EMPLOYMENT TRIBUNALS

Claimant: Mr K Sutton

Respondent: First Manchester Limited

Heard at: Manchester (remotely, by CVP) **On:** 26 May 2021
25 August 2021
(in Chambers)

Before: Employment Judge Feeney

REPRESENTATION:

Claimant: In person
Respondent: Mr R Hutchinson, Solicitor

JUDGMENT

The judgment of the Tribunal is that:

1. The claimant is allowed to amend his claim to include holiday pay claims from October and December 2020.

2. The claimant's holiday pay claims prior to October 2020 are struck out on the basis that, in accordance with **Bear Scotland**, there a more than three month gap between them and the October onwards payments

3. The claimant's claims in respect of furlough pay are out of time. It was reasonably practical to bring these claims in time. Accordingly these claims are dismissed.

REASONS

Introduction

1. By a claim form dated 19 January 2021 the claimant brought a claim of unlawful deduction of wages in respect of furlough payments and holiday pay. The claimant had obtained an ACAS certificate on 15 December 2020, discharged on 19

January 2021, on which date he presented his claim to the Tribunal. His claim was very brief and stated the following:

> "My employer has neglected to pay the correct pay for furlough for all employees as set out in the Coronavirus Act paying only 80% of basic pay instead of 80% of average earnings as the Government guidelines dictated. On top of this my employer has also realised for the previous five years to pay average holiday pay only implementing the correct pay in August 2020. They as yet have not paid any backpay for this but are trying to say that they only have to pay two years' backpay."

2. At section 9.2 the claimant says:

> "I wish to be paid the monies owed both from five years of incorrect holiday pay and from incorrect furlough pay. I also ask the court to enforce that First Manchester Limited is to pay all money owed to all employees for both the above matters."

3. In section 15 the claimant says:

> "I have attempted to correct these issues by the correct grievance procedure with my employer, however they have been unwilling to admit fault and have also taken up large amounts of time. I also have support from my union representative Unite the Union." (It was not correct that the claimant had union support with this claim)

4. The respondent's grounds of resistance stated the following: that the Tribunal had no jurisdiction to consider the claimant's unauthorised deductions of wages claim relating furlough payment, also known as Coronavirus Job Rescue Scheme ("CJRS") or holiday pay, as they had been brought outside the statutory time limits.

5. In relation to CJRS the respondent stated that the claimant was furloughed between 30 March 2020 and 19 August 2020. He was paid a week in arrears, accordingly the last date of payment he can rely on was 3 September 2020. As early conciliation did not commence until 15 December 2020 the claimant was out of time with his claim.

6. In relation to holiday pay, the claimant's claim form states he has been paid correctly since August 2020 and his last period of holiday before August was 2-7 February 2020, and that would be the subject of any claim. He was paid one week in arrears again and therefore time ran from 14 February and accordingly when he presented his claims to ACAS on 15 December 2020 he was eight months out of time.

7. The respondent also pointed out that the Tribunal did not have jurisdiction to consider any complaints which related to a deduction where the payment from which the deduction was allegedly taken was before a two year period ending with the date of presentation of the claim in accordance with section 23(4)(a) of the Employment Rights Act 1996.

8. The respondent contended that there had been a collective agreement incorporated into the claimant's contract in respect of furlough pay where the union

had agreed the terms on which furlough would be paid. There was then later an agreement with the union in respect of holiday pay that acknowledged holiday pay had been paid incorrectly and agreed a formula going forward from August 2020 and agreed to pay two years' backpay to every member of staff. The trade union stated they would not support any cases raising any issues regarding this.

9. The claimant was asked to provide further and better particulars. When he did so the respondent requested that the hearing listed for case management only be converted to a preliminary hearing for three hours, as they stated that it appeared to them an amendment was now required in addition to the other jurisdictional points he had raised, as the claimant was now seeking to argue that he was claiming for holiday pay in October and December 2020, which obviously would have the effect of bringing his claim potentially in time, and if an amendment was required the respondent objected to that amendment. This had arisen because on 15 March the claimant had presented documentation regarding being paid incorrectly in respect of holiday up to and including 25 December 2020, and that at the time he engaged with ACAS conciliation the latest incorrect payment was 5 November 2020.

