EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: S/4106552/2017

Held in Glasgow on 16 February 2018

Employment Judge: David Hoey

Mr Frank Hurles	**Claimant** **Represented by:** **Mr T Thomson**
Malatite Limited	**Respondent** **Represented by:** **Mr M Warren – Jones** **Solicitor**

JUDGEMENT OF THE EMPLOYMENT TRIBUNAL

The Tribunal was satisfied that it was not reasonably practicable to have lodged the claim in time but was not satisfied that the claim was presented within a period of time that was reasonable and so the claim is dismissed, the Tribunal having no jurisdiction to consider the claim.

REASONS

Introduction

1. This was a claim for unlawful deduction of wages with the Claimant represented by a friend, Mr Thomson, and the Respondent represented by a solicitor, Mr Warren-Jones.
2. At the start of the Hearing an agreed bundle of productions was presented with 51 pages, both parties having satisfied themselves that the productions

were authentic. An additional document was relied upon by the Claimant (during cross examination of the Respondent's Finance Director), a letter that he had sent to the Respondent, a copy of which was on his mobile telephone. The Respondent did not challenge the authenticity of the document but nothing turns on that letter.

3. The Respondent argues that the claim is time barred. The claim ought to have been lodged on 24 August 2017. It was not lodged until 23 November 2017. The Claim Form was therefore lodged just under 3 months late. In any event, the Respondent denies that the sums claimed are due.

Preliminary discussion

4. The Tribunal spent some time at the outset identifying with the parties precisely what was in dispute and what the issues to be determined by the Tribunal were.

5. The preliminary issue that arose was time bar. The Claimant accepted that the Claim Form had been lodged late and took no issue with the times as set out above. The Claimant argued that it was not reasonably practicable to have lodged the claim in time and that it was (in any event) lodged within a reasonable period of time. The Respondent argued it was reasonably practicable to have lodged the claim in time and in any event the claim had not been lodged within a reasonable time.

6. Time bar affected the jurisdiction of the Tribunal and the onus was on the Claimant to establish that the legal tests to allow the claim to proceed although late had been satisfied.

7. In light of the overriding objective, the need to deal with matters justly, and to act proportionately, it was agreed that the Hearing would also consider the merits of the claim. Parties had travelled some distance and it was consistent

with the overriding objective to hear on evidence on both the preliminary issue and the substantive issue.

8. Time was spent with the parties considering exactly what was sought by way of wages and why. The Claimant's position was that he was due 184 hours of overtime (not 190.5 hours as originally claimed). He argued these hours should attract a rate of time and a half (namely £18 per hour gross). The Respondent denied the claim in its entirety.

9. The Respondent stated in the Response Form Grounds of Resistance that "*the Claimant is put to strict proof*" of the hours claimed as they were not satisfied the Claimant had worked such hours. In any event the Respondent said, at best, any overtime hours should be paid at the normal rate (£12 per hour gross).

10. Evidence was heard from the Claimant and from Mr Clark, Finance Director of the Respondent, with the parties providing the Tribunal with submissions in light of the evidence that had been heard.

Issues

11. It was agreed that the issues to be determined by the Tribunal were:-

1. It being agreed that the Claim was lodged outwith the statutory timescale for raising a claim for unlawful deduction of wages, was it reasonably practicable to have lodged the claim within the statutory time period?

2. If not, was the claim lodged within such further period as the Tribunal considers reasonable?

3. If so, was the Claimant due to be paid in respect of 184 hours he claimed he had worked?

4. Was the payment for such hours to be £18 per hour (as maintained by the Claimant, at time and a half) or £12 an hour (as argued by the Respondent).

Findings in fact

12. The Claimant began his employment on 30 January 2017 with the Respondent as a Sign Erector.

13. The Claimant's employment ended on 26 May 2017.

14. The Claimant sought advice from ACAS around the middle of July 2017.

15. The Claimant was advised by ACAS to write to the Respondent seeking the sums he was due.

16. The Claimant wrote to the Respondent seeking payment and no substantive response was provided.

17. The Claimant understood he had to wait 3 months from the ending of his employment before he could progress his claim for payment (by which he understood to mean before he could commence early conciliation).

18. The Claimant was capable of searching the internet and sending emails at all material times.

19. The Claimant did not know that there was any time limit applicable to raising an Employment Tribunal claim for the payment of wages.

