

JJE



EMPLOYMENT TRIBUNALS

Claimant: Mr A Straight
Respondent: Ultimate Transport Services Ltd T/a Ultimate Minibuses
Heard at: East London Hearing Centre
On: 26 April 2018
Before: Employment Judge Goodrich

Representation

Claimant: In person
Respondent: Mr T Kebabchioglu, company representative

JUDGMENT

The judgment of the Tribunal is that:-

1. The complaint was not presented within the relevant time limit. It was not reasonably practicable for it to have been presented within the time limit and it was presented within a further reasonable time.
2. The Claimant's unlawful deductions from wages claim succeeds. The Respondent is ordered to pay the Claimant £1800.
3. The Respondent failed to pay the Claimant in lieu of entitlement to annual leave. The Respondent is order to pay the Claimant £674.50.
4. The Claimant has not brought a contract claim against the Respondent and the Tribunal has no jurisdiction to consider the Respondents breach of contract counter claim.

REASONS

The Claim and the issues

1 The background to this hearing before me is as follows.

2 The Employment Tribunal received a claim from the Claimant in January 2018.

3 The Courts and Tribunal Service had written a letter to the Claimant dated 7 December 2017 headed "*Reinstatement of Employment Tribunal claim following rejection, dismissal or closure for failure to pay a fee or present a valid application for help with fees*".

4 They wrote stating that they had previously written to him about his employment tribunal claim which was rejected and returned because he didn't pay the initial fee. The letter contained the following statement: "*Thank you for confirming that you would like to apply for that case to be reinstated. As we have been unable to trace the original claim form, please can you provide a new claim form containing the information which formed the basis of your original claim.*" There was an apology for having to ask him to complete the extra step.

5 The Claimant was asked to give his ACAS early conciliation number allocated to his original claim.

6 The Claimant responded, his response being dated 11 December 2017.

7 The Claimant gave his early conciliation certificate number which was R158050/16/64.

8 The Claimant ticked two boxes at the end of the letter sent by HMCTS. He stated::

"I wish to have my claim reinstated and enclose a new claim form containing the information which formed the basis of the original claim."

"I confirm that, where my claim was made after April 2014, I contacted ACAS before I made my employment tribunal claim".

9 The form appears to have been stamped by HMCTS on 3 January 2013 and they sent the Claimant's claim form to the Employment Tribunal.

10 The Claimant, in box 7 of his ET1 claim form, stated that he started work with the Respondent in February 2016 and that his employment ended on 10 June 2016.

11 In box 8 of his claim form, the Claimant ticked that he was claiming holiday pay and arrears of pay.

12 In box 8.2 of his claim form, the Claimant gave details as to his claim. These

included the following things that he said had taken place, namely:

- 12.1 On 12 May we agreed that my employment would end on 12 June, one months notice due to not getting on.
- 12.2 I still had not received my contract. I had been working on average of 200 hours a month which was too much.
- 12.3 On 10 June 2016 I was told that I would be working a long shift from 11:45pm until 1:00pm on the next day, 11 June and at 5:00pm on 10 June, I phoned and told them I couldn't do it. I had had enough of the long late hours and then switched my phone knowing they would get the work covered by themselves as they always had.
- 12.4 On 1 July, I contacted(Adam).....to ask what time my wages would be in the bank. He told me to contact Tony (Tolga) which I did.
- 12.5 I sent various texts and emailsand still haven't received any wages.
- 12.6 This has caused me great hardship.....was unable to pay my bills.
- 12.7 He owes me one month's wages, £9.50 x £200 - £1900.
- 12.8 I did not sign any contract with them and I only received a contract on 14 May, two days after I resigned.
- 12.9 Claiming £500 compensation on grounds of stress, stating that he had nearly lost his home because of arrears of rent and council tax and having to borrow money for food.

