# THE EMPLOYMENT TRIBUNALS

**Claimant** Mr J W Gilderoy

**Respondent** EHL UK Resources Ltd

**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

HELD AT MIDDLESBROUGH ON: 1st DECEMBER 2017
EMPLOYMENT JUDGE GARNON (sitting alone)

For Claimant: in person
For Respondent: Ms B Vowles HR Manager

## JUDGMENT

The Judgment of the Tribunal is:
1. The proper name of the respondent is as shown above. The claim form and title of the action are amended accordingly.
2. I cannot consider the claim of unlawful deduction of wages which is therefore dismissed.

**REASONS** (bold print being my emphasis)

### 1 . The Undisputed Facts , Issues and Relevant Law

1.1. The claim is of unlawful deduction of wages and the substantive issue is whether the claimant was paid his contractual entitlement for whatever work he did. The preliminary issue is whether I am prevented from considering his claim because it was presented outside the time limit for doing so, or whether the limited exception to that prohibition applies. The response form does not take the point I am so prevented, but the words of the legislation mean I am duty bound to do so.

1.2. The Employment Rights Act 1996 (the Act), so far as relevant, provides:

*13 (1) An employer shall not make a deduction from wages of a worker employed by him unless*….. (None of the exceptions are relevant in this case)

*(3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.*

*23 (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*

(2) *Subject to subsection (4) an employment tribunal* ***shall not consider*** *a complaint under this section unless it is presented to the Tribunal 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*

***(4) Where the Tribunal is satisfied 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***

1.3. The parties agree the claimant's first payday would have been Friday 28th April 2017. He was to be paid by Bank Credit Transfer. The 1st May was a Bank Holiday and on 2nd the claimant discovered nothing had arrived in his bank.

1.4. If this was the only relevant provision, the claim needed to be presented before midnight on 27th July 2017. However, s 207B provides for extension of time limits to facilitate Early Conciliation (EC) through ACAS thus:
*(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."*

1.5. The claimant contacted ACAS on 15th June (Day A) within 3 months of the alleged deduction. ACAS sent the EC Certificate on 29th June (Day B), **by e-mail** . The time for presentation would now be extended to 10th August. His claim arrived on 1st September 2017 so is out of time**.**

1.6. There is ample case law to the effect "reasonably practicable" means reasonably feasible or "do-able". The burden of proving it was not reasonably do-able rests on the claimant. Schultz –v-Esso Petroleum 1999 IRLR 488 says it is reasonable for a claimant at the start of the 3 month period to try to avoid litigation by making contact with the respondent to ask for what he is owed. The claimant did so from 24th April and says he could not get to speak to anyone. On 29th June it was

clear EC was not going to produce the result he wanted. It is from that point onwards my focus should be, according to the guidance in Schultz.

1.7. In Palmer v Southend on Sea Borough Council 1984 IRLR 119 the Court of Appeal held to limit the meaning of "reasonably practicable" to that which is reasonably capable physically of being done would be too restrictive a construction. The best approach is to ask "Was it reasonably feasible to present the complaint within three months?" The question is one of fact for the Tribunal taking all the circumstances into account. It will consider **the substantial cause** of the failure to comply with the time limit; eg had the claimant been physically prevented by illness, a postal strike, or something similar. It may be relevant to investigate whether and when, he **knew** he had the right to complain. It will frequently be necessary to know whether he was being advised at any material time and, if so, by whom. It will be relevant in most cases to ask whether there was any substantial fault on the part of the claimant or his advisor which led to the failure to comply with the time limit. John Lewis-v- Charman EAT 0079/11 held it was enough to warrant exercise of the discretion where the claimant was **reasonably** ignorant of the time limit. I will return shortly to other long established case law on this issue.

1.8. This case first came before me on 31st October 2017 when it had to be postponed for reasons I covered in an Order with explanatory notes sent to the parties. The claimant was not present on that day. Having taken, in good time, all the preliminary steps necessary before issuing a claim he failed to progress his case from 29th June until 1st September. Neither party was legally represented and I was concerned that at the resumed hearing both should be prepared for a point which to any lawyer would be obvious. I therefore explained , and quoted from , a Supreme Court decision on 26th July 2017, R (on the application of Unison) v Lord Chancellor [2017] UKSC 51, which held employment tribunal fees were unlawful and struck down the legislation which introduced them. It held the fee regime put people off making or continuing claims, even those that were likely to succeed. Lord Reed placed emphasis on the impact of fees on low-value claims, thus:

