



EMPLOYMENT TRIBUNALS

Claimant: Mr A Whitehouse
Respondent: Fiona Neale
Heard at: Leicester
On: 9 January 2018
Before: Employment Judge Evans (sitting alone)

Representatives

Claimant: None
Respondent: Mr P Maritus, Peninsula

JUDGMENT

1. The Tribunal has no jurisdiction to hear the Claimant's claim of unlawful deductions from wages because it was presented out of time.
2. The claim is therefore dismissed.

REASONS

Preamble

1. The Claimant's employment with the Respondent ended on 11th February 2017. Following the termination of his employment, the Claimant's presented a claim for unlawful deductions from wages. In brief, he argued that the Respondent had failed to pay him for periods during the night in respect of which the National Minimum Wage Regulations 2015 gave him the right to be paid.
2. The claim came before me in the Leicester Employment Tribunal on 9th January 2018. The parties had each produced a bundle of documents. The Claimant's bundle comprised a file containing 20 dividers, each of which had documents behind it. The Respondent's bundle comprised 552 pages.
3. There was a preliminary issue for me to consider: whether the claim was out of time and so the Employment Tribunal had no jurisdiction to hear it.

4. The Claimant represented himself at the hearing, and gave evidence on his own behalf. The Respondent was represented by Mr Maritus of Peninsula. The Respondent did not call any witnesses.
5. This Judgment deals with the preliminary issue of time only. It was given extempore at the end of the Hearing.

The Law

6. Section 23(2) of the Employment Rights Act 1996, provides as follows:

Subject to sub-section 4, an Employment Tribunal shall not consider a complaint under this section, unless it is presented before the end of the period of 3 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; or

(b) in the case of a complaint relating to a payment received by the employer, the date when the payment was received.

7. Section 23 (3) provides:

Where a complaint is brought under this section in respect of –

(a) a series of deductions or payments or

(b) a number of payments falling within sub-section (1)(d) and made in pursuance of demands for payments subject of the same time limit under section 21(1), but received by the employer on different dates

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.

8. Section 23(4) provides:

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 3 months, the tribunal may consider the complaint if it is presented within such further period as the tribunal considers reasonable.

Findings of Fact

9. I do not refer to all the evidence which was before me, but I have taken it all into account when making these Findings of Fact.

10. The Claimant's last payment of wages was made on 24th February 2017. Accordingly, the primary 3-month time limit for bringing a claim of unlawful deductions expired on 23rd May 2017. In fact, the claim was presented on 25th July 2017.

11. When the Claimant presented the claim he paid the necessary fee. Ironically this was the day before the promulgation of the Supreme Court

Judgment which ruled that the fees were unlawful, but that Judgment did not affect the date on which the Claimant presented his claim.

12. I find that the Claimant had formed the view, having done some on-line research, that he was entitled to pay for periods when he was required to be at the Respondent's house overnight almost certainly by the end of 2016 and definitely before the end of his employment. The Claimant raised his concerns in this respect with the Respondent. This resulted in the letter (at page 75 of the Respondent's bundle) which was sent in February 2017. The letter indicated some sympathy on the Respondent's part for the Claimant's position:

I know you think you should be paid night-time hours at minimum wage regardless of whether or not you were called on to work, you still have to be here. Whilst I agree the night-time hours should be recompensed for, I do not agree someone asleep in a room should be paid the same as someone working hard in the day.

13. In that letter the Respondent agreed to consider the position, further stating (at its numbered paragraph 13):

I promised to look into the pay and how I can improve it, and I will still do this. I will look at getting more help in. I will also seek legal advice regarding night-time hours and payment for this time, and I will let you know that they say.

14. Matters were not however resolved. The Claimant raised a formal grievance requesting the payment of the money which he said was owed to him by a letter dated 7th April 2017. His request for payment in this letter is quite clear when he states:

I hereby make a formal request that I am awarded the back-pay to at least bring my daily wage in line with the National Minimum Wage for those number of hours worked.

15. The Respondent sent what was in effect a 'holding reply' on 19th May 2017. This was at page 68 of the Respondent's bundle. In this letter the Respondent stated:

Firstly, I am unable to give you a final answer as my funding comes from two sources – 50% Adult Services and 50% Children's Social Services.

16. The Respondent went on to state in that letter:

I will let you know when the meeting is going to take place, and the outcome of the meeting as soon as I know it.

