



EMPLOYMENT TRIBUNALS

Claimant

Mr R Jambaya

Respondent

v Avenues Trust River House

OPEN PRELIMINARY HEARING

Heard at: London South

On: 6 June 2019

Before: Employment Judge Truscott QC

Appearances:

For the Claimant:

in person

For the Respondent:

Mr R Kohanzad of Counsel

JUDGMENT on PRELIMINARY HEARING

1. The claimant's does not have the qualifying period required by section 108(1) of the Employment Rights Act 1996 (ERA) to claim unfair dismissal, accordingly the Employment Tribunal has no jurisdiction and his claim is dismissed.
2. The claims for £105 and £60 in respect of a mobile phone do not constitute "wages" for the purposes of section 13 of the Employment Rights Act 1996, accordingly the Employment Tribunal has no jurisdiction and the claims are dismissed.
3. In any event, the claims under section 13 of the ERA were presented outside the primary time limit contained in section 23(2) of the Employment Rights Act 1996 as amended by the early conciliation provisions.
4. It was reasonably practicable for the claim to be presented within the primary time limit.

REASONS

Preliminary

1. This case has been listed for a Preliminary Hearing to determine whether the Tribunal has jurisdiction to hear the claimant's unfair dismissal and unlawful deduction of wages claims.

2. The respondent submitted that the proper questions for the ET to determine are:

- I. did the Claimant have sufficient service with the Respondent to bring an unfair dismissal claim?
- II. are any of the Claimant's claims out of time;
- III. if so, was it reasonably practicable for him to bring his claims within the time limit; and
- IV. if not, did he bring his claims as soon as reasonably practicable thereafter?

3. At a Preliminary Hearing on 18 February 2019, the claimant was ordered to provide a statement by 2 May 2019 setting out his case as to the jurisdictional issues raised by the Respondent, including whether he had sufficient service to bring an unfair dismissal claim [35].

4. By a letter dated 28 April 2019, the claimant complied with the ET's Order [38-42]. The claimant understood that he was required, amongst other things, to proffer any arguments addressing whether he had two years' service as he noted the matter in the opening paragraph of his letter. He does not contend in his letter of 28 April that he has two years' service.

Findings

5. According to the respondent, the claimant commenced employment with the respondent as a Support Worker on 28 November 2016. In evidence at this hearing, the claimant said that he commenced employment in September 2016. The respondent was not in a position to dispute the commencement date. Even if the date is correct, the claimant still has insufficient service to claim unfair dismissal. It is not disputed that he resigned from his employment with immediate effect on 6 April 2018.

6. The claimant clarified at the hearing that he was claiming £105 which was his money which had been put in a file and lost by the respondent. He also claimed £60 being the estimated cost of a mobile phone which was also lost.

7. The claimant resigned with immediate effect on 6 April 2018 and therefore that is his effective date of termination (EDT). It is not clear what date or dates the items were lost so taking the claimant's claim at the highest, the calculation of time is based on the EDT. The claimant's ordinary limitation period expired on 5 July 2018. The claimant notified ACAS of his claim on 25 April 2018 and the Early Conciliation Certificate was issued on 18 May 2018. Therefore, the deadline for the claim was 28 July 2018. The claimant, however, presented the claim to the Tribunal on 3 October 2018.

8. In the claimant's letter of 28 April 2019, he has sought to explain the reasons for bringing his claim out of time. The respondent summarised these reasons as follows:

- (i) he had to wait more than three weeks for the Respondent to respond to him;
- (ii) he tried to other organisations such as the Citizens Advice Bureau, ACAS and Mulberry Solicitors (who he emailed on 25 April 2018); and
- (iii) he had health concerns which needed professional medical attention – blinding headaches and high blood pressure – and he was advised to rest as much as possible.

9. The claimant explained in evidence that point one was not correct, he did not wait for the respondent. In relation to the latter two matters that ACAS had not provided any sort of assistance to him when he needed it [56-57] and his health was extremely adversely affected on the termination of his employment such that he was unable to prepare his claim. It is correct that the claimant consulted his GP on 18 April 2018 who noted [45] “presented with two vague episodes that occurred at the middle of the night he suddenly woaks (sic) upbitting (sic) his tongue and the whole body is a spasm associated with intense tingling sensation in the right side of the body that is followed with headache. It occurred twice this month. He said he is under pressure at work.” It is in January 2019 that the claimant’s health issues seem to increase substantially [48].

Law

10. Section 108 (1) of ERA provides the qualifying period for claiming unfair dismissal.

108 Qualifying period of employment

- (1) Section 94 does not apply to the dismissal of an employee unless he has been continuously employed for a period of not less than [two years] ending with the effective date of termination.

