Appeal No. UKEATS/0010/16/JW

EMPLOYMENT APPEAL TRIBUNAL
52 MELVILLE STREET, EDINBURGH, EH3 7HF

At the Tribunal
On 9 December 2016

Before

THE HONOURABLE LADY WISE

(SITTING ALONE)

MR DAVID FULTON & MR DOUGLAS BAXTER

APPELLANTS

BEAR SCOTLAND LIMITED RESPONDENT

JUDGMENT

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APPEARANCES

For the Appellants	MR S CHEETHAM (of Counsel) Instructed by: Minster Law Limited Alexander House Hospital Fields Road York North Yorkshire YO10 4DZ
For the Respondent	MR B NAPIER QC Instructed by : DLA Piper Scotland LLP Collins House Rutland Square Edinburgh EH1 2AA

SUMMARY

UNLAWFUL DEDUCTION FROM WAGES - Holiday Pay

JURISDICTIONAL POINTS – Limitation of Time

The claimants had litigated, with some success the issue of the calculation of pay of holiday leave, but an issue arose as to whether some of their claims were time barred, where there had been a series of unlawful deductions but where a period of more than three months had elapsed between those deductions. Following the decision on appeal – **Bear Scotland Ltd v Fulton and another [2015] ICR 221** – the case was remitted back to the Tribunal to determine the facts necessary to apply the ruling on what constituted a series of deductions for the purposes of section 23 ERA 1996.

Considering itself bound by the EAT decision in the same case, the Tribunal excluded as time barred all claims or parts of claims where a period of more than three months had elapsed between successive non or underpayments of holiday pay. The claimants appealed and sought to argue that the passages in the EAT decision might not be binding or even that they were wrongly decided, but that if they were binding, their effect was to create a strong presumption rather than a binding rule that where the series of deductions is broken by a gap of three months or more the claims is time barred. Other considerations might be brought into play that demanded examination before a decision could be reached.

Decision : None of the limited circumstances in which the EAT would depart from one of its earlier decisions were present. In any event, it was not permissible to seek to use a later appeal in the same case to seek a departure from an earlier decision in the same litigation. The relevant passages in the earlier EAT decision were part of the *ratio decidendi* and the Tribunal had correctly identified them as binding upon it. There was no room for the

interpretation now advanced by the claimants. Decisions on interpretation of different statutory provisions were of no assistance. The material relevant facts had been agreed before the Tribunal and so the circumstances of this case had not required any further enquiry.

There was no identifiable error in the Tribunal's decision.

Appeal dismissed.

THE HONOURABLE LADY WISE

1. This background to this appeal is that the initial claims in this case were initiated in December 2012 (Fulton) and January 2013 (Baxter). They claim that the respondent had made unauthorised deductions form their wages, contrary to s.13 of the Employment rights Act 1996 ("ERA 1996"). In essence, they contend that overtime and other payments had not been included in the calculation of their pay for annual leave. The Employment Tribunal, in a judgement dated 12 June 2013, found that the respondent had made certain unauthorised deductions. That decision was appealed and the decision on that appeal is now reported at [2015] ICR 221. Following mixed success at the appeal, the case was remitted back to the Employment Tribunal, which then made findings as to which of the deductions made in respect of the claimants' holiday pay were to be regarded as being brought in time. Certain of the claims were found to be time-barred and were dismissed. This appeal is against that decision. I shall refer to the parties as claimants and respondent as they were in the tribunal below. The claimants were represented at the tribunal by Mr E Morgan, of Counsel and before me by Mr S Cheetham of Counsel. The respondent was represented at the tribunal by Mr N Da Silva of Counsel and before me by Mr B Napier QC.

2. The substantive subject matter of these proceedings raises issues that have been litigated not just at earlier stages of this litigation but also in the case of **Lock v British Gas Trading Limited** **[2016] ICR 503** ("Lock"). The question raised is whether the employment Judge in this case could be said to have erred in interpreting the decision of Langstaff J at the earlier appeal stage in this case as providing a binding rule that a gap of three months always breaks the series of deductions for the purpose of assessing a time bar argument or whether what the former president laid down was a strong presumption to that effect, which could be rebutted by evidence.

