



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

Respondent

Mrs B Skarbeck-Cielecka

and

Holly Rise Consultants Limited t/a
Bluebird Care (Eastbourne and
Wealden)

PRELIMINARY HEARING

Held at Croydon on 20 November 2018

Representation

Claimant:

In person, assisted by an
Interpreter, Ms D Carty

Respondent:

Mr C Ludlow, Counsel

Before: Employment Judge Harrington (sitting alone)

JUDGMENT

- 1 The Claimant's claim for unpaid annual leave is dismissed upon withdrawal.
- 2 The Claimant's unlawful deduction from wages claim was presented outside the primary limitation period. It was reasonably practicable to present it before the end of the relevant period of 3 months. The Tribunal has no jurisdiction to consider the claim and it shall not proceed.

REASONS

Introduction

- 1 By a letter from the Tribunal dated 12 September 2018, a Preliminary Hearing was listed to consider,

'whether the Tribunal has the jurisdiction to determine the claims by the Claimant that the Respondent made unauthorised deductions from her wages, taking into account the statutory time limit.'

2 In summary, the Claimant's claim was received by the Tribunal on 7 December 2017. On 25 June 2018 the case was considered at a Preliminary Hearing. The issues requiring determination were identified and directions made including listing the case for a final hearing for four days commencing on 26 March 2019. The Case Management Summary notes that the claims arising were as follows: direct discrimination on the grounds of race, unpaid annual leave, unauthorised deductions from wages and the complaint of not being able to take a break and not being provided with a copy of her contract.

3 Following the Preliminary Hearing and in accordance with the directions, the Respondent produced an Amended Grounds of Resistance. Within the Amended Grounds, the Respondent contended that the Claimant's claims for an alleged unlawful deduction from wages were out of time (see for example, paragraphs 24, 27, 33 and 36 of the Amended Grounds). Further by an email dated 5 September 2018 the Respondent made an application to the Tribunal, copying in the Claimant, for a further Preliminary Hearing to consider the strike out of part of the Claimant's claim. Within that email, the Respondent stated,

'.....it has become apparent that the last in each of the series of deductions alleged by the Claimant does not extend beyond 10 July 2017 which was the last shift she worked for the Respondent. The Claimant did not lodge her claim with the employment Tribunal until 7 December 2017, approximately 5 months later, and it is therefore the Respondent's position that the Claimant's claims for unlawful deductions from wages have been presented significantly out of time and as such the Tribunal does not have the jurisdiction to hear them.'

4 In addition to requesting a Preliminary Hearing for determination of its application to strike out part of the Claimant's claim, the Respondent also submitted that the timetable of case management directions should be suspended pending the outcome of the Preliminary Hearing.

5 As set out above, the Tribunal notified the parties in its letter of 12 September 2018, that a Preliminary Hearing would be listed to consider the Respondent's application and meanwhile the case management orders would be suspended.

6 It is that Preliminary Hearing which I have heard today. The Claimant has represented herself assisted by an interpreter, Ms D Corty. The Respondent is represented by Mr Ludlow, Counsel. During the hearing I heard oral evidence from the Claimant and I was provided with a copy of the Claimant's last payslip and an extract from IDS Employment Law Handbooks concerning time limits. I heard closing submissions from both parties and reserved my judgment.

7 At this stage, it is convenient to refer to three further matters:

- 7.1 Firstly, at the start of the hearing, Mr Ludlow requested that the ambit of the hearing be extended to include arguments about the Claimant's claims of discrimination being out of time. He acknowledged that the Claimant had not been put on notice of this request from the Respondent and that the Respondent's application, made by email on 5 September 2018, had only referred to the unauthorised deduction from wages claim. The Claimant told me that she was not prepared to deal with the discrimination part of her case. This had not previously been identified as a matter for this hearing. I concluded, taking account of the overriding objective, that it was appropriate for the hearing to proceed as identified in both the Respondent's application dated 5 September 2018 and the Tribunal's letter dated 12 September 2018. The Claimant represents herself and had not prepared for the Tribunal to consider time limit arguments in respect of her claim of discrimination. Accordingly I proceeded to consider only whether the Claimant's claim of an unauthorised deduction from wages should proceed.
- 7.2 Secondly, during her evidence the Claimant told me that she was not continuing with her claim for unpaid holiday pay. After confirming that matter with her, I proceeded to record that this element of the claim was dismissed upon withdrawal by the Claimant.
- 7.3 Finally, the day after the Preliminary Hearing the Tribunal received an email from the Claimant as follows,

From: Bożena Skarbek [mailto:boskar1960@gmail.com]
Sent: 21 November 2018 10:28
To: LONDONSOUTHET <londonsouthet@Justice.gov.uk>
Subject: Re: 2303648/2017

It is very important!!!