The Issues

10. The issues in this case were therefore:

(1) Was the claimant required to amend in order to include claims regarding the miscalculation of his holiday pay after August 2020?

(2) Was the claimant's claim in time if his amendment was not allowed, as the claimant in his claim form had asserted that holiday pay was correct from August onwards and his only previous holiday had been in February 2021?

(3) Should the claimant's furlough payment be allowed to proceed on the basis that this was also out of time, the last furlough payment being in August 2020?

(4) In respect of the holiday pay, was there more than a three month gap between the incidences of holiday pay which broke the chain of causation in accordance with **Bear Scotland**?

Witnesses and Bundle

11. I took evidence from the claimant as to the reasons why his claims were not presented in time and why the October and December holiday pay claims were not included in his original claim.

12. There was an agreed bundle of documents.

Findings of Fact

13. My findings of fact are as follows.

14. The claimant was employed by the respondent since 27 June 2016 as a PCV driver, the respondent is a bus company. His terms of employment are expressly

subject to collectively agreed terms. The claimant was furloughed between 30 March 2020 and 29 August 2020 and he is paid one week in arrears.

15. On 24 March 2020 a national agreement was reached between the respondent and Unite the Union effective from 29 March 2020 and since amended regarding the operation of the CJRS for staff. In the respondent's view the terms were binding due to the situation regarding collective agreements being incorporated into the claimant's contract. The local agreement included a mechanism for calculating pay under CJRS. It was agreed to be at 80% of basic contractual hours per week for employees such as the claimant.

16. The respondent states they received confirmation from HMRC on 22 April, 20 May and 28 May that the methodology agreed with Unite the Union and the respondent when calculating payments under CJRS in accordance with the national agreement and local agreement was correct, and subsequently employees were furloughed. Therefore, the respondent contends that the claimant was paid correctly during his furlough period in accordance with terms and conditions as varied by the local agreement, therefore there was no authorised deduction.

17. The respondent seeks a strike out on the merits of the claim in addition to the Tribunal's considering whether or not this claim is out of time. As the claimant was paid one week in arrears, he was due his last furlough payment on 3 September 2020, accordingly when he contacted ACAS on 15 December 2020 he was clearly out of time, the three month time limit applying.

18. The claimant's reasons for not pursuing a claim in respect of furlough earlier were that he was engaging in a grievance with the respondent.

19. In respect of holiday pay, the respondent entered into a holiday pay agreement which took effect from 1 August which addressed and resolved previous issues relating to the calculation of holiday pay arising out of case law development between the respondent and the union members, including the claimant. Included issues were whether contemplated, speculated, in existence, known, ought reasonably to have known at the time of making this agreement and for the duration of this agreement.

20. There was also a backpay agreement which covered two years' backpay. The agreement was reached to "settle all holiday related backpay associated with the previously agreed current holiday pay agreement that came into effect on 1 August 2020". It further provided that:

> "This agreement resolves all and any existing holiday pay related complaints up to the date of this agreement whether the subject of litigation, grievance proceedings or otherwise, and the terms of the agreement and the settlement payments made are to fully and finally resole any holiday pay claims or queries the employees have or may have against the company to the date of this agreement and going forward. The trade union agrees not to support any such claims in any way in relation to the same (nor any claim or query contesting the application of the terms of this agreement from its date of implementation going forward). Any existing claims that may have previously been supported by the trade union will be withdrawn and judicially dismissed."

21. The backpay was paid to the claimant on 11 March. There has been a grievance in respect of the claimant's holiday pay which was not upheld, although the claimant provided further evidence regarding this.

22. In response to the respondent's request for further and better particulars the claimant provided details of his claim which then included holiday pay claims from August through to December 2020. The respondent contacted the Tribunal and advised that in their opinion the claimant needed to amend as in his claim form he had stated that the holiday pay had been resolved correctly from August 2020. Obviously these claims would have the potential of bringing the claimant's holiday pay claims in time.

