

mf



EMPLOYMENT TRIBUNALS

Claimant: Miss L Fezari

Respondent: The Urban Chocolatier Whitechapel Ltd

Heard at: East London Hearing Centre

On: Monday 20 May 2019

Before: Employment Judge Jones

Representation

Claimant: In person (accompanied by her husband, Mr Tossou-Ayayi)

Respondent: No appearance or representation

JUDGMENT

1. The claim was not presented within the relevant time limit.
2. It was not reasonably practicable for it to have been presented within the time limit and it was presented within a further reasonable period.
3. The Tribunal has jurisdiction to consider the complaint of unlawful deduction of wages.
4. The Tribunal awards the Claimant the sum of £730.44 as her remedy in this matter as that is the total sum of the wages due to her.
5. The Respondent is ordered to pay to the Claimant the sum of £730.44 forthwith.

REASONS

1. The Claimant issued a complaint on 28 January 2019 that she had not been paid all wages due to her by the Respondent. The Claimant was employed by the

Respondent from 30 June 2018 to 1 September 2018. The Respondent failed to respond to the claim within the time set out by the Tribunal in the Notice of Claim dated 7 March 2019.

2. The Respondent has not made a response to the claim.
3. The Notice of Claim also notified the Respondent that the matter would be heard today, 20 May, by a Judge of the Employment Tribunals. There was no communication received from the Respondent and they did not attend today's hearing.
4. The Tribunal wrote to the Claimant to notify her that as her claim appeared to have been issued late the Tribunal would have to determine whether the claim could proceed before it went on to consider the actual claim.
5. The Claimant gave sworn evidence to the Tribunal today. She was also able to provide the Tribunal with copies of text messages she sent to the Respondent. The Tribunal had the ACAS certificate provided to the Claimant which confirmed that Day A was 28 November and Day B was 29 November 2018.
6. The Tribunal considered the following law in deciding this case.

Law

7. Section 13 of the Employment Rights Act 1996 (ERA) stipulates that an employer can only make deductions from wages of a worker employed by him if the deduction is required or authorised by statute – such as taxation; or where the worker has previously signed a written agreement or consent to the deduction. An employer can also deduct in respect of an overpayment of wages as set out in section 14.
8. Section 23 of the ERA stipulates that a worker must present a complaint to the Employment Tribunal within 3 months of the date that the payment of wages was due. 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.
9. Section 207B ERA deals with the effect of the ACAS conciliation process on the time limits for issuing claims. 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. If a time limit would have expired between Day A and a month after Day B then the time limit expires at the end of that period. Where the Employment Tribunal has power to extend a time limit set by a relevant provision under this Act, the power is exercisable in relation to the extended time limit.
10. How does a tribunal decide whether it was reasonably practicable to present a claim in time? And if not, what is a reasonable time thereafter?
11. The law states that the question of what is or is not reasonably practicable is essentially one of fact for the Employment Tribunal to decide. In the case of *Walls Meat Co Ltd v Khan* [1979] ICR 52 CA Lord Denning explained the test like this:

"It is simply to ask this question: had the man just because or excuse for not presenting his complaint within the prescribed time? Ignorance of his rights -- or ignorance of the time limit -- is not just cause or excuse unless it appears that he or his advisers could not reasonably be expected to have been aware of them. If he or his advisers could reasonably have been so expected, it was his all their fault and he must take the consequences".

12. The matter was again part of the decision in the case of *Palmer and Saunders v Southend-on-Sea Borough Council* [1984] 1 All ER 945. In that case May LJ reviewed the authorities and stated as follows: *"reasonably practicable" means more than merely what is reasonably capable physically of being done..... 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?"-- Is the best approach to the correct application of the relevant subsection".*

13. In the case of *Schulz v Esso Petroleum Ltd* {1999} IRLR 488 it was stated by the Court of Appeal that the Tribunal must answer this question against the background of the surrounding circumstances and the aim to be achieved. This is what the "injection of the qualification of reasonableness" requires.

14. The facts of this case require the Tribunal to consider the effect of the involvement of the ACAS officer on the late filing of the claim. Of assistance may be the principle outlined in the case of *Dedman v British Building and Engineering Appliances* [1974] 1 All ER 520 at 526, in which Lord Denning MR stated (at 381):

"If a man engages skilled advisers to act for him — and they mistake the time limit and present [the complaint] too late — he is out. His remedy is against them."

15. In the *Wall's Meat* case referred to above, Brandon LJ stated that whilst ignorance of, or a mistaken belief regarding the time limit could mean that it was not reasonably practicable to present the claim in time, that is provided the ignorance or mistaken belief was itself reasonable. Neither state of mind will be reasonable:

" ... if it arises from the fault of the complainant in not making such inquiries as he should reasonably in all the circumstances have made, or from the fault of his solicitors or other professional advisers in not giving him such information as they should reasonably in all the circumstances have given him'

16. In subsequent cases what has been held to be relevant is not whether the adviser had been engaged by the Claimant to give legal advice or the particular skill or qualification of the adviser by what were the circumstances taken as a whole, which caused the claim to be issued late.

