

Guidance on the legal position in response to threats of deductions for ASOS

100% deductions

Legally, the forms of ASOS which the union has decided upon each involve a breach of the contract of employment and, whilst ASOS of course has the support of our ballot, contract law still applies to breaches of contract.

Under contract law, a party to a contract has the right to refuse to accept partial performance of that contract and, as a result, not pay what is due under that contract.

In employment terms, an employer has the right to refuse to accept partial performance by an employee in relation to the duties, responsibilities and work required by that employee to fulfill their role. The employer can therefore not pay the employee if the employer will not accept partial performance in the event that the employee is undertaking only some of the requirements of their role. The deduction from salary can be as high as 100% and this can be the case even when the majority of work required for a role is being carried out.

The majority of people would understandably view this as wrong and unfair. In terms of the legal position and what can be challenged legally, it is possible (but not certain) that a judge may agree that 100% deduction was not reasonable when a significant proportion of work was being carried out by the employee and only a minority of tasks were not.

The legal route to challenge such deductions is to look at whether any individual who has suffered a deduction has a breach of contract claim that can be pursued. The union will be happy to assess this for individual members in the event of 100% deductions in respect of ASOS.

Partial deductions

Partial deductions occur when the employer decides not to withhold all pay, but to deduct an amount proportionate to the amount of work which has been withheld pursuant to ASOS. The difficulty is that there is no settled authority on how to arrive at the amount to be deducted. One way of doing it is to act as though the employer planned to pay the full amount, and then sue the employee for damages for breach of contract. If such an action was decided by a court, the court would award the amount of money which would be required to put the employer into the position it would have been in had the employee

performed their duties in full. So, hypothetically, the court might award the cost of hiring a cover lecturer, for example. The other way of doing it is to make essentially a 'guesstimate' of what the value is of the work withheld, and to deduct that. This is called a 'quantum meruit', or 'how much it is worth' approach. Often employers will do this by coming to a rough figure for a deduction, such as 25%, where they estimate that staff are withholding about 25% of their overall work.

A partial deduction is more difficult to establish as legally unreasonable as essentially an attempt has been made to calculate the actual loss to the employer. Again, any challenge would be via a potential individual claim for breach of contract.

It should be noted that while a claimant remains in employment such breach of contract claims cannot be taken to the Employment Tribunal but to the County Court instead. This provides a longer time limit of three years during which a claim can be taken after the date of the deduction, but also means that the claim is not heard in an employment specific environment and has more costs (and costs risk) attached to taking the claim.

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