20. Upon speaking with ACAS in August 2017 the Claimant was told of the need for early conciliation and of time limits applicable to that procedure.

21. On Monday 20 September 2017 the Claimant was told by ACAS that he needed to commence early conciliation by completing the form by Friday 29 September 2017

22. The Claimant initiated early conciliation with ACAS on Wednesday 27 September 2017

23. ACAS issued an early conciliation certificate on 27 October 2017.

24. The Claimant took no action in relation to the raising of his claim for unlawful deductions until 23 November 2017.

25. The Claim was received by the Tribunal on 23 November 2017.

26. At the time the Claimant lodges his claim with the Tribunal he is not aware of the applicable time limits (and does not therefore know that it has been lodged late).

27. The Claimant was not given an initial statement of employment particulars by the Respondent within 2 months of his employment commencing, as required by section 1 of the Employment Rights Act 1996.

28. The Claimant was issued with an offer letter that set out some of the terms of his employment which was dated 24 January 2017.

29. That offer letter stated that: "*A rate of pay of £12.00 per hour, paid monthly in arrears on the 25th of each month is offered*".

30. As to hours of work the offer letter stated "*The hours are generally 8am to 430pm Monday to Friday, albeit those hours necessary to fulfil the position are expected*".

31. There is no reference in the offer letter to overtime (or any additional rate of pay for overtime).

32. The Claimant sent an email on 26 January 2017 formally accepting the offer as contained in the offer letter.

33. The Respondent was working on a large contract which was subject to time pressures which required the Claimant to work additional hours outwith the contractual hours contained within his offer letter.

34. The Claimant's line manager up to the start of May 2017 was Mr Healy.

35. When the Respondent required additional hours outwith the above hours, Mr Healy would ask the Claimant if he would work such hours.

36. Mr Healy, as the Claimant's manager, advised the Claimant in March 2017 that overtime would be paid at time and a half for each hour worked in excess of those in the offer letter.

37. Mr Russo who subsequently assumed the tasks that Mr Healy did, (upon Mr Healy's departure from the Respondent's employment in early May 2017), advised the HR department within the Respondent's business in an email dated 28 June 2017 that *"I think we would need to pay time & half for all OT regardless of which day it was worked*" in relation to the Claimant's claims.

38. During the first month of the Claimant's employment the Claimant did not work any overtime hours.

39. During the second month of the Claimant's employment, namely, March 2017, the Claimant was asked to work additional hours and the Claimant did work additional hours. The hours that he worked are those set out in the document at page 32.

40. The Claimant was due to be paid for these hours at the end of March 2017.

41. The Claimant was not paid for the overtime he worked in March 2017.

42. The Claimant spoke to Mr Healy and was advised that Mr Healy would arrange for payment to be made for the additional hours worked.

43. Mr Healy asked the Claimant to work additional hours in April 2017 to which the Claimant agreed.

44. The additional hours worked by the Claimant in April 2017 are those set out in the document at page 32.

45. The Claimant noted at the end of April 2017 that again his overtime had not been processed and that (in addition) his March overtime hours remained outstanding.

46. The Claimant spoke again to Mr Healy who repeated the assurances he had given the Claimant before that the Respondent would settle the sums outstanding.

47. At the start of May 2017 Mr Healy left the Respondent's employment.

48. Mr Healy had taken no steps internally to process payment of the additional hours the Claimant had worked (which had been agreed).

49. Mr Russo assumed the duties Mr Healy had previously discharged from early May 2017 in relation to the Claimant.

50. The Claimant spoke to Mr Russo about his outstanding wages in respect of his overtime hours and the Claimant was assured they would be paid by the Respondent.

51. The Claimant worked further additional hours in May 2017 as set out in the document at page 32

52. The additional hours worked in May 2017 were hours requested by and authorised by Mr Russo.

53. The Respondent did not pay the Claimant for the additional hours that he had worked for the months of March, April and May which totalled 184 hours.

54. The Claimant decided to leave the Respondent's employment on 26 May 2017.

55. Upon attending the Respondent's office on 26 May 2017, the Claimant sat down with one of the Respondent's office employees and using his diaries (which contained the hours he had worked) noted the precise number of additional hours he had worked by way of overtime that were outstanding, no payment having been made.

56. This list was typed up by an employee of the Respondent.

57. The Claimant's then line manager, Mr Russo, signed those hours off as accurate (which confirmed that the Claimant had in fact worked them).

