine questions of contractual interpretation, including whether a term should be implied, in the context of a wages claim. The Court of Appeal have just endorsed the latter view.

9. Usually, the terms of collective agreements are **expressly** incorporated, in whole or in part, into individual contracts of employment but incorporation can be by implication. If a collective agreement is effectively incorporated, an employee will normally be bound by the incorporated terms whether or not he is aware of their existence or of the existence of the collective agreement. Terms cannot usually be implied into a contract contrary to express terms. Even if the terms of the ASR are not incorporated as express terms of the contract, the starting point is that when he was employed the claimant was paid the sum properly payable, and for his case to succeed I would need to find an implied term that ex-employees are contractually entitled to a backdated pay increase proportionate to the percentage of the period it covers for which they were still employed. The fact the contract does not expressly say they are not, does not mean there must be an express term that they are. Mr Bayne correctly referred to Murco Petroleum-v-Forge as authority there is no generally implied term that entitles employees to any pay increase.

10. I cannot imply a term into any contract simply because I think it is "reasonable". There are another four common reasons for implying terms into a contract. The first is to give effect to Custom and Practice which subsists in an industry. In this instance the claimant accepts no employee who has left in the past, to his knowledge, has been given "backdated" pay increases. Hence, had an employee died in December 2017 , he too would not have received any backdated pay increase.

11. The next is to give it "Business Efficacy" to a contract which without the implied term would be practically unworkable. That cannot be said. Many contracts of employment provide expressly that elements of pay which can only be ascertained with hindsight, eg profit shares, are payable only to those employed at the date the sum is ascertained. The respondent should consider putting such an express provision into future contracts to avoid the argument raised in this case. However, the contract is perfectly workable on the "default" basis that only currently employed staff are given the increase.

12. The remaining two are (a) to reflect the conduct of the parties and (b) to insert terms which are obviously what the parties intended but failed to say, sometimes called the "officious by-stander test" . That test means if such a person had asked at the time the contract was made whether the parties understood the consequence of X would be Y , **both** would have answered " But of course ! ". Neither of those can be said either.

13. While I have some sympathy for the claimant's argument, I cannot find any lawful basis upon which I can uphold his case that he has, as an ex-employee, any express or implied contractual entitlement to any part of the backdated pay increase.

14. Mr Bayne was instructed to apply for costs and produced a letter sent to the claimant on 5th June warning him such an application would be made . It relies on the misconceived time point and the argument that there is no express entitlement . An unrepresented party cannot be expected to know the law I have set out , albeit only briefly, on the limitation on Tribunals implying terms into contracts . I do not consider a costs application should be granted in such circumstances.

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T M Garnon EMPLOYMENT JUDGE

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON 27th June 2018