EMPLOYMENT TRIBUNALS

Claimant: Mr G Watson

Respondent: Royal Mail Group Limited

Heard at: North Shields **On:** 10 June 2019

Before: Employment Judge S A Shore

REPRESENTATION:

Claimant: Mrs C Robinson, CAB Advisor
Respondent: Mr C Bailey-Gibbs, Solicitor

JUDGMENT

The judgment of the Tribunal is that:

> The claimant's claims of unfair dismissal and unauthorised deduction of wages are struck out because they were not presented within the period of three months from the effective date of termination, or the date upon which payment of the wages claimed were due and it was reasonably practicable for the claims to have been submitted in time. The substantive hearing listed for 8 July 2019 is vacated.

REASONS

Background

1. The claimant was employed as a Postman/Sorting Officer by the respondent from 23 September 1991 until he was summarily dismissed on 15 November 2018.

2. On 1 March 2019, the claimant submitted claims of unfair dismissal and unauthorised deduction of wages. The respondent submitted its response on 10 April 2019. With the response, the respondent applied for a preliminary hearing to determine if the claimant's claims had been submitted in time.

3. The issue that the respondent raised was that the ACAS certificate that the claimant relied upon against the respondent was applied for and granted on 21 February 2019. At paragraph 15 of his ET1, the claimant had stated that his application was out of time because he had believed he had been employed by The Post Office and had applied for early conciliation against that employer on 5 February 2019. ACAS had contacted the claimant's representative and indicated that The Post Office had no record of the claimant as an employee. He said that "it became clear that the claimant [was]… employed by Royal Mail." This was after primary limitation had expired, so early conciliation was started against Royal Mail Group Limited immediately and these proceedings were presented subsequently. The claimant had been waiting for the outcome of his appeal against dismissal until 5 February.

Hearing and Submissions

4. The relevant law in this case is contained in section 111(2) of the Employment Rights Act 1996 in the claim of unfair dismissal which states that the claim has to be presented to the tribunal before the end of the period of three months from the effective date of termination of employment. The relevant law for the unauthorised deduction of wages claim is contained in section 23(2) of the Employment Rights Act 1996, the three-month period beginning with the date of payment of wages from which the deduction was made (rather than the effective date of termination of employment).

5. The parties had prepared a bundle of documents for the hearing that consisted of the claimant's ET1, early conciliation certificate dated 21 February 2019 against Royal Mail Group Limited, early conciliation certificate dated 22 February 2019 against The Post Office Limited, respondent's application for a preliminary hearing on the time point, ACAS correspondence, respondent's ET3, respondent's request for a preliminary hearing and notice of preliminary hearing and the claimant's wage slips. Neither party had prepared witness statements.

6. As it was the respondent's application, I asked Mr Bailey-Gibbs to make his submissions first. He produced a skeleton argument. It was submitted that the circumstances in this case are straightforward. The claimant had left early conciliation late and issued against The Post Office. Royal Mail and The Post Office has split in 2013. On realising his mistake, the claimant had started early conciliation against Royal Mail Group Limited on 21 February 2019, but primary limitation had passed on 14 February 2019 and there are no provisions that assist the claimant.

7. Early conciliation in these circumstances does not extend time in which the claimant has to issue proceedings. It was reasonably practicable for the claimant to have started early conciliation against the correct employer within the three-month time limit and there was no suggestion on paper that it had not been practicable to do so. The restructure of The Post Office and Royal Mail Group was not complex.

8. The claimant obtained an early conciliation certificate on 21 February 2019, but only issued these proceedings on 1 March 2019, so it was submitted that the delay was not reasonable in the circumstances.

9. It is unclear if the claimant is seeking to blame his advisor, but the case of **Royal Bank of Scotland plc v Theobald UKEAT/0444/06** is authority for the principle that a CAB advisor is a skilled advisor for the purposes of this sort of case.

10. I was referred to the cases of **Dedman v British Building & Engineering Appliances Limited [1974] ICR 53**, **DCA v Jones [2008] IRLR 128** and **Wall's Meat Company Ltd v Khan [1978] IRLR 74** and considered them.