The Tribunal's reasoning

3. The judgment of the Tribunal sets out in detail the legal argument presented, the decision thereon and the application of the relevant law to the facts in some detail and includes the following relevant passages :

> **"50. I begin by considering the judgment of the Employment Appeal Tribunal in this case which was heard in a conjoined appeal with two other matters. The parties are diametrically opposed on the relevance of *Bear Scotland Ltd v Fulton and Baxter and ors [2015] ICR 121 EAT.***
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> **51. The respondent says that the *ratio decidendi* of *Bear* is that a period of more than three months between successive non- or under-payments of holiday pay serves to break the link between those successive non- or –underpayments so as to preclude non- or under-payments occurring prior to that period forming part of a series of non- or under-payments with those occurring after that period.**
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> **52. The claimant puts it that the passages relied upon by the respondent are not *ratio* statements and amount to no more than *obiter dicta.* Further, it is said that those *dicta* result from a point that was insufficiently addressed in submissions, with insufficient attention being paid to the interaction between the Directive, the ERA regime and the WTR provisions. It was submitted on behalf of the claimants that I was not bound by the EAT's judgement although counsel for the claimants did not go so far as to submit that the conclusion of the EAT was *per incuriam* or distinguishable.**
>
> **53. Counsel for the respondent made a powerful submission in reply addressing the question of whether the EAT identified a principle in *Bear* that is binding on me.**
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> **54. Firstly, it was identified that what was termed the "third issue" arises in the appeals by Hertel and Amec in their respective cases (see paragraph 14 of the EAT judgement). The EAT noted that this issue arose in this case but that, at first instance, Judge Kearns had left the point for determination at a further hearing (this hearing is that further hearing). The issue concerned a series of deductions.**
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> **55. The "third issue" is discussed in paragraphs 70-83 of the EAT judgment. At paragraph 71, the circumstances giving rise to the issue for determination is identified in this way " it is only if the failure [to pay correctly] forms part of a 'series of deductions' that a claim may validly be brought in respect of it" and, in the following paragraph the issue for determination is identified " This raises the question as to what constitutes a " series of deductions".**
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> **56. At paragraph 73, there is consideration of the way the case was put to the Employment Tribunal in *Hertel* and *Amec* followed by a discussion of the reasoning of the Employment Judge in paragraphs 75 and 76. The submissions of counsel are then discussed at paragraphs 77 and 78. Thereafter at paragraphs 79 to 83 Langstaff J sets out his conclusions on the issue. Of particular significance are these words "…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 reference to jurisdiction being regained is of particular relevance here because, as emerged in the hearing, the claims first presented by the claimant were presented out of time and what the claimants sought to do was to link the deductions to which the original (time-barred) claim related to later deductions so as to regain jurisdiction.**

57. Finally, at paragraph 116, this is said "The appeals of Hertel and Amec succeed in resect of the third and fourth issues".

58. I am satisfied that the EAT's reasoning as to the intention of Parliament and set out above was necessary for the disposal of the appeals of Hertel and Amec, the point was argued before the EAT and the respective submissions noted and discussed. The reasoning is part of the *ratio decidendi* of the case and is binding upon me. It matters not that the " third issue" did not arise in the appeal in this case ; had it done so, the matter would have been determined without today's hearing and the fact that the matter was determined in the Hertel and Amec as part of the same hearing, goes no less to the binding nature of the *ratio decidendi* as would have been the case had the point been determined in an entirely unrelated appeal. I have no alternative to find that a gap of more than three months between under-payments in respect of Directive leave breaks the series of deductions.

59. An alternative route to bringing within time deductions that were made earlier than the commencement of the primary limitation period is to contend that it was not reasonably practicable to bring proceedings in time and, further, that the claim was presented within such period as was reasonable following the expiry of the primary limitation period. For the reasons set out under the heading " The application of the law to the facts" I was unable to extend time.

60. In paragraph 14 of his skeleton argument, counsel for the claimants submitted " Given this position, it is submitted on behalf of C that any limitation upon the ability to recover sums artificially confined to 3 months is (subject to primary legislation applicable to all claims-as to which see below) incompatible with the rights conferred by the Directive. This is supported by the jurisprudence in this area". The authority relied on was *Levez v Jennings (Harlow Pools) Ltd [1999] IRLR 764* (per Morison J at 23-24).

