

EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: S/4100414/2018

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Held in Glasgow on 5 April 2018

Employment Judge: Mr P O'Donnell

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Mr V Kalamb

**Claimant
In Person**

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Claymore Contracting Services

**Respondent
Not Present and
Not Represented**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that the claim was presented outwith
25 the time limit set down in s23(2) of the Employment Rights Act 1996 and that it was
reasonably practicable for the claimant to have presented the claim within the
relevant time limit. In these circumstances, the Tribunal does not have jurisdiction
to hear the claim.

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REASONS

Introduction

1. The claimant has brought a complaint of unlawful deduction of wages. The
35 respondent did not submit an ET3; they did send an email in advance of the
deadline for submitting the ET3 making allegations about the claimant's right
to work in the UK and stating that they have been fined for allowing him to

work. They were asked by letter if they wished to have this email treated as further particulars of their ET3 but they did not reply to that correspondence.

2. It was identified when the claim was submitted that it was apparently lodged out of time and this issue was confirmed to the claimant in the Notice of Hearing dated 26 January 2018. It was explained to the claimant at the outset of the hearing that the Tribunal would have to determine whether the claim had been lodged in time and, if not, whether the Tribunal could exercise its discretion to hear the claim out of time before the substantive claim could be decided.

Postponement application

3. The Tribunal received an email dated 5 April 2018 from Alasdair Mitchell, managing director of the respondent. It stated that he was due to attend the hearing to represent the respondent but that he had been unwell during the night with coughing and vomiting. He made an application for the hearing to be postponed. No medical certificate accompanied the application.

4. The claimant opposed that application; he stated that a friend who had been assisting him in preparing for the hearing, whom he described as "Ben", had been in touch with the respondent on 3 April 2018 and they stated that the hearing would be adjourned. The claimant stated that he believed that the respondent never intended to appear at the hearing.

5. The Tribunal refused the application to postpone the hearing; the respondent had not submitted an ET3 and had not made any application under rule 20 for an extension of time to submit their response. In these circumstances, the respondent would not have been entitled to defend the claim had they been in attendance. The claimant had travelled from Wigan to attend the hearing incurring the time and expense of doing so. For these reasons, the Tribunal decided that the hearing would proceed.

The claimant's evidence

6. The claimant had produced a bundle of documents for the hearing. This included a witness statement which the claimant read out. He then gave further oral evidence in response to questions from the Tribunal.

5 7. In the course of giving his evidence, the claimant made reference to the following documents:-

a. A Work & Training Plan from Job Centre Plus

10 b. Correspondence from Seetec who provide the claimant with a work programme

c. A Notice of Receipt dated 18 April 2016 from HM Courts & Tribunals Service

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d. An email exchange between the claimant and Francesca Banyard of Clearfield dated 20 May 2016

20 e. A series of notes from the claimant's support worker at British Red Cross in August and September 2016

f. An email from Daniel Graham of Seetec to Gillian Hall of the respondent dated 2 September 2016

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g. A summary of the claimant's immigration history prepared by the Home Office

h. A grievance to the respondent dated 23 October 2017

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i. A grievance to the Home Office dated 16 October 2017

j. Correspondence to the Home Office dated 8 November 2016

- k. Wage slips from the respondent dated 21 August 2016 and 18 September 2016

Findings in Fact

- 5 8. The Tribunal makes the following relevant findings in fact:-
- 10 a. The claimant first worked for the respondent in May 2016. He was found the job through Clearfields which are an agency but he was employed directly by the respondent and was paid by them
- 15 b. He worked for them for only 3.5 days and had to leave because of issues with his housing situation. It appears that his landlord had locked him out of his accommodation and the claimant was homeless for a period of time, sleeping rough before living with a friend.
- 20 c. He commenced a further period of work with the respondent in August 2016. He attended an induction on 8 August 2016 and was paid for this day on 15 August 2016. He was paid weekly, a week in arrears.
- 25 d. He worked 8 hours a day and was paid £8.25 an hour.
- e. The claimant then worked for the respondent from 11 to 15 August 2016 (inclusive) and expected to be paid for this on 22 August 2016.
- 30 f. He attended work on 18 August 2016 but was told to stop work and call Clearfield. He was unable to do so as he had no credit on his phone.
- g. The claimant checked his bank balance on 22 August 2016 and found that he had not been paid for the week done from 11 to 15 August. He phoned the respondent and was told that the money would be in his account on 25 August. He was also offered further work that day

and on 25 August 2016. He attended work with the respondent on both days.

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h. The claimant checked his bank account on 25 August and found that the payment he had been expecting from the respondent had not been made. The claimant did not return to work for the respondent after 25 August. He has not been paid for the work done on 22 and 25 August 2016. He expected to be paid for these days a week after he had carried out the work.

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i. The claimant sought assistance from British Red Cross who contacted the respondent and spoke to Gillian Hall. She informed them that they could not pay the claimant as they would be fined by the Home Office if they did so. It appears that there was some issue with the claimant's right to work in the UK.

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j. The claimant is from the Democratic Republic of Congo. He has lived and worked in the UK for over a decade. It appears that he has a right to work in the UK because of his marriage to an EEA national. However, he also appears to have made unsuccessful applications for indefinite leave to remain in the UK and for asylum.

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k. An email was sent by Daniel Graham of Seetec to Gillian Hall on 2 September 2016 enclosing a notice of receipt in respect of the claimant's appeal to the Upper Tribunal.

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l. The claimant also spoke to Gillian Hall around the same time stating that if he was not paid for the work done then he would take them to court.

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m. The claimant was aware that he could bring a claim to the Employment Tribunal as he had pursued at least 2 claims against a previous employer. The claimant did not seek any advice from a solicitor, CAB

or other advice agency and informed himself of his rights by reading websites such as the ACAS website.