11. On the issue of the claimant waiting for the outcome of his appeal as grounds for it not being reasonably practicable to issue in time, I was referred to the case of **Palmer and Another v Southend on Sea Borough Council [1984] IRLR 119** as authority for the principle that an internal appeal does not pause or stop time or demonstrate facts that make it not reasonably practicable to lodge in time.

12. On the unauthorised deductions case, Mr Bailey-Gibb had spoken to Mrs Robinson and understood that the unauthorised deductions case related to a long-standing dispute concerning short payments of 15 minutes per day on public holidays going back 14 years. If that was the case, the last public holiday that the claimant would have worked would have been on the August Bank Holiday on 27 August 2018. He should have been paid for that on 31 August 2018 at the latest, which means that primary limitation would have been on 20 November 2018. His claim is, therefore, substantially out of time and time expired before he made his first application for early conciliation on 5 February 2019.

13. Time limits are procedural. There is no evidence of obstacles to starting early conciliation within either three-month period; the claimant had simply got it wrong.

14. Mrs Robinson reminded me that the claimant had been employed by the Respondent for 27 years and genuinely believed that his employer was The Post Office. It was submitted that there was a lot of legal complexity in changing entities.

15. The claimant was awaiting the outcome of his appeal, which he had lodged on 28 November 2018. She had been advising the claimant and they were aware of the 14 February time limit, so decided to issue early conciliation on 5 February 2019 because no outcome had been received and the deadline was approaching. As it was the appeal outcome had been received on 6 February 2019.

16. ACAS had contacted The Post Office about the application that had been made on 5 February 2019 and advised the claimant's representative that The Post Office had no record of the claimant as an employee on 20 February 2019 [35]. Mrs Robinson said that she then contacted the claimant for further information and, at that stage, it appeared that the employer was Royal Mail. A fresh application for early conciliation with Royal Mail Group Plc was made on 21 February 2019 and a certificate was issued on the same day [33].

17. The CAB is a voluntary organisation and the following week was the first time that Mrs Robinson could meet the claimant to complete and submit his ET1. It

was submitted that until it was clear that the claimant was employed by Royal Mail Group Limited, it had not been practicable to issue against it.

18. On the issue of the unauthorised deduction of wages, payment had been due for the disputed Bank Holiday payments for some time. The claimant interrupted at this point to remind me of information that was in the papers that the dispute had been going on for 14 years. I reminded him that in cases of unauthorised deductions and time limits, I was not concerned with how long the dispute had gone on, but when the last unauthorised deduction had been made. As he had been dismissed on 15 November 2018, the last public holiday that he had been underpaid for would have been the August Bank Holiday in August 2018. The latest he would have been paid for that would have been 31 August 2018, so he should have started early conciliation before 30 November 2018. He had not started any early conciliation until 5 February 2019, so I was struggling to see how that claim could proceed. The position with the unfair dismissal claim was factually different.

19. Mr Bailey-Gibb asked to make two points in reply to Mrs Robinson; the first was that there is a long line of case law that says that waiting for an appeal is does not give rise to a point of unreasonable practicability. The second point was that the appeal letter was still in time when received on 6 February 2019.

20. I had looked at the documents and could see that the claimant's payslips [42-45] were marked as being from Royal Mail Group Limited. There was no correspondence from the respondent in the bundle. I asked what the dismissal letter said. Mrs Robinson said the dismissal letter said the claimant had been dismissed by "Royal Mail". There was no mention of "Royal Mail Group Limited" anywhere on the letter.

Decision

21. The claimant was dismissed on 15 November 2018. He should therefore have submitted an unfair dismissal claim by midnight on 14 February 2019, subject to any extension that he had obtained by engaging in early conciliation through ACAS.

22. His wages relating to the last bank holiday he worked should have been paid by 31 August 2018 at the latest. He should, therefore have started ACAS early conciliation by 30 November 2017 at the very latest.