*96. Furthermore, it is not only where fees are unaffordable that they can prevent access to justice. They can equally have that effect if they render it* ***futile or irrational*** *to bring a claim. …. Many claims which do seek a financial award are for modest amounts, as explained earlier. If, for example, fees of £390 have to be paid in order to pursue a claim worth £500 (such is the median award in claims for unlawful deductions from wages),* ***no sensible person*** *will pursue the claim unless he can be virtually certain that he will succeed in his claim, that the award will include the reimbursement of the fees, and that the award will be satisfied in full****. If those conditions are not met, the fee will in reality prevent the claim from being pursued, whether or not it can be afforded.*** *In practice, however, success can rarely be guaranteed. In addition, on the evidence before the court, only half of the claimants who succeed in obtaining an award receive payment in full, and around a third of them receive nothing at all.*

*97. As explained earlier, the statistical evidence relating to the impact of the Fees Order on the value of awards, the evidence of the Council of Employment Judges and the Presidents of the ETs, the evidence collected by the Department of*

*Business, Innovation and Skills, and the survey evidence collected by Acas, establishes that in practice the Fees Order has had a particularly deterrent effect on the bringing of claims of low monetary value. That is as one would expect, given the futility of bringing many such claims, in view of the level of the fees and the prospects of recovering them.*

1.9. The difficulty which faces any Employment Judge in a case where there arises a point of law, particularly a novel one of general public importance, and neither party has the knowledge to put forward argument upon it , is that he or she has little option but to formulate and consider an argument even if he or she then gives reasons for rejecting it . The wording of s23 (4) could be read as empowering the Tribunal to ask whether **objectively** there was a factor which made it not reasonably practicable for a hypothetical claimant to issue in time regardless of whether that factor had any influence on the acts and omissions of the claimant in the present case. In my view, the consistent case law for over three decades has not adopted that reading.

1.10. In Machine Tool Industry Research Association-v- Simpson 1988 IRLR 212, throughout the limitation period there were crucial facts reasonably unknown to the claimant . When he found out about them, he issued. Lord Justice Purchas said

*17.. applying the plain reading to the words of the section, for my part I see little difficulty in the view that fundamentally the exercise to be performed is a study of the subjective state of mind of the employee when, at a late stage, he or she decides that after all there is a case to bring before the Tribunal. There is no indication in the wording of the section that it is necessary for an applicant to be relieved of the strict time limit to establish, as facts, those facts which have caused a genuine frame of mind, and reasonably so caused it, to form a decision to present a complaint to the Tribunal out of time.*

*18 So one turns to look to see how the subjective state of mind must be approached.*

*19 In my judgment, the submissions made by Mr Ouseley are correct. They not only reflect the ordinary meaning of the section, to which I have just referred, but are supported by such authority as is available to this court. Mr Ouseley submitted that the expression 'reasonably practicable' imports three stages, the proof of which rests on the applicant. The first proposition relevant to this case is that it was reasonable for the applicant not to be aware of the factual basis upon which she could bring an application to the Tribunal during the currency of the three-month limitation period. Secondly, the applicant must establish that the knowledge which she gains has, in the circumstances, been reasonably gained by her, and that knowledge is either crucial, fundamental or important to her change of belief from one in which she does not believe that she has grounds for an application, to a belief which she reasonably and genuinely holds, that she has a ground for making such an application. I am grateful to adopt the summary of that concept in the words that Mr Ouseley used, that it is an objective qualification of reasonableness, in the circumstances, to a subjective test of the applicant's state of mind.*

*20 The third ground, which Mr Ouseley accepts is really a restatement of the first two, is that the acquisition of this knowledge had to be crucial to the decision to bring the claim in any event.*

1.11. In Biggs-v-Somerset County Council 1996 IRLR 203, the Court of Appeal had to consider a case where the claimant had not issued a claim of unfair dismissal in 1976 because, at the time, an employee who worked less than 16 hours per week, as she did, could not claim. The House of Lords in 1994 set that rule aside as incompatible with European Law, whereupon the claimant issued her claim. Lord Justice Neill said: "*It seems to me that in the context of …the Act, the words "reasonably practicable" are directed to difficulties faced by an individual claimant* "

1.12. The Unison case takes us into uncharted waters in many respects and neither Simpson nor Biggs are on all fours with the present case. Normally the "subjective" starting point favours claimants who may have reasons personal to them for not doing what other hypothetical claimants would. In this instance, as will be seen, it favours the respondent. However, I see nothing in the Unison decision to warrant departing from a line of Court of Appeal authority. For the unlawful fee regime to be a relevant consideration, it must have had an effect on the particular claimant's decision not to issue.

