Neutral Citation Number: [2024] EAT 171

Case No: EA-2022-000862-RS

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 15 October 2024

Before:

ANDREW BURNS KC
DEPUTY JUDGE OF THE HIGH COURT

- -

Between:

MS A DEKSNE **Appellant**

- and –

AMBITIONS LTD **Respondent**

- -
- -

MS A DEKSNE the Appellant In Person
MS SUHAYLA BEWLEY, Counsel (instructed by **Wilkin Chapman LLP**) for the **Respondent**

Hearing date: 15 October 2024

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JUDGMENT

SUMMARY

UNLAWFUL DEDUCTION FROM WAGES

The Respondent conceded that it calculated the Claimant's holiday pay incorrectly. The Tribunal was wrong to find that the deductions were out of time as they were not a series. Whether deductions of wages constitute a series is essentially a question of fact answered by taking account of all relevant circumstances including the similarities, differences, frequency, size and impact of the deductions, as well as how they came to be made and applied and what linked them together. It is immaterial to that link that the interval between the payments was, from time to time, in excess of three months or that there was one correct and lawful payment.

The only permissible finding that a tribunal properly directing itself could reach is that all the underpayments of holiday pay based on the same calculation form part of a series of deductions which fall within the jurisdiction of the tribunal. Applying *Jafri v Lincoln College* there is only one answer here – that all the Claimant's holiday pay shortfalls back to the beginning of the two-year backstop in section 23(4A) of the Employment Rights Act are part of a series of deductions and within the jurisdiction of the Tribunal. This is one of those rare cases where the Employment Appeal Tribunal can and should substitute its decision that the underpayments claimed are part of a series of deductions.

ANDREW BURNS KC, DEPUTY JUDGE OF THE HIGH COURT:

1. This is an appeal against the judgment of an Employment Tribunal sitting at Cambridge sent to the parties on 12 June 2022. The Tribunal found that the Claimant's claim for holiday pay deductions for December 2020 and before were struck out. It did so because the Tribunal found they were presented out of time and the Tribunal had no jurisdiction to hear them. The Tribunal dismissed the claim for holiday pay relating to July and August 2021 as not well founded. It also struck out the Claimant's claims for unfair dismissal and a breach of section 8 of the Employment Rights Act 1996 in connection with her itemised pay slips. The Claimant, Ms Deksne, appears in person today before me on this appeal with the assistance of a Latvian interpreter and supported by friends and family. The Respondent was represented by Ms Bewley.

2. Judge Keith allowed one ground in the notice of appeal to go to this full hearing by his order dated 15 November 2023. He held that the remainder of the notice of appeal presented on 1 May 2023 did not disclose any reasonably arguable error of law on the part of the Tribunal. He said that it was arguable that the Tribunal erred in concluding at paragraph 36 of its judgment that claims for underpaid holiday pay in August 2020 and earlier were not part of a series of deductions. The Tribunal relied on *Bear Scotland v Fulton* and did not have the benefit of the Supreme Court's decision in *Chief Constable of the Police Service of Northern Ireland v Agnew* [2023] UKSC 33.

3. In the judgment of the Tribunal, the employment judge found as follows:

> "36. Any claim for unlawful deductions can only be considered up to two years before the Claimant presented the claim. Therefore the backstop in this case is August 2019. However, even if I were to consider the holiday periods taken in December and November 2020 there is then a seven month gap between those periods and the next period relied upon. On the Claimant's own case the gap is longer between August 2020 and July 2021.