61. I am satisfied that, in considering this submission, it would be artificial only to look at the remedy provided by WTR. I reach that conclusion because a non- or under-payment of holiday pay gives rise to a casue of action both under WTR and as an unlawful deduction of wages under ERA.

62. *Levez* concerned the law of equal pay, as it then was, which limited the retrospective effect of a judgement to the period of two years prior to the presentation of a claim. As appears in paragraph 24 of the EAT judgment, the provisions in respect of unlawful deductions from wages under ERA (along with discrimination on grounds of race and disability) was set up as a provision which delivered a full remedy in the way in which the Equal Pay Act 1970 did not.

63. Section 23 may be relied upon in respect of non- or under-payments that result from EU law as well as non- or under-payments that result from domestic law. For example, Section 23 may be relied upon in a claim against an employer who fails to pay the sum due under the contract of employment in respect of, say, overtime worked. Payment for such overtime may well also fall to be brought into account in the computation of holiday pay. Both rights fall to be enforced through the provisions of Section 23 ERA and, insofar as both are dependent upon establishing a " series of deductions" both would be subject to the principle in *Hertel* and *Amec.*

64. I conclude that the combined effect of WTR and Section 23 ERA does not mean that domestic law is incompatible with the rights conferred by the Directive. "

The Tribunal went on to apply the law to the facts. Having recorded (at paragraph 74) that the claimants had led no evidence to support an argument that it had not

been reasonably practicable to present the claims in time, four claims were identified as being potentially time barred. The Judge then stated;-

> **" 76……I am bound to conclude that the chain linking a series of deductions is broken when there occurs a period of three months or more between successive deductions, it follows that the under-payments occurring prior to the claims in 4112472/12, 41000534/13, 4102156/13 and 4106915/13 cannot be linked as part of a series to any subsequent under-payment as the most recent under-payment was already more than three months old at the date of presentation. Further, there are more than three months separating under-payments in subsequent holiday years."**

The judgment goes on to list certain limited deductions and series of deductions that do not fall foul of the general rule by which the Tribunal considered itself bound.

The Claimants' Arguments on Appeal

4. At the hearing before me, Mr Cheetham first sought to identify the legal provisions involved in the deduction of wages argument. In **HMRC v Stringer [2009] ICR 985** the House of Lords held that the definition of "wages" in the 1996 Act included claims under Regulations 14 and 16 of the Working time Regulations. In particular, holiday pay was " payable under (a) contract or otherwise" for the purposes of section 27(1)(a). Section 13 of the ERA 1996 enshrines the right not to suffer unauthorised deductions, with section 23 providing for complaint to the Employment Tribunal where such unauthorised deduction is claimed. The relevant " three month rule" is given in section 23 (2), setting out that proceedings must be made before the end of three months beginning with the date of payment of the wages from which the deduction was made. Subsection (3) then provides that where there has been a series of deductions or payments the reference to deduction or payment in subsection (2) is to the last deduction or payment in the series. Section 23(4) has the provision for extension of the time limit where it was not reasonably practicable to bring the claim earlier. Reference was made also to section 23 (4A) ERA 1996, as inserted by the **Deductions from Wages (Limitation) Regulations 2014** which (for complaints after 1 July 2014) sets a two year longstop time limit for most deductions from wages claims, including holiday pay, from the date of the payment of wages to the bringing of the complaint after

which the Tribunal will not have jurisdiction. Finally, Regulation 30 of the Working Time Regulations ("WTR") sets the same three month limitation period and test of reasonable practicability for late claims as section 23 ERA 1996, but with no equivalent provision in relation to a series of deductions.

5. Counsel confirmed that the target of the appeal was the determination to the effect that where there is a gap of more than three months between underpayments, the claimants were precluded from pursuing any claim in respect of such deduction. The Tribunal had heard argument on whether Langstaff J's decision, to the effect that any gap of more than three months between deductions extinguishes the jurisdiction to consider a complaint was part of the *ratio* of the decision. The Tribunal had decided that it was. Mr Cheetham explored, tentatively, whether the relevant part of Langstaff J's judgment could be regarded as *obiter,* but he very fairly accepted that it was difficult to sustain such an argument in light of the former EAT President's own views as expressed at the sift stage of this appeal. It was hard to characterise the relevant *dicta* in the earlier appeal stage of this case as *obiter* rather than part of the *ratio decidendi.*

6. Mr Cheetham drew attention very properly, to the very limited circumstances in which the *ratio* of the appeal decision in this case could be departed from, as summarised by Singh J in **British Gas Trading plc v Lock [2016] ICR 503.** However, he maintained that there were arguments that the decision that any series punctuated by a gap of more than three months was one in which the passage of time had extinguished jurisdiction was one made in the absence of consideration of relevant points and was, in any event, manifestly wrong. It was accepted that arguments pointing away from an arbitrary rule were unlikely to be successful at this stage in light of the very clear *ratio* of Langstaff J but I record that this is not something which was conceded for the future.

