EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Ms Fionn Lloyd	AND	Akaroa Bistro Limited

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Bodmin **ON** 21 November 2018

EMPLOYMENT JUDGE N J Roper

Representation

For the Claimant: In person, Assisted by Mrs M Kelly, Friend
For the Respondent: Miss Rachel Deasey, Director

JUDGMENT

The judgment of the tribunal is that the claimant's claim for unlawful deduction from wages was presented out of time and is hereby dismissed.

REASONS

1. This is the judgment following a Preliminary Hearing to determine whether or not the claimant's claim was presented in time. There was a case management preliminary hearing on 26 April 2018, and in a subsequent order dated 27 April 2018 Acting Regional Employment Judge Homes clarified that the claimant's claim was one in respect of alleged unlawful deduction from her wages. He also recorded in that Order that this claim may have been presented out of time, in which case this Tribunal would not have jurisdiction to hear it, and the parties were on notice that this issue would have to be resolved. I therefore decided to determine this time issue as a preliminary matter.
2. I have heard from the claimant, and I have heard from Miss Rachael Deasey on behalf of the respondent. I find the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after listening to the factual and legal submissions made by and on behalf of the respective parties.
3. The respondent to this action is a limited company namely Akaroa Bistro Limited, which was formerly known as No 4 Bistro and Bar Limited, based in St Agnes in Cornwall ("the Bistro"). Miss Rachel Deasey from whom I have heard, is one of two proprietors of the

respondent and a director. The claimant was employed as a kitchen porter. Both the commencement and termination dates of her employment are in dispute, and she alleges that she was promised a minimum number of thirty hours' work per week, which were not given, and that the pay which she actually received fell short of both these contractually promised hours and (on average) the relevant national minimum wage. This too is disputed by the respondent. It was not necessary at this stage to determine the main aspects of the claimant's claims because of the need to determine the preliminary point on whether the claim was issued within time. It was however necessary to determine the effective date of termination of the claimant's employment because the time limit for presenting this claim begins to run from that date.

4. The respondent company was incorporated on 8 August 2016 and on 22 August 2016 commenced a lease of the Bistro premises from a third party. It commenced trading on 27 August 2016. The claimant commenced employment as a part-time kitchen porter on 31 August 2016. Although the claimant suggests that she commenced employment on 20 August 2016, I prefer the respondent's evidence in this respect to the effect that she did not start until 31 August 2016, because the Bistro had not started trading on the date suggested by the claimant, and the claimant's payslips indicate that she was paid continuously from 1 September 2016, and not from any date earlier in August 2016.
5. Unfortunately, the Bistro was not a success and it ceased trading on Saturday, 10 December 2016. After some redevelopment and a rebranding, the Bistro opened again on 1 June 2017 as Akaroa. It continued trading until 21 December 2017 when it closed and finally ceased trading. The respondent remains liable for payments due under its rental agreement.
6. The respondent asserts that it was forced to close on the first occasion in December 2016 when its chef left unexpectedly and that all of the Bistro's staff (numbering six in total) were given notice of the termination of their employment and forms P45. The respondent suggests that each member of staff was issued with a form P 45 in electronic version with their last payslip. The respondent has not been able to adduce a copy of the claimant's form P45 as at that date. The respondent asserts that the claimant was given one week's notice of the termination of her employment on about 6 December 2016, to take effect from 13 December 2016, and that her last working day was 10 December 2016. The respondent accepts that it intended to reopen the Bistro once it had been rebranded and that they began seeking appropriate staff from February or March 2017. Two chefs had been approached and agreed to start, but failed to do so, and following one trial evening in May 2017 the Bistro became fully functional again in June 2017. The respondent says that the claimant was not approached to recommence work and that it had no obligation to make any such approach because the claimant's employment had been terminated in December 2016.
7. The claimant's version of events is that Miss Deasey informed her in December 2016 that the Bistro would close temporarily for renovations and that it would reopen in March 2017. The Bistro finally reopened at the end of May 2017 and that the respondent failed to respond to enquiries about her continuing employment. The claimant denies having received any confirmation or notification of the termination of her employment, and did not receive any letter or form P45 to that effect. The claimant asserts that she therefore believed that she was still employed by the respondent "until at least May 2017 when the restaurant reopened with different staff". She says that she only received her form P45 when the Bistro eventually closed in December 2017, and I have seen that form P45 which is dated 22 December 2017 and refers retrospectively to a leaving date (more than a year earlier) of 10 December 2016. The claimant accepts that her employment "constructively ended in May 2017".
8. The position is further complicated by the parties agreeing that the claimant could train as an apprentice with Truro and Penwith College. The contractual documentation relating to this apprenticeship which I have seen indicates that the claimant commenced her apprenticeship on either 4 or 5 October 2016 on the basis that she was engaged by the respondent for 30 hours each week as a trainee chef. A document headed "Amendment to Learning Programme" later records that the "date of last attendance" of the claimant was

