



EMPLOYMENT TRIBUNALS

Claimant: Miss M Beckett
Respondent: Family Mosaic
Heard at Ashford on: 18th August 2017
Before: Employment Judge Pritchard

Representation
Claimant: In person
Respondent: Mr S Bellm, solicitor

JUDGMENT

The Claimant's claim that she suffered unlawful deductions from wages was presented outside the time limit provided in section 23 of the Employment Rights Act 1996 and the Tribunal does not have jurisdiction to consider it.

REASONS

- 1 Reasons for the decision were given orally at the hearing and these written reasons are provided at the Claimant's request.
- 2 The Claimant claimed unlawful deductions from wages. There were two aspects to her claim: firstly, that she should have been paid at her hourly rate when disturbed and required to work at night during "sleep-ins"; and secondly, that she should have been paid for her breaks when she was similarly disturbed or required to carry out her duties.
- 3 The Claimant told me that the last payment for having carried out sleep-in duties would have been about the end of May or June 2016. That made sense because she was signed off sick from 23 May 2016. She resigned with effect from 28 July 2016.
- 4 By letter dated 12 September 2016, the Claimant wrote to the Respondent alleging that they had made unlawful deductions from her wages in the same way as she now claims to the Tribunal. By letter dated 14 September 2016, the Respondent replied saying no wages were outstanding and that all wages had been paid in accordance with the legislation. However, the Respondent agreed to check. By letter dated 30 September 2016, the Respondent informed the Claimant that,

having carried out a review of wages paid, and considered the provisions of the National Minimum Wage Act, the Claimant's allegations were without foundation.

- 5 It appears that there was further correspondence between the parties but the Respondent's position was clear: it had not breached any legal obligations.
- 6 The Claimant contact ACAS on 28 October 2016 and an early conciliation certificate was issued on 14 November 2016. The Claimant presented her claim to the Tribunal on 12 December 2016.
- 7 The Claimant explained that she had tried to resolve the issues with her former employer and she had not contacted ACAS earlier because she just wanted to forget everything. She also said that she had spoken to a member of the Tribunal staff on the telephone on the question of fees who told her that her claim was in time. I very much doubt that was the case, not only because Tribunal staff should not give advice to parties, but because the member of staff would have had no idea of the date upon which time should have started to run for limitation purposes. I suspect there was some confusion on the Claimant's part, I did not form the impression that she was being dishonest or seeking to mislead me in any way. The Claimant told me that she had carried out some research on the internet and the content of her letter of 12 September 2016 strongly suggests she had done so.
- 8 Section 23 of the Employment Rights Act 1996 provides, insofar as it is relevant to this case:
 - (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.
 - (3A) Section 207B (extension of time limits to facilitate conciliation before institution of proceedings) apply for the purposes of subsection (2).
 - (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.

9 Section 207B provides:

- (1) This section applies where this Act provides for it to apply for the purposes of a provision of this Act (a “relevant provision”).
- (2) In this section—
 - (a) Day A is the day on which the complainant or applicant concerned complies with the requirement in subsection (1) of section 18A of the Employment Tribunals Act 1996 (requirement to contact ACAS before instituting proceedings) in relation to the matter in respect of which the proceedings are brought, and
 - (b) Day B is the day on which the complainant or applicant concerned receives or, if earlier, is treated as receiving (by virtue of regulations made under subsection (11) of that section) the certificate issued under subsection (4) of that section.
- (3) In working out when a time limit set by a relevant provision expires the period beginning with the day after Day A and ending with Day B is not to be counted.
- (4) If a time limit set by a relevant provision would (if not extended by this subsection) expire during the period beginning with Day A and ending one month after Day B, the time limit expires instead at the end of that period.
- (5) Where an employment tribunal has power under this Act to extend a time limit set by a relevant provision, the power is exercisable in relation to the time limit as extended by this section.

10 The burden of proof in showing that it was not reasonably practicable to present the claim in time rests upon the Claimant; see Porter v Bandridge Ltd [1978] ICR 943 CA. If the Claimant does succeed in doing so then the Tribunal must also be satisfied that the time in which the claim was in fact presented was in itself reasonable. There is a plethora of appellate case law on the subject of “reasonable practicability”. One of the leading cases is Palmer and Saunders v Southend-on-Sea Borough Council [1984] IRLR 119 CA in which May LJ referred to the test as being in effect one of “reasonable feasibility” (in other words somewhere between the physical possibility and pure reasonableness). A number of factors may need to be considered. The list of factors is non-exhaustive but may include the manner and reason for the dismissal (in an unfair dismissal case); the extent to which the internal grievance process was in use; physical or mental impairment (including illness – see Shultz v Esso [1999] IRLR 488 CA, a case concerning a claimant suffering from a depressive illness; whether the Claimant knew of his rights; any misrepresentation on the part of the Respondent; any advice given and the substantive cause of the Claimant’s failure to comply.

- 11 As I state above, the Claimant told me that her last payment for having carried out sleep-in duties would have been about the end of May or June 2016. However, even if the last date of due payment of the wages from which it is alleged the deductions, or series of deductions, were made had been the termination date, the Claimant in any event contacted ACAS one day outside the 3 month time limit.
- 12 I had to consider therefore whether or not it was reasonably practicable for the Claimant to have presented her claim in time. As part of that deliberation, I wished to calculate just how long the Claimant delayed making her claim to the Tribunal and this would depend on whether or not the Claimant had the benefit of the time extension periods set out in Section 207B. Subsection (3) can be readily understood when described as the “stop the clock” provision. In other words, time stops running for limitation purposes – the clock stops – during the consultation period. Subsection (4) only applies if the time limit expires during the period beginning with day A.
- 13 I concluded that the extensions of time set out Section 207B did not apply. Subsection (3) cannot apply to “stop the clock” since time had already expired when the Claimant contacted ACAS – the clock had already stopped. Subsection (4) cannot apply because it only applies if the time limit expires during the period when the Claimant first contacts ACAS – here the time limit had already expired.
- 14 I concluded therefore that, even on the assumption that the last due wage payment from which deductions might have been made was the date of termination, the Claimant presented her claim about six and half weeks outside the three month time limit which expired on 27 October 2016.
- 15 In light of that delay, I went on to consider whether it had been reasonably practicable for the Claimant to have presented her claim in time. The Claimant was unable to persuade me that it was not reasonably practicable – or not reasonably feasible – for her to have presented her claim in time. While perhaps understandable that initially she simply wanted to forget all about her dispute with her former employers, that cannot lead to the conclusion that that it was not reasonably feasible for her to have presented her claim in time. She knew well within the time limit that her former employer had rejected her complaints about unlawful deductions and her allegations of underpayment. Although the Claimant was ill for a period around the time her employment ended, she was well enough to start a new job at the beginning of August 2016, again well within the time limit.
- 16 For these reasons I concluded that the Claimant had presented her claim outside the statutory time limit in circumstances in which it was reasonably practicable for her to have done so. The Tribunal did not therefore have jurisdiction to consider her claim of unlawful deductions.

Employment Judge Pritchard

Date: 18 August 2017