EMPLOYMENT TRIBUNALS (SCOTLAND)

Case Number: 4104769/2017

Decided on the papers in Glasgow on 14th August 2018

Employment Judge M Whitcombe

Mr M Williams	**Claimant** **Represented by:** **Mr D Hutchison** **(Solicitor)**
Gareloch Support Services (Plant) Limited	**Respondent** **Represented by:** **Mr N Moore** **(Solicitor)**

JUDGMENT ON A PRELIMINARY ISSUE

The judgment of the Tribunal is that on the material currently available for consideration:

(1) the claim for unlawful deductions from wages was brought within time and should proceed to the final hearing listed on 4th and 5th September 2018;

(2) this finding is necessarily contingent on findings as to whether unlawful deductions were Indeed made on particular dates and it may therefore be necessary to revisit jurisdictional time points during the final hearing.

REASONS

Introduction

1. This is a holiday pay claim arising from what the claimant characterises as "rolled up" holiday pay arrangements, but which the respondent refers to as "consolidated pay". The claimant alleges that unlawful deductions have been made from his wages contrary to s.13 ERA 1996.

2. This preliminary hearing has been arranged to determine the preliminary issue of "time bar" (i.e. the jurisdictional time limit). At a preliminary hearing for case management on 9th July 2018 it was agreed between the representatives and therefore ordered that this preliminary issue could be determined without any need for the parties to attend the hearing in person. It was therefore decided on the papers. The final hearing is due to take place on 4th and 5th September 2018.

Documents

3. The parties have sent in the following documents for the purposes of this preliminary hearing:

   a. A joint bundle of documents which, according to the index, runs to 85 pages. There were clearly some problems sending it to the tribunal. It was sent by email in several parts. Some of those parts were sent more than once. Even aggregating those parts only the first 55 of the 85 pages are present. Neither side referred to any need for a bundle of documents at the preliminary hearing for case management and there was no direction for one. If anyone had suggested that an 85 page bundle of documents would be necessary then I would probably not have agreed that the matter was suitable for resolution on the papers at all. I have decided this preliminary issue on the basis of the material received by the tribunal. If either side considers that the missing pages could have affected the outcome then they may of

course apply for a reconsideration of this judgment.

b. Three separate emails from the respondent's solicitor attaching four authorities.

c. A further email from the respondent's solicitor attaching copies of the Merchant Shipping (Hours of Work) Regulations 2002, a Merchant Shipping Notice, the Merchant Shipping (Working Time: Inland Waterways) Regulations 2003 and the Seafarers Working Time Directive 1999/63/EC. Once again, some of those documents have been sent to the tribunal more than once.

d. Written submissions on behalf of the respondent running to 61 paragraphs.

e. Written submissions on behalf of the claimant running to 38 paragraphs.

4. The proliferation of email attachments, several of them duplicated, has not really helped the preparation of this case and it has also added unnecessarily to the workload of the tribunal administrative staff. Not unreasonably, most of the attachments have been added, in order of receipt, to the ET correspondence file. That makes them rather difficult to read as a whole. It might have been better all round if a single, bound, hard copy of the agreed bundle and any authorities had simply been delivered to the tribunal offices.

The time limit in deductions claims

5. As is well known, a claim under s.23(1)(a) ERA 1996 that there has been a contravention of s.13 ERA 1996 can only be considered by an employment tribunal if it is presented before the end of the period of three months beginning with:

a. the date of payment of the wages from which the deduction was made

(in the case of a complaint relating to a deduction by the employer); or

b. the last deduction in the series, where the complaint is of a series of deductions.

6. It is also relevant to note the definition of deduction contained in s.13(3) ERA 1996. 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.

The substantive claims

7. The claimant claims that there has been a series of deductions of leave due under regulations 13 and 13A WTR 1998 culminating in a failure to make a payment upon termination under regulation 14 WTR 1998 (see para 9.2 of the ET1, from which I take the reference to 28 days per year to be an implicit reference to leave due under both regulations 13 and 13A). The claimant seeks two years of holiday pay arrears in accordance with the limit imposed by the Deduction from Wages (Limitation) Regulations 2014.

8. The respondent disagrees that the WTR 1998 are the applicable legislation, contending that the claimant's entitlement is instead governed by the Merchant Shipping (Hours of Work) Regulations 1992.

9. It is not the purpose of this preliminary hearing to decide which is the applicable legislation, still less the claimant's entitlement under that legislation or whether it was breached.

Position of the parties on time limits

The respondent's position

10. The respondent argues that time started to run on the effective date of termination ("EDT"). The EDT was 14th May 2017 according to the ET1, but 15th May 2017 according to the ET3, which also ticked the box to confirm that the dates of employment stated in the ET1 were correct. The statement of agreed facts states that the EDT was 14th May 2017.

11. Since for present purposes nothing turns on the one day difference in the EDT I will adopt the date in the statement of agreed facts - 14th May 2017. On that analysis the last day on which a complaint could have been presented within time was 13th August 2017. The claimant contacted ACAS on 17th August 2017, outside the 3 month period. The upshot is that the claim would be out of time in its entirety.

The claimant's position

12. The claimant argues that there was a series of similar deductions, the last of which was made from the final payment made to the claimant on 31 May 2017. On that analysis, contact with ACAS occurred well within the 3 month primary time limit such that the limitation date would be extended to 17th October 2017. Since the claim form was presented to the tribunal on 27th September 2017 it would have been presented within time.

My approach

13. As the claimant's submissions correctly recognise (paragraph 1) it is not appropriate at this stage to address the merits of the case. I therefore make no findings at all on the substantive issue of whether any unlawful deductions have actuafty been made from the claimant's wages. I also make no findings at all on whether there was a series of similar deductions for time limit purposes.

