



EMPLOYMENT TRIBUNALS

Claimant: Mr M Sorour

Respondent: Northumbria Healthcare NHS Foundation Trust

Heard at: Newcastle

On: 2 October 2018

Before: Employment Judge S A Shore

REPRESENTATION:

Claimant: No appearance

Respondent: Mr D Bayne of Counsel

JUDGMENT

The judgment of the Tribunal is that:

1. The claimant's claims of unauthorised deduction of wages and breach of contract are struck out because they were not presented within the period of three months from the effective date of termination, or the date upon which payment of the wages claimed were due and it was reasonably practicable for the claims to have been submitted in time.

REASONS

Background

1. The claimant was employed by the respondent as a specialist registrar from 22 August 2016 to 26 December 2017 when his employment ended on the expiry of the notice he had given. His effective date of termination was 26 December 2017.

2. On 29 May 2018, the claimant submitted a claim that he had been underpaid by the respondent throughout his employment. The claim was coded as a breach of contract and an unauthorised deduction from wages.

3. The ET3 filed by the respondent made a submission that the Tribunal has no jurisdiction to hear the claim as it was presented out of time. It also set out a defence to the substantive claim.
4. The claimant applied for a postponement of today's hearing, which was refused by EJ Buchanan on 1 October 2018. No fresh application was received.
5. The claimant had indicated that he could not attend the hearing and was advised that he could make written representations. No representations were received.
6. The claimant exchanged witness statements with the respondent.
7. No issues had been agreed by the parties. The issues in this case were:
 - 7.1. Did the Tribunal have jurisdiction to hear the claims?
 - 7.2. What was the pay that was properly payable to the claimant?
 - 7.3. Did he receive it?
 - 7.4. Did the respondent breach the claimant's contract of employment?

Hearing and Evidence

8. At the outset of the case, I noted that there was a jurisdiction point to deal with and asked if Mr Bayne wanted to deal with it as a preliminary issue. His preference was to deal with the totality of the case, which I was content to do.
9. I heard evidence from Jeremy Rushmer, the Executive Medical Director of the respondent. His evidence in chief was that the claimant had been employed by the respondent as a speciality registrar in Obstetrics and Gynaecology under a scheme called the Medical Training Initiative (MTI). This scheme allowed doctors from overseas to work in the NHS. The employing NHS Trust is able to set the level of pay to reflect the experience of the MTI candidate as training standards are not uniform across international health services. They are employed on the NHS 2002 Medical and Dental Terms and Conditions of Service. A decision was made on the level of pay once the candidate's experience had been assessed.
10. The respondent's discretion on pay is set out in the rules of the MTI scheme at page 37 of the bundle. Mr Rushmer explained why he had exercised the respondent's discretion in the way that he did. It was about the claimant's ability to perform. The claimant himself had acknowledged in an appraisal document at page 44 of the bundle that his experience in Egypt had not been as good as he would have received in the United Kingdom.
11. In the claimant's case, the appropriate level of salary was deemed to be MN37, which paid £34,746 per annum when the claimant's employment began. His contracted pay was set out in the claimant's contract which started at page 79 of the bundle.

12. I put the claimant's statement to Mr Rushmer and asked for his comments on the case presented. He said that the agreement with the claimant was as set out in the offer letter and contract. The claimant had agreed the terms. His work was not of the standard and he did not have the experience to be paid on the 4th nodal point of the scale.

13. I considered the claimant's statement.

14. In closing submissions, Mr Bayne submitted that on the time point, it was not in dispute that the claimant was employed from 22 August 2016 to 26 December 2017. He was last paid on 21 December 2017. The period of three months less one day to start ACAS Early Conciliation (EC) expired on 25 March 2018. The claimant had started EC on 30 April 2018 and it had ended on 29 May 2018. The proceedings had been lodged the same day.

15. The effect of EC is to stop the clock. It cannot operate to retrospectively make a claim in time. The claim is, therefore out of time on the face of things. The claimant knew that the respondent was raising the time point as it is clearly set out in the ET3. He was aware he could make written representations and had provided no explanation as to why he had not started EC in time. He knew what pay he was receiving and when he was paid.

16. On the substantive case, the claimant was making two claims; he should have been paid at a higher rate, and; he did not receive his annual increment on the first anniversary of his appointment.

