THE EMPLOYMENT TRIBUNALS

Claimant: **Mr D Gowland, in person**

Respondent: **Sunderland Association Football Club Limited**

Heard at: Newcastle CFCTC, by telephone **On: 18 August 2023**

Before: Employment Judge Legard (sitting alone)

Representation:
Claimant: In Person
Respondent: Ms Tague (HR)

JUDGMENT

The Judgment of the Tribunal is that the complaint for unlawful deductions was presented out of time and it was reasonably practicable for the claim to be presented within the statutory time period. The Tribunal therefore lacks jurisdiction to hear the claim and it is therefore struck out.

REASONS

1 Background and Issues

1.1 By a claim form presented on 21st December 2022 (attempted early conciliation having taken place between 26th October and 21st November 2022) the Claimant ('C') brought a claim in respect of unpaid weekly retainer fees.

1.2 On 8th March 2023 the matter came before EJ Loy for a preliminary hearing upon which he made clear that, given that this was a claim brought pursuant to s.13 ERA and further that the Respondent ('R') had conceded 'worker' status, there was no need for any hearing to determine whether or not C was an employee within the meaning of s.230 ERA.

1.3 EJ Loy went on to clarify the issues as follows:

- Was C entitled to receive a monthly retainer payment in respect of each month between [since?] and including November 2020, the date of the last of such payments claimed?
- Did R's failure to make such payments as might have been due to C amount to unauthorised deductions from C's wages?
- If so, how much was deducted?
- Are all or any of the deductions time barred by virtue of application of the Deduction from Wages (Limitation) Regulations 2014 or the application of the principles in *Bear Scotland Ltd v Fulton [2015] ICR 221*?

1.4 The matter was set down for a hearing which was originally due to take place on 27th June 2023. C failed to attend that hearing on account of a pre-existing medical condition. The hearing was duly postponed until today.

2. EVIDENCE & SUMISSIONS

2.1 The hearing was conducted by telephone with the agreement of the parties. I heard oral evidence from both C and Ms Tague for R. Both were cross-examined by the other. I was referred to a number of documents contained within small bundles provided by both sides. At the conclusion of the evidence I heard oral submissions from both representatives. Neither party drew my attention to any caselaw.

2.2 I am grateful to both Mr Gowland and Ms Tague for the extremely professional but cordial manner in which they conducted themselves and presented their respective cases before me.

3. FINDINGS OF FACT

3.1 My findings of fact are founded upon the balance of probabilities. R is a well-known and supported regional football club. Since 1997 C has been engaged by R as a talent scout (operating locally) under a series of 'scouting agreements.' Within R's bundle is a copy of the 2004 agreement which, amongst other things, contains a provision that C was (then) entitled to a weekly retainer fee of £25 (increased to £40 per week in 2011). The retainer fee's principal purpose being to reward and maintain the loyalty of local and regional talent scouts. It would appear that this is the first written agreement governing the engagement of C (and presumably other talent scouts) and, prior to that, verbal agreements prevailed.

3.2 The 2004 agreement also entitled C to expenses and bonus payments (the latter dependent upon the introduced player, having signed for the club, achieving various club or international appearances). The agreement

goes on to state that C is deemed to be self-employed and that the agreement is terminable by R at any time without notice.

3.3 In early 2020 the CV-19 pandemic hit the UK. Unsurprisingly, football was a casualty of the various UK government 'lockdown' policies. As is well known, the government introduced the Coronavirus Job Retention Scheme (CJRS or the 'furlough scheme') whereby all UK employers were able to claim reimbursement of up to (initially) 80% of the wages of their staff. In June 2020 C was notified that he was to be furloughed with R continuing to fund the balance of his full pay. By July, R was unable to continue this arrangement and withdrew the 20% balance, leaving C on 80% of his regular earnings under the furlough scheme. C was invited to agree to and accept this variation to which he did by letter dated 30th June 2020. C remained on furlough until the end of the CJRS in October 2020.

3.4 In late October 2020 a conversation took place between C and Jed McNamee (R's Head of Recruitment). C and R have differing recollections of this meeting. C maintains that Mr McNamee told him that the retainer fee was being suspended and would be reinstated once R's financial position had improved. R has provided a witness statement from Mr McNamee in which he states that he had been instructed by the then Financial Director to inform all scouts that retainer payments would be terminated with effect from 1st November 2020 and that he verbally updated C of this very fact. In his evidence, however, C accepted that he had been told by Mr McNamee that the retainer fees were being withdrawn but would be '…looked at again when the financial situation improved.'

