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EMPLOYMENT TRIBUNALS

Claimant: Miss A El Abbeir
Respondent: The Kawasaki Fund Limited
Heard at: East London Hearing Centre
On: 22 October 2018
Before: Employment Judge Brook

Representation

Claimant: In Person
Respondent: Ms Izmail & Mr Lion - Trustees

PRELIMINARY HEARING JUDGMENT

The Judgment of the Employment Tribunal is that the Claimant's claims are dismissed for want of jurisdiction the claims having been lodged with the Tribunal out of time.

REASONS

1 In this matter the Claimant, Miss Abbeir, brings claims in unlawful deduction of wages in respect of notice pay, unpaid wages and reimbursement of her out of pocket expenses. The unpaid wages relate to undisputed contractual hours worked and to further hours which the Respondent asserts were worked pursuant to an arrangement to work additional hours on a voluntary basis but which the Claimant asserts were payable hours. The Claimant seeks a declaration as to the terms and conditions of her now former employment, it being common ground that the Respondent had failed to give her a written contract of employment or, in default of this, written particulars of the principal terms of employment. The Claimant also complains of bullying and unfair treatment but there is no specific claim made under any of the discrimination regimes.

2 At this Hearing the Claimant represented herself and the Respondent, a registered charity, was represented by two of its Trustees, Ms Izmail and Mr Lion each of whom, by the nature of their office, are unpaid. During her short employment Ms Abbeir had been the Respondent's only employee which is otherwise entirely reliant on volunteers.

Background

3 Ms Abbeir commenced employment on 6 November 2017 and was summarily dismissed, for what the Respondent regards as professional misconduct, some five months later on 7 April 2018. According to the Respondent Ms Abbeir was employed for 16 hours paid work per week and also required to work further hours on a voluntary basis. The Claimant takes issue with the latter contention though it is common ground that the Claimant was not given a written contract of employment, or written particulars, within the required statutory period or at all. It is also admitted that, so far as the 16 hours per week is concerned, the Respondent has withheld the Claimant's final month's pay by reason of the alleged misconduct.

The Alleged Gross Misconduct

4 Mr Lion told me that the Claimant was dismissed summarily on grounds of gross misconduct without notice pay, which notice would otherwise had been one week's pay, and her final month's pay was also not paid on the grounds that the Claimant's conduct was such as to repudiate the contract and gave rise to a counterclaim or set off which exceeded these unpaid sums. According to the Respondent the Claimant negligently permitted an unauthorised volunteer to work in the Respondent's shop, thereby giving this person access to cash and a credit card machine, and that whilst unsupervised this volunteer took the opportunity to steal money, and quite possibly a laptop and mobile phone, the total value exceeding the Claimant's claim.

5 It was on this basis that the Respondents withheld the sum of £546, otherwise due to the Claimant as her final month's wages, and the notice pay was withheld on the basis that this alleged gross misconduct terminated the contract. The Claimant's summary dismissal was on 7 April 2018, by chance on or about the day that her monthly pay in arrears would otherwise have been paid to her, and it is common ground that this is the day upon which time began to run for the purposes of jurisdiction in the Tribunal.

Statutory Basis for the Claims

6 All the disclosed claims, save for that of failing to provide a written contract/particular of employment, fall within Sections 13 and 23 of the Employment Rights Act 1996 in virtue of which an employer cannot withhold wages, or a payment in lieu of notice save in a lawful case of gross misconduct, unless there is an express written agreement with the employee permitting such deductions from the employee. In this jurisdiction such deducted sums typically relate to holidays taken in excess of the amount accrued at the time of dismissal, or for costly training which the trained employee might be contractually liable to reimburse if he/she leave their employment before a specified time had elapsed. No such written agreement exists here, not least because there is no contract and/or written particulars incorporating such an express provision, and the Respondent does not seek to rely upon any such provision. Indeed, the Respondent accepts it has not paid £546 wages for the last month worked as it believes it has a valid and enforceable counterclaim which extinguishes the Claimant's claims for the losses arising the Claimant's gross negligence which led to the aforesaid theft.