58. At no stage during the Claimant's employment had anyone alleged the additional hours that were claimed were not worked by the Claimant.

59. The additional hours sought by the Claimant (as approved by his then line manager and Mr Russo) were sent ultimately to the Finance Director to authorise and pay.

60. The Finance Director was not satisfied the hours were worked, due to the absence of timesheets or clear express authorisation by Mr Russo (or Mr Healy).

61. The Finance Director was concerned that the amount of hours that were claimed seemed excessive and absent express authorisation (clearly consenting to payment for such hours explicitly) no payment would be made.

62. The Finance Director would pay for any overtime that was worked, provided he was satisfied that the hours were in fact worked

63. The Finance Director was not based at the office from which the Claimant worked and relied upon local managers expressly authorising any additional hours.

64. The Respondent did not operate timesheets at this time in respect of hours worked by the Claimant.

65. The Finance Director asked for one of his staff to seek additional evidence to support the additional hours worked.

66. Noone approached the Claimant seeking such further evidence (for example his diaries) nor to advise him that the payment would not be made.

67. Mr Russo in his email of 28 June 2017 noted that there were no timesheets to prove the hours that were worked.

68. The Respondent had an email from the Claimant's manager authorising the additional hours sought by the Claimant.

69. The specific hours sought by the Claimant were not challenged by the Respondent at the time.

70. The Claimant had escalated the nonpayment of his overtime by going to Mr Russo who had assured the Claimant he would be paid for the additional hours worked.

71. Time sheets have since been introduced into the Respondent's business to identify specific hours worked by each employee.

72. A colleague of the Claimant had worked overtime and been paid time and a half for the additional hours worked.

73. The Claimant had chased the Respondent for payment on a number of occasions following the ending of his employment, for example on 25 July 2017.

74. The Respondent refused to pay for the sums claimed on the basis that they were not satisfied the hours had been worked.

Submissions

75. The Claimant's representative said that it was not reasonably practicable to lodge his claim in time as the Claimant was entirely ignorant of the time limit. He had contacted ACAS and been told about early conciliation and had acted promptly in relation to that.

76. The Claimant contacted the Respondent repeatedly for payment but had been getting nowhere. The Claimant was exasperated and spoke to ACAS and followed their instructions.

77. The Claimant did lodge the claim in a reasonable time as he believed that there were no time limits. Had the Claimant been told of the timescales he would have complied. The Claimant could offer no explanation as to why

nothing happened between the issuing of the early conciliation certificate on 27 October 2017 and the lodging of the claim on 23 November 2017.

78. As to the sums due, the Claimant had worked the 184 hours in excess of his normal hours which had been evidenced via his work diaries which led to the typing up of the hours he was due. His manager had authorised his additional hours during each relevant month and advised him that he would be paid time and a half for such additional hours Mr Russo, his ultimate manager, at p36, accepted that time and a half was the correct rate for such hours.

79. The Respondent's position was that the hourly rate for any overtime was not agreed and even the Claimant was not clear as to this – seen from the Claimant's email at p39 and p43, where reference is made to the rate of pay still being undecided. That, said Mr Warren-Jones, showed that no agreement had been reached as to time and a half since the Claimant himself was not clear as to the rate.

80. The Respondent accepted that the Claimant had no idea as to the 3 month time limit and accepted the Claimant genuinely believed there were no time limits for lodging a claim. While Mr Warren-Jones did not refer to any authority on the applicable legal test, he argued that common sense should prevail. It was incumbent upon the Claimant to make some inquiries and it was unreasonable for him to assume there were no time limits in connection with lodging a claim, particularly when he was told there were time limits for early conciliation and the Claimant had access to emails, the Citizens Advice service and the internet.

81. Mr Warren-Jones said ignorance is no excuse and the question for the Tribunal is whether it is reasonable for the Claimant to have the belief he had. Common sense dictates that there would be some time limit for lodging the claim and the Claimant having been in touch with ACAS ought to have

challenged ACAS and sought specific information as to time limits, rather than simply assuming there was none.

82. Mr Warren Jones pointed out that the time limits are strict and the test for allowing a claim to proceed when it is lodged late is also strict. There was no explanation given by the Claimant why he waited almost a month from receiving the certificate to lodging his claim. The Claimant ought to have acted quickly upon receipt of the early conciliation certificate. The Claimant needs to show that he acted within a reasonable period. The fact that the Claimant did nothing for almost a month means that the time in which the claim was eventually raised was unreasonable.

