Appeal No. UKEAT/0200/17/RN

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 19 January 2018
Judgment handed down on 29 March 2018

Before

HER HONOUR JUDGE EADY QC

(SITTING ALONE)

MR A M COLETTA — APPELLANT

BATH HILL COURT (BOURNEMOUTH) PROPERTY MANAGEMENT LTD — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MS BETSAN CRIDDLE (of Counsel) Bar Pro Bono Scheme Assisted by: Paris Smith LLP 1 London Road Southampton Hampshire SO15 2AE
For the Respondent	MR MARK GREEN (of Counsel) Instructed by: Ashfords LLP Ashford Court Blackbrook Park Avenue Taunton TA1 2PX

SUMMARY

NATIONAL MINIMUM WAGE

UNLAWFUL DEDUCTION FROM WAGES

National minimum wage - unauthorised deduction from wages - section 23 ***Employment Rights Act 1996*** *- sections 9 and 39* ***Limitation Act 1980***

The Claimant had successfully claimed that the Respondent had failed to pay him at national minimum wage rates and, at the subsequent Remedies Hearing before the ET, sought to recover payment for the sums that should have been paid, going back to the introduction of the **National Minimum Wage Act**, a period of some 15 years. The Respondent resisted that claim, contending that section 9 **Limitation Act 1980** meant the Claimant could only recover sums going back six years. The ET agreed with the Respondent, holding that the three-month time limit for bringing an unauthorised deductions claim was concerned only with the question of the ET's jurisdiction to determine the claim and did not amount to a period of limitation for the purposes of section 39 **Limitation Act** such as to disapply section 9. The Claimant appealed.

Held: allowing the appeal

Where a claim was brought under a statute that prescribed a period of limitation, section 39 **Limitation Act 1980** provided that the limitations that would otherwise apply pursuant to that **Act** (including the six-year limitation under section 9 of the **Limitation Act**) would not do so. Claims for unauthorised deductions were subject to a period of limitation by virtue of subsections 23(2) and (3) **Employment Rights Act 1996**. The ET had been wrong to hold that this was not a period of limitation for the purposes of section 39 **Limitation Act**: section 39 drew no distinction between periods of limitation for jurisdictional or remedy purposes. The Claimant had brought his claim in respect of the series of deductions made from his pay within three months of the last of the deductions in the series, as prescribed by subsection 23(3) and was thus entitled to recover the sums that had been deducted from the wages properly payable

to him, as provided by the **National Minimum Wage Act**, without the imposition of a back-stop of six years.

HER HONOUR JUDGE EADY QC

Introduction

1. This appeal gives rise to a discrete question relating to the jurisdiction of the Employment Tribunal ("ET") to award compensation in respect of a series of deductions from wages. Specifically, does section 9 **Limitation Act 1980** ("LA") apply to a claim in respect of an unauthorised deduction of wages, so as to apply a six-year limitation to the recovery of compensation, or does section 23 **Employment Rights Act 1996** ("ERA") prescribe an alternative period of limitation for the purposes of section 39 **LA**?

2. In this Judgment I refer to the parties as the Claimant and Respondent, as below. This is the Full Hearing of the Claimant's appeal from a Remedy Judgment of the Southampton ET (Employment Judge Salter, sitting with members Mr Cross and Mr Stewart, on 11 November 2016), by which it was held that that, pursuant to section 9 **LA**, the sums due to the Claimant by way of arrears of pay were limited to six years.

The Relevant Factual Background and the ET's Decision and Reasoning

3. The Respondent is the management company for a substantial block of apartments in Bournemouth, in which capacity it employs a team of porters. In 2000, the Claimant took up employment with the Respondent as a porter, becoming Head Porter in or about 2007. In 2014, the Claimant commenced ET proceedings against the Respondent, claiming he had been underpaid by reference to the national minimum wage. That claim was upheld by the ET in its Judgment promulgated 9 September 2015 (subsequently upheld by the EAT) and, on 11 November 2016, the ET reconvened to determine remedy, ultimately awarding the Claimant

£44,603.05, that being the amount of the underpayment for six years prior to the commencement of proceedings.