7 As I made clear in the Hearing whilst there might be such a counter claim it is not one which could defeat the Claimant's claim in unpaid wages pursuant to Section 13 of the ERA in the absence of any express written provision permitting such deductions, though the existence of this counterclaim might have led to the enforcement of a Judgment of the Tribunal being stayed pending the resolution of that counterclaim. The deductions are hotly contested by the Claimant as her version of events was that no one could have known that this volunteer was likely to steal from the Respondent and she was only doing her job of recruiting volunteers to undertake such work.

8 Whilst this background did not go directly to the matter of whether the claims were out of time it was helpful to understand the position of each Party. It was also helpful that Mr Lion for the Respondent said that if the Claimant would accept the £546 backpay in full and final settlement of the financial and declaration claims the Trustees would, "through gritted teeth", pay that and be done with it. The Claimant was however not interested in settling on this basis and thus the matter moved to consideration of the jurisdiction point.

Time Limits

9 The primary time limit for bringing money claims to the Employment Tribunal is short in comparison to other jurisdictions, as it is for claims seeking for declaratory relief, in this case being three months from the date on which the employment was terminated. That time limit is provided by Section 23 of the ERA and, had the Claimant brought her claims within that three month time period, her disclosed claims would have been properly brought and the Tribunal would have accepted Jurisdiction. Precisely similar considerations apply to the declaratory relief claim. Having regard to both the ACAS Certificate, and the primary time limit of three months, this claim should have been presented on or before 6 July 2018. In fact it was presented on 30 July 2018, thus some three weeks out of time.

10 The Tribunal has the power to extend time where the Claimant provides reasons for the delay which show it was not "reasonably practicable" to have brought the claims within the primary time limit. As to Miss Abbeir's reasons she told me that at the time she was consumed by financial worries, her two young daughters were with relatives in France, her new accommodation had no cooker or fridge, and she was at her wits end as to how to cope. She was aware of the three month time limit but when she reached out for help in submitting her claim none was forthcoming, except at a price which she could not afford from a local firm of solicitors. She had obtained initial advice from her local Citizens' Advice Bureau however this did not stretch to assisting her in completing the Claim form, hence her approach to solicitors which in turn she could not afford.

11 All these events were documented by way of contemporaneous correspondence, with the aforesaid solicitor and with the CAB, which correspondence she was self-evidently able to engage in at that time, that is to say within the 3-month period. There was no medical evidence to suggest that the Claimant was, for example, so clinically depressed that she was incapable of completing even the most basic of Claim Forms. The criterion for an extension of time in this type of matter is whether it was "reasonably practicable" for the Claimant to present her claim to the Tribunal within the primary three month time limit. It can be sometimes yield seemingly harsh results. The decided authorities on the point are that in the type of circumstances sketched out by the Claimant, particularly where she was aware of the time limit and was able to engage in

correspondence with bodies upon whom she hoped to obtain assistance in completing and presenting her claim, these do not provide grounds for an extension of time beyond the primary three months. I therefore find that the Tribunal has no jurisdiction to hear these claims as they were presented out of time and there is no basis upon which an extension of time can properly be granted.

12 That the Claimant cannot have her debt claims decided in the Tribunal does not however preclude the Claimant from pursuing precisely these claims, save for the claim for declaratory relief which is exclusively the preserve of the Tribunal jurisdiction, in the County Court where, if she wishes, she could now submit her debt claims which would very probably be allocated to the small claims low cost track. She has six years from the date of her dismissal to bring her debt claims and, if so brought, then the Respondent can potentially bring a counter claim in that jurisdiction. With this prospect in view the Parties might wish to continue their discussions with a view to bringing this doubtless difficult and painful episode to a mutually satisfactory conclusion without recourse to further litigation. That is a matter for the Parties, so far as the jurisdiction of the Employment Tribunal is concerned, the Claims are out of time and are accordingly dismissed.

Employment Judge Brook

5 November 2018