23. In addition, the respondent stated that following **Bear Scotland** there were too many gaps in the claimant's holiday pay absences for there to be a continued series of deductions. In particular there was a year's gap between the last alleged authorised deduction in 2019 and that in 2020.

24. The claimant gave evidence to me to explain his claims further and to explain why he believed he was not out of time and to explain why the Tribunal should grant him the amendment. The claimant stated that he had difficulties obtaining documents from the respondent to determine whether his holiday pay was being paid correctly post August 2020. He did not have payslips and the records needed to calculate the holiday and he was seeking these in the post August period. The claimant put in a grievance regarding holiday pay in March 2021. He stated that when he put his claim in in January, whilst he thought he was not being paid correctly he did not have the documentation to be sure. The claimant also believed that ACAS had advised him that all deductions would be included in his claim, and he did not need to specify them separately. The claimant stated he had brought a number of grievances starting with 26 October 2020 regarding various matters, including in November 2020 regarding his overtime rate and the incorrect payment of duty.

25. The claimant also asserted that in the course of his grievance the respondent had agreed that his pay had been paid incorrectly. He also did not think he needed to check his holiday payments post August initially as there had been this agreement, and that he had needed to make subject access requests to get the data he needed. He stated that he did not have paper payslips which would have assisted him. The meeting where he had been told his calculations were correct was in May 2021.

26. The respondent, in the claimant's view, had delayed the grievance procedure and had not acted within the time limits in their own procedure and therefore it appeared unfair to him that he should suffer because of this. Further, he believed that it was one claim between the furlough and the holiday pay and therefore that the furlough should be in time.

The Law

27. Section 23(1) of the Employment Rights Act 1996 ("ERA") gives workers the right to complain to an Employment Tribunal about a deduction from wages and to seek reimbursement of the sums involved. There is a three month time limit for presenting such a complaint to the Tribunal. The operative date from which time

starts to run is "the date of payment of the wages from which the deduction was made" (section 23(2)(a)).

28. Under section 23(4) where a claim is out of time if a Tribunal is satisfied that it was not reasonably practicable to present a complaint within three months it may be presented within such further time as the Tribunal considers reasonable. In addition, the time allowed for ACAS conciliation has now to be taken into account. However, the primary time limit will be the three months in respect of the first approach to ACAS. If that is not made within three months the claim will be out of time.

29. Therefore, in respect of the last deduction relied on the date time runs from will be the date it was paid, as acknowledged by the respondent in this case where the last furlough payment, for example, was 3 September 2020.

Series of Deductions

30. The definition of a series of deductions was considered by the Employment Appeal Tribunal ("EAT") in the case of **Bear Scotland v Fulton [2015]** where it was said that:

> "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 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 such 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."

31. Bear Scotland did concern a claim that the employees had not received all the holiday pay they were due under the Working Time Regulations. The EAT held there had only been underpayments in relation to leave taken under European legislation: additional contractual leave had been paid correctly. There was an issue there about some payments therefore being unlawful and some being lawful, however that is not an issue here.

32. In **Bear Scotland** Langstaff P took the approach that for the purposes of a section 23 claim a series is broken if there is a gap of more than three months between any two of the disputed payments relied upon by the claimant. He stated that:

> "Since the statue 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 (unless it was not reasonably practicable for the complaint to be presented within that three month period in which case there may be an extension for no more than a reasonable time thereafter), I consider that Parliament did not intend that jurisdiction could be regained simply because of a later non payment occurring more than three months later could be characterised as having 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 had extinguished the jurisdiction to consider a complaint that it was unpaid."

33. Accordingly, if there is a three month gap between any of the disputed payments within a series of deductions that breaks the chain and causation only begins with the next payment to which the same test would apply, whether there was less than three months before the next payment in the new chain.