83. As to the hours worked by the Claimant, Mr Warren-Jones accepted that if the Tribunal was satisfied from the evidence presented by the Claimant, that could not be challenged and 184 hours would be payable. As to the rate of pay, Mr Warren Jones pointed to the offer letter which stated the hourly rate (and the absence of any reference to time and a half).

84. Mr Warren-Jones also conceded that if the Tribunal found for the Claimant, it would be inevitable that a 2 week uplift would be applicable, in the absence of a section 1 written statement of employment particulars.

Relevant law

85. Section 13 of Employment Rights Act says:-

> "(*1*) *An employer shall not make a deduction from wages of a worker employed by him unless –*
>
> *(a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or*

(b) the worker has previously signified in writing his agreement or consent to the making of the deduction.

86. Section 23(1) of Employment Rights Act says:-

"*(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.

87. Section 38 Employment Act 2002 says:-

"(*1) This section applies to proceedings before an Employment Tribunal relating to a claim by an employee under any of the jurisdictions listed in Schedule 5.*

(2) If in the case of proceedings to which this section applies –

(a) the Employment Tribunal finds in favour of the employee, but makes no award to him in respect of the claim to which the proceedings relate, and

(b) when the proceedings were begun the employer was in breach of his duty to the employee under Section 1(1) or 4(1) of the Employment Rights Act 1996 (c 18) (duty to give a written statement of initial employment particulars or of particulars of change) [or under section 41B or 41C of that Act (duty to give a written statement in relation to rights not to work on Sunday)],

the tribunal must, subject to subsection (5), make an award of the minimum amount to be paid by the employer to the employee and may, if it considers it just and equitable in all the circumstances, award the higher amount instead.

(3) If in the case of proceedings to which this section applies –

(a) the employment tribunal makes an award to the employee in respect of the claim to which the proceedings relate, and

(b) when the proceedings were begun the employer was in breach of his duty to the employee under Section 1(1) or 4(1) of the Employment Rights Act 1996 [or under Section 41B or 41C of that Act],

the tribunal must, subject to subsection (5), increase the award by the minimum amount and may, if it considers it just and equitable in all the circumstances, increase the award by the higher amount instead.

(4) In subsections (2) and (3) –

(a) references to the minimum amount are to an amount equal to two weeks' pay, and

(b) references to the higher amount are to an amount equal to four weeks' pay.

(5) The duty under subsection (2) or (3) does not apply if there are exceptional circumstances which would make an award or increase under that subsection unjust or inequitable.

(6) The amount of a week's pay of an employee shall –

(a) be calculated for the purposes of this section in accordance with Chapter 2 of Part 14 of the Employment Rights Act 1996 (c 18), and

(b) not exceed the amount for the time being specified in section 227 of that Act (maximum amount of week's pay).

> *(7) For the purposes of Chapter 2 of Part 14 of the Employment Rights Act 1996 as applied by subsection (6), the calculation date shall be taken to be –*
>
> *(a) if the employee was employed by the employer on the date the proceedings were begun, that date, and*
>
> *(b) if he was not, the effective date of termination as defined by section 97 of that Act."*

88. Schedule 5 of the Employment Act 2002 sets out the jurisdictions to which Section 38 applies. This includes Section 23 of the Employment Rights Act 1996 (unauthorised deductions from wages).

89. What is reasonably practicable is essentially a question of fact for the Tribunal to determine. The onus of proving that presenting the claim in time was not reasonably practicable rests on the Claimant.

90. In **Palmer v Southend** [1984] IRLR 119 the Court of Appeal stated that "*reasonably practicable*" does not mean reasonable (on its own) but instead means "*reasonably feasible*". The question was whether it was reasonably feasible for the claim to be lodged within time,

91. On the question of ignorance of the law and ignorance of time limits for raising a claim, the Court has said (in **Porter v Bandridge** [1978] ICR 943 by majority) that the correct test is "*not whether the Claimant knew of his rights but whether he ought to have known of them*".

Decision

Was it reasonably practicable to have lodged the claim within the statutory time?

92. The parties accept that the Claimant did not know that there was any time limit applicable to his Employment Tribunal claim. The Tribunal requires to consider whether it was reasonable for the Claimant to have held this belief. The Claimant was told by ACAS that there were time limits applicable to early conciliation. The Claimant's evidence was that at no time did ACAS advise him that there were time limits applicable to his claim.