17. Where the claimant satisfies the Tribunal that it was not reasonably practicable to present her claim in time, the Tribunal must then go on to consider whether it was presented within a reasonable time thereafter. In making this assessment the Tribunal must exercise its discretion reasonably and with due regard to the circumstances of the

delay. The Tribunal has to look at the particular circumstances of each case and make a decision.

18. In the case of *James W Cook & Co. (Wivenhoe) Ltd v Tipper (1990)* IRLR 386 – a period of two weeks was held to be reasonable and in the case of *Walls Meat* referred to above, four weeks was held to be reasonable, on the particular facts of that case.

Findings of fact

19. The Tribunal found the following facts from the evidence in this case.

20. The Claimant started work at the Respondent as part of the 'back of house' team on 30 June 2018. She frequently worked late and had to clean up after the shop closed. This meant that she frequently left work at 3am. The Respondent runs dessert cafes, one of which is situated in Whitechapel where the Claimant worked.

21. The Claimant was employed for two months. She was paid at the rate of £7.38 per hour. At the end of the first month she was paid some of her wages but there was a shortfall of £169.56. During the second month the Claimant worked 76 hours. She was due £560.88. The total amount due to the Claimant is £730.44.

22. The Claimant decided that she could no longer continue to work for the Respondent if she was not going to be paid and she left the job. The Claimant got into difficulty with her rent and was evicted from her home. She was unable to pay her rent because of the Respondent's decision not to pay her wages on time or at all.

23. The Claimant secured new employment and started work on 3 September 2018.

24. The Claimant sent text messages to the manager called Shawan, who told her to wait and that she would be paid. She therefore did not take action immediately upon leaving the job. She also sent text messages to someone she knew as Wax although she was not sure of the spelling. She waited as she was told to.

25. The Claimant sought advice from the Romford CAB sometime in October. She was told to contact ACAS and duly did so. The Claimant was advised by ACAS that she had been allocated Barry Hamilton as her ACAS advisor. He was to call her and her husband within one week. That did not happen but eventually, Mr Hamilton did get in touch and issued the ACAS certificate on 29 November.

26. The Claimant and her husband, Mr Tossou-Ayayi are both French nationals. The Claimant had only been in the UK for a few months at the time that she was working for the Respondent and was not aware of UK employment rights. Although Mr Tossou-Ayayi had at the time, been here for 3 years, he was also not aware of UK employment rights. His English is a little better than the Claimant's but he is not a fluent English speaker. The Claimant speaks little English and her husband did his best to translate for her during today's hearing.

27. Mr Hamilton told the Claimant that she should not issue the claim and that he

would get the outstanding wages for her. He was confident that he would succeed in conciliating this matter for her. However, after the certificate was issued, the Claimant and her husband, James Johnathan Toussou-Ayayi, continued to experience difficulties in contacting Mr Hamilton on the telephone. He had assured them that he would sort this matter out for them and that he was their conciliator. They wanted to speak to him to find out what was going on. They waited for him to give them feedback.

28. They managed to speak to him on 10 January. He advised that it was too late to go to court and that the time had passed. He advised them that they should not take the case to the Tribunal and that he would try to find a solution. The Claimant did not know what he was going to propose. After 10 January, the Claimant became concerned that her claim was late and tried to contact the Employment Tribunal herself by telephone. Eventually, they managed to speak to someone at the Tribunal offices and found out what to do. The claim was issued on 28 January.

29. The Claimant was clear that she was always keen on bringing this case and that if she had been aware of the three-month deadline she would have issued within the time. Neither the advisor at the CAB or Mr Hamilton told her about the statutory time limit at the time that she consulted them. Her evidence was that Mr Hamilton only discussed time limits with her after the time limit had passed.

Decision

30. As the Claimant's employment terminated on 1 September 2018 the wages were due on that day. A period of time within 3 months of 1 September is 30 November. Adding the ACAS conciliation period of 1 day means that the limitation period expired on 1 December before the application of Section 207B ERA. Applying that section, which in effect, means adding a further month, means that the limitation period expired on 29 December 2018.

31. The claim was issued on 28 January which means that it was issued 30 days late.

32. Was it reasonably practicable for it to have been issued in time?

33. There are three factors that operated against the Claimant in this case. One was her unfamiliarity with the English language which would have hampered her ability to do things like searching the internet for information on her employment rights when she found out that she had not been paid and was unlikely to be paid by the Respondent. It may also have hampered her understanding of what she was told by the CAB when she sought their advice.

34. Secondly, from her evidence it is likely that all that happened at the CAB was that she was signposted to ACAS rather than being given advice.

35. The third factor was the involvement of ACAS. It is this Tribunal's judgment that Mr Hamilton was not a skilled or otherwise advisor engaged by the Claimant to give her legal advice. ACAS is an independent government body with the remit to provide free and impartial information and advice to employers and employees on all aspects of workplace relations and employment law. They provide training to employers. They

also offer a mandatory individual conciliation service when there is conflict between employer and employee. This service must be used by the employee before she can issue proceedings in the Employment Tribunals. ACAS can continue to provide conciliation services after the certificate is issued and right up to the hearing date, if appropriate.

