



EMPLOYMENT TRIBUNALS BETWEEN

Claimant

Mrs K R Eddison

AND

Respondent

Hywel Dda University
Local Health Board

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Haverfordwest ON 10 March 2017

EMPLOYMENT JUDGE NW Beard

Representation

For the Claimant: In Person

For the Respondent: Jonathon Walters (Counsel)

JUDGMENT ON A PRELIMINARY HEARING

The judgment of the tribunal is that:- . It was reasonably practicable for the claimant to present her claims of unlawful deduction of wages within the time limits set out in the Employment Rights Act 1996, and the tribunal has no jurisdiction to hear her claims which were presented after that period, and the claimant's claim is dismissed.

PRELIMINARIES

1. This is a preliminary hearing to consider the matters set out in the order made by Employment Judge Cadney in January of this year. Those are: (a) Whether in the absence of following a new Early Conciliation process the claimant is permitted to present this claim? (b) Whether the claim is out of time and, if so, whether time should be extended? (c) Whether the claimant falls foul of the guidance set out in ***Johnson v Gore-Wood & Co. [2001] All.E.R. 481*** and the claim should be struck out as an abuse of process? (d) Whether the claim has no reasonable prospect of success so as to be struck out or little reasonable prospect of success so that a deposit should be ordered? The claimant presented a claim form on 10 November 2016. This is not the first claim form presented by the claimant. An earlier claim (1600280/2015) contained causes of action connected with the claimant's current claim. The claimant represented herself and the respondent was represented by Mr Walters of Counsel. I heard no oral evidence as there was no significant dispute of fact on the relevant issues. I was provided with a bundle of documents, which runs to approximately two hundred pages.

THE FACTS

2. The claimant presented her first claim form on 4 February 2015. As part of her claim she made a claim for unpaid wages by ticking the box next to “arrears of pay” on the form. In the body of claim form the claimant indicated that she sought loss of earnings since 10 May of 2014. I should explain that she was suspended from, as it was described by her, employment as of that date (the respondent disputed that she was an employee). It took two preliminary hearings for the claimant’s employee status to be resolved. The first of those hearings before Regional Employment Judge Stuart Williams (as he then was) on 1 June, 2015 decided that the claimant was an employee on the basis of a series of contracts where mutuality of obligation was to be found, but that there was no global contract in existence. However, he was concerned that the issue of continuity of employment not been ordered to be dealt with and thus ordered that a further preliminary hearing would follow to deal with that issue. The second preliminary hearing was on 26 August, 2015 at that hearing, following the statutory provisions at section 212 of the Employment Rights Act 1996 Employment Judge Philip Davies held that the claimant had continuity of employment. The claimant had brought a number of claims besides a claim for unpaid wages, disability discrimination had been dismissed, but unfair dismissal could now be pursued to hearing because of the combined effect of the preliminary judgments.
3. The matter was listed for a substantive hearing before Employment Judge Povey which was heard on the 22nd 23rd and 24th of February 2016. Employment Judge Povey gave judgement in respect of the claim of unfair dismissal only: there is no indication of a judgment in the other outstanding claims.
4. There was correspondence between the claimant and the tribunal beginning in July of 2016 relating to the unpaid wages matter. A tribunal response letter was sent on 16 September 2016. The tenor of the letter appears to indicate that the content was obtained directly from employment judge Povey as it refers to his notes. The letter sets out that the notes indicate that at the outset of the February hearing the sole issue identified was one of unfair dismissal. That letter also indicated that that the claimant could either seek a review of the February 2016 judgement or bring a fresh claim. The claimant presented this claim to the employment tribunal on 10 November 2016; there was no application for review.
5. In this claim form the claimant included other claims in addition to a claim for unpaid wages. However, those other claims were rejected by Employment Judge Philip Davies on review of the claim form and only the unpaid wages claim was permitted to proceed. The claim form used by the claimant refers to the early conciliation certificate number that had been relied upon in the previous proceedings; the claimant did not commence a further process of early conciliation. It is common ground between the parties that no further certificate was obtained.
6. The claimant has taken me to various documents within the bundle relating to the contractual position. She has referred me to a statement of terms and conditions (page 75) at section 12 headed managerial and professional accountability under 12.2. the following is set out
“Bank workers are required to comply with all policies and procedures of the NHS

organisation and those of the specific area in which they are engaged. All bank workers must familiarise themselves with these policies and procedures, copies of which are available in the working area.”

Under the section marked disciplinary at 13.1.

“Any disciplinary issues will be dealt with under the NHS organisation’s policies and procedures”

The respondent sent a letter sent to the claimant dated 19 May 2014 which sets out

“I write to advise you that I’ve been informed of an incident that occurred on the 10th of May 2014 where it is alleged that your care for a patient was inappropriate and undignified. A full investigation will therefore need to be conducted. This is a matter which will be managed in accordance with the all Wales disciplinary policy. A copy of which is enclosed.”