23. I find the submission that it was not reasonably practicable for the claimant to have submitted his ET1 in time because he was genuinely unaware of the legal identity of his employer carries little weight for a number of reasons:

    23.1. Mr Bailey-Gibb's submission that The Post Office and Royal Mail Group Limited had split in 2013 was not challenged;

    23.2. As a customer of both organisations, I take judicial notice that the two organisations are separate. I find it implausible that the claimant did not know which organisation he worked for;

23.3. The claimant's payslips were clearly marked "Royal Mail Group Limited";

23.4. The fact that the dismissal letter said that the claimant had been dismissed by Royal Mail was a telling fact. The absence of the words "Group Limited" is immaterial. If the claimant had started early conciliation on 5 February 2019 against "Royal Mail". His claim would have been in time, and;

23.5. The CAB is a skilled advisor. I was not asked to make any other finding. I find that a skilled advisor would have checked the correct legal identity of an employer before issuing early conciliation, especially as primary limitation was approaching.

24. In any event, the unauthorised deduction of wages claim was well out of time by the date that early conciliation (against the wrong employer) was started. I ought to cover the possibility that the claimant was not advised at the time that his unauthorised deductions claim crystallised.

25. As Lord Scarman commented in **Dedman v British Building & Engineering Appliances Limited [1974] ICR 53**:

> "Where a claimant pleads ignorance as to his or her rights, the Tribunal must ask further questions:
>
> - What were his opportunities for finding out that he had rights?
> - Did he take them?
> - If not, why not?
> - Was he misled or deceived?"

26. In this case, the claimant had an adviser. He did not present a reasonable excuse as to why he had not taken opportunities to find out what the time limits were. His dispute about Bank Holiday pay had gone on for 14 years. He was not misled or deceived.

27. In the case of **Porter v Bandridge Limited [1978] ICR 943** the Court of Appeal ruled that the correct test is not whether the claimant knew of his or her rights, but whether he or she ought to have known of them. I find that the claimant ought to have known about his rights to bring a claim and the time limits in which those claims should have been brought. He clearly thought he had a claim, because he had been in dispute with his employer about it for 14 years. I note the words of the Employment Appeal Tribunal in the case of **Avon County Council v Haywood-Hicks [1978] ICR 646**, which rejected the idea that ignorance, however abysmal and however unreasonable, is a universal excuse. It said that this offended the notion of common sense and that an intelligent and well-educated man ought to have investigated his rights within the time limit and claimed in time. Given that the unfair dismissal legislation has been in force since 1972, Tribunals will rarely be sympathetic to the notion that claimants were wholly ignorant of their rights.

28. Therefore, having considered the submissions of the claimant and the respondent and considered the document submitted, I have absolutely no hesitation in finding that the claimant failed to lodge his claim of unauthorised deduction of wages within the period of three months from the date that payment was due and that it was reasonably practicable for him to have done so.

29. My consideration of the unfair dismissal claim is different because the claimant at least sated early conciliation before primary limitation expired. However, I do not find that his submissions on the reason for starting early conciliation against the respondent on time to be reasonable or compelling for the reasons I have set out in paragraph 23 above. In making this decision, I considered the jurisprudence that Mr Bailey-Gibb relied upon and which I have listed at paragraphs 9, 10 and 11 above. The claimant was advised in February 2019 and should have been told about the inability of a claimant to rely on waiting for an appeal to be a ground for reasonable impracticability.

30. I also do not accept that the claimant's submission that he was unaware of who his employer was to be a reason to find reasonable impracticability for the reasons I have already set out.

31. As I have found that it was reasonably practicable to submit both claims within the time limit, I do not have to consider whether they were actually submitted within such additional period as was reasonable, but had I been required to do so, I do not accept that the delay between 21 February and 1 March was a reasonable period in the circumstances because Mrs Robinson knew the claims were out of time and even a simple ET1 with no more detail that that available to her when the early conciliation application was made would have been accepted by the tribunal.

32. I therefore strike out both the claimant's claims and vacate the substantive hearing listed for 8 July 2019.

Employment Judge S A Shore

Date 10 June 2019

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