4. In reaching its decision on remedy, the ET concluded that section 9 **LA** provided a long-stop date for any award in respect of unauthorised deductions; section 23 **ERA** did not itself provide another limitation period for such a claim - that was focussed on a different issue, namely whether the ET had jurisdiction to hear the claim at all; a claim outside the ET's jurisdiction could, subject to any rules of *res judicata* or abuse of process, be litigated in the civil courts and would be limited to six years; section 39 **LA** did not, therefore, apply and the applicable time limit was six years, as provided by section 9.

Statutory Employment Protections - The Relevant Legal Framework

5. The Claimant's claim was made in reliance on the provisions of the **National Minimum Wage Act 1998** ("NMWA"), which, by section 1(1) provides that:

> **"(1) A person who qualifies for the national minimum wage shall be remunerated by his employer in respect of his work in any pay reference period at a rate which is not less than the national minimum wage."**

6. By section 17(1) **NMWA**, it is then provided:

> **"(1) If a worker who qualifies for the national minimum wage is remunerated for any pay reference period by his employer at a rate which is less than the national minimum wage, the worker shall at any time ("the time of determination") be taken to be entitled under his contract to be paid, as additional remuneration in respect of that period, whichever is the higher of -**
>
> **(a) the amount described in subsection (2) below, and**
>
> **(b) the amount described in subsection (4) below."**

7. The actual statutory formula (provided in subsections 17(2) and (4) **NMWA**) is not relevant for present purposes, but the effect of section 17(1) is to provide the worker with a contractual entitlement to be paid at the relevant rate. A failure to pay the national minimum

wage to a worker in respect of any pay reference period is thus to be treated as an unauthorised deduction from wages under Part II **ERA** - it being a payment of wages less than that which is "properly payable" (see section 13(3) **ERA**). Section 13 **ERA** relevantly provides:

> **"13.** ***Right not to suffer unauthorised deductions***
>
> **(1) An employer shall not make a deduction from wages of a worker employed by him unless -**
>
> > **(a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or**
> >
> > **(b) the worker has previously signified in writing his agreement or consent to the making of the deduction.**
>
> **(2) In this section "relevant provision", in relation to a worker's contract, means a provision of the contract comprised -**
>
> > **(a) in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or**
> >
> > **(b) in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.**
>
> **(3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him 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 for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.**
>
> **…"**

8. A worker does not, however, have to show a contractual entitlement to a payment in order to pursue a complaint that the failure to pay comprises an unauthorised deduction from wages; section 27(1)(a) **ERA** defines "wages" more broadly, as follows:

> **"(1) In this Part "wages", in relation to a worker, means any sums payable to the worker in connection with his employment, including -**
>
> > **(a) any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise,**
> >
> > **…"**

And see **New Century Cleaning Co Ltd v Church** [2000] IRLR 27 CA.

9. By section 23(1)(a) **ERA** it is provided 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 (including a deduction made in contravention of that section as it applies by virtue of section 18(2)),**
> >
> > **…"**

10. By section 205(2) **ERA**, it is further provided that the remedy for a worker in respect of any breach of section 13 is by way of complaint to an ET and not otherwise. That said, a party to a contract of employment will still be entitled to pursue a common law claim for sums due under that contract in the civil courts (or, if the claim in question arises or is outstanding on the termination of the employment, in the ET pursuant to the **Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994** ("the 1994 Order")), see **Rickard v P B Glass Supplies Ltd** [1990] ICR 150 CA.

11. For complaints of unauthorised deductions in the ET, the period within which such a claim must be presented is provided by subsections 23(2)-(4) **ERA**:

> **"(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, 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 section in respect of -**
>
> > **(a) a series of deductions or payments, or**
> >
> > **(b) a number of payments falling within subsection (1)(d) and made in pursuance of demands for payment subject to the same limit under section 21(1) but received by the employer on different dates,**
>
> **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."**

12. In determining whether a claim of unauthorised deductions has been brought in time, in **Taylorplan Services Ltd v Jackson** [1996] IRLR 184, the EAT (HHJ Peter Clark presiding) held that an ET would need to address the following questions (the cause of action then being provided by the **Wages Act 1986**, the predecessor to Part II of the **ERA**):