93. There are authorities which suggest that an employee who has knowledge of the right to make a claim ought to inquire as to the time limit applicable to such a claim (such as **Reed v Fraine** UKEAT/520/10). The Claimant was asked in cross examination whether he accepted that he had no knowledge of the time limit and that he made no attempt to find out. The Claimant said that he did not know that he had to look for any time limit. His position was that he took the word of the people in ACAS with whom he had spoken and none had suggested to him that he had to lodge his claim within any time period at all.

94. The Tribunal has to determine whether it was reasonably practicable to have lodged the claim within the statutory period when the Claimant was entirely unaware of the time period (and had been in contact with ACAS whom he believed not to have made reference to any such time period). For those reasons he made no inquiries as to time limits and had no reason to double check the position At this time the Claimant was still seeking payment from the Respondent of the sums due to him and was engaging in early conciliation.

95. In light of the findings in fact the Tribunal has determined that it was not reasonably practicable for the Claimant to have lodged his claim within the statutory time scale.

Was the claim lodged within a reasonable time?

96. The next question to determine is whether the Claimant lodged his claim in a time that was reasonable. The Claimant was unaware of any time limit and therefore saw no urgency in lodging a claim. Nevertheless lodging an Employment Tribunal claim is an important event and affects not just the Claimant, but also the Respondent (and others). The Claimant ought to act promptly and not unreasonably delay the lodging of any claim. There are good reasons why parties to litigation need to act promptly, not least given the effect the passage of time has on memory and given staff can move on.

97. The Claimant was unable to offer any explanation as to why no action took place between the date of the early conciliation certificate being issued on 27 October 2017 and the lodging of the claim on 23 November 2017.

98. The Tribunal has balanced all the factors in this consideration and decided that it was not reasonable for the Claimant to have waited until 23 November 2017 to have presented his claim.

99. The Claimant knew when the early conciliation certificate was issued on 27 October 2017 that the Respondent had decided to challenge his claims for payment. Payment would not be received unless action was taken by the Claimant. At that point the Claimant ought to have acted promptly to have enforced his rights for payment. Doing nothing for almost a month, with no explanation, is not reasonable.

100. The Tribunal has therefore decided that the claim was not lodged within a reasonable period of time and therefore the claim should be dismissed, it having no jurisdiction to determine the claim.

What sums were due to the Claimant?

101. Had the Tribunal decided that the Tribunal had jurisdiction to consider the merits of the claim, the Tribunal would have decided that the claim for unlawful deduction of wages was well founded.

102. The Claimant had done all he could to satisfy the Respondent as to the hours worked (which were hours the Claimant had been asked to do by his then managers). The Claimant had escalated non-payment by raising it with Mr Russo, who himself accepted the hours were due and that time and a half was the applicable rate. The Claimant had gone through his diaries to set out the hours he had worked, none of which were challenged at the relevant time.

103. While the Claimant's contract makes no reference to time and a half, the Claimant had been told this by his manager, whose successor had also agreed that time and a half was the appropriate rate for payment. The email sent by the Claimant suggesting the rate had not been agreed (at page 39) does not, in the Tribunal's view show the Claimant was not sure what rate was due. That email simply narrates the Claimant saying the Respondent had yet to pay at time and a half (which was the rate the Claimant had been told he would receive).

104. In the Tribunal's view it was not reasonable to refuse to pay for additional hours that the Claimant had worked, when no substantive challenge had been made to the hours being claimed at the relevant time. The issue would be resolved by introducing time sheets to ensure proper supervision and control of hours worked could be achieved, which has since been implemented.

105. Had the Respondent issued an initial statement of particulars, that would have set out the applicable rates (and procedure for payment) in respect of overtime.

106. Had the Tribunal been satisfied that it had jurisdiction to consider the claim, (which on the facts it was not), it would have issued a declaration that the Claimant had suffered an unlawful deduction in the sum of £3,312 (being £18 an hour multiplied by 184 hours) uplifted by a sum representing 2 weeks' pay (namely £960) in respect of the admitted failure to issue an initial statement of particulars.

107. The Tribunal thanked the parties' agents for their assistance in dealing with the issues arising in this case and in working together in compliance with the overriding objective.

108. As the Tribunal has no jurisdiction to determine the claim, it is dismissed.

Employment Judge: David Hoey
Date of Judgment: 22 February 2018
Entered in register: 06 March 2018
and copied to parties