17. Mr Bayne submitted that the second claim was not in the ET3 and was first seen in the witness statement of the claimant. That is why it was not dealt with in Mr Rushmer's statement. However, I was asked to look at the schedule of payments made to the claimant at pages 117 and 118 of the bundle. These clearly show that up to August 2017, the claimant was paid at his starting salary, but after the anniversary of his start date, his pay went up to £36,675 and the date noted for his next increment changed from 22 August 2017 to 22 August 2018.

18. On the main point of the claim, Mr Bayne submitted that the question for me was what pay was properly payable to the claimant. His contract set out the figure at page 80 of the bundle. The respondent's discretion on pay was set out at page 37 of the bundle. Mr Rushmer had explained how he had exercised that discretion and the claimant had accepted the terms.

19. At page 141 of the bundle were the details of another MTI appointee who was appointed on the same terms as the claimant in December 2017.

20. I was therefore invited to strike out the claim for jurisdictional reasons but find for the respondent if I was not with him on the jurisdictional point.

Decision

21. The provisions relating to time limits in unauthorised deduction of wages claims are in section 23(2) Employment Rights Act 1996; the time limit is a three-month period beginning with the date of payment of wages from which the deduction was made. In accordance with section 23(4), a Tribunal cannot consider a claim if it

is made out of time unless it is satisfied that it was not reasonably practicable for the complaint to be presented in time and is presented within such further period as it finds reasonable.

22. Similar provisions in respect of breach of contract claims are contained in Article 7 of the Employment Tribunals Extension of Jurisdiction (England & Wales) Order 1994 except that the deadline is three months from the effective date of termination (26 December 2017), rather than three months from the date of the last payment (21 December 2017).

23. As Lord Scarman commented in **Dedman v British Building & Engineering Appliances Limited [1974] ICR 53**:

“Where a claimant pleads ignorance as to his or her rights, the Tribunal must ask further questions:

- What were his opportunities for finding out that he had rights?
- Did he take them?
- If not, why not?
- Was he misled or deceived?”

24. In this case, the claimant had every opportunity to look online and discover his rights. He did not take those opportunities but has provided no explanation as to why he failed to do. There is no suggestion that he was misled or deceived.

25. In the case of **Porter v Bandridge Limited [1978] ICR 943** the Court of Appeal ruled that the correct test is not whether the claimant knew of his or her rights, but whether he or she ought to have known of them. I find that the claimant ought to have known about his rights to bring a claim and the time limits in which those claims should have been brought. I note the words of the Employment Appeal Tribunal in the case of **Avon County Council v Haywood-Hicks [1978] ICR 646**, which rejected the idea that ignorance, however abysmal and however unreasonable, is a universal excuse. It said that this offended the notion of common sense and that an intelligent and a well-educated man ought to have investigated his rights within the time limit and claimed in time. In that case, it was held that given that the unfair dismissal legislation has been in force since 1972, Tribunals will rarely be sympathetic to the notion that claimants were wholly ignorant of their rights. In this case, the unauthorised deductions legislation has been in force since 1993 and the contract jurisdiction has been in force since 1994.

26. Therefore, having considered the evidence and the submissions of Mr Bayne, I have absolutely no hesitation in finding that the claimant failed to lodge his claims of unauthorised deduction of wages and breach of contract within the period of three months from the effective date of termination (for the breach of contract claim) and from the date that payment was due (for the unauthorised deduction claim) and that it was reasonably practicable for him to have done so. I therefore strike out all the claimant's claims.

27. Had I been required to make a determination on the substantive claim, I would have found that the claimant did not meet the required standard of proof (the balance of probabilities) that he had been underpaid or that there was a breach of his contract. The pay properly payable to the claimant was that set out in his contract of employment. The evidence shows that he was paid that amount. The level of pay was at the discretion of the respondent and I was satisfied that the discretion was exercised lawfully. The evidence showed that the claimant received his annual increment on the anniversary of the commencement of his employment.

Employment Judge S A Shore

Date 2 October 2018

JUDGMENT AND REASONS SENT TO THE PARTIES ON

8 October 2018

G Palmer
FOR THE TRIBUNAL OFFICE

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