11. Section 13 contains the deduction from wages provisions.

13 Right not to suffer unauthorised deductions

- (1) An employer shall not make a deduction from wages of a worker employed by him unless—

None of the exclusions apply in this case.

12. Section 27 defines wages.

27 Meaning of ‘wages’ etc

- (1) In this Part ‘wages’, in relation to a worker, means any sums payable to the worker in connection with his employment, including—

- (a) any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise,
- (b) statutory sick pay under Part XI of the Social Security Contributions and Benefits Act 1992,
- (c) statutory maternity pay under Part XII of that Act,
- [(ca) [statutory paternity pay] under Part 12ZA of that Act;
- (cb) statutory adoption pay under Part 12ZB of that Act;]
- [(cc) statutory shared parental pay under Part 12ZC of that Act;]

- (d) a guarantee payment (under section 28 of this Act),
 - (e) any payment for time off under Part VI of this Act or section 169 of the Trade Union and Labour Relations (Consolidation) Act 1992 (payment for time off for carrying out trade union duties etc),
 - (f) remuneration on suspension on medical grounds under section 64 of this Act and remuneration on suspension on maternity grounds under section 68 of this Act,
 - [(fa) remuneration on ending the supply of an agency worker on maternity grounds under section 68C of this Act,]
 - (g) any sum payable in pursuance of an order for reinstatement or re-engagement under section 113 of this Act,
 - (h) any sum payable in pursuance of an order for the continuation of a contract of employment under section 130 of this Act or section 164 of the Trade Union and Labour Relations (Consolidation) Act 1992, and
 - (j) remuneration under a protective award under section 189 of that Act,
- but excluding any payments within subsection (2).

13. Section 23 sets out the time for making a claim to the Tribunal.

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)),
- (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.

14. A Tribunal may only extend time for presenting a claim where it is satisfied of the following:

“It was “not reasonably practicable” for the complaint to be presented in time
The claim was nevertheless presented “within such further period as the Tribunal considers reasonable”

(Section 23(4) ERA 1996.)

15. In accordance with section 207B(4) of the ERA 1996, compliance with the early conciliation procedure extends time:

“If a time limit would (if not extended by this subsection) expire during the period beginning with Day A and ending one month after Day B, the time limit expires instead at the end of that period”.

16. There are two limbs to the formula in subsection 4. First, the employee must show that it was not reasonably practicable to present the claim in time. The burden

of proving this rests on the claimant (**Porter v. Bandridge Ltd** [1978] ICR 943 CA). Second, if she succeeds in doing so, the Tribunal must be satisfied that the time within which the claim was in fact presented was reasonable.

17. In **Dedman v. British Building Engineering Appliances Ltd.** [1974] ICR 53 Lord Denning held that ignorance of legal rights, or ignorance of the time limit, is not just cause or excuse unless it appears that the employee 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 or their fault, and he must take the consequences. Scarman LJ indicated that practicability is not necessarily to be equated with knowledge, nor impracticability with lack of knowledge. If the applicant is saying that he did not know of his rights, relevant questions would be:

‘What were his opportunities for finding out that he had rights? Did he take them? If not, why not? Was he misled or deceived? Should there prove to be an acceptable explanation of his continuing in ignorance of the existence of his rights, it would be inappropriate to disregard it, relying on the maxim “ignorance of the law is no excuse”.

The word “practicable” is there to moderate the severity of the maxim and to require an examination of the circumstances of his ignorance’

18. This approach was endorsed in **Walls Meat Co. Ltd. v. Khan** [1979] ICR 52. Brandon LJ dealt with the matter as follows:

‘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. The impediment may be physical, for instance the illness of the complainant or a postal strike; or the impediment may be mental, namely, the state of mind of the complainant in the form of ignorance of, or mistaken belief with regard to, essential matters. Such states of mind can, however, only be regarded as impediments making it not reasonably practicable to present a complaint within the period of three months, if the ignorance on the one hand, or the mistaken belief on the other, is itself reasonable. Either state of mind will, further, not 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’.

19. **Palmer & Saunders v. Southend-on-Sea Borough Council** [1984] ICR 372 CA followed this line and talked in terms of reasonable possibility at page 384-385.

DISCUSSION and DECISION

20. The claimant does not have two years qualifying service with the respondent.

21. The claimant claims two sums which do not fall within the definition of “wages” so the provisions of the ERA do not apply.

22. Even if they did apply, the claim was out of time. Although he was ill over the period following the termination of his employment, the Tribunal was satisfied that the claimant was well enough to address the making of a claim. The claimant was aware of the employment tribunal process because he contacted ACAS. The Early Conciliation Certificate was issued on 18 May 2018. The monetary claims are dismissed. The Tribunal considered that it was reasonably practicable for the claimant to submit his ET1 in time.

Employment Judge Truscott QC

Date 6 June 2019