7. Counsel then concentrated primarily on developing the argument that the interpretation laid down by Langstaff J might be regarded as a strong presumption rather than a universal rule and that the Employment Tribunal had erred in regarding it otherwise. He submitted that the rule was not as strict as the Employment Judge thought. It was not quite a " hard and fast" rule. He referred to paragraphs 79 – 81 of the Langstaff judgment. In particular, at paragraph 79, the decision states that the issue of whether or not there had been a series of deductions *"....involves two principal matters in the present context."* This signalled that there could be other contexts not covered by the EAT decision. Where the Employment Tribunal is making findings in fact, allowing for other contexts might include it being able to find, for example, that an unscrupulous employer was creating gaps between series of deductions deliberately and to deviate from the presumption accordingly. Further, the interrelationship between Regulation 13 and 13A WTR was relevant. In paragraph 82 of the EAT judgment, Langstaff J, in a passage that is clearly *obiter* states that the inherent power of an employer to exercise control means that, in the absence of a contrary contractual provision, the employer is entitled to direct when, within a leave year, regulation 13 holiday should be taken (albeit subject to regulation 15). So far as regulation 13A was concerned, it is described in the Regulations as "additional leave". Langstaff J expressed the view that, accordingly, the dates of such leave should be the last to be agreed on during the course of a leave year. Again, therefore, it was a submitted that a factor that could result in a deviation from the usual rule might be if the facts found illustrated that an employer had tried to use those provisions to its advantage against the employee. It was accepted that in this particular case a concession had been made about the order in which the leave should be taken for the purposes of regulation 13 and 13A had been made.

8. Submissions were made on the concept of a "series" generally. It was contended that, on the assumption that the EAT appeal in this case was correctly decided, then the three

month "guillotine" would logically also apply, for example, to " a series of deductions" on account of cash shortages or deficiencies under section 18(2)(b) ERA 1996 and " a series of similar acts or failures" comprising less favourable treatment under the *Part Time \workers (Prevention of Less Favourable Treatment) Regulations 2000, Reg 8(2)* or the *Fixed-Term Employees (Prevention of Less Favourable Treatment) Regulations 2002, Reg 7(2).* The Court of Appeal had considered the expression "part of a series of similar acts or failures" in section 48(3) ERA 1996 in the case of **Arthur v London Eastern Railway Ltd [2007] ICR 193.** The issue was whether, when there was a series of alleged acts of detriment, some within the statutory three month period and some outwith it, they could all be included within the definition of a " series of similar acts" for the purpose of the statutory provision. The court decided that whether the acts alleged fell within the definition was a question of facts and circumstances, but Mummery LJ also expressed the following view ;-

"The provision can therefore cover a case where, as here, the complainant alleges a number of acts of detriment, some inside the three-month period and some outside it. The acts occurring in the three-month period may not be isolated one-off acts, but connected to earlier acts or failures outside the period. "

Mr Cheetham submitted that while of course there had to be a connection, put by Langstaff J in this case in terms of a factual link and a temporal link, the case of **Arthur** did not support any contention that a temporal connection should be measured against and limited by the primary limitation period. The point was not considered by Langstaff J and **Arthur** had not been cited to him. Looking at paragraphs 77 and 78 of the EAT judgment, it was also questionable whether the submissions made to Langstaff J had even addressed the approach that he had gone on to adopt.