13 The Claimant was asked for an explanation, by letter from the Employment Tribunal dated 19 January 2018.

14 In reply, by email dated 22 January 2018 the Claimant stated:

".....I did not proceed with my claim from the outset. The reason is as follows, due to financial difficulties brought on by the fact that I had not been paid, I did not have the money to proceed with the claim at the time. Since the law has been changed, I can now proceed. I hope this is to your satisfaction".

15 The Claimant's claim was accepted and sent to the Respondent.

16 The Respondent disputed the Claimant's claims on the basis that he did not provide the mandatory one month's notice period as in the contract of employment. Amongst the points made in the ET3 response were the following:

- 16.1 We did not receive any formal written resignation as required by our contract of employment for the minimum of one month's notice period,

referring to his statement of main terms and conditions of employment.

- 16.2 All resignations must be supplied in writing, stating the reason for resigning from your post.
- 16.3 The Claimant was booked to work a shift on 10 June 2016 starting at 02:00.....and failed to carry out his duties.
- 16.4 We were not notified of any reason as to why the Claimant could not fulfil his duties prior to his start time and were only notified of his absence at 03:15 by the client, who is due to be collected at this time, calling our offices to find out where the driver was to collect them.
- 16.5 When we tried contacting the Claimant, his phone went straight onto voicemail.
- 16.6 We had to sub contract the job and other assigned jobs at much higher costs as well as using agency workers in order to cover the work assigned to the Claimant and not let their clients down.
- 16.7 This had caused the company severe financial losses and damage to the reputation of Ultimate Minibuses.
- 16.8 The duties assigned to the Claimant throughout his absence and notice period, were also subcontracted and covered by agency staff as we had to keep his position open until we had received contact from him which was not until 1 July 2016 demanding his salary to be paid.
- 16.9 The cost of hours owed to the Claimant was £1800.00.
- 16.10 The cost of sub contractors and agency staff £3950, leaving a loss of £2150.

17 The response was also accepted as notice of a breach of contract counterclaim by the Respondent against the Claimant.

18 The Claimant sent a number of emails in response to the Respondent's response and counterclaim.

19 One of those emails was an email disputing the claim against him. He stated that he did not receive a contract till 7 June which was delivered by hand to his partner at their home address by Kubilay; that he did not sign these as he did not agree with them and making other points about the notice given. He sent an email to the Tribunal the following day, correcting the date on which he said he had been given a contract and stating that it was on 14 May.

20 The Claimant sent another email to the Tribunal, dated 13 March 2018, alleging that Tolga had beaten up another driver called Peter in the yard and when Peter had

asked for his wages, had threatened to burn down my house and telephone my current employer trying to get me the sack.

21 Employment Judge Foxwell directed that the Claimants emails should be accepted as a response to the counterclaim.

22 The case has been set down for this hearing.

23 As the Claimant's claim is clearly out of time, the issue for me to decide is whether time limit should be extended. If I decide to extend time limits, the issues are whether to uphold the claims. I also need to consider whether the Tribunal has jurisdiction to consider the counterclaim and, if so, whether that should succeed.

The Relevant Law

24 I asked the Claimant to confirm what the claims he was bringing were. He confirmed that he was bringing an unlawful deduction of wages claim based on a failure to pay wages that were due to him on 1 July 2016.

25 In addition, the Claimant stated that he was bringing a holiday pay claim based on the Working Time Regulations, although at this point he had given me no details as to what holiday he has taken and what holiday outstanding he claimed was due.

26 As regards to an unlawful deduction from wages claim, section 13 Employment Rights Act 1996 ("ERA") provides, so far as relevant:

(1) "An employer shall not make a deduction from wages of a worker employed by him unless –

- (a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or
- (b) the worker has previously signified in writing his agreement or consent to the making of the deduction.

(3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him, is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this part, as a deduction made by the employer from the workers wages on that occasion.

27 Section 23 ERA provides that:

"(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 to the Tribunal 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 the payment of the wages from which the deduction was made.

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

(4) where the Tribunal is satisfied 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.