Yesterday I had a hearing at 14:00 hours. I couldn't answer the Judge question about my last gross payslip advice date. I found this paper with the date of 18/12/2017, so I did not even receive it going to Citizen Advice Bureau on the 30/11/2017. My employer was doing everything possible to stop me going to the Court. Can you, please, pass this information to the Lady Judge asap?

Yours faithfully

Bożena Skarbek-Cielecka

- 7.4 The content of the email appears to be an attempt by the Claimant to add to the oral evidence she gave during the hearing about when she received a copy of her gross payslip advice. For the avoidance of doubt, in reaching my conclusions in this case, I have not taken into account the contents of this email. I did not consider it was appropriate to do so for the following reasons: the Claimant was given a full opportunity to give her evidence in person at the hearing on 20 November, at which time she was also cross examined by Counsel for the Respondent. The Claimant did not seek an adjournment of that hearing or contend that she was not in a position to give her evidence on the day. In the circumstances, I do not accept that it is appropriate for her to be given further opportunities to add to her evidence after the hearing has

concluded. It would be unfair on the Respondent if she was permitted to do so. The Respondent has not been given an opportunity to test this apparently new evidence and applying the overriding objective, I do not consider that it would be appropriate to hold an additional hearing in order for this to occur. The Claimant was on notice as to the issue to be determined at the Preliminary Hearing and was able to prepare accordingly. As set out in paragraph 7.1 above, the ambit of the hearing was not extended, despite the Respondent's request to do so, and therefore the Claimant was to be expected to provide all relevant evidence on the day.

The Facts

- 8 The Claimant last worked for the Respondent on 10 July 2017. She brings a claim for an unauthorised deductions from her wages for the period 23 June 2016 to 10 July 2017.
- 9 In respect of the final payment she received from the Respondent, the Claimant told me in evidence that she got paid at the end of July 2017 but that she wasn't able to confirm whether the payment was correct until she received the payslip in August 2017. Mr Ludlow suggested to the Claimant that she would have received her July 2017 payment sometime between 1 – 5 August 2017 rather than the end of July 2017. Later in evidence the Claimant referred to receiving a payment in early August but she also told me that she was unable to confirm this without checking her bank account.
- 10 I have concluded on the balance of probabilities that the Claimant did receive her last payment on 5 August 2017. I have reached this conclusion doing the best I can on the evidence available. There is no documentary evidence before me to assist with my determination of this point however the Respondent suggests payment would have been made between 1 – 5 August 2017 and the Claimant confirmed in her later oral evidence (see paragraph 11 below) that she received the payslip in early August shortly after being paid her wages. This supports my conclusion that payment was made on 5 August 2017.
- 11 In her evidence the Claimant stated *'I finally got the payslip in August'*. She was unable to give a precise date in August although confirmed that she didn't have the payslip by the time she received the Early Conciliation Certificate on 14 August 2017. After a short break, the Respondent produced the Claimant's final payslip for the period 19 June 107 to 23 July 2017. The Claimant confirmed that she had received that payslip in early August, shortly after she received the payment of wages into her bank account. By way of clarification, the Claimant told me that when referring to the 'payslip' in her earlier evidence, she had actually meant a document known as the 'gross payslip advice' rather than the payslip now produced by the Respondent. The Claimant had received the payslip in early August but had had to wait for her gross payslip advice – it was the gross payslip advice which provided the full breakdown of the payment being made, listing times spent with clients, travel time and mileage, which thereby

allowed the Claimant to understand what she had been paid for. In evidence the Claimant told me,

'When I got the advice, I definitely knew what was going on and how much they didn't pay me.'

