EMPLOYMENT TRIBUNALS

Claimant ***Respondents***

Mr I Prempeh **AND** LSG Vision Security Group Ltd

Heard at: London Central **On**: 15 September 2017

Before: Employment Judge Ayre

Representation

For the Claimant: In person
For the Respondent: Mr A Joicey, ER Manager

JUDGMENT

1. It was not reasonably practicable for the claimant to submit his claim in time.

2. The claimant did not however submit his claim within such further period as was reasonable.

3. Accordingly, the Employment Tribunal does not have jurisdiction to hear the claim.

REASONS

4. By Claim Form dated 2 June 2017, the Claimant submitted a claim for 'arrears of pay'. The claim presented to the Tribunal was for unlawful deduction from wages. It was not presented as a claim for breach of contract which the Employment Tribunal would in any event not have had jurisdiction to consider as the Claimant was still employed at the time the claim was submitted.

5. The Claimant alleges that he was incorrectly paid by the Respondent during the period from January 2013 to December 2015. The Respondent defends the claim on the following basis:-

a. The claim was submitted out of time and should have been submitted within three months of 10 January 2016;

b. Any claim for arrears of wages should be limited to the period of two years prior to the date of submission of the Claim Form; and

c. In any event the Claimant is not entitled to any sums because the Respondent has not made any unlawful deductions from his wages.

6. The case was listed for a preliminary hearing to consider whether the claim was submitted out of time and, if not, to list a final hearing and give orders for preparation for that hearing.

7. The Tribunal heard evidence from the Claimant, who had prepared a witness statement, and was presented with two bundles of documents:-

a. A Claimant's bundle running to 123 pages; and
b. A Respondent's bundle running to 46 pages.

8. Judgment was given orally on the day. The Respondent subsequently requested written reasons and these reasons are provided in response to that request.

The Facts

9. The Claimant was employed by the Respondent from 14 July 2012 until 30 June 2017. He was employed as a security officer and worked at a number of different sites at which the Respondent was contracted to provide services.

10. The Claimant was employed in accordance with a contract of employment which provided for a fixed rate of pay of £8 an hour. In practice the Claimant was not always paid £8 an hour and his rate of pay varied throughout most of his employment.

11. The Respondent has different rates of pay for security staff. Some were paid a fixed hourly rate set out in their contract which did not vary. Others were paid a varied hourly rate which depended upon the particular site at which they worked, and was known as the 'site rate'. Different sites attracted different hourly rates.

12. The Respondent paid the Claimant site rates from 25 July 2012 to 3 January 2014, again from 7 March 2016 to 11 March 2016, on 1 and 2 April 2016 and on 25 July 2016. On other dates during the course of his employment, the Claimant was paid at a different rate.

13. The Claimant produced a summary setting out what he had actually been paid during the course of his employment, and what he thought he should have been paid – i.e. what he considered the correct site rates to be. This summary was at pages 41 to 43 of the Respondent's bundle.

14. It is noticeable that the rates of pay set out in this document varied significantly from £6.50 an hour to over £10 an hour. On some occasions the Claimant was paid more than the correct site rate and on others he was paid less than the site rate.

15. The Claimant was issued with payslips which set out the hourly rates that he had been paid. The Claimant did not check the hourly rates of pay on his payslips because, quite understandably, he trusted his employer to pay him the correct rates. The Claimant did not therefore feel the need to check them.

16. In November 2016 however, the Claimant was made aware by his then line manager Ashley Hayward, that he may have been underpaid. The Claimant contacted ACAS in December 2016 to ask for advice as to what he could do.

17. The Claimant gave evidence that he had been told by ACAS that there was a 90 day limit for bringing Employment Tribunal claims. The Tribunal assumes that this is the Claimant's interpretation of the three month time limit. The Claimant accepted in evidence that from December 2016 onwards he was alive firstly to the possibility of bringing an Employment Tribunal claim, secondly of the existence of time limits and thirdly, what the time limit was – in broad terms. .

18. The Claimant gave evidence that from that point onwards he was concerned about time limits and had discussed them with his employer. Mr Hayward who was not an employment law expert told him that he needed to go through the internal grievance process before bringing a Tribunal claim. The Claimant told us that this was consistent with the advice that he received from ACAS and there was no evidence from the Respondent to contradict this.

19. On 9 December the Claimant raised the issue of his pay with Gregg Beech of the Respondent and on 16 January he emailed the Respondent's HR department. In that email he referred to having taken advice from ACAS.

20. In January 2017 the Claimant raised a grievance and on 25 January he submitted a subject access request asking for copies of his payslips. Those payslips were provided to him on 9 February.

21. On 25 January the Claimant contacted ACAS to commence early conciliation. At page 1 of the Respondent's bundle was a copy of the early conciliation certificate which lists date A as 25 January 2017 and date B (the date of issue by ACAS of the certificate) as 8 February 2017.