3.5 On 31st October 2020, C received a letter from Jo Graham (Deputy HR Manager) informing him that the retainer fee was to be withdrawn with effect from 1st November (ie the following day). The letter stated that this decision confirmed the outcome of a conversation that C had had with Mr McNamee and the contents of this letter are, of course, consistent with Mr

McNamee's recollection of what he had earlier told C. C would however continue to receive a match fee (£25) plus bonuses (where applicable) and expenses.

3.6 On balance, and notwithstanding Mr McNamee's absence (he is no longer employed by R) and therefore C's inability to cross-examine him, I find that C was told that the retainer fees would terminate on 1st November 2020 but that they would be looked at again in the event that R's financial situation improved. In other words, C may have been left with the impression that the retainer fees would be reinstated at some indeterminate point in the future. It is that which caused C to believe that the retainer fees were simply being temporarily suspended when, in fact, they were being terminated as the letter made explicitly clear.

3.7 The retainer fees were terminated on 1st November 2020. On the same day C was issued with a new agreement (Local Talent Scout Agreement) conferring upon C the status of 'worker' as opposed to 'employee' and providing for an hourly rate of pay (£10) together with a revised bonus scheme. This agreement also covered holidays, sickness absence and other standard terms. It was silent on the subject of retainer fees. This contract has never been signed by C.

3.8 C remained unhappy with the withdrawal of the retainer fee and there followed many months of discussions between himself and Mr McNamee on the subject. Throughout this time, he continued to provide a scouting service to R, receiving bonuses and expenses which were calculated in accordance with the updated terms set out within the unsigned agreement dated 1st November 2020. Eventually, in or around May 2021, C met with HR whereupon he was reminded once again that the 'discretionary' retainer fee had been terminated. He was informed that this was due to the financial impact of Covid-19.

3.9 Following a period of attempted early conciliation, C presented his claim in December 2022.

4. RELEVANT LAW

Time limits

4.1 The basic rule (s 23(2) ERA) is that a complaint must be made within a period of three months beginning with the date of the payment of the wages from which the deduction was made. However, where there has been a series of deductions or payments, it is sufficient for the purposes of s 23(3) that the complaint should be made within three months from which the last deduction in the series was made.

4.2 An employment tribunal may allow a complaint to be presented outside the three-month limit if it is made 'within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented within the relevant period of three months' (ERA 1996 s 23(4)). In addition, the time limit for bringing a claim can be extended to allow for ACAS early conciliation. Time will run from the contractual date for payment - *Group 4 Nightspeed Ltd v Gilbert [1997] IRLR 398*.

4.3 It is for the 'employee' to show why it was not reasonably practicable to present his claim in time (*Porter v Bandridge Ltd*) and, even if he does, the tribunal must also be satisfied that the further time beyond the primary time limit within which the claim was in fact presented was reasonable. The 'not reasonably practicable' formula applies a higher threshold than the 'just and equitable' escape clause in the Equality Act 2010.

4.4 If a claimant could reasonably have been expected to be aware of their rights and relevant time limits but nonetheless lodged the claim outside the primary time limit it is 'their fault, and [t]he[y] must take the consequences (Lord Denning in *Wall's Meat Co Ltd v Khan* and see also Scarman LJ in the *Dedman* case).

What is meant by a series of deductions?

4.5 There is no statutory definition of a ‘series of deductions' for the purposes of ERA 1996 s 23(3) but there must be both a factual and temporal link between the deductions in order for there to be a ‘series.’ see *Bear Scotland Ltd v Fulton; [2015] IRLR 15*.

4.6 In *Bear Scotland Ltd* the EAT also suggested that a series would be broken *if there is a gap of more than three months* between any two of the disputed payments relied upon by the claimants although this so-called ‘three-month gap’ rule was subsequently rejected in *Chief Constable of the Police Service of Northern Ireland v Agnew [2019] IRLR 782*.

4.7 Since the introduction of the Deduction from Wages (Limitation) Regulations 2014 there is now a two-year cap on any unlawful deduction claim.

‘Wages’ and unlawful deductions

4.8 The definition of 'wages' (s.27(1)) is a broad one, and includes ‘any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise’ (see also *Delaney v Staples [1992] IRLR 191*).

4.9 Pursuant to s.13(1) ERA a deduction from a worker's wages will only be lawful if

- required or authorised to be made by virtue of any statutory provision (s 13(1)(a));
  - required or authorised to be made by virtue of any relevant provision of the worker's contract (s 13(1)(a)); or
  - the worker has previously signified in writing his agreement or consent to the making of the deduction (s 13(1)(b)).

