Case Number: 1402543/2018

EMPLOYMENT TRIBUNALS

Claimant:	**Vanessa Cox**	
Respondent:	**National Probation Service**	
Heard at:	Southampton Employment Tribunal	**On:** Wednesday, 1st May 2019
Before:	Employment Judge Mr. M. Salter	

Representation:
Claimant: In person
Respondent: Ms. V. Webb, counsel

JUDGMENT

The Claimant's claim for breach of contract and unlawful deduction of wages have been presented to the tribunal out of time in circumstances where it was reasonably practicable for them to have been presented within the relevant time period. The Tribunal, therefore, has no jurisdiction to hear those claims.

REASONS

References in square brackets below are unless the context suggests otherwise to the page of the bundle. Those followed by a with a § refer to a paragraph on that page and references that follow a case reference, or a witness' initials, refer to the paragraph number of that authority or witness statement.

References in round brackets are to the paragraph of these reasons or to provide definitions.

INTRODUCTION

1. These are my reasons for the Reserved decision above.

2. The Employment Tribunal is required to maintain a register of all judgments and written reasons. The register must be accessible to the public. It has recently been moved online. All judgments and reasons since February 2017 are now available at: https://www.gov.uk/employment-tribunal-decisions. The Employment Tribunal

has no power to refuse to place a judgment or reasons on the online register, or to remove a judgment or reasons from the register once they have been placed there. If you consider that these documents should be anonymised in any way prior to publication, you will need to apply to the Employment Tribunal for an order to that effect under Rule 50 of the Tribunal's Rules of Procedure. Such an application would need to be copied to all other parties for comment and it would be carefully scrutinised by a judge (where appropriate, with panel members) before deciding whether (and to what extent) anonymity should be granted to a party or a witness.

BACKGROUND

The Claimant's case as formulated in her ET1

3. The Claimant's complaint, as formulated in her Form ET1, presented to the tribunal on 5th July 2018, is in short, she was made the subject of unlawful deduction from wages when the Respondent did not pay her in accordance with its policies for a period of sick leave from early until mid-2016 despite her requests, further the Claimant's application for an injury payment, made in October 2018 had not been resolved by the presentation of her claim.

4. The Claimant had applied for ACAS conciliation on 8th June 2018 and this ended the same day [13].

The Respondent's Response

5. In its Form ET3 [17], the Respondent disputed the payments were owed and took the point that the Claimant's claims had been presented out of time, her employment ending in October 2017, some 9 months before the presentation of her claim and some 8 months before she applied for ACAS conciliation.

Relevant Procedural History

6. After receipt of the Respondent's ET3 a Notice of Hearing [29] was sent to the parties listing the matter for Preliminary Hearing "to consider if claim (sic) was brought in time and, if not, whether time should be extended" , it was given a two-hour time estimate.

7. This time allocation was extended by Notice of Amended Preliminary Hearing [32] to take into account the Respondent's request that the tribunal consider that the

matter be struck out in accordance with r37 of Schedule 1 of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013 ("the 2013 Rules"), or made the subject of a deposit order under r39 of the 2013 Rules.

8. By an email to the Tribunal, copied to the Respondent, on the 18th September 2018 [additional document 3] the Claimant clarified her claim to the employment tribunal, namely her claim in relation to SLE covered the period 14th January 2016 until 15th July 2016, and that her claim in relation injury award was because she still had not received an outcome to her application.

THE PRELIMINARY HEARING

General

9. the matter came before me for that Preliminary Hearing. The Claimant represented herself and the Respondent was represented by Ms. Webb of Counsel

Litigant in person

10. The Claimant represented herself and I explained to her that although I had obligations to ensure she was not disadvantages in the process before me, it was not up to me to run her case for her and that she should put before me all evidence and submissions she wanted me to consider when making my decision.

DOCUMENTS AND EVIDENCE

Witness Evidence

11. As would be expected in a hearing considering these issues, I only heard evidence from the Claimant, the Respondent did not call any live evidence. Both parties produced a statement from Mr. Duncan Ireland but he did not attend to give evidence.

12. Both the Claimant and Mr. Ireland gave evidence by way of written witness statements that were read by the me in advance of hearing oral evidence. The Claimant was cross-examined.

Bundle

13. To assist me in determining the matter I have before me today an agreed bundle consisting of some 94 pages prepared by the Respondent. There were three other documents added by the Claimant at the outset of the hearing. I placed these at the back of the bundle and identify them as "Additional Document 1, 2 or 3".

14. My attention was taken to a number of these documents as part of me hearing submissions and, as discussed with the parties at the outset of the hearing, before commencing their submissions, I have not considered any document or part of a document to which my attention was not drawn. I refer to this bundle by reference to the relevant page number.

SUBMISSIONS

Respondent

15. The Respondent prepared a written skeleton argument and so it is unnecessary to repeat its contents here as it is in writing. Ms. Webb made submissions emphasising elements of her written submissions.