9. It was submitted further that the doctrine of equivalence applies to the issue in this case, such that the remedy for any breach of EU rights must be no less favourable than those

available in similar domestic proceedings and must be capable of effective exercise in practice. Although it had been argued at the appeal stage in this case that a claim in respect of a series of deductions from holiday pay was an additional remedy required to satisfy the principle of equivalence, the point was said by Langstaff J not to answer the question as to what constitutes a series. Mr Cheetham contended that the doctrine was still relevant in considering whether the approach now required rendered the claimants' remedy less effective. The strict application of the three month rule would lead to arbitrary and unfair results. For example, workers who take their annual leave in frequent, short breaks may be in a more advantageous position than those who choose to take their annual leave in longer breaks with consequently longer gaps between them. The difficulty was even more pronounced when coupled with the decision on the sequence of Regulation 13 and Regulation 13A leave. If Regulation 13A leave is " additional leave", the dates of which should be the last to be agreed, then a gap of three months is almost inevitable.

10. Turning to the argument that the Tribunal in this case had erred, Mr Cheetham submitted that, even if it was accepted that there was a rebuttable presumption that a gap of three months normally breaks the series, it was incumbent upon the Tribunal both to consider the evidence as to how the deductions were made and also to consider how that affected the temporal link between deductions. It was not sufficient for the respondent to answer that, because the facts of the schedules and dates of holidays had been agreed, without any oral evidence, any argument that there was only a strong presumption not a rule that a gap of three months always breaks the chain of causation was irrelevant in this case. While it was true that the decision was based upon agreed material facts and without oral evidence, it was still incumbent on the Tribunal to address the issue of why a gap of more than three months had arisen. This was important because of the need to consider whether leave was taken under Regulation 13 or 13A. While the parties had agreed was that annual leave under Regulation

13 (referred to as " Directive Days") comprised the first days of annual leave requested and taken, they had included under the heading " Matters not Agreed", *" the sequence/order in which annual leave is to be credited(i.e directive/domestic regulations/contractual)"* In any event, regardless of what was agreed or not, in circumstances where (if Langstaff J was correct) the employer can decide when holiday is taken, including Regulation 13A holiday, it was incumbent upon the Tribunal both to consider evidence as to how those decisions were made and also to consider how that affected the temporal link between deductions. Accordingly, the Tribunal had erred in not considering the material before it on this point and the case should be remitted back for that to be addressed.

11. For the respondents, Mr Napier QC first pointed out that the leave that was given in allowing this appeal to proceed was very restricted and did not extend to any argument that the decision of Langstaff J at the earlier appeal stage had been wrong, or that his *dicta* on the three month rule was *obiter* rather than part of the *ratio.* All that could be argued was that the Tribunal erred in its approach when applying the rule that was binding upon it. In any event, the Langstaff J decision in this case had not been appealed further. This was not a case in which the EAT could refuse to follow a decision in another case on the basis set out in **British Gas Trading plc v Lock [2016] ICR 503.** In a case where the decision of the EAT had not been appealed, the claimants could not seek to argue that the earlier decision had been wrongly decided. The Tribunal, in the decision now appealed against, had been correct in regarding what Langstaff J had said about a " series of deductions" as part of the *ratio decidendi of the decision.*

12. The reference to context in paragraph 79 of the Langstaff J judgment, when he said there were*"...two principal matters in the present context"* was a legal context, not a factual one. There could be no doubt that the principle expressed thereafter was binding on the

Tribunal. Accordingly, the issues for consideration in this appeal were restricted to (i) identifying what the principle laid down by Langstaff J is and (ii) determining whether it was correctly applied on the facts of the present case.

13. It was important to note that Regulation 30 WTR provides only for a primary time limit of three months from the last underpayment within which a claim must be made to the Tribunal; it does not make special provision for a sequence or series of such underpayments. However, the effect of **HMRC v Stringer [2009] ICR 985** was that a claim for unpaid holiday pay could be categorised as a claim in respect of an unauthorised deduction of pay, and brought under section 13 ERA 1996, because holiday pay can be seen as falling within the category of wages and also because to hold otherwise would offend the principle of equivalence. Accordingly, a worker who suffered an underpayment of (Directive) holiday pay had the option of proceeding either under Regulation 30 WTR alone, or also under section 23 ERA 1996, which bestows the more favourable regime because of the special provision made in respect of a " series of deductions". The Tribunal had acknowledged this (at para 48) by referring to section 23 ERA as ameliorating the potential harshness of Regulation 30 by opening the way to complaints about non or under payments that had occurred more than three months prior to the presentation of the claim. The issue before the Tribunal relevant to this appeal was whether successive failures of the respondent to make payments of holiday pay at the level required by EU law constituted a series of deductions for the purposes of section 23 ERA 1996. The point was correctly focused by the Tribunal (at para 49) as *" whether a series of deductions is broken if there is a period of more than three months between any two non- or under-payments"*. The Tribunal had agreed with the respondent's position that there could be no remedy in respect of underpayments occurring more than three months prior to the presentation of the claims, where there was a gap of three months or more between successive underpayments. Against that background the Tribunal