36. It is this Tribunal's judgment that in her ignorance of UK employment rights and the difficulties she would have faced making those enquiries herself on the internet, it was reasonable for her to rely on her conversations with Mr Hamilton as giving her direction as to how she should go about getting an order to the Respondent to pay her wages.

37. If the Claimant had been aware of the three-month time limit it was clear from her evidence in the hearing that she would have complied with it. The Claimant has always been, as shown by the existence of text messages to the Respondent, clear that she was owed wages and that those wages should be paid by the Respondent. Once she realized in October that the Respondent was not going to pay her wages she was clear that she wanted to take action in the appropriate court to get her wages paid.

38. The Claimant was not given advice by the CAB. Mr Hamilton assured her that he would be able to resolve the matter. It may be that due to pressure of work he was unable to get back to her within sufficient time for her to issue the complaint in time. He issued the certificate within one day but it is highly unlikely that he advised her on the urgency of then issuing her claim in the Employment Tribunal.

39. The Claimant was ignorant of her rights and that ignorance was not dispelled by her contact with the CAB or with ACAS. Her ignorance does not arise from the failure of professional advisers as she did not have any professional advisers. It may have arisen from her not making enquiries of the internet on her employment rights but given the difficulties that would have arisen had she done searches on the internet in her understanding what was written there as she is not an English speaker; it is this Tribunal's judgment that it was reasonable for her to rely on the advice and assistance she was getting from Mr Hamilton of ACAS.

40. It is this Tribunal's judgment that it was likely that as it was simply a matter of unpaid wages, Mr Hamilton considered that he would be able to resolve the matter without the Claimant having to go to Tribunal. The Tribunal did not hear from Mr Hamilton today but as he delayed for some time before issuing the certificate if he saw the Claimant in October, it is the Tribunal's judgment that he was either busy or on leave or considered that this was a matter that he could resolve swiftly and therefore was not urgent. The certificate was not issued until 29 November and the first unsuccessful contact with the Respondent was only 1 day earlier, on 28 November.

41. The Claimant, being still unaware of the approaching deadline of 29 December relied on Mr Hamilton's assurances that he would resolve the matter for her and that she should not yet issue in the Tribunal. Once she was able to speak to him on 10 January and realised that the time limit had passed, she took action and issued her claim once she found out how to do so.

42. It is this Tribunal's judgment that in the particular circumstances: where English is not the Claimant's first or familiar language which would mean that it would be difficult to do her own research on her UK employment rights, where the CAB did not give her any advice, where she did not engage her own advisers and where the only person who did give advice told her not to issue as he would resolve the matter; it was reasonable for her to rely on what the ACAS officer told her. She is able to use the escape clause as Mr Hamilton is not a skilled legal adviser engaged by her. It is this Tribunal's judgment that was not reasonably practicable for her to have issued her claim in time.

43. It was not until 10 January 2019 that the Claimant was told of the three-month time limit and that it had passed. She sensibly did not listen to Mr Hamilton anymore when he told her that she should not issue and leave the matter with him. She made her own enquiries and found out about the Employment Tribunal and the forms that need to be completed in order to bring the claim. She completed the form online herself with her husband's assistance. There are the briefest of details on the form which is likely to be because of the language difficulties the Claimant and her husband experienced in putting any more details there.

44. It is this Tribunal's judgment that they acted as quickly as they could once they were told on 10 January that they were now out of time. It is the Tribunal's judgment that the fact that the Claimant still issued her claim when Mr Hamilton advised her against doing so demonstrates that she would have issued in time had she known of the time limits and that she always intended to issue her claim.

45. It is this Tribunal's judgment that the Claimant had to make telephone calls to the Employment Tribunal offices and then once directed to the right website, had to go online and complete the ET1 form and submit it. This took her two weeks as the 10 January was a Thursday and the claim was issued on Monday 28 January. In the circumstances, it is this Tribunal's judgment that 2 weeks is a further reasonable time.

Judgment

46. The claim was not presented within the relevant time limit.

47. It was not reasonably practicable for it to have been presented within the time limit and it was presented within a further reasonable period.

48. The Tribunal has jurisdiction to consider the complaint of unlawful deduction of wages.

49. There is no defence to the claim. The Claimant has worked and is therefore entitled to her outstanding wages.

50. The Tribunal awards the Claimant the sum of £169.56 plus £560.88 = £730.44. The total amount due to the Claimant is £730.44. The total remedy awarded to the Claimant is the sum of £730.44 as her remedy in this matter as that is the total sum of the wages due to her.

51. The Tribunal make no award in respect of the stress caused to the Claimant by being evicted due to failure to pay her rent. The Tribunal had no jurisdiction to do so.

52. The Respondent is ordered to pay to the Claimant the sum of £730.44 forthwith.

Employment Judge Jones

3 June 2019