21 March 2017, and that the reason for withdrawal from the apprenticeship course was "Left Catering".

9. In addition, there was an exchange of emails between the parties in the Spring of 2017. On 22 March 2017 Miss Deasey emailed the claimant to suggest that the respondent was trying to reopen the Bistro for Easter and was wondering whether the claimant wished to "come back as commis chef?" The claimant confirmed that she would like to come back, but on 4 April 2017 Miss Deasey explained that they had been let down by the prospective new chef and that she proposed having a chat with the claimant about how they might proceed. There were no further emails about prospective re-employment, but there was an exchange of emails about the claimant's request for payment of the days when she had been at college. Miss Deasey made enquiries and by email on 25 April 2017 confirmed with an apology that the respondent should have paid the claimant for days worked at college. The claimant requested payment for 21 days at college at six hours per day. The respondent refused to pay this amount, and by email dated 2 June 2017 explained that this was because the claimant had only worked for 11 days whilst she was an employee up to mid December 2016. In other words the respondent declined to pay for the days which the claimant had attended at college in early 2017 when its view the claimant was no longer an employee.
10. The position is rather confusing, and the respondent has not helped its position by failing to adduce any documentary evidence that the claimant's employment terminated in December 2016, such as a letter of termination or a form P45 at that time. Nonetheless it is clear from the payslips which I have seen that the claimant was not paid for any hours worked beyond Saturday, 10 December 2016, and it is clear from the Amendment to Learning Programme form that the claimant had given up being a trainee chef because she had "Left Catering" as at 21 March 2017. She knew that the Bistro had closed, and appears to have objected to the fact that she was not invited to re-join when the Bistro later reopened. On balance I favour the respondent's version of events because it is more consistent with the contemporaneous documents. I find that the employees were no longer employed beyond December 2016, and that they were not retained on a paid or unpaid basis pending the possible reopening of the Bistro. I therefore find on balance that the claimant's effective date of termination of employment was 13 December 2016.
11. At some stage in the summer of 2017, probably in about July 2017, the claimant sought legal advice, which included advice about the cost of issuing proceedings to the Employment Tribunal. It is not clear whether she received specific advice as to the relevant time limits. In any event the claimant subsequently researched the position further by use of the Internet, which included information about issuing Employment Tribunal proceedings, and the relevant three month time limit, and the need for an ACAS Early Conciliation Certificate.
12. The claimant first made contact with ACAS under the Early Conciliation procedure on 29 September 2017 (Day A), and the Early Conciliation Certificate was issued on the same day 29 September 2017 (Day B). These proceedings were presented on 25 January 2018. The claimant was unable to give any explanation as to the reasons for these periods of delay.
13. Having established the above facts, I now apply the law.
14. The relevant statute is the Employment Rights Act 1996 ("the Act"). Subsections 23(2), 23(3) and 23(4) of the Act provide that an employment tribunal shall not consider a complaint of unlawful deduction from wages unless it is presented before the end of the period of three months beginning with the date of a deduction (or the last in a series of deductions), or 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.
15. In addition, with effect from 6 May 2014 a prospective claimant must obtain an early conciliation certificate from ACAS, or have a valid exemption, before issuing employment tribunal proceedings.
16. Section 207B of the Act provides: (1) This section applies where this Act provides for it to apply for the purposes of a provision of this Act (a "relevant provision"). But it does not