> **"18. … when dealing with a limitation point under the Wages Act the tribunal must ask itself the following questions:**
>
> **(1) Is this a complaint relating to one deduction or a series of deductions by the employer?**
>
> **(2) If a single deduction, what was the date of the payment of wages from which the deduction was made?**
>
> **(3) If a series of deductions, what was the date of the last deduction?**
>
> **(4) Was the relevant date under (2), alternatively (3), above within the period of three months prior to the presentation of the complaint?**
>
> **(5) If the answer to question (4) is in the negative, was it reasonably practicable for the complaint to be presented within the relevant three-month period?**
>
> **(6) If the answer to question (5) is in the negative, does the tribunal consider that the complaint was nevertheless presented within a reasonable time?"**

13. Pursuant to subsection 23(3) **ERA**, where the claim made is in respect of a "series of deductions", the three-month time limit starts to run from the date the last deduction in the series was made. Whether there is a series of deductions is a question of fact, requiring a sufficient factual and temporal link between the underpayments, see the EAT's guidance in **Bear Scotland Ltd v Fulton** [2015] ICR 221 (Langstaff P presiding), at paragraphs 79 and 81:

> **"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.**
>
> **…**
>
> **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 (section 23(2) and (3) of the [ERA] taken together) … 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."**

14. The EAT's judgment in **Bear Scotland** concerned entitlement to paid annual leave under the **Working Time Regulations 1998** ("the WTR"). The definition of "wages" for purposes of Part II **ERA** has been held to include the non-payment of holiday pay due under the **WTR**, see **Revenue and Customs Commissioners v Stringer** [2009] ICR 985 HL and, as such, the Claimant contends Part II **ERA** must now be viewed in the light of the judgment of the European Court in **King v The Sash Window Workshop Ltd** Case C-214/16, [2018] IRLR 142 CJEU. In that case it was held that, in the absence of any national statutory or collective provision establishing a limit to the carry-over of leave in accordance with the requirements of EU law, working time protections were not to be interpreted restrictively: allowing that an acquired right to paid annual leave could be extinguished would validate conduct by which the employer was unjustly enriched to the detriment of the very purpose of the protection.

15. Returning to Part II **ERA**, with effect from 8 January 2015, subsection (4A) was inserted into section 23 by regulation 2 of the **Deductions from Wages (Limitation) Regulations 2014** ("the 2014 Regulations"); it provides:

> **"(4A) An employment tribunal is not (despite subsections (3) and (4)) to consider so much of a complaint brought under this section as relates to a deduction where the date of payment of the wages from which the deduction was made was before the period of two years ending with the date of presentation of the complaint."**

16. The Explanatory Note to the **2014 Regulations** states that regulation 2 amends section 23 **ERA** to:

> **"… insert a limitation on how far back in time an employment tribunal is able to consider when determining whether a worker has suffered unauthorised deductions from their wages. …"**

17. Finally, where an ET finds a complaint under section 23 **ERA** well-founded, section 24(1)(a) provides that:

> **"(1) … it shall make a declaration to that effect and shall order the employer -**

(a) … to pay the worker the amount of any deduction made in contravention of section 13;

…"

The Limitation Act 1980

18. Under section 9(1) **LA** it is provided that:

> **"(1) An action to recover any sum recoverable by virtue of any enactment shall not be brought after the expiration of six years from the date on which the cause of action accrued."**

19. Where, however, alternative provision for limitation is made by any other enactment, section 39 disapplies the provisions of the **LA** their entirety, stating:

> **"This Act shall not apply to any action or arbitration for which a period of limitation is prescribed by or under any enactment (whether passed before or after the passing of this Act) …"**

Other Statutory Provisions referred to in Argument

20. In approaching the question of construction arising in this matter, the parties have sought to draw analogies from other statutory employment protection provisions. The Claimant thus seeks to rely on section 123 **Equality Act 2010** ("the EqA"), which relevantly provides:

> **"123. *Time limits***
>
> **(1) … proceedings on a complaint … may not be brought after the end of -**
>
> **(a) the period of 3 months starting with the date of the act to which the complaint relates, or**
>
> **(b) such other period as the employment tribunal thinks just and equitable.**
>
> **…**
>
> **(3) For the purposes of this section -**
>
> **(a) conduct extending over a period is to be treated as done at the end of the period;**
>
> **(b) failure to do something is to be treated as occurring when the person in question decided on it.**
>
> **(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something -**
>
> **(a) when P does an act inconsistent with doing it, or**
>
> **(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it."**