27 Both parties in this case agree that the date the wages would have been due was 1 July 2016.

28 As regards the Working Time Regulations (“WTR”), Regulation 30 provides similar provisions as to reasonable practicability of presenting a claim as those under the ERA.

29 As regards when the entitlement becomes due, Regulation 14 provides that when the proportion of leave taken by the worker is less than the proportion of the leave year which has expired, his employer shall made him a payment in lieu of leave in accordance of paragraph (3).

30 There have been numerous cases on the practicability of bringing claims and whether time limits should be extended.

31 In the case of *Williams and Spencer Plc, Marks & Spencer Plc -v- Williams-Ryan 2005 IRLR562CA* it was stated that the (equivalent section for unfair dismissal claims) should be given a liberal interpretation in favour of the employee.

32 In *Palmer -v- Southend On Sea Borough Council 1984 IRLR119* the Court of Appeal held that the meaning of the words “reasonably practicable” lies somewhere between reasonable on the one hand and reasonably physically capable of being done on the other. The best approach is to ask “was it reasonably feasible to present the complaint to the Employment Tribunal within the relevant three months?”

33 It was held in the *Palmer* case that reasonable practicability was an issue of fact for the Tribunal. The kinds of factors they suggested should be considered would be whether the Claimant was physically prevented from complying; whether the employee knew of the right to claim of unfair dismissal; whether the employee was being advised at the material time and if so, by whom; and the employment tribunal might also wish to consider the manner and reason for which the employee was dismissed including the extent to which any appeals mechanism was used.

Findings of Fact

34 The Claimant's explanation for submitting his claim out of time was as follows.

35 Firstly, he confirmed as stated in his email to the Tribunal that he was in financial difficulties with presenting a claim because of the loss of his job and having no payment of wages due for June.

36 The Claimant gave further details.

37 After his employment with the Respondent ended, he went to sign on for work with an agency but did not get any work for June.

38 About 2 weeks into July he started working for ATS Minibuses but went about one and a half months without work and pay.

39 He claimed benefits which took a while to sort out. His partner is working part time and they did eventually receive about £120 per week benefit.

40 Their circumstances are that they have two children living at home, ages 10 and 19. At the time the 19 year old was not at work, although she does currently have a job.

41 At the time his employment with the Respondent ended, he was not in arrears with the council tax and rent in the council property in which he and his family live.

42 Since losing his job, until January this year, his work was more intermittent.

43 This led to him getting into rent arrears and nearly losing his council property although he has recently cleared his arrears of rent.

44 After his pay would have been due on 1 July, he and the Respondent had various communications in which the Respondent made clear that he would not be paid for June giving similar explanation to the one given in their ET3 response.

45 The Claimant does not remember exactly when he went to ACAS for early conciliation but believes that it was in July 2016.

46 After ACAS conciliation had been unsuccessful, he submitted a claim and was asked for payment of a fee. He could not afford to pay it. He tried to apply for a fees exemption but because he had started working by then, he was not granted one.

47 The Claimant found out from newspapers and other people telling him that fees were being waived in future. As a result of this, he started doing some research about his position on the Tribunals website. When he was researching what to do, he received correspondence from the HMCTS.

48 Firstly, was it reasonably practicable for the Claimant to present his claim in time? I find that it was not, including because:

- 48.1 It must be borne in mind that the Claimant was asked to pay a fee in order to bring his claim which the Supreme Court has decided was illegal.
- 48.2 Lord Brown gave particular reference in the Supreme Court judgment as to the position of people making relatively low value wages claims. He stated that many claims which seek a financial award are for modest amounts and that no sensible person would pursue a claim unless they can be virtually certain that they will succeed in the claim, that the award would include the reimbursement of fees and that the award would be satisfied in full.
- 48.3 I accept that the Claimant's financial difficulties after the ending of his employment were real. Obviously, getting into rent arrears and running the risk of losing your home is a serious financial difficulty.
- 48.4 The Claimant was not physically prevented from bringing a claim as per being ill in bed or something of the like.
- 48.5 So far as advice is concerned, the Claimant did not obtain legal advice. It is well known that legal aid is not available for bringing tribunal claims. The Claimant might perhaps have sought to get advice from a source of free legal advice but sought to do the best he could on his own.