> Underpaid holiday pay in accordance with *Bear Scotland* cannot be claimed as the last in a series of deductions where more than three months has elapsed between deductions. The Tribunal therefore does not have jurisdiction to hear any holiday claims prior to April 2021.
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> 37. If the Claimant had a claim for underpaid holiday pay in August 2020 such a claim if it is not a series of deductions would need to be brought within three months. It is clear from the history of this matter the Claimant has been asserting her holiday pay rights for some time and that it was reasonably practicable to bring that complaint within three months.
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> 38. There is no evidence that it was not reasonably practicable to bring the complaint in time as the evidence was to the contrary in that she had been trying to get the Respondent to pay this for over 2 years. She raised a grievance in February 2021 but then didn't commence ACAS early conciliation until August 2021 4 months after the internal grievance appeal was concluded.
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> 39. Holiday pay has been correctly paid in July 2021 but even if it had not been, this meant any deductions from December 2020 and older are considerably out of time by the time ACAS early conciliation commenced. The Claimant needed to bring the claim sooner or have gaps of less than three months between deductions and in this case we have significantly longer.
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> 40. I am aware of a NI case which took a different view on this matter but the EAT in *Smith v Pimlico Plumbers* [2021] declined to follow *Agnew* (the NI case).
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> 41. The Tribunal therefore finds that the Claimant's claim for unlawful deductions from wages for holiday pay is not well founded and is dismissed."

4. The Supreme Court in *Agnew* decided that the word "series" in the present context meant a number of things of a kind following each other in time. It held that whether deductions constituted a series was essentially a question of fact answered by taking account of all relevant circumstances including the similarities, differences, frequency, size and impact of the deductions, as well as how they came to be made and applied and what linked them together. In *Agnew* itself each unlawful deduction in relation to holiday pay was factually linked to its predecessor by the common fault that holiday pay had been calculated by

reference to basic pay rather than normal pay.

5. The Supreme Court held that it was immaterial to that link that the interval between the payments was, from time to time, in excess of three months. It also held that the series of underpayments that were linked was not broken or brought to an end by one correct and lawful payment of holiday pay. In that respect, it approved the words of Simler LJ in *Smith v Pimlico Plumbers* [2022] ICR 818 and overruled the relevant part of *Bear Scotland v Fulton* [2015] ICR 221 that was relied upon by this Tribunal.

6. The Claimant commenced employment with the Respondent in 2017. The Tribunal found that the rules on holiday pay calculations for variable hours changed to a 52-week average after April 2020. The Claimant says that she was subjected to a series of unlawful deductions taking into account the findings of *Agnew*. She claimed that she was underpaid holiday pay from August 2020. In fact, she was also underpaid holiday pay by a very small amount in August 2019.

7. The Respondent in its skeleton argument and in the submissions by Ms Bewley conceded that it calculated the Claimant's holiday pay incorrectly. It had not taken the average payment and calculated it in accordance with the appropriate formula. It included weeks when the Claimant, who was a part-time worker, did not work. Having accepted that this method of calculation was incorrect, it conceded that it should not have included weeks where no work was done.

8. A schedule was produced to the Tribunal and has been produced to me today. The Tribunal looked at the schedule and found as follows:

> "26. The Claimant set out her calculations but this was for a whole holiday year as if employment had terminated and bore no correlation to times holiday was actually taken. Her calculation was based on her usual £9.04 hourly rate and based on 7.3 hour

> days which for 28 days holiday equated to 204.4 hours per holiday year. She felt that this meant she should have had £329.96 but at the time she was paid £196.05 at the time. It was not in dispute that the Claimant was paid £196.05 for that holiday. The Claimant was paid weekly.
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> 27. The Claimant was right she was underpaid for the holiday and when the Respondent looked at this after the claim was issued and used the 52 week average, it accepted the Claimant was underpaid. She should have been paid £228.52. It was not in dispute that on this occasion the Claimant was underpaid £32.47 and this was paid to the Claimant.
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> 28. Having reviewed the Respondent's calculations of holiday pay for the 52 weeks average I accept its calculations. I also accepted the Respondent's evidence which was that the time sheets were provided by the client and sent to them to be processed on a weekly basis. The Claimant had no evidence to support any suggestion that the hours worked were incorrectly recorded."

The Tribunal concluded at paragraph 33:

> "We are content that the rules on holiday pay calculations for variable hours changed to 52 week average after 6 April 2020. Considering the way the Respondent has calculated the Claimant's entitlement, the Tribunal is satisfied that this is in accordance with both the Working Time Regulations and s224 Employment Rights Act 1996. I conclude that the Claimant was correctly paid for the July 2021 as she has now received the underpayment."

That is a reference to the receipt by the Claimant of an underpayment of £32.47 in respect of an underpayment of holiday pay taken in July 2021.