22. It was therefore clearly in the Claimant's mind that he may bring Employment Tribunal proceedings from January 2017 onwards. The Claimant said in his evidence, that he did not do so because he had been told by ACAS and by his line manager that he needed to go through the internal grievance process before issuing proceedings.

23. The first stage of the internal grievance concluded on 11 April 2017. In the grievance outcome (at page 107-109 of the Claimant's bundle) the Respondent upheld the Claimant's grievance and apologised. The Respondent also informed the Claimant that whilst they did not believe he was entitled to be paid the full amount claimed for the past three years, he would be paid the site rate pay for the previous 12 months which would be backdated to 1 December 2015.

24. The Claimant knew therefore from receipt of the grievance outcome dated 11 April that he was only going to be paid for the period going back to December 2015.

25. The Claimant took legal advice in early April 2017. On 10 April he sent an email to the Respondent which included the words "*after consultation with my solicitor "*" and "*failure to do so results in my issuing legal proceedings against VSG company for a claim for an unlawful deduction of wages using the Employment Tribunal and a claim for breach of your employment contract using the County Court"*.

26. It is clear from this email that by 10 April the Claimant had taken advice from a firm of solicitors and was aware of the potential to bring Employment Tribunal proceedings and/or a claim in the County Court.

27. The Claimant did not however issue proceedings until 2 June 2017 when he received the outcome of his grievance appeal upholding the decision of the original grievance hearer.

The Law

28. The relevant law is set out in Sections 23 (2)(a) of the Employment Rights Act 1996 ("the ERA"), Section 23(3) of the ERA and Section 23(4) of the ERA. These provide that where an Employment Tribunal is satisfied that it was not reasonably practicable for a complaint for unlawful deduction of wages to be presented within three months of the last deduction, the Tribunal may consider the complaint if it is presented within such further period as the Tribunal considers reasonable.

29. There are a number of established cases which deal with the question of reasonable practicability. I have taken account of the cases of **Dedman v British Building and Engineering [1974]** and of **Riley v Tescos Stores Ltd** where a claim was not accepted because advice from a Citizens Advice Bureau was considered to render it reasonably practicable for the Claimant to have submitted his claim in time.

30. I have also taken account of **Dixon Stores Group v Arnald EAT 772/93** where it was held that it was not reasonably practicable to submit a claim in time because of incorrect advice from a job centre, of **Ryback v John Sorelle Ltd [1991]** and **London International College Ltd v Sen** in which a Claimant who was wrongly advised by Employment Tribunal staff, successfully claimed that it was not reasonably practicable to present his claim in time.

31. The most relevant case in my view however, is that of **Drewery v Carphone Warehouse Ltd** [ET 3203057/06] in which an employee was told by ACAS to pursue a formal appeal before issuing proceedings and relied on that advice. The Tribunal found it was not reasonably practicable for a claimant to have presented the claim in time and allowed the claim to proceed.

32. The claimant in that case had relied on ACAS's advice to await the outcome of his appeal. If the misleading advice had been given by an independent advisor, the claim would have been rejected (as the remedy would be against the negligent advisor). The Tribunal thought the position was different with an organisation such as ACAS as it was to be expected that callers would rely upon their advice.

33. In the Drewery case the Tribunal also took into account the fact that the employer had significantly delayed the hearing of the appeal.

Conclusions

34. I find that it was not reasonably practicable for the Claimant to submit a claim until April 2017 for the following reasons. Firstly, he

was not aware of his right to bring a claim until November or December 2016 as he was not aware that he was being underpaid. Secondly, it was reasonable of the Claimant to trust that his employer was paying him correctly until he was alerted to the contrary by his manager.

35. I also find, taking account of **Drewery v Carphone Warehouse Ltd,** that it was reasonable for the Claimant to rely upon the advice given by ACAS to pursue an internal grievance before issuing Employment Tribunal proceedings.

36. The outcome of the grievance was in April 2017 and coincided with the Claimant taking advice from a firm of solicitors. It is well established that where an individual does not pursue a claim because they have been incorrectly advised by a firm of solicitors then the remedy lies against the firm of solicitors and it is not grounds for the Tribunal to extend jurisdiction.

37. It is clear that by early April 2017, the Claimant knew about the time limit, knew about the possibility of bring a Tribunal claim and had been through the early conciliation process. The Claimant admitted in evidence that at the time that he spoke to his solicitors in April 2017, he discussed time limits with them.

38. I therefore find that whilst it would not have been reasonably practicable for the Claimant to submit his claim within three months of 10 January 2016 because he did not know about the potential to issue such a claim until November2016 and until then he was not aware that he had been underpaid.

39. I find however that it would have been reasonable for the Claimant to submit his claim in April 2017 when he took advice from a firm of solicitors and received the outcome of his grievance.

40. For these reasons, I find that the claim is out of time and according the Employment Tribunal does not have jurisdiction to hear it.

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Employment Judge Ayre
15 October 2017