was required to look at the agreed facts on when holidays were taken and paid for and identify what holidays were to be treated as “Directive Leave” (leave required only under EU law). As it had been agreed that the first 20 days of leave taken in each of the claimants’ holiday years were Directive leave, it was only in relation to that leave that alleged underpayments of holiday pay arose, as it had been calculated by reference to basic pay only. The Tribunal had made a specific finding (at para 22) that within the periods in respect of which the claim was made, there were occasions when the interval in holiday periods was more than three months. Applying the binding rule stated by Langstaff J to those facts, that resulted in those periods being excluded from the claim.

14. There had been no scope for a further factual enquiry in this case because there was an agreement about the relevant facts. It was clear from Langstaff J’s decision that he did not accept an open ended reading of the expression “series of deductions”. It was necessary to have both a factual and a temporal link, such that it was not enough to show that a factual link was satisfied by two deductions being similar in kind. A temporal link was also necessary and, as a matter of statutory construction, Langstaff J had held that the reference to “series” in section 23 meant that a gap of more than three months in time between successive non-payments had the result that underpayments preceding the gap were not part of the same series as those that followed the gap. In such a situation, absent the “not reasonably practicable” mitigatory test being satisfied, the Tribunal simply had no jurisdiction over the time barred claim or part of the claim. The Tribunal had done no more than apply the construction of the statute endorsed by Langstaff J.

15. Mr Napier contended that the “unscrupulous employer” example given by Counsel for the claimants as one in which what had been termed the rebuttable presumption of the three month rule might be rebutted, was irrelevant, because both the factual and temporal link

between the series of deduction would still be required before the Tribunal could have jurisdiction. In any event, had Langstaff J intended to state that the two elements of factual and temporal link were normally required but that other matters could be considered he would have done so and would have disposed of the matter differently. His decision could not be read as laying down a strong presumption as opposed to a decision on the construction of a statute binding on the Tribunal below.

16. Senior Counsel referred to **" The Nature and authority of precedent" (N Duxbury, Cambridge University Press, 2007)** on the difference between a legal rule and a judge's ruling. Duxbury challenge an assumption made by Rupert Cross that the *ratio* of a decision is a rule of law treated by the judge as a necessary step in reaching his conclusion as not being quite correct. He expresses the view (at p 78) that *" When, for example, a judge interprets a statute in the process of reaching a decision, the ratio is what the judge believes to be the best interpretation of the statute- the judge's ruling, in other words, rather than the legal rule".* In this case, Langstaff J having made a ruling on the interpretation of section 23, the Tribunal had to apply the law as interpreted by the superior court, the EAT.

17. It was submitted that the three month rule did not result in arbitrariness as suggested for the claimants. The unscrupulous employer in Mr Cheetham's example would be taking away his employees' EU rights and so would be acting unlawfully. There would easily be scope in such a situation for the Tribunal to interpret the "reasonable practicability" rule to take account of that. It was in any event not sufficient to state that the rule could work harshly. Every case of this sort would involve looking at circumstances from the past. Langstaff J's analysis made sense and was restricted to an interpretation of section 23. Cases that had looked at other statutory provisions were not relevant.

18. So far as the reference to the 2014 Regulations was concerned, Mr Napier pointed out that the **Deductions from Wages (Limitation) Regulations 2014** had been enacted after, and thus " in the knowledge of " the Langstaff decision. There was no problem with equivalence in comparing the domestic and European law of Regulation 13 and 13A. In the circumstances there was no need to rely on the *obiter dicta* of Langstaff J in paragraph 82 of the appeal decision.