34. This was not appealed, although it has been considered now by the Northern Ireland Court of Appeal in **The Chief Constable of Northern Ireland v Agnew**. In **Agnew** amongst many arguments was the argument that the series of deductions was broken by a gap greater than three months, and the Court of Appeal in Northern Ireland rejected this argument, Lord Justice Stephens saying:

> "Holding that a three month gap breaks a series of deductions leads to arbitrary and unfair results. There is nothing in the ERO [the Northern Ireland equivalent of the ERA] which expresses imposes a limit on the gaps between particular deductions making up the series. We do not consider that there is anything implied from the terms of the ERO which compels to such an interpretation of a series. As a matter of proper construction of the ERO we conclude that a series is not broken by a gap of three months or more."

35. There is no reason why this analysis could not be applied to ERA 1996, however decisions of the Northern Ireland Court of Appeal are not binding on courts or Tribunals in Great Britain and no case has yet arisen where it has been considered by a UK court with an appeal jurisdiction, such as EAT.

36. However, in addition the Government introduced statutory legislation (The Deduction from Wages (Limitation) Regulations 2014) which do not apply in Northern Ireland but do in England where this means that there is a two year limit on any unlawful deductions claims in the series.

37. In addition, it is relevant to consider the EAT's decision in **Prakash v Wolverhampton City Council EAT [2006]** which states:

> "In principle there is no reason why a cause of action that accrues after the presentation of the ET1 should not be added to a claim by way of amendment."

38. This possibility has been recognised in the Employment Tribunals Presidential Directions.

39. In respect of the two year limitation, it applies to a deduction where the date of the alleged deduction falls more than two years before the date of presentation of the claim: neither does this just apply to holiday pay, it applies to other deductions from wages, with some exceptions.

<u>Amendment</u>

40. Guidance as to whether or not to allow an application to amend is given in the case of **Selkent Bus Company v Moore 1996 EAT**, the overarching principle was stated by Mummery J to be "whenever the discretion to grant an amendment is invoked the Tribunal should take into account all the circumstances and should balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it".

41. Mummery J went on to set out a non-exhaustive list of factors relevant to the exercise of discretion.

A. The nature of the amendment;

B. The applicability of time limits;

C. The timing and manner of the application.

42. It was stressed however that the paramount consideration remains that of comparative disadvantage, the Tribunal must balance the disadvantage to the claimant caused by refusing the amendment against the disadvantage to the respondent caused by allowing it. In respect of the nature of the amendment it was said in **Selkent** "applications to amend are many different kinds ranging on the one hand from the correction of clerical and typing errors to addition of factual details to existing claims and the additional substitution of other labels for facts already pleaded to on the other hand the make of an entirely new factual allegation which change the basis of the existing claim. The Tribunal has to decide whether the amendments sought is one of the minor matters or is a substantial alteration pleading a new course of action. Where an amendment merely involves relabelling facts that were fully set out in the claim form the amendment will in most circumstances be very readily permitted **TGWU v Safeway Stores Limited EAT** 2007. If, on the other hand, it introduces a whole new claim it is important to consider time limits as part of the overall balancing exercise.

43. In respect of time limits Mummery J observed that of a new complaint or cause of action is proposed to be added by way of amendment it is essential for the Tribunal to consider whether that complaint is out of time and if so, whether the time limits should be extended under the applicable statutory provisions. It is not an absolute bar however that a claim is out of time. The Tribunal has to consider whether the claim would have been out of time even if included in the original claim form. In terms of comparative hardship, the claimant suffers no disadvantage by the refusal of the amendments as the newly introduced claim would inevitably fail on the time limit grounds.

<u>Strike Out</u>

44. Under rule 37 of the Employment Tribunals Rules of Procedure 2013, it states that:

> "At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds…

(a) that it is scandalous or vexatious or has no reasonable prospect of success."

45. It is recognised that striking out is a draconian power not to be readily exercised (**Blockbuster Entertainment Limited v James [2006] Court of Appeal**).

46. If no live evidence is heard on a strike out application the facts pleaded in the claim should be taken as true unless the opposite can be shown by clear evidence which is not seriously disputable (**A v B & C [2010] Court of Appeal**).