14. Similarly, I make no findings at all on the applicable legislation, or the claimant's entitlement under that legislation. I merely note that the claimant alleges that he was entitled to paid annual leave under regulations 13 and 13A WTR 1998. The only critical legislation for present purposes is that in Part II of the ERA 1996 governing complaints of unlawful deductions.

15. Instead I must address the claim as it is put by the claimant, in order to decide whether it is in time *if the key allegations are established on their merits.* The respondent asks for the claim to be dismissed at this preliminary stage on the basis that, even on the most favourable view of the merits from the claimant's point of view, it cannot be in time.

16. Clearly the weakness of that approach is that the tribunal may ultimately find that the last deduction in any series of similar deductions did not occur, which could then alter the position on time limits. No doubt the parties had that well in mind when suggesting that the time-bar point should be determined as a preliminary issue, and nevertheless thought it was a worthwhile exercise.

17. The respondent's submission is that it has never made a payment in respect of paid annual leave. No findings have yet been made as to whether that is factually correct, or whether that approach entailed paying the claimant any less than the amount properly due to him, but if it did then a deduction would be made on any on occasion on which the claimant took annual leave but was not paid for it, or upon the termination of employment if a payment was due under regulation 14 WTR 1998.

18. I do not accept the claimant's submission that "he suffered a series of deductions on a monthly basis". He only suffered deductions if he took leave but was not paid for it. Otherwise, his entitlement was to a payment in respect of accrued but untaken leave upon the termination of employment.

19. While I understand the basis upon which the claimant argues that, month by month, he was deemed by contract to have taken leave from his statutory entitlement without any associated payment for that leave, I do not consider

it appropriate to make findings on that argument at this preliminary stage without the benefit of witness evidence and cross-examination. To do so would stray into the substantive issues.

20. The agreed facts do not include any agreement that the claimant ever took leave without proper payment for that leave. The parties take opposite views of the effect of the agreed contractual terms. The index to the bundle refers to a leave record and to payslips, but those are some of the missing pages and it is therefore impossible to make any findings on the balance of probabilities regarding leave actually taken or deductions in respect of that leave.

The critical consideration

21. However, one thing can be said with rather more certainty. The claimant's case is that the final deduction in a series of similar deductions occurred following the termination of his employment. He argues that he was at that point entitled to a payment under regulation 14 WTR. If there was an entitlement to a payment of that sort, then the failure to make any payment in respect of that entitlement in the final payslip on 31st May 2017 was an unlawful deduction from wages. I therefore find that time started to run on 31st May 2017 and that the claim is in time.

22. Both sides referred to ***Arora v Rockwell*** (UKEAT/0097/06), an unreported decision of HHJ Altman which is also considered at paragraph 4.7 of the IDS Handbook on "Wages". To adopt the categorisation used in that case, the present case is one of underpayment rather than of complete non-payment. The respondent certainly did make a payment to the claimant on 31st May 2017, and that payment should have included anything due in respect of accrued but untaken rights to paid annual leave. The failure to include such a payment, if due, would be an underpayment falling firmly within the definition of "deduction" in s.13(3) ERA 1996, since it would be "less than the total amount of the wages properly payable".

23. I do not accept the respondent's argument that the case was one of "complete non-payment", as considered in ***Arora*** (above) and ***Group 4 Nightspeed Ltd v Gilbert*** [1997] IRLR 398, EAT. The claimant did receive a payment on 31st May 2017, but (on his case) it failed to include all sums properly due. The fact (if established) that the respondent did not make any payments at all in respect of paid annual leave during the claimant's employment does not transform the case into one of "complete non-payment" because the focus is on the disputed payment or occasion for payment. Clearly the claimant received something on 31st May 2017 and it is not a "non-payment" case.

24. In my judgment the respondent's argument confuses *consistency* of underpayment with the question whether, on a particular occasion, the situation was one of underpayment or complete non-payment. The ***Arora*** test is not concerned with the question whether the respondent had made a deduction consistently. That would often be the case where there was a series of similar deductions, but that is not what is meant by "complete non-payment". The test is simple to apply - if there has been any payment of wages at all then it is not a situation of complete non-payment.

25. That conclusion is strengthened by the statutory wording. Section 13(3) ERA 1996 focuses on the "total amount of wages" without distinguishing different types of or elements of wages. A missing element of wages does not render the case one of "complete non-payment", even if it has been missing from every previous payment of wages too.

26. At the risk of repetition, I emphasise that my finding that the claim is in time is based upon two working assumptions:

    a. there was an unlawful deduction from wages on 31st May 2017;
    b. there was a series of similar deductions which included all of the other deductions complained of (if any).

27. If either of those working assumptions proves to be false once the tribunal has heard all of the evidence, then it might be necessary to revisit the issue

of jurisdictional time limits.

28. At the final hearing the tribunal may have to consider whether, in accordance with principles in ***Bear Scotland*** [2015] ICR 221, EAT, there was a gap in the series of deductions for the purposes of time limits. I should therefore draw the parties' attention to the fact that I was one of the barristers appearing for the claimants in that appeal, arguing against the construction ultimately adopted by Langstaff P in his judgment.

29. If either of the parties in this litigation considers it inappropriate that I should sit on the final hearing then they should write to the tribunal promptly making any application that they wish to make. It may be that I am not assigned to hear the case anyway, but if there are to be any applications for me to recuse myself then I would prefer to deal with them well in advance of the final hearing in order to avoid unnecessary disruption.

Employment Judge: M Whitcombe
Date of Judgment: 14 August 2018
Entered in register: 20 August 2018
and copied to parties