- 12 As stated, the Claimant told me that she had been referring to her gross payslip advice in her earlier evidence. In other words, when she told me that she finally got her payslip in August although not before 14 August 2017, she meant her gross payslip advice rather than the payslip. I accepted the Claimant's evidence on this point and explanation as to this matter. I accepted the Claimant's account that whilst she received her wages and payslip in early August 2017, she did not receive her gross payslip advice until later in that month and it was not until she received that document that she was able to calculate the deductions that had been made to her earnings when compared with her timesheets.
- 13 I also accepted the Claimant's account that she had previously compared her timesheets with the gross payslip advice documents and had met with managers from the Respondent in September 2016 and January 2017 to explain to them what she considered to be discrepancies in her pay at those times. Although the Claimant was unable to provide specific dates, she also confirmed that she had contacted ACAS 'quite often' for advice about earlier discrepancies and how to resolve matters. The Claimant told me, and I accept, that it was likely that this contact was before a staff meeting on 4 May 2017.
- 14 The Claimant went to Poland following her last shift working for the Respondent in July 2017. She was back in the UK by 1 August 2017. Whilst the Claimant submitted a letter of resignation to the Respondent on 8 August 2017 and received her EC Certificate on 14 August 2017, she was still planning on working a one month notice period. In the event, she did not return to work for the Respondent.
- 15 The Claimant spoke with Margaret Wright from ACAS on 14 August 2017 and was told about the 3 month time limit for bringing her claims. The Claimant stated in evidence, *'I knew the 3 month time limit by ACAS on 14 August. I was told by Margaret Wright. She said I must make sure that the claim will be arriving in 3 months time.'* Thereafter she made various calls to FRU and the ProBono unit seeking advice and representation and made an appointment at the CAB.
- 16 The Claimant attended an appointment with the Citizens Advice Bureau on 30 November 2017. Thereafter she attempted to submit her claim to the Tribunal. Unfortunately, this process was interrupted by her computer becoming infected with a virus. In the event the Claimant went to the Post Office on 6 December 2017 and sent her ET1 to the Tribunal by recorded delivery post.

Submissions

Respondent's case

- 17 The Respondent submitted that for different parts of the unlawful deductions claim (i.e. claims for overtime, unpaid wages and mileage), different dates applied as to when the 3 month time period began to run. However the latest date when work was carried out requiring payment was the shift on 10 July 2017. If payment for that work was made on 5 August 2017, the 3 month time period ran until 4 November 2017. Adding an additional 13 days for the period of early conciliation, time for presenting the ET1 ran out on 17 November 2017. The ET1 was actually received by the Tribunal on 7 December 2017, over 3 weeks later.
- 18 The Respondent highlighted that the Claimant was aware of her rights, that she had previously made contact with ACAS and had had meetings with the Respondent's management back in late 2016 and January 2017 about pay discrepancies. The Claimant was also aware from 14 August 2017 of the time limits applicable to the claim she wished to bring.
- 19 Furthermore, the Respondent contended that if the Tribunal was satisfied that it was not reasonably practicable for the Claimant to present her claim in time, the further delay between 30 November 2017, when she attended the CAB, and 7 December 2017, when the ET1 was received, was unreasonable.

Claimant's case

- 20 The Claimant referred to the fact that she had to 'beg' the Respondent for the relevant paperwork. She waited for the gross payslip advice, to identify where the discrepancies in her pay were, and then she waited for the meeting at the CAB. The earliest appointment she could get at the CAB was 30 November 2017. The Claimant also told me that she was stressed at this period, as she was also having to look for jobs and attend for interviews.

Legal Summary

- 21 Section 23 of the Employment Rights Act 1996 provides as follows:

'23 Complaints to [employment tribunals].

(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 (including a deduction made in contravention of that section as it applies by virtue of section 18(2)),

(b)that his employer has received from him a payment in contravention of section 15 (including a payment received in contravention of that section as it applies by virtue of section 20(1)),

(c)that his employer has recovered from his wages by means of one or more deductions falling within section 18(1) an amount or aggregate amount exceeding the limit applying to the deduction or deductions under that provision, or

(d)that his employer has received from him in pursuance of one or more demands for payment made (in accordance with section 20) on a particular pay day, a payment or payments of an amount or aggregate amount exceeding the limit applying to the demand or demands under section 21(1).

(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, or

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

(3)Where a complaint is brought under this section in respect of—

(a)a series of deductions or payments, or

(b)a number of payments falling within subsection (1)(d) and made in pursuance of demands for payment subject to the same limit under section 21(1) but received by the employer on different dates,

the references in subsection (2) to the deduction or payment are to the last deduction or payment in the series or to the last of the payments so received.

[(3A)Section 207A(3) (extension because of mediation in certain European cross-border disputes) [and section 207B (extension of time limits to facilitate conciliation before institution of proceedings) apply] for the purposes of subsection (2).]

(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.

[(4A)An employment tribunal is not (despite subsections (3) and (4)) to consider so much of a complaint brought under this section as relates to a deduction where the date of payment of the wages from which the deduction was made was before the period of two years ending with the date of presentation of the complaint.

(4B)Subsection (4A) does not apply so far as a complaint relates to a deduction from wages that are of a kind mentioned in section 27(1)(b) to (j).]

