

Insights

UNLAWFUL DEDUCTIONS CLAIMS AND TRICKY TIME LIMITS

UK HR TWO MINUTE WEEKLY

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SUMMARY

This week we consider a new EAT decision that emphasises the difficulties of making assumptions about tribunal time limits, particularly the date from when time starts to run.

Please note that the Two Minute Weekly will be taking a one month holiday, returning on Thursday 12 September and we wish all our readers a happy summer and bank holiday.

The law relating to unlawful deductions is complex, but a recent case concerned basic points that can sometimes be overlooked. These are:

- **What the claim is** – this might sound obvious but sometimes, more frequently with a litigant in person, the legal claim being brought may not be clear and may have to be clarified and considered by the employer. For example, a whistleblowing claim may not immediately look like or be called a whistleblowing claim; and
- **When the statutory time limit starts to run** – it is normally the termination date, but not always.

In this case the claimant's employment terminated on 9 September 2020. On 18 September 2020, the claimant was paid, just over a week in arrears and when he would normally have been paid, what the respondent believed to be his outstanding notice pay and holiday pay. The claimant disputed the sums paid to him and brought a tribunal claim for outstanding notice pay and holiday pay.

The claimant, acting in person, did not specify in his claim form the statute or cause of action under which he brought his claim. He simply said he was claiming outstanding notice pay and holiday pay. The tribunal treated the claim essentially as a breach of contract.

Because of this interpretation of the claim, the tribunal treated the three month statutory time limit as running from the date of termination of employment, 9 September. The tribunal noted that the claimant had applied for ACAS Early Conciliation on 16 December 2020, outside the three-month time limit. The claim was eventually presented in February 2021. The tribunal dismissed the claim as being out of time. The claimant appealed.

The EAT saw the claim differently and, in particular, treated it as a possible unlawful deductions claim. This is logical, as claims for unpaid notice pay and holiday pay are frequently brought as unlawful deductions claims. The EAT considered the point as to whether the tribunal, which had treated the claim essentially as a breach of contract, should have considered the claim as an unlawful deductions claim. The EAT commented:

"Whilst there was.....a degree of ambiguity in the claim form, in that it did not make explicit reference to an unlawful deduction....claim, such claims are routinely advanced in relation to alleged non-payment or underpayment of notice monies.....Furthermore, there was nothing in the claim form that precluded the claim from being advanced [as an unlawful deductions claim]"

So the tribunal should have considered the possibility that, even though the language was not certain, the claim could have been an unlawful deductions claim. If it were an unlawful deductions claim, would this make a difference to the statutory time limit? The short answer is yes.

In any unlawful deductions claim it is best not to rely on the termination date as the date from which the time limit starts to run. Section 23(2) of the Employment Rights Act 1996 (ERA) sets out the rules on time limits for unlawful deductions claims and makes no reference to the termination date. Under section 23(2)(a), the ERA states that time starts to run:

"in the case of a complaint relating to a deduction made by the employer, [from] the date of payment of the wages from which the deduction was made"

Keeping it brief and simple, the employer should not focus on the termination date, it should focus on either:

1. The date on which the actual alleged unlawful deduction was made; or
2. The date on which the deduction would have been made, had the employer complied with its normal contractual obligations relating to payment.

In simple terms, time starts to run from the date of the unlawful deduction, not the termination date, and the last unlawful deduction may take place after the termination date.

In this case both dates could easily have been (and were) after the termination date. The date of the deduction in this case was 18 September, 9 days after the termination date, which meant that the claimant's application for ACAS Early Conciliation, made on 16 December, was within the statutory time limit.

Also, the date of deduction and the contractual date for payment in this case were more or less the same (18 September) but point 2 above about the date on which the payment should have been made contractually, arises from the 1997 case of *Group 4 Nightspeed Limited –v- Gilbert*, where it was held that, if an employer makes a payment (from which unlawful deductions were made) earlier than the contractual date for payment, the statutory time limit for bringing a claim starts to run from the contractual date for payment. In *Group 4* the actual payment was made around the 20th of the month but the contractual date for payment was the 31st of the month – the employer just happened to pay (and deduct) early. It was held that the statutory time limit for a claim would run from the date the payment **should** contractually have been made (31st), not the date when the payment was actually made (20th). This would not work in reverse – if the actual date of payment was after the contractual date for payment, so the employer is late in paying, time would run from the actual date.

In this case the EAT held that the claim, even though not specified in the claim form, was a claim for unlawful deductions, and the statutory time limits under section 23 of the ERA would apply. This meant that time started to run from 18 September, and the claimant's application to ACAS, along with his subsequent tribunal claim, was within the statutory time limit.

The unlawful deductions case itself was remitted back to the tribunal.

WHY THIS MATTERS

Issues relating to identifying claims and time limits are generally good points for employers to watch out for. Any litigation or other strategy based on statutory time limits can be undermined if the claim(s) and the date on which time starts to run are not correctly identified. The date will almost always be the termination date but beware an unlawful deductions claim, where time can start to run after the termination date has come and gone. To calculate the time limit however, the claim, or how the claim could be interpreted, has to be identified.

Mr J Wharton v Sheehan Haulage and Plant Hire Limited

RELATED PRACTICE AREAS

- Employment & Labor

MEET THE TEAM



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