21. For its part, the Respondent refers to the **1994 Order**, which relevantly provides:

> **"3. *Extension of jurisdiction***
>
> **Proceedings may be brought before an employment tribunal in respect of a claim of an employee for the recovery of damages or any other sum (other than a claim for damages, or for a sum due, in respect of personal injuries) if -**
>
> > **(a) the claim is one … which a court in England and Wales would under the law for the time being in force have jurisdiction to hear and determine;**
> >
> > **(b) …; and**
> >
> > **(c) the claim arises or is outstanding on the termination of the employee's employment.**
>
> **…**
>
> **7. *Time within which proceedings may be brought***
>
> **An employment tribunal shall not entertain a complaint in respect of an employee's contract claim unless it is presented -**
>
> > **(a) within the period of three months beginning with the effective date of termination of the contract giving rise to the claim, or**
> >
> > **(b) where there is no effective date of termination, within the period of three months beginning with the last day upon which the employee worked in the employment which has terminated, or**
> >
> > **(c) where the tribunal is satisfied that it was not reasonably practicable for the complaint to be presented within whichever of those periods is applicable, within such further period as the tribunal considers reasonable."**

The Appeal and the Claimant's Submissions

22. The Claimant contends the ET erred in limiting the period for which he could recover for unauthorised deductions from wages to six years prior to the presentation of his claim. For claims made prior to 1 July 2015, sections 23 and 24 **ERA** did not provide any cap on the recovery of back pay, albeit section 23 provided for a limitation period within which a claim must be presented in order for an ET to have jurisdiction to consider it. The ET erred in concluding that section 23 did *not* constitute a period of limitation within the meaning of section 39 **LA**; it ought, rather, to have concluded that section 9 **LA** was disapplied by virtue of section 39 because section 23 **ERA** provided an alternative period of limitation. Provided the claim was brought within three months of the last in the series of deductions, a worker could thus recover compensation in respect of the whole series (here, over a period of 15 years), the entitlement conferred by section 24(1)(a) **ERA** being to a declaration that the complaint was

well-founded and an order that the worker be paid the amount of the deduction made in contravention of section 13.

23. More specifically, the ET was wrong to hold that "*The question of whether the deductions are a series or not, whilst related to the question of how much the Claimant can claim, is focused on another issue: namely whether the Employment Tribunal has jurisdiction to hear the claim at all … a claim outside the ET's jurisdiction can, subject to any rules of res judicata or abuse of process, be litigated in the civil courts and would be limited to six years*" (ET, paragraph 27). This analysis was flawed: (1) although, where a worker sought to rely on section 23(3) **ERA** in respect of multiple deductions from wages, it was likely to be necessary to consider whether those deductions constituted a "series", the *purpose* of the enquiry was to determine whether the claim was brought in time, within the scope of the limitation provisions of subsections 23(2)-(4) **ERA**; and (2) it was wrong to state that the ET was merely one forum in which an unauthorised deduction of wages claim can be presented: it was the *sole* forum which had jurisdiction to consider such a complaint (section 205(2) **ERA**) - subsections 23(2)-(4) **ERA** exclusively provided the limitation for an unauthorised deduction of wages claim.

24. Furthermore, the Respondent's argument to the contrary lacked logic; it did not contend (nor could it) that subsections 23(2)-(4) **ERA** did not apply in determining whether a claim in respect of unauthorised deductions has been presented to the ET in time. Rather the Respondent contended there was a double limitation period for unauthorised deduction of wages claims: a claim must be presented within three months of the (last) deduction *and* it must relate to deductions arising in the six years prior to the date of claim. That, however, was not supported by the statutory language; on the contrary subsections 23(2)-(4) provided a single, coherent code governing limitation for pursuing such a claim.

