



EMPLOYMENT TRIBUNALS

Claimant

Mr R Sandhar

v

Respondent

Royal Mail Group Limited

OPEN PRELIMINARY HEARING

Heard at: Watford

On: 1 June 2018

Before: Employment Judge Alliott

Appearances:

For the Claimant: In Person

For the Respondents: Mr David Summers (Unregistered Counsel)

JUDGMENT

1. The judgment of the tribunal is that:-
 - (i) The claim was not presented in time.
 - (ii) Time should not be extended such that the tribunal may consider the complaint.
 - (iii) The claim is dismissed.

REASONS

1. This open preliminary hearing has been held in accordance with a direction given by Employment Judge Bedeau on the 2 May 2018. He directed that there will be a preliminary hearing to determine the following issue:

“Whether the claim was presented in time and if not whether time should be extended.”

2. At that time Employment Judge Bedeau also made the following directions:

“The parties are required to comply with the following Case Management Orders:

1. The parties shall agree a joint bundle of documents for the preliminary hearing to be produced by the respondent and sent to the claimant by the 10 May 2018.
2. The parties shall prepare witness statements containing facts relevant to the preliminary hearing issue and send them to the other party by the 24 May 2018.”

The law

3. The claimant has presented a claim for holiday pay. That could be characterised as a claim for unlawful deduction of wages under the Employment Rights Act 1996 or a claim pursuant to the Working Time Regulations 1998.
4. The relevant sections dealing with the time limits for the presentation of complaints to an Employment Tribunal are not worded the same but encompass the same principles. Section 23 ERA 1996 provides as follows:-

“23(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 ...
 - (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.”
5. Section 30 of the Working Time Regulations 1998 provides as follows:-

“30(2) An employment tribunal shall not consider a complaint under this regulation section unless it is presented –

 - (a) before the end of the period of three months ...beginning with the date on which it ... the payment should have been made
 - (5) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three ... months.”
6. In dealing with “not reasonably practicable” extensions, I have had regard to the commentary in the IDS Employment Tribunal Practice and Procedure Handbook at paragraph 5.41 which states as follows:-

“When a claimant tries to excuse late presentation of his or her ET1 Claim Form on the ground that it was not reasonably practicable to present the claim within the time limit, three general rules apply:

 - S.111(2)(b) ERA should be given a “liberal construction in favour of the employee” – Dedman v British Building and Engineering Appliances Limited [1974] ICR 53CA

- What is reasonably practicable is a question of fact and thus a matter for the tribunal to decide. An appeal will not be successful unless the tribunal has misdirected itself in law or has reached a conclusion that no reasonable tribunal could have reached. As Lord Justice Shaw put it in Walls Meat Co Limited v Khan [1979] ICR 52, CA: “The test is empirical and involves no legal concept. Practical common sense is the keynote and legalistic footnotes may have no better result than to introduce a lawyer’s complications into what should be a layman’s pristine province. These considerations prompt me to express the emphatic view that the proper forum to decide such questions is the employment tribunal, and that their decision should prevail unless it is plainly perverse or oppressive.”
- The onus of proving that presentation in time was not reasonably practicable rests on the claimant. “That imposes a duty upon him to show precisely why it was that he did not present his complaint” - Porter v Bandridge Limited [1978] ICR 943, CA

Even if a claimant satisfies a tribunal that presentation in time was not reasonably practicable, that does not automatically decide the issue in his or her favour. The tribunal must then go on to decide whether the claim was presented “within such further period as the tribunal considers reasonable”.

7. At paragraph 5.69 Trade Union Representation is dealt with as follows:-

“Trade Union Representatives also count as “advisors” in this context and, if they are helping a claimant with his or her case, they are generally assumed to know the time limits and to appreciate the necessity of presenting claims in time.”

8. Mr Summers on behalf of the respondent has placed before me the case of Apelogun-Gabriels v Lambeth London Borough Council & Another [2002] ICR 713, CA. This is summarised at paragraph 5.111 as follows:-

“Ongoing internal procedure. “The fact that a complainant has awaited the outcome of an internal grievance procedure before making a complaint is just one matter to be taken into account by a tribunal considering the late presentation of a discrimination claim.””

The evidence

9. On the 18 May 2018 the respondent’s solicitors emailed the claimant to state that the respondent was not intending to call any witnesses and requesting that Mr Sandhar’s statement was sent to them. On the 21 May 2018 Mr David Bharrat, on behalf of the claimant, sent an email as follows:-

“Mr Sandhar has requested myself to state that he wishes to not call on any witness/witness statements for the preliminary hearing on the 1 June 2018.”

Mr Bharrat is a CWU Trade Union Representative assisting the claimant.

