

Series of deductions: a new chapter?

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Chief Constable of the Police Service of Northern Ireland & Northern Ireland Policing Board v Agnew & Others [2019] NICA 32

Introduction

The Chief Constable of the Police Service of Northern Ireland and the Northern Ireland Policing Board ('the Appellants') admitted failing to pay appropriate amounts of holiday pay to police constables, police sergeants and police support staff since 23 November 1998. It was admitted that holiday pay had wrongly been calculated by reference only to 'basic pay', rather than by reference to basic pay, overtime and other allowances which together constitute 'normal pay'.

The appeal addressed a wide range of issues related to: the interpretation of the Employment Rights (Northern Ireland) Order 1996 ('ERO') and the Working Time Regulations (Northern Ireland) 1998, the EU principle of Equivalence, the method of calculation of the amount of overtime to be taken into account in holiday pay and the identification of the appropriate reference period.

But of particular significance for employment lawyers in England and Wales was the Court's consideration of the meaning of the term 'series of deductions' and the well-known judgment of the Employment Appeal Tribunal in *Bear Scotland Ltd & Others v Fulton & Others* [2015] IRLR 15 ('*Bear Scotland*').

The legal principles

Article 55 ERO mirrors the language of section 23 Employment Rights Act 1996. Article 55 states that:

Complaints to industrial tribunals

(1) A worker may present a complaint to an industrial tribunal—

(a) that his employer has made a deduction from his wages in contravention of Article 45 (including a deduction made in contravention of that Article as it applies by virtue of Article 50(2)),

...

(2) Subject to paragraph (4), an industrial tribunal shall not consider a complaint under this Article unless it is presented before the end of the period of three months beginning with—

(a) in the case of a complaint relating to a deduction by the employer, the date of payment of the wages from which the deduction was made, or

(b) in the case of a complaint relating to a payment received by the employer, the date when the payment was received.

(3) Where a complaint is brought under this Article in respect of —

(a) a series of deductions or payments, or

...

the references in paragraph (2) to the deduction or payment are to the last deduction or payment in the series or to the last of the payments so received.

In *Bear Scotland* Mr Justice Langstaff held that:

Conclusion in respect of series of deductions

79. 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.

80. I accept Ms Rose QC’s submission that the precise force of the word, common though it is, has to be understood in the legislative context. That is one in which a period of any more than three months is generally to be regarded as too long a time to wait before making a claim. The intention is that claims should be brought promptly. I doubt, therefore, that the draftsman had in mind that a deduction separated by a year from a second deduction of the same kind would satisfy the temporal link. It would have been perfectly capable of justifying a claim at the time, and within three months of it. Whereas when considering a series, as when considering whether there has been, conduct extending over a period’ (the analogous provision in the Equality Act 2010) some events in the series may take colour from those that come either earlier or later, or both, so that the factual similarities can only truly be appreciated when a pattern of behaviour is revealed, the essential claim here is for payment in a sum less than that to which there is a contractual entitlement. The colour of such a deduction is, though not inevitably, at least likely to be clear within a short time after it occurs, if not at the time.

81. Since the statute 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 (sections 23(2) and (3) ERA 1996 taken together) (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 a later non- payment, occurring more than three months later, could be characterised as having such 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 has extinguished the jurisdiction to consider a complaint [emphasis added]

The Judgment of the Court of Appeal in Northern Ireland

The Court dealt with the meaning of the term ‘series of deductions’ in paragraphs 88 to 110 of its judgment.

The Appellants argued that where there is a gap between deductions of three months or more, a series of deductions is broken. It was accepted that this may have harsh consequences but it was submitted that “sometimes the law has harsh consequences”. The Court noted that it was perfectly legitimate for the Appellants to rely on a limitation period or a lack of jurisdiction: these concepts are reflections of the principles of finality and legal certainty.

In addition, the Appellants argued that a lawful payment acts to break a series of unlawful deductions. For example, it was argued that if within a particular reference period no overtime was worked (and no other allowances were earned) then normal pay would be simply basic pay and therefore a payment based only on basic pay would be lawful on such an occasion. It was contended that in this scenario, ‘such a lawful payment would break the series with the consequence that the Tribunal would have no jurisdiction in respect of an earlier series of unlawful deductions’ (paragraph 92).

The Court confirmed that ‘series’ is an ordinary word, although in this context it has the meaning of a series through time, and whether there has been a series of deductions is a question of fact (paragraphs 98 to 99).

The Court also held that a series of deductions through time does not have to be ‘metronomic’; a series of deductions ‘can be constituted by deductions with a sufficient frequency of repetition but occurring at different time intervals and also we would add in different amounts’ (paragraph 100). Moreover, there ‘is nothing to suggest that the payments from which the unlawful deductions are made have to be contiguous if they are to amount to a series. Contiguous unlawful deductions is not a requirement of a series’ (paragraph 101). At paragraphs 102 to 103, the Court went on to explain that:

We consider that in order to establish a series of deductions a claimant does not have to establish that every payment made to him during a particular period of time was subject to an unlawful deduction. In our view it is necessary to identify the alleged series. In these appeals the alleged series is a series of unlawful deductions *in relation to holiday pay*. There will have been appropriate payments of pay between the various holiday payments whilst the claimants were at work which will not have been subject to unlawful deductions. However identifying the series as a *series in relation to holiday pay* means that those lawful payments whilst the claimant was at work will not interrupt the series.

We agree that there has to be “sufficient similarity of subject matter, such that each event is factually linked with the next (*in the alleged series*) in the same way as it is linked with its predecessor;” see paragraph [79] of *Bear Scotland* to which we have added the words “in the alleged series”. We do so because factual consideration as to whether there is a sufficient similarity of subject matter requires the identification of what is alleged to constitute the series of deductions. For instance in this case it is only when one identifies the alleged series as being a series of deductions *in respect of holiday pay* that one sees that each unlawful deduction is factually linked to its predecessor by the common fault or unifying or central vice that holiday pay was calculated by reference to basic pay rather than normal pay. That method of calculation factually linked all payments of holiday pay... and it did so consistently since 23 November 1998. [Emphasis added].

The Court went on to address the Appellant’s submission that a gap of more than three months in a series of deductions from holiday pay breaks the series. It held that (paragraph 105):

holding that a three month gap breaks a series of deductions leads to arbitrary and unfair results... There is nothing in the ERO which expressly imposes a limit on the gaps between particular deductions making up a 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.

And at paragraph 106, the Court held that a series of deductions is not broken by a lawful payment 'if the lawful payment comes about by virtue of the common fault or unifying or central vice' (in this case that holiday pay was calculated by reference to basic pay rather than normal pay).

Comment

Most obviously, while the judgment is not binding in England and Wales, it is persuasive authority that, in *Bear Scotland*, Mr Justice Langstaff was wrong to hold that the Employment Tribunal's jurisdiction in relation to a series of deductions is extinguished by a gap of more than three months between the deductions.

Despite the fact that, both in *Bear Scotland* and in this case, it was held that 'series' is an ordinary word, which in this context refers to a series *through time*, it is worth noting the Court's emphasis on the need to identify the factual link between the deductions. In light of this, care should be taken when drafting claims to clearly identify the 'common fault or unifying or central vice'.



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