Claimant

16. The claimant made oral submissions which I have considered with care, in short she said that the situation was “farcical’ that it had taken so long and still she did not have a resolution to her application. She told me that’s he had been advised that the time limits contained within the relevant statute or regulations were “guidelines” only.

MATERIAL FACTS

General Points

17. From the evidence and submissions, I made the following finding of fact. I make my findings after considering all of the evidence before me, taking into account relevant documents where they exist, the accounts given by the Claimant in evidence, both in her statement and in oral testimony. I have also considered both of Mr. Ireland’s statements. Where it has been necessary to resolve disputes about what happened I have done so on the balance of probabilities taking into account my assessment of the credibility of the witnesses and the consistency of their accounts with the rest of the evidence including the documentary evidence. In this decision I do not address every episode covered by that evidence, or set out all of the evidence, even where it is disputed.

18. Matters on which I make no finding, or do not make a finding to the same level of detail as the evidence presented to me, in accordance with the overriding objective reflect the extent to which I consider that the particular matter assisted

me in determining the identified issues. Rather, I have set out my principle findings of fact on the evidence before me that I consider to be necessary in order to fairly determine the claims and the issues to which the parties have asked me to decide.

<u>The Respondent's Policies</u>

19. The Respondent operates a policy for sick pay in which employees with the Claimant's length of service are entitled to 6 months full pay whilst absent from work on grounds of sickness and then a further six-months on half pay [82 §1].

20. If sickness or injury is caused whilst at work then the employee can apply for Sick Leave Excusal ("SLE"), and if successful up to 182 calendar days are removed from the employee's record for sick pay proposes and any attendance process [75, 94]. The scheme is clearly discretionary, the wording of the policy states:

> *"Someone who…is injured whilst at work <u>may</u> qualify for sick leave excusal. <u>If</u> excusal is granted all sick leave, up to a maximum of 6 months (182 calendar days), relating to that injury…is removed from reckoning against the individual's sick leave record for sick pay purposes and excluded from consideration under the Unsatisfactory Attendance procedures."*
>
> My emphasis

21. It should be noted that the above is from the 2017 Scheme, but it was accepted that it contained the same language as the 2014 scheme in place when the claimant applied

22. Once SLE has expired an employee can apply for an injury allowance and, if their application is granted, then an award can be made.

<u>The Claimant's Employment</u>

23. The Claimant was employed from 16th November 1996 [4 §5.1] by the Respondent until her dismissal on grounds of medical incapacity effective 16th October 2017 [56].

24. The Claimant had an accident at work on 7 July 2015 [43], after which she was absent from work for 31 working days until 18 August 2015 [44]. The Claimant was then absent from work from 30th September 2015. She did not return until her

dismissal on 17 July 2018 for medical incapacity. The dismissal as on notice and so her employment ended on 16th October 2017 [56].

25. In accordance with the Respondent's policies the Claimant received full pay until mid-January 2016 [40] and then half-pay until the 15th July 2016. From 19th July 2016 the claimant's absence was unpaid [52].

26. In the lead up to her dismissal she had raised on a number occasions her entitlement to SLE [43, 53] and it is admitted that it was not progressed by the respondent for a variety of reasons [69], none of which were the Claimant's fault.

27. Throughout the progress of her application she was supported by Mr. Duncan Ireland, as well as a solicitor who was advising her on a personal injury claim arising from her fall on 7th July 2015.

28. Just before the Claimant's employment ended she discovered that "I maybe (sic) entitled to an injury award" (see email 16th October 2017) and on the 18th October 2017 the Claimant made an application for an injury award [additional document page 1]. She has still not received an outcome of this application.

29. I am told the Claimant started making enquires as to her rights "some months" before the emails on [59] that are dated February 2018

30. The Claimant accepted in evidence she understood that the three-month deadline for presentation of a claim would have expired in January 2018, but at the time did not know of the limitation period.

31. She explained in evidence that nothing had really changed in the situation relation to her SLE application from during her employment to the date she presented her claim.

THE LAW

<u>Statute and Regulations</u>

32. So far as is relevant the Employment Rights Act 1996 states:

> **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)),

…

(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.

33. The Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 states:

3 Extension of jurisdiction

Proceedings may be brought before an [employment tribunal] in respect of a claim of an employee for the recovery of damages or any other sum (other than a claim for damages, or for a sum due, in respect of personal injuries) if—

…

(c) the claim arises or is outstanding on the termination of the employee's employment.

7 Time within which proceedings may be brought

[Subject to article… 8B, an employment tribunal shall not entertain a complaint in respect of an employee's contract claim unless it is presented—

(a) within the period of three months beginning with the effective date of termination of the contract giving rise to the claim, or

…

(c) where the tribunal is satisfied that it was not reasonably practicable for the complaint to be presented within whichever of those periods is applicable, within such further period as the tribunal considers reasonable.