47. Where central facts are in dispute a claim should be struck out only in the most exceptional circumstances i.e. where the assertions of the claimant can be proved to be untrue on documents alone, but in a normal case if there is a crucial core of disputed facts it is an error of law for the Tribunal to pre-emp the determination of a full hearing by striking out (**Ezsias v North Glamorgan NHS Trust [2007]**). It is a high test, and particularly true in discrimination cases where the evidence is not clear, however some of the advice given to Tribunals by the Appeal Courts may not be as relevant in cases which rely on the claim having no reasonable prospect of success because of some legal barrier for which the claimant has got no cogent or coherent riposte.

Conclusions

Furlough Claim

Out of Time

48. In respect of the claimant's claim regarding the furlough payments, I find that this claim is clearly out of time and the claimant had put forward no reasons why he could not have brought this claim earlier. The furlough payments ended on 3 September 2020 and the claimant entered into ACAS conciliation on 15 December 2020, issuing his claim on 19 January 2021. It was clearly more than three months after the last furlough payment when the claimant entered into ACAS conciliation, and his claim is out of time.

49. In respect of whether it was reasonably practicable to put his claim in time, the claimant's argument appeared to be that he thought the furlough payments and the holiday payments would be treated as one. However, this is a completely unconvincing claim as even an uneducated observer would be aware these are two different claims, albeit the best that can be said is they are all put as unlawful deductions of wages.

50. I do not accept that it was not reasonably practicable for the claimant to put his claim in time, neither do I accept that he received advice to this effect from ACAS as ACAS does not given advice of this nature. Nevertheless, by the time the claimant went to ACAS he was already out of time and therefore whatever advice they gave him was not relevant in respect of this claim.

51. As I have considered the matter out of time, I have not gone on to consider the respondent's strike out claim in respect of merits.

Holiday Pay Claim

Amendment

52. The claimant did not raise issues regarding his October and December payments until March 2021. He says this was because he had not received sufficient documentation to establish that there was an underpayment in those months, although he had suspected it.

53. This is not a matter that comes under the Prakash amendment as these are not matters arising after the claimant submitted his claim, they are matters arising before he submitted his claim but which he failed to include.

54. However, I have accepted the claimant's argument that he was seeking further documentation before making a claim. It appears to me it was prudent of the claimant to do this rather than launching into unsubstantiated claims and causing the respondent potentially unnecessary cost. Such an approach is not to be discouraged unless it causes significant prejudice to the other side. In this case it does not constitute considerable prejudice to the respondent as the matter has been considered in the claimant's grievance a number of times.

55. Accordingly, I do allow the claimant to amend to include payments in October and December. These would be close enough to form a series of deductions. There are a number of other claims between those dates which the claimant says are subject to underpayment, and those claims should now be included in his claim.

Series of Deductions

56. However, in relation to the original claims, as far as I am aware the last underpayment to the claimant was February 2020 and accordingly there is more than a three month gap between that payment and the earliest he relies on now, which is October 2020. I rely on Bear Scotland.

57. Accordingly, under the three month point the claimant's series of deductions claim can only begin in October 2020 and the other claims three months prior to that are all out of time. There is no reason given by the claimant for not bringing a holiday pay claim sooner in respect of payments preceding August 2020. Those claims are struck out.

Other Points

58. The claimant should bear in mind that the two year limitation means that any holiday pay claims in any event could only go back to December 2018. I understand that the claimant has been paid any underpayments during this period by virtue of the agreement with Unite the Union.

59. In relation to the payments allowed by the amendment, it was not clear from the claimant's evidence whether these matters had also been paid. Obviously if these underpayments have been paid the claimant would be at risk on costs if he continues to pursue a claim where he no longer has a loss.

Further Case Management Directions

60. Following this decision, within 14 days of its promulgation the claimant is to advise the Tribunal whether he does have any outstanding claims and if he considers that he does, whether he has received the amounts of the alleged unlawful deductions since he brought his claim on 19 January 2021, and if so explain the grounds for still pursuing any claims.

61. Following this, further case management directions will be given.

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Employment Judge Feeney

Date: 12 October 2021

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON

2 February 2022

FOR THE TRIBUNAL OFFICE