10. Hence it is that, notwithstanding the direction of Employment Judge Bedeau that witness statements should be filed, no witness statements were provided by either the claimant or his Trade Union Representative. Nevertheless, I permitted the claimant to give sworn evidence on the issues that I have to determine in this open preliminary hearing. The claimant was cross-examined by Mr Summers on

behalf of the respondent. However, as a general observation, the extent to which the claimant could comment as to why delays had taken place in this case was limited.

The facts

11. The claimant was employed by the respondent in 2009. He was employed on a 5 hour per week contract although his case is based on the fact that he regularly worked an average of 40 hours a week overtime. In essence, his claim is that he should have been entitled to equivalent holidays to full-time employees, in particular being paid for public holidays. In his claim form his claim is put as follows:-

“The same amount of public holidays that a full-time contract attracts as I have (up until 2016).”

12. On the 10 February 2018 Employment Judge Lewis directed that the claimant be written to to ask him to confirm that his claim relates only to holiday pay which he claims was payable in 2016. In an email dated the 14 February 2018, Mr Bharrat on behalf of the claimant replied:-

“Mr Sandhar has requested that I reply on his behalf. Mr Sandhar is stating that his claim is for annual leave from 2016.”

13. On the 12 March 2018 Mr Bharrat sent an email as follows:-

“Mr Sandhar has Informed me that the email he requested I send on his behalf was incorrect. Mr Sandhar has requested that his email be amended to 2014 and not 2016.”

14. In actual fact in evidence today it has been demonstrated that on the 7 November 2016 the claimant was put on a different contract of employment that provided for 25 hours per week pay and, more importantly, entitled him to be paid for all public holidays. The claimant has confirmed that his claim in relation to unpaid holiday pay does not relate to any time after the 7 November 2016.

15. The relevant chronology in this matter is as follows.

16. The claimant told me that in the summer of 2016 he approached his Trade Union Representative, Mr Bharrat, because he was missing out on pay for public holidays. Therefore, clearly the claimant was aware of the factual basis of his claim from that time. This is not a case where the delay in presenting a claim can be excused due to ignorance of the facts. On the 7 of November 2016 the claimant was put on a new contract and he makes no complaint of deduction of wages or breach of the Working Time Regulations thereafter.

17. Therefore, the last deduction of wages has to have been prior to the 7 November 2016. In all probability it would relate to the August Bank Holiday on the 29 August 2016. The claimant was paid weekly and consequently three months from the last payment is probably the 1 December 2016 or the 7 February 2017 at the latest. I shall take the later date as being the relevant one.

18. At some point in late 2016 the claimant put in a grievance concerning the non-payment of his holiday pay. That grievance was rejected on the 6 June 2017. The claimant appealed that rejection. The ACAS Notification Form is dated the 11 October 2017.
19. The ACAS Certificate is dated the 25 November and the claim was presented on the 25 November 2017.
20. The grievance appeal was rejected on the 30 November 2017. That post-dates the ACAS Notification and the issuing of the claim and so it cannot be said that the claimant was waiting the outcome of the grievance appeal before initiating proceedings.

Conclusions

21. As I have already found, the period of three months from the last possible deduction from wages expired on the 7 February 2017. The claim form was only presented on the 25 November 2017 and so I find that the claim was presented out of time.
22. I now turn to consider whether the claimant has established that it was not reasonably practicable to issue his claim within the three month time limit. In essence the reasons that the claimant advances are that the whole issue was ongoing and Royal Mail were taking their time in dealing with his complaint and grievance. Secondly, he says that he was unaware of his rights. It is true that the grievance took time to be dealt with but that is only one factor to be taken into account. As far as the claimant saying he was unaware of his rights, I have found that he was perfectly well aware of the factual basis of his claim. Thirdly, from the summer of 2016 he had Trade Union assistance and I take into account that Trade Union Representatives can generally be taken to be aware of the three month time limit for presenting claims. The claimant told me that he was sure that the Trade Union Representative would have had access to legal advice if required. What I do not have is any evidence from Mr Bharrat as to why delays took place. I find that it was reasonably practicable for a claim to be made to the Employment Tribunal within the period of three months prior to the 7 February 2017. As indicated this is probably a generous three months as time probably expired on the 1 December 2016. I find that awaiting the grievance outcome was not a reasonable excuse.
23. Nevertheless, had I found that awaiting the grievance outcome was a reasonable excuse not to present the claim, then I would have found that the claim was not presented within a reasonable period thereafter. The grievance was rejected on the 6 June 2017. The ACAS Notification was only made on the 11 October 2017, some four months later. No explanation whatsoever has been given for the delay between those two dates which was in excess of the three months laid down by parliament for the bringing of a claim. Consequently, I find that presenting the claim form on the 25 November was out of time and I have determined that time should not be extended such that the tribunal may consider the complaint.
24. Consequently, the claim is dismissed.

Employment Judge Alliot

14 June 2018

Sent to the parties on:

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For the Tribunal:

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