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EMPLOYMENT TRIBUNALS

Claimant: Mr M Bhuiyan
Respondent: Sainsbury's Supermarkets Limited
Heard at: East London Hearing Centre
On: Wednesday 3 July 2019
Before: Employment Judge Goodrich
Representation
Claimant: In Person
Respondent: Miss S Tharoo (Counsel)

JUDGMENT PRELIMINARY HEARING (OPEN)

The judgment of the Tribunal is that:-

- 1 The Claimant's complaint of unlawful deductions from wages was not presented in time despite it being reasonably practicable to do so. The complaint is dismissed.
- 2 As further set out below, it was reasonably practicable for the Claimant to have presented a part of his breach of contract complaint in time; and the part for which it was not reasonably practicable for it to be presented in time was not presented within a further reasonable period thereafter. The complaint is dismissed.
- 3 The Claimant's claim for a redundancy payment is dismissed, the Respondent having paid him the redundancy payment to which he was entitled.

REASONS

Background and The Issues

1 The background to this Preliminary Hearing is as follows

2 The Claimant presented his ET1 Employment Tribunal claim on 17 December 2018. Before doing so, he obtained an ACAS early conciliation certificate, as required, before issuing Employment Tribunal proceedings. His ACAS early conciliation certificate covered the period from 18 October to 18 November 2018.

3 The effective date of termination of the Claimants employment is agreed by both parties to be 7 July 2018.

4 In box 8.1 of his claim form the Claimant ticked that he brings claims for a redundancy payment, notice pay, arrears of pay and other payments.

5 Attached to the Claimant's claim form was a document giving details of his claim. This was headed "Particulars of Complaint for ET1 in a claim for Redundancy (Pilon Pay) and further subject to discrimination".

6 The Claimant gave details of his claim including his account of the events that took place.

7 At the end of his Particulars of Complaint, at paragraphs A-F, the Claimant summarised his claim. The details given included the following (as drafted by him, without me correcting any grammar mistakes):

7.1 I was discriminated as other colleagues got full redundancy pay (with pilon pay) and I have been deprived from that.

7.2 When I was in Bethnal Green, I have been deprived my Saturday and Sunday premium without giving me any written notice.

7.3 I have found the treatment and action of the Respondent very stressful and subjected me unlawful discrimination and breach the contract and redundancy. Hence, I am seeking the followings:

7.4 Compensation in regard to my redundancy.

7.5 Compensation for injury of my feelings and financial loss.

7.6 An uplift of at least 25% compensation as not to follow the code of conduct of contract agreement policy.

7.7 My rights according to my contract paper (Saturday and Sunday premium) while I was in Bethnal Green store.

7.8 Any other Remedy the tribunal judge.

8 There was some delay in the Respondents ET3 response being submitted, probably because it was sent to the store where the Claimant was working, rather than their head office or legal department or HR department.

9 Eventually however, the Respondent's ET3 response was submitted and accepted. The Claimant's claims were denied both on the basis that it was contended that they were out of time; and as to the merits of the case.

10 An application was made by the Respondent's representatives for a Preliminary Hearing to consider whether the Tribunal has jurisdiction to hear the claim on the basis that it was not presented within time.

11 Employment Judge Russell granted the application and listed the case for a two hour hearing today. She also asked the Claimant to notify the Tribunal whether he was bringing an unlawful discrimination claim; and, if so, on which protected characteristic it was based. She asked him to reply by 25 June 2019.

12 The Preliminary Hearing was listed for two hours at 10am today.

13 Unfortunately, however, the case was not allocated to a Judge but left "floating" in the hope that a Judge would become available to conduct the Preliminary Hearing. I did become available but not until later in the day, so that the allocated length of hearing had already ended before I started hearing the case.

14 As a result of a delay in starting the case, I offered the parties the choice, once closing submissions had been completed, of either waiting for me to give my oral judgment; or for me to send a written judgment, having reserved my decision. The Claimant asked not to wait longer and to be sent the judgment in writing.