4.10 There is no requirement that a deduction has to be either fair or reasonable. A purely verbal arrangement or agreement to make a deduction or authorise a payment is clearly not good enough. Nor is an arrangement based solely on custom and practice. However, in *Kerr v Sweater Shop (Scotland) Ltd [1996] IRLR 424* the Scottish EAT held that for a contractual term authorising a deduction to be valid, the employee did not necessarily have to assent to it in writing. It was sufficient that he could nevertheless be shown to have agreed to it, whether expressly or impliedly by, for example, continuing to work following a written communication bringing the term to his attention. And, in *Laird v AK Stoddart Ltd [2001] IRLR 591* the EAT made clear that if an employee agrees to a contractual variation even under protest, he can be said to affirm it if he continues in the workplace.

What is 'properly payable.'

4.11 Section 13(3) provides that:

"where the total amount of any wages paid on any occasion by an employer … 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 … as a deduction made by the employer from the worker's wages."

4.12 The words 'properly payable' refer to a legal, but not necessarily a contractual, entitlement on the part of the worker to the payment. Therefore, the preliminary stage is to consider whether there is a sum legally due. It is only if the answer to this question is in the affirmative that consideration should then be given as to whether there has been a deduction from that sum. Tribunals dealing with unlawful deduction claims have jurisdiction to resolve any issue necessary to decide whether a sum claimed is 'properly payable', including an

issue as to construction of the worker's contract (see the Court of Appeal's decision in *Agarwal* per Underhill LJ). However the claim must be in respect of an 'identifiable sum.'

5. SUBMISSIONS

R's submissions

5.1 On R's behalf, Ms Tague argued that R had explicitly reserved the right to amend any worker payment schedules at their discretion; that C, despite voicing concerns about the withdrawal of the retainer fee, continued to work in accordance with the new and revised casual worker agreement under which he continued to receive payments of £25.00 per match worked together with reasonable expenses and bonus payments where eligible. In any event, contended Ms Tague, C's claim was presented substantially out of time, the primary time limited having expired on or about 28th February 2021 (the fee having been terminated with effect from 1st November 2020). C has failed to show that it was not reasonably practicable for him to have presented his claim within that time period.

C's submissions

5.2 C maintained that, although he understood why, without income coming through the turnstiles, the club paying a retainer was difficult he was nevertheless assured that, once COVID 19 restrictions had been lifted, the retainer would be reinstated. He was one of only 5 or 6 scouts who were put onto retainers and that his annual appraisals demonstrated that his services had been valued and appreciated. He had not been fully aware of the relevant time limit but, in any event, the reason for delaying his presentation of the claim was because he had preferred to seek agreement or compromise through an internal complaint or grievance process.

6. CONCLUSIONS

6.1 The retainer fee was unequivocally and explicitly terminated with effect from 1st November 2020. C was well aware of this having been informed by both Jed McNamee and Jo Graham. Although there may have been a hope (and, from his perspective, an expectation) that it would subsequently be resurrected once CV-19 restrictions had been lifted and money had once again begun to flow through the turnstiles – this was never anything more than a possibility. At no point did R provide any certainty or guarantee that the retainer fee would be reinstated.

6.2 There is no question, in my judgment, that, in these particular circumstances, there was a continuing 'series' of deductions after 1st November 2020. Even if I am wrong on that point, C clearly by his actions waived any contractual breach and affirmed the new casual worker agreement which made no provision for any such retainer fee.

6.3 C's claim therefore crystallised on 1st November with the result that time began to run from that date. Subject to any extension pursuant to the early conciliation regulations, the statutory period expired at the end of February 2021. In this case early conciliation did not commence until October 2022 and the claim form was not presented until December 2022.

6.4 It follows that the claim is out of time, having been presented more than three months after the date of the most recent failure to pay the retainer fee.

6.5 C knew all that he reasonably needed to know in November 2020 with which to advance and present his claim. There were no further details or information that could have assisted his understanding of the position with regard to retainer fees. He was aware of all the facts that he

needed in order to submit a claim at that point. He had been told that the retainer fee was being terminated.

6.6 There were no supervening illness or technical issues affecting C's ability to present or pursue a claim. It would appear that his wish to maintain a dialogue with R and exhaust an internal grievance process may have delayed his claim submission but, on these particular facts, that cannot excuse or explain such a long delay. There was no inducement or encouragement by R not to enforce his rights. There was no question of C receiving any negligent advice from any source. Any ignorance of time limits (which were hinted at during the course of his evidence) cannot come to his aid. Despite choosing to remain a litigant in person, there was nothing preventing him from seeking and obtaining advice (be that from a local CAB or through self-research on the internet). One short sentence into a search engine would have sufficed or certainly guided him in the right direction. This was never an overly complicated matter even for a litigant in person.

6.7 In the circumstances, I find that it was reasonably practicable for C to have brought his claim within the relevant statutory time limit. He failed to do so and accordingly the Tribunal, being a creature of statute, has no jurisdiction to hear his claim and the same must be struck out.

Employment Judge Legard

13th September 2023