49 Was the claim presented within a reasonable time after the time limit?

50 I have decided that it was. The Claimant responded to correspondence from Her Majesty's Court and Tribunals Service which was sent some while after the Supreme Court Judgment. He made clear in the correspondence that he wished to pursue a claim and he sent his claim form in within a short period after the letter asking him to submit a new claim.

Closing Submissions

51 Both parties gave brief oral closing submissions, in which they maintained their respective claims.

Conclusions

52 For the reasons given in the findings of fact above, I have extended the time limits for the Claimant to have presented his claim. The Tribunal, therefore, has jurisdiction to consider the Claimant's claim.

53 I have considered whether the Tribunal has jurisdiction to consider the Respondents counterclaim.

54 The Claimants claims are for unlawful deductions from wages and for holiday pay under the Working Time Regulations. He disputes that he ever signed a contract of employment with the Respondent.

55 Article 8 of the Employment Tribunals Extension of Jurisdiction Order 1994 provides

“.....an Employment Tribunal shall not entertain a complaint in respect of an employers contract claim unless:

(a) it is presented at a time when there is before the Tribunal a complaint in respect of a contract claim of a particular employee which has not been settled or withdrawn.”

56 The Claimant has not brought a breach of contract claim. He has brought an unlawful deduction from wages claim and a holiday pay claim under the Working Time Regulations.

57 The Tribunal, therefore, has no jurisdiction to consider the Respondents counter claim.

58 It is unnecessary (and would be inappropriate) therefore to make findings of fact on the disputes as to the Respondents breach of contract counterclaim against the Claimant. I note that the parties dispute when it was that the Claimant received his contract of employment; and what was contained in the contract of employment supplied to him and I heard some evidence from both as to this.

59 Most of the time allocated to the case was spent in consideration of the issue of time limits. I had further discussions with the parties about the issues between them in the case. Neither party wished to return to the Tribunal for a further hearing to calculate possible remedy.

60 After discussion, both parties agreed that the Claimant was owed £1800 gross wages when his employment ended. In his claim form the Claimant had claimed £1900, although when discussing this with him he was unsure whether he had worked additional hours in the month in question. I understood from the parties that the Claimant was paid on the first day of each month, with the pay dating from the middle of one month to another month. So, for example, the Claimant's pay due on 1 July 2016 was from the period from mid May to mid June 2016.

61 The Respondent had stated in their ET3 response that the Claimant was owed £1800 wages. This was based on the Claimant's standard 35 hour working week. The Claimant was willing to accept £1800 as representing the wage payment that had not been paid to him.

62 I award, therefore, the Claimant £1800 unlawful deduction of wages.

63 Both parties accepted that, during his period of employment with the Respondent, the Claimant had not taken any paid holiday.

64 As regards to holiday pay, on the Claimants case he gave notice to his employer for his employment to terminate on 12 June 2016. I am aware that the Respondents contention was that his employment ended later on 1 July 2016, when he telephoned to

ask about his wages. If the Respondents contention was to be held to be correct, the Claimant would be entitled to marginally more holiday pay. As it is the Claimants case for holiday pay, I base the figures on his dates. His dates are, therefore, that he was employed by the Respondent from 1 February 2016 to 12 June 2016 and had not taken any paid holidays.

65 Using the government's holiday pay entitlement calculator, the Claimant is entitled to 70 hours 52 minutes holiday. I round this up to 71 hours. 71 hours at the rate of £9.50 per hour amounts to £674.50 gross. I, therefore, award the Claimant this sum.

Employment Judge Goodrich

31 May