1.13. In my view then, there are three parts to the time limit issue: (a) what were the substantial causes of the claimant not issuing in time? (b) did fees, or any other factor, render it "not **reasonably** practicable" to issue in time? (c) if so, was the claim presented within such further period as the Tribunal considers reasonable?

1.14. I view point (c) as requiring consideration of two time "gaps". The first is between the date of the Supreme Court judgment on 26th July 2017 and the date of issue. Each case will depend on its own facts. Some claimants who have advice from lawyers or unions could reasonably be expected to have known of the judgment almost as soon as it was published. Litigants like the claimant may reasonably not have found out about it for several weeks.

1.15. The second time gap is between the date of the events to which the claim relates and the date of issue. Again, I emphasise each case will depend on its own facts. By analogy with the other time limit "extension" test in Equality Act 2010 cases of whether it is "just and equitable" to consider a claim presented more than three months after the date of the act complained of, key factors include the length of the delay and the extent to which the quality of the evidence has been impaired by the passage of time. Tribunals must be fair to both parties. The fee regime was in place for almost exactly four years. Some cases involve evidence which is mainly the recollection of witnesses as to what they did and why. Other cases depend largely on documentary evidence. If witnesses cannot be expected to remember events, or if documents have been discarded in the normal course of business, due to the passage of time, it may not be reasonable to consider a claim despite the fact the claimant is not to blame for the delay.

## 2 Findings of Facts and Conclusions

2.1. The claimant is a joiner. His pay was agreed as £12.50 per hour gross with premium rates for overtime. The respondent's case is he was dismissed on the day he was hired and did no work for it. The claimant says he started work on Monday 10th April at Sunderland University and worked there on every day until Sunday 23rd April. On Monday, 24th April he worked at the respondent's premises for 8 hours. He was told over the telephone while driving home he would not be used again. On his case, he was entitled to 148 hours pay which equates about £2000.

2.2. On issue (a), the claimant **knew by 2nd May** he was owed money, had not been paid and could issue a clai . He accepts **ACAS told him about time limits**. When I asked him whether he knew about fees, he unhesitatingly said he did not. He said ACAS did not tell him. From May to the date of issue, he did not realise he would have to pay a fee. Therefore, the unlawful fee regime cannot have been any part of his failing to issue in time.

2.3. I asked what his reasons were. He replied he had been unsettled by what had happened, had financial worries and responsibilities and was concentrating on finding other paid work. He did so by about early June and embarked upon EC. Although I accept he is not used to communicating by email, he used that means to commence EC so ACAS replied by e-mail. He said he did not check his emails regularly which delayed him seeing the EC Certificate but he could not tell me when he saw it. He must have known EC normally lasts 4 weeks so by mid July he knew he had to issue within a short time limit even if he did not work out he had until 10th August. Had he tried to do so after 27th July, he would not have been asked for a fee. I gave him every opportunity to give a reason other than fees which may have justified his lack of action in July and early August. He could give none. I was driven to conclude he simply did not get around to doing what any reasonable claimant would have, which was to issue in time. .

2.4. Had I reached issue (b), this case is a good example of the dilemma Lord Reed was addressing in the paragraphs quoted above. The claimant may have had to decide (a) whether he should risk expending issue and hearing fees to obtain a judgment (b) whether the respondent would be likely to pay the amount ordered. If, borrowing Lord Reed's terminology, the claimant had concluded it would have been" *futile or irrational*" to bring a claim at that time and "*no sensible person* "would have risked throwing good money after bad, that would have been a good argument. Remission applications, especially by people not on state benefits, and the claimant was not, were difficult. On issue (c) neither time gap is great. The claim was presented within five weeks of the Supreme Court judgment and relates to events which are documented in the current financial year.

2.5. However, in my judgment the claimant "falls at the first hurdle". I cannot see in the Supreme Court's decision any warrant for finding the mere existence of the unlawful fee regime can contribute to a finding it was not reasonable practicable to issue in time in a case where the claimant, on his own candid admission, was

unaware of , and thus uninfluenced by, that fee regime . I am therefore unable to consider his claim which must be dismissed.

**Employment Judge Garnon**

**JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON 4th DECEMBER 2017**