apply to a dispute that is (or so much of a dispute as is) a relevant dispute for the purposes of section 207A. (2) In this section - (a) Day A is the day on which the complainant or applicant concerned complies with the requirement in subsection (1) of section 18A of the Employment Tribunals Act 1996 (requirement to contact ACAS before instituting proceedings) in relation to the matter in respect of which the proceedings are brought, and (b) Day B is the day on which the complainant or applicant concerned receives or, if earlier, is treated as receiving (by virtue of regulations made under subsection (11) of that section) the certificate issued under subsection (4) of that section. (3) In working out when a time limit set by a relevant provision expires the period beginning with the day after Day A and ending with Day B is not to be counted. (4) If a time limit set by a relevant provision would (if not extended by this subsection) expire during the period beginning with Day A and ending one month after Day B, the time limit expires instead at the end of that period. (5) Where an employment tribunal has power under this Act to extend a time limit set by a relevant provision, the power is exercisable in relation to the time limit as extended by this section.

17. I have been considered the following cases, namely: Palmer and Saunders v Southend-on-Sea BC [1984] ICR 372; Porter v Bandridge Ltd [1978] IRLR 271 CA; Wall's Meat Co v Khan [1978] IRLR 499; London Underground Ltd v Noel [1999] IRLR 621; Dedman v British Building and Engineering Appliances [1974] 1 All ER 520; Cullinane v Balfour Beattie Engineering Services Ltd UKEAT/0537/10; and Wolverhampton University v Elbeltagi [2007] All E R (D) 303 EAT. Although these cases relate to unfair dismissal claims, the statutory test is effectively the same for claims in respect of alleged unlawful deduction from wages.
18. In this case the claimant's effective date of termination of employment was 13 December 2016. The three month time limit therefore expired at midnight on 12 March 2017. The claimant first made contact with ACAS under the Early Conciliation procedure on 29 September 2017 (Day A), and the Early Conciliation Certificate was issued on the same day 29 September 2017 (Day B). By this stage the initial three month time limit had already expired, and the claimant does not benefit from an extension of time under the Early Conciliation provisions. These proceedings were not then issued until 25 January 2018, some ten months out of time.
19. The claimant has provided no grounds for suggesting that it was not reasonably practicable to have issued proceedings within the relevant time limit. In addition, the claimant has provided no explanation as to why she delayed issuing proceedings after the date of the ACAS Early Conciliation Certificate on 29 September 2017, until these proceedings were issued on 25 January 2018.
20. The question of whether or not it was reasonably practicable for the claimant to have presented his claim in time is to be considered having regard to the following authorities. In Wall's Meat Co v Khan Lord Denning, (quoting himself in Dedman v British Building and Engineering Appliances) stated "it is simply to ask this question: has the man just cause or excuse for not presenting his complaint within the prescribed time?" The burden of proof is on the claimant, see Porter v Bandridge Ltd. In addition, the Tribunal must have regard to the entire period of the time limit (Elbeltagi).
21. In Palmer and Saunders v Southend-on-Sea BC the headnote suggests: "As the authorities also make clear, the answer to that question is pre-eminently an issue of fact for the Industrial Tribunal taking all the circumstances of the given case into account, and it is seldom that an appeal from its decision will lie. Dependent upon the circumstances of the particular case, in determining whether or not it was reasonably practicable to present the complaint in time, an Industrial Tribunal may wish to consider the substantial cause of the employee's failure to comply with the statutory time limit; whether he had been physically prevented from complying with the limitation period, for instance by illness or a postal strike, or something similar. It may be relevant for the Tribunal to investigate whether, at the time of dismissal, and if not when thereafter, the employee knew that he had the right to complain of unfair dismissal; in some cases the Tribunal may have to consider whether there was any misrepresentation about any relevant matter by the employer to the employee. It will frequently be necessary for the Tribunal to know whether the employee