The letter then sets out the allegations. The disciplinary policy in section 10 sets out as follows

“suspension is not a disciplinary penalty and is without prejudice suspension from the workplace will be with pay in accordance with paragraph 10.41 of this policy”

And later under 10.41

“pay during suspension will be calculated according to the normal duty roster work by the employee, and during this period, the employee will be recorded as paid leave of absence in order to maintain confidentiality”

The Law

7. The Employment Tribunals Act 1996 S18A (1) provides
- Before a person (“the prospective claimant”) presents an application to institute relevant proceedings relating to any matter, the prospective claimant must provide to ACAS prescribed information, in the prescribed manner, about that matter.*

In the interpretation part of the Employment Tribunals (Early Conciliation: Exemptions and Rules of Procedure) Regulations 2014 and the Early Conciliation Rules of Procedure a prospective claimant is defined as follows:

A person who is considering presenting a claim form to an Employment Tribunal in relation to relevant proceedings;

A prospective claimant must go through the early conciliation process and will be provided with a certificate

8. In principal parties are required to place all issues in dispute between them before the court or tribunal at the first opportunity; they should not advance issues on a piecemeal basis. See the judgement of Lord Bingham in the case of **Johnson v Gore-Wood & Co. [2001] All.E.R. 481.**

9. I am to apply the Employment Tribunal Rules of Procedure 2013 rule 37 which respectively (in so far as it is relevant) provides:

37. (1) At any stage of the proceedings, ----- on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds—

(a) that it ---- has no reasonable prospect of success;

(2) A claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing.

10. I begin by reminding myself what function I undertake at this stage. I am required to decide that, in relation to the various statutory requirements, the claimant has no reasonable prospect of establishing her claims. I take account of what was said in ***Ezsias v North Glamorgan NHS Trust*** [2007] 4 All ER 940 by Maurice Kay LJ

“(T)hat what is now in issue is whether an application has a realistic as opposed to a merely fanciful prospect of success”

That test is an indication that there is a very substantial hurdle to cross for strike out to be made, indeed as is often said depriving an individual of an opportunity to present a case in full is a draconian step.

11. Section 23(4A) of the Employment Rights Act 1996 provides:

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 the presentation of the complaint.

Thus it can be seen that any wages claim that is based on a failure to pay wages prior to the 10 November 2014 falls outside the tribunal’s remit.

Analysis

12. In the absence of following a new Early Conciliation process is the claimant permitted to present this claim? Mr Walters argues that the phrase “considering presenting a claim form” must mean that the claimant is contemplating presenting a form in these proceedings: I can see no such complexity in the statutory wording. The conciliation process relates to the time when the claimant is prospectively

engaging with a potential claim. In my judgment at the time when the claimant entered into the process with ACAS she was a prospective claimant in relation to this respondent. There is no judgment on the issue that she brings before the tribunal in the current claim, it cannot be said there are concluded proceedings on that matter which would have brought to an end the efficacy of the previous certificate. Had there been such a judgment then I would see force in the respondent's submissions, as there is not it appears to me on the strict wording of the provisions the claimant has complied. The claimant has provided ACAS with the relevant information and has complied with the process and has a certificate.

13. The claimant has presented this claim out of time; considerably so. The claim relates to payment, at the latest, in September 2014. The claim form was presented in November 2016. There is a three-month time limit (which can be extended by the conciliation process but on the basis of the date of her certificate, 14 January 2015, that could be no later than March 2015). It cannot be said that it was not reasonably practicable for the claimant to present the claim within time as she did so in previous proceedings. No reasonable tribunal could conclude that the claim was in time: therefore the tribunal has no jurisdiction pursuant to section 23 ERA 1996 to hear that claim based on this claim form. On that basis the claim is struck out.
14. As the matter is struck out for the reasons I have already given it is not strictly necessary for me to consider matters further, however out of courtesy to the arguments I have heard I do so. On the substantive argument presented by the respondent I do not accept it can be said there is no or little reasonable prospect of success on the claim. The claimant was an employee, she was suspended, suspension generally attracted pay. Such a decision would need the terms of the contract to be found as the terms are developed through a number of documents. The disciplinary policy refers to suspension with pay: it is silent as to what that means in circumstances where an employee is paid only for shifts which are worked. Such a matter requires full argument and potentially evidence. I cannot say that there is no or little reasonable prospect of success.
15. In respect of section 23(4A) the claimant's claim relates to wages earned up to September 2014. That section precludes the tribunal from considering claims for wages that relate to a period of more than two years before the claim form is presented. In the circumstances of this case that means that the tribunal cannot consider unpaid wages prior to 10 November 2014. All of the claimant's claim is prior to that date; the tribunal cannot consider it.
16. I do not consider it appropriate, in circumstances where I have struck out this claim form based on lack of jurisdiction, to resolve the abuse of process issue. This is because there is no judgment on the wages claim made in earlier proceedings apparent from the information before me. There could have been an unrecorded dismissal upon withdrawal as the respondent urges me to accept or there could have been a simple failure to adjudicate. To consider the issue of abuse of process would involve making findings as to what happened in a hearing (conducted by a judge of equivalent jurisdiction) in which I had no part and, further, to make factual findings as to what was decided in that February 2016 hearing. To do so would, in my judgment, trespass on the jurisdiction of the judge allocated to deal with the

substantive hearing in the original claim. It is unnecessary for me to say anything further.

EMPLOYMENT JUDGE W BEARD

Judgment posted to the parties on
3 April 2017

Dated: 30 March 2017

For the staff of the tribunal office

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