15 At the outset of the Preliminary Hearing I clarified with the Claimant what his claims are.

16 The Claimant clarified that he is not seeking to bring a complaint of unlawful discrimination. He was not saying, for example, that the failure to pay him the sums he contends that he is owed was an act of race or of religion/religious belief discrimination.

17 The Claimant informed me that:

17.1 The Respondent did pay him the redundancy payment he was owed.

17.2 They did not pay him the pay in lieu of notice payment that he was owed.

17.3 Nor did they pay him the sums he contends he is owed for Saturday and

Sunday premium working whilst he worked in the Respondent's Bethnal Green store.

18 I explained to the Claimant that the Tribunal does not award injury to feelings for a successful breach of contract or for an unlawful deduction of wages claim.

19 The issue for me to consider was, therefore, whether to extend time limits for the Claimants breach of contract and/or unlawful deduction from wages claims.

20 Although Miss Tharoo, the Respondents representatives, submitted initially that the Claimant's claim for non-payment of his premium payments was an unlawful deduction from wages claim, she accepted my proposition that it could also be a breach of contract claim. This is significant because, as a deduction from wages complaint, the shift premium payment claim arose from the Claimant working in the Respondent's Bethnal Green store, from which he transferred in March 2015. The complaint was therefore years out of time as an unlawful deduction from wages claim; although only a relatively short period out of time as a breach of contract claim.

21 As regards the Claimant's breach of contract claims, the three months' time limit for presenting his claim expired on 6 October 2018, three months from the effective date of termination of his employment. The Claimant was unable to benefit from the extension of time provisions of the early conciliation legislation because his claim was already out of time before he started ACAS early conciliation.

22 The issues for me to consider were therefore:

22.1 Whether it was reasonably practicable for the complaints to be presented within three months beginning with the effective date of termination of his employment; and, if not

22.2 Whether it was presented within such further period as the Tribunal considers reasonable.

The Relevant Law

23 Article 7 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 provides

"... 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

(b) 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."

24 As regards time limits for unlawful deductions from wages complaints section 23 Employment Rights Act 1996 contains provisions in section 23 (2) as to the starting point for a deduction from wages complaint (when the deduction was made, or in respect of a complaint relating to the payment received by the employer, the date when the payment was received; or in respect of a series of deductions or payments three months from the last deduction or payment in the series or the last of the payments so received. Section 23(4) contains similar extension of time provisions to those described above for breach of contract complaints.

25 In the case of *Palmer v Saunders v Southend-on Sea Borough Council (1984) IRLR 119 CA* it was held that whether it was reasonably practicable for complaint to be presented in time is pre-eminently an issue of fact for the Employment Tribunal, taking all the circumstances of the given case into account. Guidance as to the types of factors that might be considered was given (although not limited to) the following:

- 25.1 The substantial cause of the employee's failure to comply with the statutory time limit
- 25.2 Whether he had been physically prevented from complying with the limitation period, for instance by illness or a post-strike or something similar
- 25.3 Whether, at the time of the dismissal, and if not when thereafter, the employee knew that he had the right to complain about unfair dismissal, whether there was any misrepresentation about any relevant matter by the employer to the employee
- 25.4 Whether the employee was being advised at any material time and, if so, by whom
- 25.5 The extent of the adviser's knowledge of the facts of the employee's case and of the nature of any advice which they may have given him
- 25.6 Whether there was any substantial failure on the part of the employee or his adviser which led to the failure to comply with the time limit the extent to which, if at all, the employers can conciliatory appeals machinery had been used – however, the mere fact that an employee was pursuing an appeal through the internal machinery does not mean that it was not reasonably practicable for the unfair dismissal application to be made in time.

