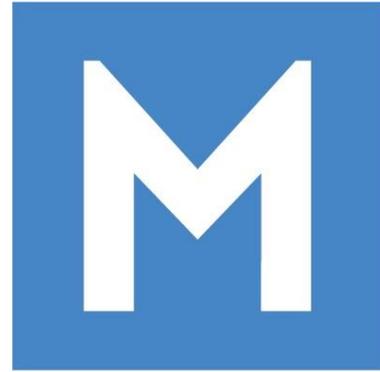




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People



Management

Pay: An Explanation

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'Just being honest that's all'

Pay: An Explanation

Pay, the reason why people go to work!

Getting paid for the work that employees do is fundamental to the contractual relationship between employer and employee. That is why in an Employment Tribunal when sitting in front of a judge, with a pay claim, at the beginning of a hearing a litigation consultant, such as me, always feels really uncomfortable when defending a respondent, and feeling really confident when representing a claimant. Why? Because tribunal judges hate pay disputes, they do not like to hear about employers withholding employees pay, whatever the circumstances.

So, as employers, if you withhold employees pay you better have a really good reason for doing so otherwise you will lose at the tribunal. Your reason has to be backed up with some solidly documented consent clearly demonstrating that the employee was fully aware of the circumstances allowing an employer to deduct from wages and that the employee gave their consent for that deduction within that context to be made.

But, (and it's a BIG BUT), even that will probably not be enough for the employer to win the case outright, because the judge will then go on to investigate loads of other issues such as, how much was deducted, for what purpose, was the deduction a genuine loss that the employer suffered, how much in money terms was the actual loss, and how much was actually deducted, was the deduction a penalty, a punishment and so on and on!

I am not saying that a tribunal judge is biased, no, not at all. What I am suggesting though is that the tribunal judge recognises that pay is the most fundamental aspect of the employment relationship and if an employer deducts from pay, the judge will want to make sure that the employer acted correctly, legally and ethically. The judge, I suppose, has to look for duplicitous behaviour and then return a decision. That type of judicial assessment does not necessarily apply to other types of tribunal hearings. That is why I do not relish defending Pay claims, they are mostly unpredictable and difficult to win.

The issues

Any failure to pay an employee properly and according to the Contract of Employment (the contract) will nearly always constitute a fundamental breach – which will entitle the employee to resign and claim constructive dismissal and, in my opinion, they will have a very good chance of winning the case.

Any number of issues can constitute a dispute about pay, including some of the following (not an exhaustive list):

- Failure to provide written details
- Not providing an Itemised Pay Statement (Pay Slip)
- Not paying the minimum wage
- Not paying the correct sick pay
- Holiday pay
- Notice pay
- Sick pay
- Maternity/Paternity pay
- Medical suspension payments
- Guaranteed payments
- Commission/Bonus
- Pension contributions
- Payments and benefits associated with a company car or car allowances
- Other contractual payments, benefits or allowances, such as healthcare cover, insurance, payments towards personal protective equipment, employee benefits including discounts and vouchers and other perks

Things to keep in mind

The rate of pay is set in the contract normally before the employee starts to work for a company. Various pieces of legislation govern the pay relationship and the contract is silent about these statutory provisions. For example, the Equal Pay Act of 2010 provides equality in wage between men and women doing the same job, The Minimum Wage Act 1998 ensures a wage floor for everyone. The contract is silent about a lot of things that are taken for granted when it comes to pay.

Part II of the Employment Rights Act 1996 (ERA, 1996) protects an employees wages from an unlawful deduction. Section 27 of the ERA, 1996 defines wages as inclusive of bonus, commission, holiday pay and '*any other pay due under the contract of employment*'.

So, the basis of the employment relationship with regards to pay is governed by a complex mix of contractual rights and statutory provisions

No deduction from an employees wages can be made 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.

(ERA, 1996, sec, 13(a)(b))

If sums are unlawfully deducted then the employer will have to pay them back to the employee, sometimes with interest. If a sum is to be deducted because the contract allows the deduction, then the deduction will only be lawful if the contract has been shown to the employee or the employee has been notified in advance of the deduction, that the deduction will be made and that the deduction is subject to a specific clause contained in the contract.

The law allows an employer to deduct:

- overpayment of wages or expenses
- in retail work, if there is a cash shortfall (with some set parameters around amounts)
- If ordered to do so by a court order (Attachment of Earnings Order)
- If the employee has given written consent to the deduction being made; this could be for any number of payments. Typically such deductions are for union membership or a workplace charity subscription
- If the employee has been involved in a strike (with some exceptions)

The employee has to be paid on time (as agreed in the contract). In *Francis v Elizabeth Claire Care Management Ltd (2005)* the company dismissed an employee because they complained about the late payment of their wages. The court found the dismissal to be one that fell within the parameters of an automatic unfair dismissal because the employee had asserted a statutory right (the right not to suffer an unlawful deduction of wages). This means that the late payment of wages constitutes an unlawful deduction of wages. In the above case, the employer was found guilty of an unlawful deduction and an automatic unfair dismissal (get your chequebook out time)!

Other issues that could technically legally amount to an unlawful deduction of wages (subject to individual context) could be changes in hours, demotion, job role changes, changes from day to night shifts or vice versa or any other working arrangement that involves changes in pay and benefits.

Employers have to really think about their actions and the financial consequences on an employee. For example, if an employee wants to return to work after a period of sickness and the employer refuses to allow them back (maybe because of health and safety issues) and then the employer does not pay the employee; that refusal could constitute an unlawful deduction and in some cases indirect discrimination on the grounds of disability. Think

about it: the employee is making themselves available for work, it is the employer who is refusing the request, so the employer pays, simple logic.

Other issues could include instances where a contract states a particular pay rate at a particular time, for example during the night or during defined unsociable hours, if the employer does not pay those rates then that will represent an unlawful deduction.

Sometimes issues are not clear-cut for employers, for example, If an employer pays an incorrect amount of holiday pay defined in the Working Time Regulations 1998 then the claim would be brought under the ERA 1996, for an unlawful deduction of wages. Employers have to understand that because pay is so fundamental to the employment relationship the law on pay is broad and wide with interconnections between different statutory provisions that can be applied, usually quite easily, if the lawyer knows what they are doing.

Finally, even where the contract states explicitly that a deduction will be made in the event of a particular issue and the employee has clearly consented to the deduction that does not mean the employer can continue with the deduction. If the deduction is seen as a penalty, rather than a genuine deduction for a loss that the employer has suffered, then the deduction will be unlawful. This is even more relevant where the sum deducted, authorised by contract, was 'extravagant' or 'unconscionable' from the 'actual loss' suffered by the employer (*Cleeve Link Ltd v Bryla, 2013*).

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