<u>Authorities</u>

34. Both the breach of contract and unlawful deduction from wages jurisdictions have a discretion to extend time if the claimant can show that, firstly, it was not reasonably practicable for the claimant to have presented her claim in time and, if it was not reasonably practicable, she has presented her claim within a reasonable period thereafter.

35. Guidance as to how to apply this test has been provided in a number of cases including Palmer and Saunders v Southend-on-sea Borough Council [1984] IRLR 119 where May LJ stated:

> "to construe the words 'reasonably practicable' as the equivalent of reasonable is to take a view too favourable to the employee. On the other hand 'reasonably practicable' means more than what is reasonably capable physically of being done…in the context in which the words are used in the [1996 Act]…they mean something between the two. Perhaps to read the word 'practicable' as the equivalent of 'feasible'…and to ask colloquially and untrammelled by too much legal logic – was it reasonably feasible to present the complaint to the [employment] tribunal within the relevant three-months?..."

36. IN Walls Meat Co Ltd v Khan [1978] ICR 52 Brandon LJ noted:

> "the performance of an act, in this case the presentation of a complaint, is not reasonably practicable if there is some impediment which reasonably prevents, or interferes with, or inhibits such performance."

CONCLUSIONS ON THE ISSUES

Approach to the Question

37. It is for the Claimant to prove that it was not reasonably practicable to have brought her claim in time.

38. For the reasons I set out below I consider that both of the Claimant's claims have been presented out of time, and the Claimant has not satisfied me that it was not reasonably practicable for her to have presented her claims in time. Accordingly, the tribunal has no jurisdiction to consider them.

39. Owing to the lack of jurisdiction it has not been possible for me to consider the merits of the claims and so nothing I say below should be considered as a determination or assessment on the merits of any claim.

SLE Application

Is the Claim in time:

40. The Claimant's application for SLE covers the period to mid-July 2016, this would appear to be the last of the deductions complained of. The Claimant did not present her ET1 until some two-years later.

41. If this claim were presented as a breach of contract claim then, for the purposes of the tribunal's jurisdiction the limitation period would commence on the effective date of termination, namely 16th October 2017. Accordingly, limitation would expire (subject to any alteration by ACAS mandatory conciliation) on 15th January 2018.

42. The Claimant did not seek ACAS conciliation until 8th June 2018. Conciliation ended on that day.

43. The Claimant presented her claim on 5th July 2018 [1]. Therefore, however the claim is formulated, I find that the claim has been presented out of time. In fairness to the Claimant she did not seek to argue that her claim has been presented within time.

Reasonable Practicality

44. I remind myself that the question for me is not one of whether the Claimant has acted reasonably when not presenting her claim, but rather whether it was reasonably practicable for her to have presented her claim in time.

45. I find that it was.

46. I do so for the following reasons:

    a. Whilst the claimant has informed me she was unwell, she accepted in evidence there was nothing resulting from her illness that prevented her from presenting a claim in time or from conversing with the Respondent about this matter, I therefor consider there was no impediment to her presenting a claim for this reason;
    b. The claimant was aware of the factual basis upon which her claim or complaint could be based within the relevant time limit and she confirmed in evidence that the factual circumstances had not changed since her employment, she was therefore not, I find, ignorant of a fundamental fact in her claim;
    c. the Respondent did not deceive or mislead the claimant in anyway;
    d. I have seen reference in the documents to the Claimant having access to sources of legal advice throughout, in the form of a solicitor [62] in May 2018, and CAB [65] again in May 2018, that is one month prior to her ACAS application and a further month before she entered her ET1. Further, in evidence, the Claimant confirmed she was receiving the assistance of a

solicitor during her time in employment, albeit in relation to her personal injury claim.

47. I did consider whether the Respondent's failure to deal wither application for SLE for a considerable period of time was a factor which could permit me to exercise my discretion. For the reasons above I do not consider that it was: the Claimant candidly accepted nothing had changed since her employment ended as her application was still pending, and I had heard nothing that could or did amount to deception by the Respondent or them misleading her in anyway.

48. I therefore concluded that it was reasonably feasible for the claimant to have presented a claim form to the tribunal by the end of the relevant limitation period.

49. Having determined this I am not required to consider whether the Claimant had presented a claim within a reasonable period thereafter.

<u>Injury Application</u>

50. For the reasons given above I consider that this application to the tribunal has been presented out of time.

51. If I were wrong on this then, in any event, the tribunal would not have jurisdiction to consider the claim if presented as a breach of contract claim as the claimant has not had an outcome to her application, therefore any breach of contract cannot be said to arise out of, or exist at, the time of the Effective Date of Termination (Art 3(c) of the Extension of Jurisdiction Order).

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Employment Judge Salter

Date Tuesday, 21st May 2019