26 In the case of *Marks & Spencer PLC v Williams-Ryan (2005) IRLR 562 CA* it was held that section 111(2) of the Employment Rights Act 1996, which requires an unfair dismissal complaint to be presented within three months of the effective date of termination unless the Tribunal is satisfied that it was not reasonably practicable to do so, should be given a liberal interpretation in favour of the employee. In accordance with that approach, it has repeatedly been held that, when deciding whether it was reasonably practicable for an employee to make a complaint to an Employment Tribunal, regard should be had to what, if anything the employee knew about the right to complain to the Tribunal and of the time limit of making such a complaint. Ignorance of either, however, does not necessarily render it not reasonably practicable to bring a complaint in time. It is

necessary to consider not merely what the employee knew but what knowledge the employee should have had if he or she had acted reasonably in all the circumstances.

27 If a Tribunal is satisfied that it was not reasonably practicable for a complaint to be presented before the end of the statutory three month period, there are no time limits on what it can regard as a further reasonable period for presenting the complaint.

Findings of Fact

28 The Claimant's explanation for putting in his Employment Tribunal claim when he did (on 17 December 2018), rather than earlier and within the statutory time limits, was as follows.

29 The Claimant was unhappy at not being paid the pay in lieu of notice he considered he was due (£2,939.93).

30 The Claimant wrote to the Respondent's Human Resources department on 16 August 2018 to complain about not having received pay in lieu of notice as part of his redundancy payment; and as to outstanding holiday pay.

31 The Claimant wrote some follow up emails.

32 On 3 October 2018 Mr Gohil replied to the Claimant to notify him that he had asked for 84 hours of holiday pay to be processed and paid to him.

33 By email dated 11 October, the Claimant wrote to Mr Gohil to thank him as to the holiday pay and confirm that he had received £705.62. He thanked him for this.

34 With regard to the Claimant's claim for pay in lieu of notice, the store manager must have notified the Claimant previously (although I am not sure when) that he would not get his full redundancy money (i.e his pay in lieu of notice) as he did not work 11 weeks of his notice. The Claimant wrote to complain about this.

35 On 22 October 2018 the Claimant wrote to Mr Gohil again to complain about not receiving his pay in lieu of notice.

36 At the end of the Claimant's letter he complained about not having received a response for more than 10 days and that the situation had made him feel frustrated and depressed as he had not been treated fairly after being loyal to the company for a long time. He concluded by stating "therefore, I have decided to seek legal assistance in this matter."

37 By then the Claimant had contacted ACAS to start early conciliation (on 18 October 2018).

38 Of note is that the Claimant made no complaint during this time about not being paid Saturday and Sunday premium payments whilst working at the Sainsbury's Bethnal Green store.

39 As regards the Claimants knowledge of Employment Tribunal procedure and time limits his explanation was as follows.

40 Although the Claimant had been a Trade Union member for part of the period that he was an employee of the Respondent, he had left the Trade Union before his employment ended. In August he discussed his employment problems with a friend who said that he could go to ACAS or the CAB.

41 The Claimant has access to a computer and the internet and did some research on the ACAS website. He cannot remember whether he saw the details of what it says about Employment Tribunal time limits (generally, claims should be made within 3 months of the employment ending).

42 The Claimant also telephoned the CAB but it took too long to get an appointment with them. The Claimant delayed going to ACAS because he thought Sainsbury's would consider his complaint.

43 The Claimant, at least by the time he started ACAS early conciliation, knew that he could not bring Employment Tribunal proceedings until after early conciliation was completed. This took a month, he said because Sainsbury's were slow to respond to ACAS.

44 Once ACAS early conciliation was completed the Claimant's explanation for the delay in presenting his claim form between 18 November 2018 and 17 December 2018 was that he thought that he made a mistake in filling in his form; and that his friend told him how to fill in the form so he then filled it in correctly. He thought that his claim would be in time.

45 Was it reasonably practicable for the Claimant to submit his pay in lieu of notice and premium payment complaints in time? I find that it was reasonably practicable for him to do so for his Saturday and Sunday premium payment complaint; but that, giving a liberal interpretation in favour of the employee, it was not reasonably practicable for him to do so for his pay in lieu of notice complaint including because:

45.1 There was nothing physically preventing the Claimant from bringing his complaint. Although he felt frustrated and depressed about not receiving the sums in question, this did not prevent him engaging in correspondence about the issue, entering early conciliation, or (out of time) submitting his complaints.