19. It was acknowledged that the Tribunal in this case did not conduct an examination of the course of conduct between the parties before deciding that there was no " series" allowing recovery of underpayments that fell outside the three month limitation period. The reason it was not required to do so in this case was that once it had determined that the temporal element was missing there was neither need nor basis for looking at the factual element referred to by Langstaff J. In other words, any consideration of the factual similarities between underpayments would have been otiose, as the lack of the temporal element meant there could never be the "series of deductions" required for the Tribunal to have jurisdiction.

20. The only circumstances in which there could be any complaint about the Tribunal decision was if the proper interpretation of section 23 required not just consideration of the two elements identified by Langstaff J but something more in every case. Otherwise, there was no error of law and the Employment Judge had done no more and no less than he was obliged to do.

Discussion

21. It may be useful first to record my decision on what I consider to be the limitations on the scope of this appeal. The decision of Langstaff J in the earlier appeal in this case – **Bear**

Scotland Limited v Fulton [2015] ICR 221 lays down an interpretation of section 23 (2) and (3) that is binding on first instance Employment Judges. In my view it is clear that the relevant passages of his decision (paragraphs 79-81) form part of the *ratio decidendi* of the judgment. The only circumstances in which a differently constituted EAT could depart from that decision would be if one of the established exceptions to the norm of the EAT following its own previous decisions. Those exceptions are :- (i) where the earlier decision is *per incuriam*, ie no relevant legislative provision or binding decision has been considered (ii) where there are two or more inconsistent decisions of the EAT, (iii) where there are inconsistent decisions of the EAT and another court or tribunal of co-ordinate jurisdiction on the same point (iv) where the earlier decision is manifestly wrong and (v) where there are other exceptional circumstances – **British Gas Trading plc v Lock [2016] ICR 503 at para 75.** I do not consider that any of those exceptions arise in the present case. Even if they did, departure from the norm of following earlier decisions is not permissible where the earlier decision is in the same case as that in which departure is sought. The proper course for a litigant who is unhappy with a decision of this Tribunal is to seek to appeal it to the Inner House of the Court of Session (or Court of Appeal in England as appropriate). Where, as in this case, that was not done, the claimants cannot use a subsequent appeal to this Tribunal in the same case to revisit the issue on which leave to appeal to a higher court could have been sought. The claimants have permission only to argue that the Tribunal to which Langstaff J remitted the case for further procedure in light of his judgement has erred in its application of the law to the facts. That includes consideration of whether the interpretation of section 23 ERA 1996 laid down by Langstaff J provides a rule from which no deviation other than the "not reasonably practicable" test for extension is available, or whether it provides a strong but rebuttable presumption such that the Tribunal requires to explore and consider both the factual and temporal links between series of deductions in every case before deciding whether they fall within the limitation provision.

22. The next stage, then is to look at section 23 and the interpretation of it by Langstaff J. Section 23 provides that "*(1) A worker may present a complaint to an employment tribunal – (a) that his employer has made a deduction from his wages in contravention of section 13…(2) Subject to subsection (4), an employment tribunal shall not consider a complaint under this section 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….(3) Where a complaint is brought under this section in respect of – (a) a series of deductions or payments…….. the references in subsection (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. (4) Where the employment tribunal is satisfied that it was not reasonably practicable for a complaint under this section to be presented before the end of the relevant period of three months, the tribunal may consider the complaint if it is presented within such further period as the tribunal considers reasonable".*

23. At paragraph 79 of the earlier appeal decision, Langstaff J ruled that a "series of deductions" for the purpose of section 23(3) requires both a sufficient factual and a sufficient temporal link. He went on (at para 80) to accept a submission made that the legislative context was that*" .. a period of any more than three months is generally to be regarded as too long a time to wait before making a claim."* However, the use of the word " generally" in that passage does not, in my view, open an argument that the three month rule is only a presumption ; it is a rule that provides, within the four corners of the legislative provision itself, a " not reasonably practicable" exception. Accordingly, the reference to more than three months begin generally too long must be understood in the context of it being a clear rule, but with an equitable excepting provision, not a presumption rebuttable in undefined and open ended circumstances. Similarly, where Langstaff J states that "*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" it is against a backdrop of a provision, the terms of which allow relief where the colour of the deduction was not in fact known within three months of it being made.

24. The ruling on the correct construction of the provision is then given in the following terms ;-

" ..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 that it was unpaid."