17. The Respondent, in fact, sent her final response in relation to the Claimant's grievance on the 19th July 2017, and this was at page 69 of the Respondent's bundle. In that letter the Respondent denied that the Claimant had been paid incorrectly. This was the first time when the Respondent's position in relation to the Claimant's arguments was crystal clear: he was not entitled to the payments that he claimed.

18. The Claimant had in fact begun and completed ACAS Early Conciliation on 18th July 2017. He then presented the claim on 25th July 2017.

19. Turning now to advice which the Claimant took, I find in accordance with his evidence to me that he only took advice from ACAS on two occasions. The first occasion was prior to him lodging the grievance in early April 2017. The second occasion was on 18th July 2017, when he completed the EC Notification requirements.

20. I find, again in accordance with the Claimant's evidence, that ACAS told the Claimant that his claim was "late" on the 18th July 2017. I find that the Claimant had received some advice in relation to limitation when he spoke to ACAS about the grievance and prior to presenting it in early April. I find that the Claimant's recollection, and/or understanding of what was said to him about limitation, was confused. However, he confirmed in his evidence to me, that he was not suggesting that ACAS had given him incorrect advice.

21. I find that by the time the Claimant sent the grievance in early April 2017 he knew there was a time limit and that it was 3-months, although he was not clear about how that time limit worked. I accept his evidence that he thought that sending a grievance might be sufficient to protect himself in relation to the issue of time. However I find that the Claimant did not take reasonable steps to clarify the position, either by going back to ACAS, or conducting the necessary research on-line.

22. I find that from when the Claimant's employment terminated to the date on which he presented his claim the Claimant's bank account was substantially overdrawn. I find, again in accordance with his evidence, that during this period his parents lent him the sum of £2,900, specifically to buy a car. I find, again in accordance with the Claimant's evidence, that he did not ask his parents to lend him £160 to begin an Employment Tribunal Claim.

23. I find that the financial position of the Claimant was no better by the time he presented his claim than it had been at any time during the 3-month limitation period. I find that the Claimant made no efforts to establish whether there were circumstances in which Employment Tribunal Fees did not have to be paid. (In making this finding I am not suggesting that it would not have been necessary for the Claimant to pay the fees.)

24. I find, in accordance with the Claimant's evidence, that what prompted him to present the claim on 25th July 2017 was the Respondent definitively saying that she would not pay him the amounts that he believed were due to him.

Conclusions

25. I conclude that the substantial cause of the presentation of the claim being delayed until 25th July 2017 was that the Claimant hoped that the matter could be resolved if he awaited the outcome of the grievance, and that he did not have the 'time limit' or its significance clearly in mind. He presented the claim shortly after it had become clear that the grievance would not resolve the matter to his satisfaction.

26. I so conclude, in light of the findings set out above. I accept that the fact of fees entered into the Claimant's decision to delay, to some limited extent, but I do not find that it was in anyway a significant factor, because:

- (1) The Claimant did not mention the fees in his explanation of the delay, which was clearly set out in his claim form;
- (2) He paid the fee on 25th July 2017, when his financial position had not improved;
- (3) He did not ask his parents to lend him the claim fee, or make enquiries about whether there were circumstances in which it was not necessary to pay the fee;
- (4) When I asked the Claimant when he would have submitted the claim, if the fees mechanism had not existed, he was unable to give me a clear answer.

27. The question for me, therefore, was whether in light of these findings and conclusions, it was not reasonably practicable for the Claimant to present the claim by 23rd May 2017.

28. I have concluded that it was reasonably practicable for reasons which include the following:

- (1) By no later than the date of the grievance on 7th April 2017 the Claimant was aware of the factual basis for his claim, the legal basis for his claim, and the existence of the 3-month time limit;
- (2) The Claimant had access to advice through ACAS, and could have conducted on-line research. The fact is that he did not take reasonable steps to clarify the time limits, in respect of which he accepts he was unclear by going back to ACAS or by pursuing on-line enquiries;
- (3) The Respondent had not acted disingenuously. Until the 19th July 2017 the Respondent had made clear that she was undecided. She had not suggested that the Claimant would be paid if he waited, although she had expressed some sympathy for his position;
- (4) The Claimant did manage to pay the fee when the Respondent's position became final.

29. In these circumstances I conclude it was reasonably practicable for him to present his claim before the expiry of the 3-month time limit. All he needed to do was to clarify the position in relation to limitation. He did not take reasonable steps to do this. Consequently the Tribunal has no Jurisdiction to hear his claim and it is dismissed.

Employment Judge Evans
Date: 11 March 2018

JUDGMENT SENT TO THE PARTIES ON

19 March 2018

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FOR THE TRIBUNAL OFFICE