9. The Respondent realistically concedes before me that there was an error of law by the Tribunal in following *Bear Scotland* and deciding that the break of three months or more stopped the deductions being a series. The Respondent concedes that this means that the only result that a Tribunal properly directing itself could reach in the light of *Agnew* is that there was a series of deductions and the Claimant's claim was in time.

10. The Claimant has made submissions to me today. She said that the Respondent had no

proper database and it produced no proper payslips. Those were matters considered by the Tribunal and the subject of the other grounds of appeal which are not before me today. She said that the Respondent's database had an error in that it said it was from 1920 rather than 2020. The Claimant told me that she was an accountant and had calculated the deductions properly. She had counted how many days she worked, she knew that she had 28 days of holiday and she applied the hourly rate to her holidays. She said that the payslips that she was provided by the Respondent were in some way 'fraudulent'. That was also a matter that she raised before the Tribunal but which the Tribunal rejected on the evidence and in respect of which there is no arguable ground of appeal before me.

11. The Claimant said that the Respondent's spreadsheet which was in the Tribunal bundle and was accepted by the Tribunal in its findings of fact was not reliable. That is not a matter that I can overturn in that there was evidence before the Tribunal and the Tribunal is the final arbiter of fact except in cases of perversity. In any event, perversity is not a ground of appeal that was allowed through to the final hearing.

12. The Claimant said that her calculations showed a much larger deduction of £4,177 based on the various alleged acts which were rejected by the Tribunal. However, when I compared her figures and those in the spreadsheet of figures accepted by the Tribunal, I can see that the base calculation figures that she has used and the Tribunal used are the same. The Respondent's spreadsheet, which was accepted by the Tribunal, calculates the deduction of wages being the difference between the proper average holiday pay figures that she should have been paid and the lower incorrect figures paid by the Respondent at the time.

13. The Respondent concedes that any reasonable tribunal is likely to find that the previous accepted underpayments based on the same calculation error form a series of deductions.

I agree. The only permissible finding that a tribunal properly directing itself could reach is that all the underpayments of holiday pay based on the same calculation form part of a series of deductions which fall within the jurisdiction of the tribunal.

14. I need to decide whether or not this matter needs to be remitted to the Tribunal to decide whether there has been deductions and how much those deductions are. The test from *Jafri v Lincoln College* [2014] IRLR 544 is that the Employment Appeal Tribunal can only substitute its own decision if there is just one possible decision that a tribunal can reach after the Employment Appeal Tribunal has corrected the misdirection. The Employment Appeal Tribunal can be robust in deciding whether there is only one answer but must not make findings of fact itself if there are different facts that a tribunal could possibly find.

15. On the basis of the Tribunal's findings in paragraph 28 of its judgment, there is only one answer here. All the Claimant's holiday pay shortfalls back to the beginning of the two year backstop in section 23(4A) of the Employment Rights Act 1996 are part of a series of deductions and within the jurisdiction of the Tribunal. All the shortfalls except for the one in March 2019 that are shown in the calculation spreadsheet accepted by the Tribunal are inevitably part of the deductions claim that any tribunal properly directing itself would accept. The two-year backstop means that the earliest deduction within the jurisdiction of the Tribunal is 11 August 2019.

16. In those circumstances, this is one of those rare cases where the Employment Appeal Tribunal can and should substitute its decision that the underpayments claimed are part of a series of deductions and the total amount of the deductions is £496.75. That is the amount shown in the schedule of calculations accepted by the Tribunal less the amount that the Tribunal recorded as having been paid and taking out the underpayment that was

outside of the two-year limitation period. I am not asked to and I have not set off the small overpayments said to have been made by the Respondent to the Claimant on other occasions.

17. Therefore, I allow the appeal and substitute a judgment that:

i) The claim for holiday pay going back to 11 August 2019 was within the jurisdiction of the Tribunal;

ii) That the claim for unlawful deduction of wages under section 23 of the Employment Rights Act 1996 is well founded; and

iii) That the amount of the unlawful deduction is £496.75.

18. I order the Respondent to pay to the Claimant the sum of £496.75. That is the judgment of the Employment Appeal Tribunal.

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