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EMPLOYMENT TRIBUNALS

Claimant: Mr R Wispy
Respondent: Proficient Security Limited
Heard at: East London Hearing Centre
On: 21 January 2019
Before: Employment Judge Foxwell

Representation

Claimant: Did not attend
Respondent: Mr M Cameron (Consultant)

JUDGMENT

The judgment of the Tribunal is that the Tribunal does not have jurisdiction to hear these claims and they are dismissed.

REASONS

1 On 9 October 2018 the Claimant, Mr Rian Wispy presented complaints of breach of contract and for unpaid wages, holiday pay and “other payments” to the Tribunal. He did not give his employment details as requested at box 5 of his claim form but it appeared from other parts of his claim that his employment had ended in 2016. The claim was accepted administratively by the Tribunal and served on the Respondent. At the same time Employment Judge Brown directed that this hearing take place to determine whether the Claimant’s complaints had been presented within the relevant statutory time limit. Notice of this hearing was sent to the parties on 29 October 2018.

2 The Respondent subsequently filed a response disputing the claim on the merits but challenging the Tribunal’s jurisdiction on the basis that the claims had been presented out of time. It also asserted that the claims were an abuse of process or subject to the doctrine of *res judicata* in that they had been the subject of proceedings in the County Court under case number DO5YJ101 and an earlier claim in the Employment Tribunal

under case number 3200047/2018. Employment Judge Gilbert reviewed the claim form and response and at her direction the parties were notified in Orders sent to them on 7 January 2019 that today's Preliminary Hearing would consider not only the jurisdictional issue of time but also whether the claim should be struck out as an abuse of process.

3 Immediately upon receipt of this notice the Claimant emailed the Tribunal saying that such a hearing was unnecessary. On the following day, 8 January 2019 he requested a postponement of today's hearing on the basis that he would be away and that he would need three months' notice of it to make the appropriate arrangements with work. This was referred to Employment Judge Gilbert who refused his application for a postponement by letter dated 11 January 2019. She pointed out that the original notice of hearing was dated 29 October 2018 so the Claimant had, in fact already had three months' notice although the requirement under the Rules is for 14 days' notice only.

4 The Claimant renewed his application for a postponement and this was considered by Employment Judge Goodrich who concluded that there was no material change in circumstances and that therefore the decision of Employment Judge Gilbert stood.

5 The Claimant has not attended this hearing today. I delayed the start by 15 minutes in case he was running late. I also asked the clerk to telephone his mobile telephone number but there was no reply despite two attempts. I have therefore proceeded with the hearing in his absence. The evidence that the Claimant is aware of today's hearing is overwhelming.

6 I deal firstly with the issue of time. The relevant time limit for a complaint of unlawful deduction from wages is contained in Section 23(3) of the Employment Rights Act 1996 which provides as follows:

“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”*

7 There are corresponding provisions in the Extension of Jurisdiction Order 1994 in respect of claims of breach of contract and under the Working Time Regulations 1998 in respect of claims for holiday pay. The requirement therefore is for a claim to be presented within three months of the unlawful deduction from wages, breach of contract or failure to pay holiday pay. Additionally, the last two claims can only arise upon the ending of an employee's employment (additionally on the ending of a worker's contract in the case of holiday pay).

8 These time limits are modified to a limited extent by the early conciliation provisions contained in the Employment Tribunals Act 1996. I note that the Claimant

began early conciliation in 2016 before bringing claim number 320047/2018. I note too that that claim was dismissed by Regional Employment Judge Taylor at a hearing on 17 May 2018 for the reasons that she subsequently provided to the parties in writing.

9 The primary time limit for presenting these claims can be extended where the Employment Tribunal is satisfied that it was not reasonably practicable for the complaint to be presented before the end of the relevant period of three months and provided that it has been presented within such further period as the Tribunal considers reasonable in all the circumstances (see, for example, Section 23(4) of the Employment Rights Act 1996). The burden of establishing the Tribunal's jurisdiction lies on the Claimant and, accordingly, to benefit from this provision he must show, firstly, that it was not reasonably practicable to present the claim in time and, secondly, that it has been presented within such further period as is reasonable in all the circumstances.

10 The Claimant's employment by the Respondent appears to have begun in May 2016 and ended on 17 August 2016. It follows that this claim has been presented some two years and two months after the end of his employment. This is substantially outside the primary time limit. The Claimant has provided no explanation for this delay and I cannot be satisfied therefore that it was not reasonably practicable to present the claim in time. For that reason alone I must dismiss the claims as falling outside the Tribunal's jurisdiction. Even if the Claimant had discharged the burden of proving this first element, however, I would have found it difficult to conceive how he would have proved the second, namely that the claim had been brought in such further period as was reasonable in the circumstances.

11 I am satisfied too that the claims are an abuse of process. They duplicate a claim presented to the County Court in March 2017; the Claimant's particulars of claim in those proceedings sought payment of unpaid salary, holiday pay and notice pay. This claim was struck out by the County Court with effect from 16 August 2018 under the terms of an order dated 23 February 2018. The Claimant presented claim 320042/2018 to the Tribunal on 8 December 2017, ticking the boxes at section 8 of his ET1 relating to unfair dismissal, redundancy payments, notice pay, holiday pay, arrears of pay and other payments. It follows therefore that this claim is the third set of proceedings relating to the same subject matter.

12 In neither case were the earlier proceedings resolved on their merits so there has been no determination of the underlying facts but the principle of finality in litigation requires parties to pursue their claims diligently. It is an abuse of process for a party to fail to do so and then bring the same claim repeatedly. I am satisfied therefore that the bringing of this claim is an abuse of process and, had the Claimant been able to satisfy me on the jurisdictional questions relating to time, I would nevertheless have struck out the claims for this reason.

13 For those reasons, therefore, the claims are dismissed.

Employment Judge Foxwell

28 January 2019