5 n. The claimant lodged a claim to the Employment Tribunal at some point in September, October or November 2016. He could not recall the precise date. This claim was rejected as the claimant had not complied with ACAS Early Conciliation. The claimant recalled receiving a letter from the Tribunal rejecting his claim but could not recall the date and did not have a copy of the letter.

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o. The claimant appealed the rejection of his claim to the Employment Appeal Tribunal. He appears to have lodged his appeal to the EAT in 2016 as it was registered under case number UKEATPAS/0047/16/JW but he could not recall the precise date. The claimant received a letter
15 rejecting his appeal. Again, he could not recall the precise date but believed it was in the Spring of 2017.

p. The claimant then submitted a grievance to the respondent on 23 October 2017. The claimant waited for a period for a response to this.

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q. The claimant commenced Early Conciliation on 15 January 2018 and ACAS issued the Certificate on the same day.

r. The ET1 was lodged on 19 January 2018.

25 **Relevant Law**

9. Section 13 of the Employment Rights Act 1996 (ERA) provides that an employer shall not make a deduction from a worker's wages unless this is authorised by statute, a provision in the worker's contract or by the previous
30 written consent of the worker.

10. Section 23(2) states that the Tribunal shall not consider a complaint of deduction of wages unless it is presented within 3 months of the date of

payment of the wages. Where there are a series of deductions then s23(3) states that the time limit runs from the last deduction in that series.

- 5 11. The Tribunal has discretion under s23(4) to hear a claim outwith the time limit set in ss23(2) and (3) where they consider that it was not reasonably practicable for the claim to be presented within the 3 month time limit and it was presented within a further period that the Tribunal considers to be reasonable.

Claimant's submissions

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12. The claimant included written submissions with the documents he provided at the outset of the hearing and supplemented these orally.

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13. He made reference to the original claim being lodged on time and being struck out for not following the right procedure.

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14. He asked the Tribunal to allow the case because he felt it was like a form of modern slavery and that he was being exploited by the respondent. He believed that the respondent had no intention of paying him and that this was clear from what had happened when Seetec and the British Red Cross had contacted them.

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15. He took issue with the assertions made by the respondent about his right to work in the UK. He made reference to the fact that they employed him on three separate occasions without any issue.

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16. The claimant stated that the whole process had caused him stress and he had found it very depressing to go over what had happened when preparing for the case.

Decision

17. The Tribunal finds that the claim was not presented within the relevant time limit under s23 ERA. The claimant did not receive the payment of wages which were due on 22 August, 29 August and 5 September 2016. The time limit for lodging a claim based on this series of deductions would have expired on 4 December 2016 and the claim was lodged on 19 January 2018.
18. The Tribunal considered whether or not it would exercise its discretion under s23(4) ERA to hear the claim out of time. For the reasons set out below, the Tribunal considered that it would not do so.
19. The Tribunal considered that it was reasonably practicable for the claim to have been presented in time. The claimant was aware of his right to bring the claim and that there were time limits for doing so. He appears to have researched his rights by going to the ACAS website and other internet resources but does not appear to have identified the need to contact ACAS before lodging his claim.
20. He did lodge a claim sometime in September to November 2016 which was in time. However, this claim was rejected because the claimant had not complied with the requirement to engage ACAS Early Conciliation before lodging his ET1.
21. The claimant could not recall the precise dates when he lodged the claim and when it was rejected. It is, therefore, not possible to say if he had time to remedy the rejection by obtaining an ACAS Early Conciliation Certificate at this time and re-submitting his claim before the expiry of any relevant time limit. However, what can be said is that he did not take this course of action and, instead, he brought an appeal to the EAT.
22. In these circumstances, the Tribunal considers that it was reasonable practicable for the claimant to have lodged his claim in time as he was capable of doing so and would have done so had he complied with the requirement to obtain an ACAS Early Conciliation Certificate. There was no explanation from

the claimant as to why he did not do this beyond the fact that he did not appear to be aware of this requirement.

- 5 23. Even if the Tribunal had been of the view that it was not reasonably practicable for the claim to have been lodged in time then it would not have exercised its discretion under s23(4) ERA because the Tribunal considered that the claim was not lodged within such further period as it considered reasonable.
- 10 24. The claimant received the rejection of his appeal to the EAT sometime in the Spring of 2017 but he did not take any further action until October 2017 when he lodged his grievance with the respondent. The claimant did not take steps to engage ACAS Early Conciliation (which was the issue which affected his first claim) until January 2018.
- 15 25. The claimant did not provide any explanation for the delay between the decision of the EAT and the action he took in October 2017. He did explain that he was waiting for the respondent to reply to his grievance before contacting ACAS and that was why he did not take this step until January 2018.
- 20 26. The Tribunal considered that length of time between the decision of the EAT and the further action taken by the claimant in October 2017 and January 2018 was not reasonable. The claimant gave evidence that he was aware of the time limits involved in bringing Employment Tribunal claims and would have received correspondence from the Tribunal when his first claim was rejected
25 clarifying this. A delay of 5-8 months in taking further action is not reasonable in the circumstances of the case.
- 30 27. In these circumstances, the claim being lodged out of time and the Tribunal not being willing to exercise its discretion to hear the claim out of time, the Tribunal does not have the jurisdiction to hear the claim.

28. In light of the decision on the time limit issue, the Tribunal has not considered the substantive issues regarding whether or not the claimant was subject to an unlawful deduction of wages.

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10 Employment Judge: P O'Donnell
Date of Judgment: 17 April 2018
Entered in register: 18 April 2018
and copied to parties

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