45.2 The Claimant knew, within the time limits, of his ability to bring an Employment Tribunal claim, although not as to the time limits

45.3 The Claimant was at fault, at least to some extent, for not doing more to find out about the time limit for bringing his Employment Tribunal complaint. He knew about ACAS, he did some research online about them and could have either ascertained through his internet research on the ACAS website (which possibly he may have done) or through asking ACAS directly as to what the time limit was for bringing the claim.

45.4 I do not, however, criticise the Claimant for not obtaining legal advice in the current climate where there is no legal aid for bringing Employment Tribunal proceedings and the resources of the likes of Citizens Advice Bureaux are heavily overstretched.

45.5 As regards the Claimant's pay in lieu of notice complaint, he made considerable efforts to resolve the dispute internally. I consider this to be a strong point in his favour. Successive governments have wanted employees and employers to resolve the disputes they may have between themselves with litigation being a last resort, rather than a first port of call. The (now repealed) statutory grievance procedures were one method of seeking to do so. The introduction of fees (subsequently declared unlawful by the Supreme Court) was another incentive for litigation being a last resort. The requirement to obtain an ACAS early conciliation certificate before issuing proceedings are the current method for seeking to limit Employment Tribunal claims. So far as the Claimant's pay in lieu of notice complaint is concerned, which I consider to be finally balanced as to whether it was reasonably practicable to present the claim in time or not, I regard the Claimant's efforts to resolve the matter directly with his employers to be a decisive factor.

45.6 As regards the Claimants dispute about Saturday and Sunday premium payments, he was not, during the time period in question, trying to resolve the matter internally. It was an issue that arose from a period of working in a store which had ended in March 2015, when he transferred store. He could have made an unlawful deduction of wages Claim to an Employment Tribunal at any period after March 2015.

46 I have gone on to consider whether the Claimant presented his Employment Tribunal Claim, as regards his pay in lieu of notice complaint, within a reasonable period after the statutory time limit.

47 I find that the Claimant did not present his pay in lieu of notice complaint within a reasonable time after the statutory time limit because:

47.1 Statutory time limits are meant to be observed. The burden of proof is on the Claimant to satisfy me that he submitted his claim within a reasonable period of the time limit.

47.2 By 18 October 2018, when ACAS issued the early conciliation certificate in this case, the Claimant knew that early conciliation had been unsuccessful. He had exhausted all the steps he had taken to resolve his dispute without issuing legal proceedings.

47.3 The Claimant then delayed a further month before issuing his Employment Tribunal claim. Although he stated that he thought his claim was in time, he did not suggest that he understood that he had one month from ACAS issuing the early conciliation certificate in order to present his claim (this would have been an understandable mistake, although it would also have brinkmanship on his part to have delayed issuing his claim until the last day of the month in question). So far as I was made aware, nothing was done by

the Claimant as to his dispute with his former employer's other than to prepare his claim form.

50.4 The Claimant did not check whether whatever understanding he had as to time limits was correct. He did not, for example, ask the ACAS officer dealing with early conciliation for him whether his claim was in time or how much time he had left.

50.5 The statutory test for extending time on the basis of reasonable practicability is a stricter test than that of whether it is just and equitable to extend time. Had I been considering the just and equitable provisions, my decision might have been different.

50.6 Had the Claimant acted with a reasonable degree of urgency after finding out that his early conciliation had been unsuccessful, he would have put his claim in sooner. A week or even two weeks delay might have been reasonable in the circumstances- in the Claimant's circumstances the delay was too long.

51 The Tribunal does not, therefore, have jurisdiction (power) to consider the Claimants complaints and they are dismissed

Employment Judge Goodrich

12 August 2019