25. The Respondent further sought to contend that subsections 23(2)-(4) **ERA** were not to be regarded as constituting a period of limitation because it "*simply does not provide any length of time beyond which a claim cannot be brought*". But that was also true of section 123 **EqA**, the language of which was materially identical to subsections 23(2)-(4) **ERA** and likewise provided for limitation to run from the end of the last "act" (or "deduction" in the case of unauthorised deductions). If subsections 23(2)-(4) did not give rise to a period of limitation (because they did not provide a length of time beyond which a claim could not be brought), it must follow that section 123 **EqA** also did not and that the provisions of sections 9 and 11 **LA** (section 9 relating to sums recoverable by statute; section 11 to actions in respect of personal injuries) would be applicable to claims in that jurisdiction. That, in turn, would necessarily mean that no claim could be presented to the ET in respect of discriminatory acts occurring more than six years prior to the date of claim even if those acts could be part of a continuing act (section 9 **LA**), and if that argument had merit, it would have been taken in cases such as **Hendricks v Commissioner of Police for the Metropolis** [2003] IRLR 96 CA; it was not. Furthermore, it would mean that no damages could be awarded for personal injury sustained as a result of discriminatory acts occurring more than three years prior to the presentation of the claim (that being the limitation imposed in respect of personal injury claims under section 11 **LA**), albeit no claim for damages could be pursued in the civil courts in respect of personal injury sustained because of discriminatory acts as the ET has exclusive jurisdiction, see **Sheriff v Klyne Tugs (Lowestoft) Ltd** [1999] ICR 1170 at 1179E-1180A

26. As for the Respondent's suggestion that breach of contract claims pursued in the ET under the **1994 Order** were also limited to six years, the Claimant disagreed. There was nothing in Article 7 of the **1994 Order** providing for a double limitation period but, in any event, any such back-stop would be because Article 3 allowed that a contract claim presented to

the ET will be one "*which a court in England and Wales would under the law for the time being in force have jurisdiction to hear and determine*". Thus, if there was a distinction between the limit of recovery in the ET in a breach of contract claim and an unauthorised deduction of wages claim, it would be because Parliament had chosen to draw that distinction.

27. The Respondent's argument further failed to have regard to the fact that a claim under section 23 **ERA** would include claims for non-payment of holiday pay under the **WTR** (**Stringer**). If the limitation provisions in subsections 23(2)-(4) **ERA** were to be treated as subject to a second (silent) back-stop of six years, that would fail to give proper effect to the right to paid leave provided by the **Working Time Directive** (see **King v The Sash Window Workshop Ltd** Case C-214/16, [2018] IRLR 142 CJEU).

The Respondent's Case

28. For the Respondent it was contended that the ET had neither erred in its reasoning nor had it failed to explain how it had reached its conclusions in this matter. The ET's approach was, moreover, supported by public policy.

29. Section 23 **ERA** specified that workers had three months from the end of any series of deductions to bring a claim but the **ERA** was silent as to the length of time such a series could stretch back. Section 9 **LA** provided for a limitation period of six years for claims for sums recoverable by virtue of any enactment, albeit that was potentially subject to section 39 **LA**: if another statute provides a different period for limitation, section 9 **LA** would thus be disapplied. It was the Respondent's case that in order for a "period of limitation" to be "prescribed" (the language of section 39 **LA**) a statute must refer to a specific length of time, definable in weeks, months or years; a reference to an open-ended series of deductions (which could be anything

A from two days to several decades) would not satisfy this criterion. There was thus no "other" period of limitation: section 23 **ERA** was silent as to limitation.

B 30. Indeed, the Claimant's case was predicated on the basis that section 23 did not specify how far back in time a claim might reach. That was, the Respondent submitted, entirely the point: there being no limit, there could be no limitation period such as would disapply section 9 **LA**. Moreover, given that the Claimant accepted that an award would be limited by the date the C **NMWA** had come into force, he was allowing that a back-stop provision could be implied.

D 31. A limitation on unlawful deductions claims under the **ERA** to a period of six years had, moreover, been accepted - albeit without extensive argument - by the Court of Appeal in **Alabaster v Barclays Bank plc (formerly Woolwich plc)** [2005] ICR 1246. It had, further, been assumed in argument in **Levez v T H Jennings (Harlow Pools) Ltd (No. 2)** [1999] IRLR E 764 EAT (Morison P presiding) - in which it was held that claims of unauthorised deductions were "juridically the same" as claims of a breach of the equality clause (see paragraph 23), and to the extent that it had been suggested that there might be no limit, this point had not been developed in argument and the EAT could not see any merit in it (see paragraph 27).

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32. This could also be taken to have been Parliament's intention: it could have provided that there was no limit to a series of deductions but had not done so. Indeed, the Explanatory G Memorandum to the **2014 Regulations**, at paragraph 4.4, had specifically stated that the six-year limitation period applied to unauthorised deductions claims under the **ERA** (albeit, acknowledging that some commentators had suggested that section 39 **LA** meant this might not H be so). Whilst not binding on the EAT, that had to be persuasive as indicative of Parliament's understanding of the position.