was being advised at any material time and, if so, by whom; the extent of the advisor's knowledge of the facts of the employee's case; and of the nature of any advice which they may have given him. It will probably be relevant in most cases for the Industrial Tribunal to ask itself whether there was any substantial failure on the part of the employee or his adviser which led to the failure to comply with the time limit. The Industrial Tribunal may also wish to consider the manner in which and the reason for which the employee was dismissed, including the extent to which, if at all, the employer's conciliatory appeals machinery had been used. Contrary to the argument advanced on behalf of the appellants in the present case and the obiter dictum of Kilner Brown J in Crown Agents for Overseas Governments and Administrations v Lawal [1978] IRLR542, however, the mere fact that an employee was pursuing an appeal through the internal machinery does not mean that it was not reasonably practicable for the unfair dismissal application to be made in time. The views expressed by the EAT in Bodha v Hampshire Area Health Authority on this point were preferred to those expressed in Lawal:-

22. To this end the Tribunal should consider: (1) the substantial cause of the claimant's failure to comply with the time limit; (2) whether there was any physical impediment preventing compliance, such as illness, or a postal strike; (3) whether, and if so when, the claimant knew of his rights; (4) whether the employer had misrepresented any relevant matter to the employee; and (5) whether the claimant had been advised by anyone, and the nature of any advice given; and whether there was any substantial fault on the part of the claimant or his adviser which led to the failure to present the complaint in time.
23. In addition, in Palmer and Saunders v Southend-on-Sea BC, and following its general review of the authorities, the Court of Appeal (per May LJ) concluded that "reasonably practicable" does not mean reasonable (which would be too favourable to employees), and does not mean physically possible (which would be too favourable to employers) but means something like "reasonably feasible".
24. Subsequently in London Underground Ltd v Noel, Judge LJ stated at paragraph 24 "The power to disapply the statutory period is therefore very restricted. In particular it is not available to be exercised, for example, "in all the circumstances", nor when it is "just and reasonable", nor even where the Tribunal "considers that there is a good reason" for doing so. As Browne Wilkinson J (as he then was) observed: "The statutory test remains one of practicability … the statutory test is not satisfied just because it was reasonable not to do what could be done" (Bodha v Hampshire Area Health Authority [1982] ICR 200 at p 204).
25. Underhill P as he then was considered the period after the expiry of the primary time limit in Cullinane v Balfour Beattie Engineering Services Ltd (in the context of the time limit under section 139 of the Trade Union & Labour Relations (Consolidation) Act 1992, which is the same test as in section 111 of the Act) at paragraph 16: "The question at "stage 2" is what period - that is, between the expiry of the primary time limit and the eventual presentation of the claim - is reasonable. That is not the same as asking whether the claimant acted reasonably; still less is it equivalent to the question whether it would be just and equitable to extend time. It requires an objective consideration of the factors causing the delay and what period should reasonably be allowed in those circumstances for proceedings to be instituted - having regard, certainly, to the strong public interest in claims in this field being brought promptly, and against a background where the primary time limit is three months."
26. In conclusion therefore there was no substantial cause and no physical impediment which prevented the claimant from complying with the initial three month time limit. There is no evidence that the respondent misrepresented the position in any way to the claimant, and no evidence of any wrong or negligent advice upon which the claimant relied. I find that it was reasonably practicable for the claimant to have issued these proceedings within three months, and accordingly the proceedings are out of time.
27. In any event, even if it were not reasonably practicable for the claimant to have issued proceedings until she says that she knew the position concerning time limits and the need for an ACAS Early Conciliation certificate (by late September 2017) the claimant did not issue these proceedings within such further period as can be considered reasonable. She has given no explanation as to why she then waited a further four months before issuing

these proceedings. I would also dismiss these proceedings as being out of time for this reason.

28. For the purposes of Rule 62(5) of the Employment Tribunals Rules of Procedure 2013, the issues which the tribunal determined are at paragraph 1 to 3; the findings of fact made in relation to those issues are at paragraphs 4 to 12; a concise identification of the relevant law is at paragraphs 14 to 25; how that law has been applied to those findings in order to decide the issues is at paragraphs 26 and 27.

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Employment Judge N J Roper

Dated 21 November 2018