[(5)No complaint shall be presented under this section in respect of any deduction made in contravention of section 86 of the Trade Union and Labour Relations (Consolidation) Act 1992 (deduction of political fund contribution where certificate of exemption or objection has been given).]

- 22 A tribunal shall not consider a complaint of an unauthorised deduction from wages unless it is presented before the end of the period of 3 months beginning with the date of payment of the wages from which the last deduction was made (section 23(3)).
- 23 Where the tribunal is satisfied that it was not reasonably practicable for a complaint to be presented before the end of the 3 month period, it may consider the complaint if it is presented within such further period as the tribunal considers reasonable.
- 24 I am reminded by the IDS publication provided to me, that what is reasonably practicable is a question of fact and thus a matter for the tribunal to decide. The onus of proving that presentation in time was not reasonably practicable rests on the claimant. Even if the claimant satisfies a tribunal that presentation in time was not reasonable practicably, 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'.

Conclusions

- 25 The Claimant's claim for an unauthorised deduction from wages was not presented before the end of the period of 3 months beginning with the date of payment of the wages from which the last deduction was made. On the balance of probabilities, I have found that the relevant payment was made on 5 August 2017 and the ET1 was received by the Tribunal on 7 December 2017. Even allowing for the period of early conciliation, the claim is out of time by a little over 3 weeks.
- 26 Although presented out of time, the Tribunal may proceed to consider the claim if it is satisfied that it was 'not reasonably practicable' for the complaint to be

presented before the end of the 3 month period and that it was presented 'within such further period as the tribunal considers reasonable'.

- 27 The Claimant told me that she required the gross payslip advice in order to understand the detail and extent of any underpayments. I accept that she did require this document to fully identify and particularise her claim. On previous occasions the Claimant had been able to carry out the necessary analysis with the gross payslip advice and copies of her timesheets to highlight alleged underpayments made by the Respondent. This had led to the Claimant having meetings with the Respondent's management in September 2016 and January 2017.
- 28 The Claimant received the gross payslip advice after receiving the last payment and the last payslip in early August. I have accepted the Claimant's oral evidence that she received the gross payslip advice in August 2017 albeit after 14 August 2017.
- 29 It is the Claimant's case that her claim was presented outside of the 3 month time limit because of the delay in her receiving the gross payslip advice and the wait for an appointment with the CAB. I must consider whether these matters rendered it 'not reasonably practicable' for the claim to be presented in time. Having carefully considered the entirety of the relevant circumstances of the case and the evidence I have heard and seen, I am not satisfied that it was not reasonable practicable for the Claimant to bring her claim in time. I find that it was.
- 30 The Claimant's own oral evidence given towards the start of the hearing was that she received the gross payslip advice in August 2017. Upon receipt of that document, the Claimant was in a position to set out her claim in an ET1 to be presented to the Tribunal. It is clear that she had been able to carry out a similar exercise previously with reference to gross payslip advice documents in 2016 and 2017, when she met the Respondent's management to discuss alleged deductions. I do not accept that the delay resulting in the Claimant receiving the gross payslip advice in late August rendered it 'not reasonably practicable' to present her claim on or before 17 November 2017. On her own evidence, by the end of August 2017 the Claimant was in receipt of the required information to formulate and present her claim.
- 31 The Claimant has also contended that she had to wait for her appointment with the CAB on 30 November 2017. I do not accept that the Claimant's wish to attend the CAB for relevant legal advice satisfies the test of it being 'not reasonably practicable' for the claim to be presented in time. Whilst I entirely understand the Claimant wished to consult relevant advisors, the Claimant was aware of her claim, had the necessary particulars of the payments she had received and knew of the applicable time limits for bringing a claim. In short, the Claimant was in a position to set out and present her claim to the Tribunal and, in those circumstances, waiting for an advisory appointment did not render it 'not reasonably practicable' for her to do so.

- 32 In conclusion I am not satisfied that it was not reasonably practicable for the complaint to be presented before the end of the relevant period of 3 months. For the avoidance of doubt, I have also taken into account the Claimant's evidence that she was understandably preoccupied with looking for another job and attending interviews at the time but again, I do not accept that these factors which satisfy the relevant threshold to permit the claim to continue even though it was presented out of time.
- 33 The claim for an unlawful deduction from wages has been presented out of time and shall not proceed. The Tribunal has no jurisdiction to consider this part of the Claimant's claim.
- 34 I have amended the case management directions as discussed with the parties at the Preliminary Hearing and the remainder of the Claimant's case continues to be listed for a full merits hearing commencing on 26 March 2019.

Employment Judge Harrington
2 January 2019