33. Had section 23 **ERA** simply provided that a claim had to be brought within three months of the deduction complained of, then this would have provided a clear period of three months for limitation sufficient to displace section 9 **LA** by virtue of section 39 **LA**. The unlimited nature of the series of deductions provision meant, however, that there was no such clarity and thus there was a need for section 9 **LA**, which imported a procedural limitation of six years.

34. If that was not correct, the Respondent urged that there were strong public policy reasons as to why limitation on unauthorised deduction of wages should not be permitted to extend back indefinitely. The Claimant's interpretation of the law would allow individuals to make claims extending back decades; that could not have been the intention of Parliament given how difficult the older parts of such claims would be to evidence, in particular where there might be a knock-on effect in terms of potential liabilities under the **Transfer of Undertakings (Protection of Employment) Regulations 2006** ("TUPE"). Indeed, the Claimant implicitly allowed that a back-stop limitation could be inferred given that he was limiting his claim to the introduction of the **NMWA**. A six-year time limit would provide for certainty and consistency.

35. Allowing that, by virtue of section 205 **ERA**, unauthorised deductions claims can only be brought in the ET, there were many aspects of such claims that could be brought in other courts, in which case the relevant time limit would be six years.

36. It was, further, possible to draw an analogy with breach of contract claims in the ET, which were limited to six years (see **Taylor v Central Manchester University Hospitals NHS Foundation Trust** ET 2405066/12), despite the fact that Article 7 of the **1994 Order** also only provided for a three-month period from termination of employment in which to bring a claim

and was similarly silent as to a point in the past beyond which a claim could not be made. The distinction between the time within which a claim had to be brought (three months) and the limitation on the period for which damages could be recovered could be seen as the difference between a jurisdictional time limit (the three months) and a procedural limitation (the six years), see the first instance decision in **Taylor** and note the distinction drawn in **Radakovits v Abbey National plc** [2010] IRLR 307 CA, between a statutory jurisdictional limitation rather than a "mere limitation" (paragraph 16): the effect of section 9 **LA** was to extinguish the remedy, it did not serve to extinguish the right to bring the claim itself. Although there was no principle of equivalence requiring unauthorised deductions to be subject to the same limitations as contract claims in the ET, there was a public policy reason for adopting a consistent approach in both types of claim.

37. It was, further, no argument against the Respondent's case that the **2014 Regulations** had introduced an amendment to insert a two-year time limit. That did not mean that there was no limit before; it had simply taken time for legislation to catch up with what the law was or should have been (similar to the delay in amending the **Equal Pay Act 1970** ("the EqPA") following **Levez**).

38. As for the other provisions relied on by the Claimant, this case did not concern holiday pay and the potential issues that might arise in such claims following **King**. Equally, it was unhelpful to seek to draw any analogy with section 123 **EqA** given the material differences between the series of deductions (for the purposes of section 23 **ERA**) and the conduct extending over a period (for the purposes of section 123(3) **EqA**). In any event, the Respondent would argue - following **Levez** - that there was a limitation under the **EqA**.

The Claimant in Reply

39. The Claimant rejected the argument that the EAT's decision in **Levez** assisted the Respondent: the EAT had held that section 2(5) **EqPA** (which had limited compensation in an equal pay claim to a two-year period preceding the claim) was "a unique limitation" (see paragraph 24), hence the ruling that it was incompatible with the requirement to provide a full and effective remedy for breach of Article 119 of the **European Treaty** and the **Equal Pay Directive** (paragraph 25). There was, further, no distinction to be drawn between procedural and jurisdictional rights for these purposes (and see, in the equal pay context, per Lord Sumption at paragraph 42 **Abdulla and ors v Birmingham City Council** [2012] ICR 1419 SC); back-pay provisions were not the same thing as a period of limitation.

40. As for the Explanatory Memorandum relating to the **2014 Regulations**, at most that provided a statement of departmental opinion, it said nothing of Parliament's intent.

41. It was, further, no argument against the Claimant that he accepted that a claim could not go back further than the introduction of the **NMWA**: that was not to imply a limitation period, but simply to recognise the basis of the entitlement for the claim.