25. The claimants in this case argue that even on the basis that a temporal and a factual link between different series was required, there could be other factors, or " contexts" not covered by the Langstaff J decision. While of course there are always situations not anticipated at the time a judicial ruling is made, it seems to me that Mr Napier was correct in submitting that the context referred to by Langstaff J was a legal rather than factual context. In order to fall within the three month rule, two matters both have to be satisfied. Once that is understood, the "unscrupulous employer" example given on behalf of the claimant is not relevant to the question of the application of the statutory provision. Where both the temporal and factual link are required before the Tribunal can take jurisdiction, only matters falling within the " not reasonably practicable" exception can competently be raised if a claimant has not established both links. So far as the reliance of the claimants on the case of **Arthur v London Eastern Railway Ltd [2007] ICCR 193** is concerned, that case was not before Langstaff J in the earlier appeal. It related to the construction of a different provision

of the 1996 Act, one dealing with alleged acts of detriment in the discrimination context. While the court in that case was looking at the three month limitation period, the nature of the claim was very different. The Court of Appeal was concerned with the issue of acts that took place both within and outwith the three month period and the need for a Tribunal to find the facts and circumstances before determining whether there was a sufficient link between the alleged acts such as to render those that were on the face of it out of time "part of a series of similar acts or failures" and so capable of being included in the claim. There is an obvious difference between payments of or deductions from wages, which will be made at specific and easily identifiable moments of time, and acts of discrimination which may be isolated events or part of an ongoing course of conduct that may be consistent or erratic. The *ratio* of the Langstaff J judgment on the limitation rule in section 23 ERA 1996 is that (i) whether or not there has been a series of deductions is a question of fact and (ii) that it is not enough where what is involved is a series of payments or deductions to show a factual link because the legislation limits the jurisdiction of the Tribunal in a way linked to the date or dates of payment/ non-payment. The *ratio* of the Court of Appeal decision in **Arthur** is that a full consideration of the facts is required before applying the limitation provision in section 48(3) ERA 1996. One of the reasons for that being necessary was that it could be contemplated that that acts occurring within the three month period are connected to earlier acts or failures outside the period. There is in my view no tension between the judgment of Langstaff J in this case and the decision in **Arthur.** Both judgments emphasise the essential requirement of a determination, as an issue of fact, on whether there has been a "series of deductions" or "series of similar acts" as the case may be. The Langstaff decision then construes a provision that focuses on dates of payment or deductions, unlike the Court in **Arthur**, which was addressing a provision that contemplated actions extending over a period that could, if the relevant facts supported it, be treated as a single continuing act. The decision of the Court of Appeal on the interpretation of a different statutory provision could have had no bearing on

the Tribunal in this case. The task before the Tribunal was to apply the Langstaff ruling in the case before it on the applicable statutory provision involved in its decision.

26. The reason why further enquiry was not required in this particular case was because of the agreement between parties about the relevant facts. Had the dates or circumstances of leave taken been in dispute, there might have been scope for an argument about whether the Tribunal had correctly applied the law to the facts. In the absence of any dispute, the Tribunal did what it was bound to do and excluded those claims or parts of claims where there had been a gap of three months or more between two successive alleged non or under payments. Standing the agreed facts, there was simply no need for the tribunal to assess the material before it further than as set out in the judgment. Once satisfy that the temporal link was broken, the factual similarities became irrelevant. They could only have been relevant if the applicable authority had indicated that factual similarities were sufficient on their own to satisfy the requirements of section 23(3), but the authority binding on the Tribunal was to the opposite effect. I accept also Mr Napier's submission that, unless the proper interpretation of section 23 required not only consideration of the two elements of a factual and temporal link but something else in addition, there can be no scope for complaint about the Tribunal's approach in this case. I do not consider that there was any scope, in this particular case, for such additional enquiry, it being accepted that the " not reasonably practicable" exception was not in play.

27. No problem of equivalence arises. The rights of the claimants fall to be enforced through the provisions of section 23 ERA, the only provision applicable to this case that includes the "series of deductions" definition. It is not necessary for disposal of this appeal to comment on the statements of Langstaff J at paragraph 82 of the appeal decision which were

agreed to be *obiter,* standing the concession made by the claimants in this case about the order in which the relevant leave had been taken.

28. For the reasons given, I consider that no error of law in the Tribunal's decision has been identified in this case and I will dismiss the appeal.