EMPLOYMENT TRIBUNALS
PRIVATE PRELIMINARY HEARING

Claimant: **Mr S McCreary**

Respondent: **Nattrav Limited**

Heard at: **North Shields Hearing Centre** **On:** **Wednesday 29th May 2019**

Before: **Employment Judge Speker OBE DL**

Appearances:

Claimant: **In Person**
Respondent: **Miss L Halsall (Consultant)**

JUDGMENT AT PRELIMINARY HEARING

1. The respondent's application to strike-out the claim is refused

REASONS

1. This case had been listed for full hearing but on the basis of an application lodged by the respondent it was converted to a preliminary hearing. This was to determine an application by the respondent set out in an e-mail to the tribunal on 29th April 2019 that the claimant's claim be struck-out on the following grounds: "scandalous or vexatious or has no reasonable prospect of success" (Rule 37(1)(a)). The e-mail stated that the grounds for the application were

    i) that the claimant's claim was for an unlawful deduction from wages only, that the deduction was made on 31st October 2017 and that the claim was issued on 22nd March 2019, a substantial amount of time outside the three-month time limit

    ii) the claimant had failed to put forward any convincing argument that it was not reasonably practicable for him to issue his claim in time but had referred to being called as a witness in a separate case; it was

unreasonable for the claimant to state he was unable to take legal advice in respect of his claim in view of the time which had passed and the opportunities he had had to seek advice

2. The claimant gave evidence on his own behalf and made submissions. The respondent did not call any evidence but provided to the tribunal a bundle of documents consisting of eighty-seven pages. The claimant's account of the circumstances was that he was employed by the respondent to collect and deliver motor vehicles. On 3rd October 2017 the claimant had collected and delivered to the respondent a BMW motorcar. Subsequently it was found that there was damage to two of the wheels of the car. The respondent held the claimant responsible for this. The claimant had been under the impression that nothing may be done about this. Subsequently he was informed that the respondent held him responsible for the damage and required to pay the full cost of the repair (£678.34 or £688.34) and that he should permit deductions from his wages in accordance with his contract. The claimant had offered to pay £50.00 per month towards the repairs but the respondent refused this. At the end of that month October 2017 the claimant resigned from his employment due to stress. He was then told that the full amount of repair costs would be deducted from his final payment. He was unhappy about this but in the event signed a document confirming his agreement to it, which left him with approximately £200.00 in salary for the whole month. The claimant made no formal challenge to the deduction and did not issue any Employment Tribunal claim at that time. He said that he was not aware of his right to challenge the payment in an employment tribunal. He sought no legal advice but discussed the matter with family and friends.

3. Early in 2019 the claimant was called as a witness at an Employment Tribunal hearing in North Shields. The claim was against the respondent company for whom he had been employed. During his evidence he made reference to the deduction he had suffered from his pay and he alleged that the Employment Judge who heard the case informed him that the deduction may have been unlawful and that he was entitled to challenge this. He then made enquiries and contacted ACAS. He went through the early conciliation process and then lodged an application in the tribunal on 22nd March 2019. He conceded that he now understood that there was a three-month time limit for the presentation of his claim but said that he had not had the opportunity of presenting the claim because he was unaware of how the deduction could be categorised. When cross-examined he conceded that he had signed a document (page 84 in the bundle) giving authorisation to the respondent to make deductions of the cost of £688.34 although the document stated that this was to be "from my monthly wage". On the same form it is stated that the payment was to be taken from his final pay on Tuesday 31st October 2017. He also maintained that he had acted promptly in issuing his claim as soon as the circumstances were explained when he attended the other Tribunal hearing.

4. On behalf of the respondent, Miss Halsall submitted that the claim was very substantially out of time and that it had been reasonably practicable for the claimant to have issued the claim in time. She also referred to the case of *Walls Meat Company Limited v Khan 1979 ICR52*. She did not make any

further representations with regard to the specific wording of the application to strike-out on the basis that the claim was scandalous or vexatious or that it had no reasonable prospect of success other than as to the claim being out of time.

5. The claimant on his own behalf repeated that he had only become aware of the right to make this claim when he had attended the employment tribunal early in 2019 and that although he regretted making the claim so late he felt that he should be allowed to have his case heard.

6. It is acknowledged that to strike out a claim particularly for an unrepresented party is a draconian measure. With regard to the circumstances of the present case it was clearly an issue as to whether the claim could have been brought in time and whether it was reasonably practicable for the claimant to have done so. The case of *Palmer and another v Southend-On-Sea Borough Council 1984 ICR372 (Court of Appeal)* concluded that "reasonably practicable" does not mean reasonable, which would be too favourable to employees, and does not mean physically possible which would be too favourable to employers but means something like "reasonably feasible". In the case of *Asda Stores Limited v Kauser EAT0165/07*, Lady Smith explained it in the following words "the relevant test is not simply a matter of looking at what was possible but to ask whether, on the facts of the case as found, it was reasonable to expect that which was possible to have been done".

7. In the present case and bearing in mind that the claimant had signed a document which on the face of it agreed to the withdrawal of the repair costs from his final salary, there were issues as to the way in which that form was signed and the fact that the claimant maintained that he was constrained to sign it otherwise he would not have been paid any wages at all. That is an issue to be considered on the basis of full evidence. It is also a basis for finding that it was not reasonably practicable for the claimant to have issued his claim at the time. He was encouraged to do so by the circumstances which he described being categorised by an Employment Judge before whom he was giving evidence, as potentially unlawful and capable of challenge by him. It was at that time that it was reasonably practicable for him to make enquiries and present a claim, which he did so without undue delay.

8. There is no application before me for a deposit order on the basis that the case has little prospect of success. The application before me is that the case has no reasonable prospect of success. I do not find that I can so categorise this case. There are issues to be resolved and the case should therefore proceed to a full hearing.

9. For the above reasons the application to strike-out is refused. Case management orders have been made so that the case can be brought to a hearing as soon as possible.

Case no:2500524/2019

Employment Judge Speker OBE DL

Date 18 June 2019