Discussion and Conclusions

42. As acknowledged in the Explanatory Memorandum to the **2014 Regulations**, different views have been expressed as to whether section 9 **LA** applies to actions for sums recoverable as unauthorised deductions of wages pursuant to section 13 **ERA**. It was assumed that it did in **Alabaster** and in **Levez**, but in neither case was argument heard on the point, and it is not suggested that these cases give rise to any binding ruling on the issue raised by the current appeal. Equally, although paragraph 4.4 of the Explanatory Memorandum to the **2014**

Regulations asserts that section 9 **LA** applies to unauthorised deductions claims under the **ERA**, that is no more than an expression of the view of the Department for Business, Innovation and Skills (it stands in contrast, for example, to the view expressed by the learned authors of *Harvey on Industrial Relations and Employment Law*, see BI [377]); it cannot be relied on as a statement of Parliamentary intent.

43. That said, on its face it might seem that section 9 **LA** should indeed apply to unauthorised deductions of wages claims; such a claim being an "*action to recover [a] sum recoverable by virtue of [an] enactment*". The issue is whether section 9 is disapplied by virtue of section 39 **LA**, and that - in turn - requires determination of the question whether a claim of unauthorised deductions is subject to "*a period of limitation ... prescribed by or under any other enactment*"; here, the **ERA**.

44. Having regard to subsections 23(2)-(4) **ERA**, the answer seems to be clear: a limitation is thus placed on unauthorised deductions claims by virtue of section 23 **ERA**, such that an ET can only consider a complaint presented before the end of a period of three months beginning with (I paraphrase) the deduction in issue. That being so, the simple answer would seem to be that section 39 **LA** applies and section 9 does not. Indeed, as Mr Green, for the Respondent, volunteered in argument, if a claim for these purposes was limited to a single deduction, no issue would arise: the Respondent would accept that subsection 23(2) **ERA** prescribes a period of limitation of three months beginning with the date of the deduction. The Respondent's objection is, however, to the suggestion that this is equally so in respect of a series of deductions. By subsection 23(3) **ERA**, it is provided that in such cases the references in subsection 23(2) to "*the deduction*" will be to "*the last deduction ... in the series*". The Respondent contends that this does not provide for a "*period of limitation*" as it only limits the

period within which a claim must be brought in respect of the last of the deductions. It makes no provision for a period of limitation for each of the deductions: for the first deduction, therefore, there is no time limit for an action to recover that sum by virtue of the **ERA**.

45. I am not persuaded by this argument. Subsection 23(3) **ERA** requires the ET to be satisfied that there has been "*a series of deductions*" from wages. That is a question of fact. The ET will need to have found: "*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 ... a sufficient frequency of repetition*" (see **Bear Scotland**, at paragraph 79). If, however, the ET is thus satisfied that there is such a series, subsection 23(3) prescribes a period of limitation: a claim to recover the sums that were thus the subject of the series of unauthorised deductions must be brought before the end of a period of three months from the last such deduction in the series. On a straightforward reading of the statute, an action to recover a series of unauthorised deductions is thus subject to a prescribed period of limitation.

46. This reading of subsection 23(3) **ERA** seems to me to be consistent with how Parliament chose to construct section 23 as a whole. It is the provision that enables the worker to present his or her complaint to the ET and subsections (2) and (3) are obviously intended to interrelate: if, as the Respondent accepts, there is a prescribed period of limitation in respect of a claim relating to a single deduction (subsection 23(2)), there is equally a period of limitation prescribed in respect of a claim relating to a series (subsection 23(3)). Hence the EAT's characterisation of the three-month time limit as "*the limitation period applicable to **Wages Act** claims*" (emphasis added) in **Taylorplan** (see at paragraph 15 of that case).

47. It was, of course, open to Parliament to provide greater prescription in terms of the relevant period of limitation: it could - as it has since done, by means of the **2014 Regulations** - have further provided that there was a back-stop to the period for which the ET might make any award. In the equal pay context, for example, a time limit is prescribed for bringing a claim before the ET - expressed as the "qualifying period" within which a claim has to be brought (see section 129 **EqA**) - *and* there is a limitation on the period for which arrears of remuneration or damages may be awarded - the "arrears date" (see section 132 **EqA**). Prior to January 2015, however, section 23 **ERA** prescribed no such limitation on the arrears that an ET could award, provided that the claim had been presented within the period of limitation of three months from the deduction, or the last of the series of deductions, in issue. Although, therefore, there was no limitation on arrears, there was thus still a "*period of limitation*" for the purposes of section 39 **LA**.

48. The Respondent argues that this was insufficient: it imposed a jurisdictional but not a procedural limitation. This was the argument that found favour with the ET; it concluded that section 23 **ERA** did not provide a limitation period for such a claim but was, rather, focussed on a different question: whether the ET had jurisdiction to hear the claim at all.

49. I am, however, unable to see that section 39 **LA** makes such a distinction. Subsections 23(2) and (3) **ERA** lay down a period of limitation for the bringing of claims before the ET; that is all that section 39 requires. Were there no such provision under Part II of the **ERA**, section 9(1) **LA** would apply such that no claim to recover unauthorised deductions could be brought after the expiration of six years from the date on which the cause of action accrued: a limitation that would similarly deprive the ET of jurisdiction.

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50. By way of alternative argument, the Respondent objects that the approach urged by the Claimant cannot be consistent with public policy, not least as a six-year back-stop would apply to claims of unpaid wages if pursued as breach of contract claims in the civil courts or under the **1994 Order**. For the Claimant, it is countered that public policy must have regard to the fact that Part II of the **ERA** provides important employment protections; the present case itself involving the Respondent's breach of its **NMWA** obligations over a number of years. It is further questioned whether there is any six-year limit on contract claims under the **1994 Order**.

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51. On the question whether there is a six-year limitation on damages under the **1994 Order**, that seems to me to be a moot point. By Article 7, there is a period of limitation in respect of the bringing of a claim, and, by Article 10, the ET is unable to make an award greater than £25,000. Otherwise, I cannot see that there is any limitation in terms of the period for which any award made by the ET might relate. That said, I can see that the requirement, under Article 3 - that the claim made must be one which "*a court in England and Wales would under the law for the time being in force have jurisdiction to hear and determine*" - might be said to import a six-year limitation on any award. Apart from thus acknowledging the arguments on the point, I am not sure it is helpful for me to state any view on this issue. More specifically, I do not consider that it assists in identifying where any principle of public policy would fall when considering the wholly distinct regime under the unauthorised deductions provisions. Whereas a claim under the **1994 Order** can only be brought after the employment has ended (see Article 3(c)), the worker bringing an unauthorised deductions claim may still be in employment and there may be good reasons why she would not wish to pursue a claim in those circumstances. The **1994 Order** is, further, concerned solely with contract claims; that is not the case with claims under Part II of the **ERA**, "wages" being more broadly defined than simply as sums due under the contract. There is no entirely straightforward read-across from the

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A statutory protection against unauthorised deductions from wages to the regime applicable to breach of contract claims in the civil courts.

B 52. In contrast, although the language used in the discrimination context at section 123(3) **EqA** is not identical to section 23(3) **ERA**, there are obvious similarities in the approach Parliament has chosen to adopt when addressing the issue of the imposition of a limitation period in claims involving a series of acts or omissions, whether described as a series of C unauthorised deductions (section 23(3) **ERA**) or as conduct extending over a period (section 123(3) **EqA**). As the Claimant has observed, although there have been many cases concerned with how ETs should deal with claims of discriminatory conduct extending over a number of D years, it has not been suggested that the answer might simply be provided by the imposition of a time limit pursuant to section 9 **LA**.

E 53. More generally, I do not consider there is an easy answer as to what public policy would dictate in this context. I appreciate the real-world difficulties for many employers facing unauthorised deductions claims going back many years; the failure to pay sums "properly payable" may not have been intentional; employers will no doubt point to the development of F case-law in the context of the **NMWA** and under the **WTR**. That said, Part II **ERA** is intended to provide an important statutory protection for workers; in this context, they are simply claiming those sums that were properly due to them. They were, moreover, required to bring G such claims within three months of the deduction in issue - or the last in a series of deductions - by virtue of subsections 23(2) and (3). Ultimately, I am satisfied that section 23 **ERA** thus prescribed a period of limitation such as to displace the application of section 9 **LA** and on that basis I therefore allow this appeal.

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54. At the hearing in this matter, it was intimated that, should the appeal be allowed, the parties were in agreement that I should set aside the award made by the ET, substituting that with a sum agreed in the light of my ruling. The parties are therefore given 14 days from the date this Judgment is handed down, to provide their (agreed) written representations as to the terms of the Order disposing of this appeal, along with any other written applications for consequential Orders arising from my Judgment.