



EMPLOYMENT TRIBUNALS

PRELIMINARY HEARING

Claimant: Mr V Sekisambu

Respondent: St Anne's Community Services

Heard at: Leeds **On:** 5 September 2019

Before: Employment Judge Licorish (sitting alone)

Appearances:

For the claimant: in person

For the respondent: Mr R Dunn, Counsel

JUDGMENT

1. The correct name of the respondent is St Anne's Community Services (which is a company limited by guarantee).
2. The claimant's complaints of unfair dismissal, breach of contract (notice pay), and unlawful deductions from wages and/or holiday pay under the Working Time Regulations 1998 were not validly presented within the relevant time limit.
3. It was reasonably practicable for the claimant's claim form to have been presented within the relevant time limit. The Tribunal does not therefore have jurisdiction to hear the claimant's complaints, which are accordingly dismissed.

RESERVED REASONS

1. On 11 July 2019, the claimant validly presented a claim form which included complaints of unfair dismissal, breach of contract (notice pay), and unlawful deductions from wages and/or breach of the Working Time Regulations 1998 for payment for accrued annual leave. In his claim form, the claimant states that he was employed by the respondent housing association as a casual support worker from 2 August 2010 until 16 May 2018. The respondent denies the claimant's claims. In particular, the respondent maintains that the claimant was a casual worker and not an employee, and that he was removed from its list of such workers in 2018 because he had not worked a shift since 2015.

2. Early conciliation with ACAS started on 18 April and ended on 2 May 2019. Accordingly, any alleged acts or omissions by the respondent which took place before 19 January 2019 are potentially out of time so that the Tribunal may not have jurisdiction. If the claimant was dismissed in May 2018, there therefore appears to be no complaint which is in time.
3. This hearing was therefore listed to clarify the claimant's complaints, and determine whether any complaint should be dismissed because it has been brought outside the statutory time limit or whether there are grounds for the Tribunal to allow a late claim.
4. In this respect, the claimant argues that it was not reasonably practicable for his claim form to have been presented within the relevant time limit and it was presented within a further reasonable period.
5. The respondent also argues more generally that the claimant's complaints are misconceived. If any complaint is allowed to proceed, the Tribunal explained that it would then consider whether to strike out any complaint because it has no reasonable prospects of success, or whether to order the claimant to pay a deposit as a condition of continuing to advance any specific allegation or argument if the Tribunal considers that any such allegation or argument has little reasonable prospects of success. In the event, no complaint was allowed to proceed because of the time limit issue.
6. During the hearing the claimant gave oral evidence. The respondent produced a file of documents (comprising 93 pages). The Tribunal read the claim and response form, and the documents referred to during the evidence. References to page numbers in these Reasons refer to the corresponding page numbers in the respondent's file of documents. The respondent also produced a written skeleton argument.
7. The claimant initially produced three further documents (referred to below as C1 to C3). Although during cross-examination the claimant confirmed that those were the only documents he wanted to rely upon, during the Tribunal's deliberations he left the building to obtain copies of a county court order relating to a claim he is pursuing against the Home Office (referred to below as C4). He did so because in evidence he stated that the time it was taking him to deal with that claim had been one of the reasons for not submitting a Tribunal claim in 2018. One of the documents he initially relied upon showed only that he had made a complaint against HM Courts and Tribunal Service (HMCTS).
8. In the circumstances, the respondent's representative confirmed that he did not wish to question the claimant any further in respect of this additional document, but both parties made further submissions prior to the Tribunal deliberating for a further short period and announcing its decision. As a result, there was insufficient time for the Tribunal to explain its reasons to the parties, hence these reserved Reasons.
9. The Tribunal considered all of the parties' submissions with care. They are not repeated below in full, but the parties will recognise how the Tribunal has taken their arguments into account.

Background

10. The claimant started to work for the respondent as a casual support worker on 2 August 2010 (pages 22 to 23). He last worked a shift on 7 November 2015. This is because the respondent was told by the Home Office (the UK

Border Agency) that the claimant might be in this country illegally. The claimant has been trying to resolve his immigration status ever since.

11. By email on 23 February 2016, the claimant asked the respondent to pay him holiday pay and sick pay while he waited for a decision from the Home Office (page 33). Shortly afterwards he was paid for his accrued entitlement to 5 hours' holiday (page 31).
12. By email on 6 April 2016, the claimant then asked the respondent for his P45 (pages 30 to 31). At the time he was trying to obtain accommodation and financial support, and needed proof that he had stopped working. In reply, he was told by a payroll clerk that he would have to formally leave the respondent's employment before it could issue a P45 (page 27). During his evidence, the claimant explained that he decided not to tell the respondent that he wanted to leave. Nevertheless, by letter on 7 April 2016 the respondent confirmed to the Home Office that the claimant had last worked a shift in 2015 (page 19).
13. By letter dated 16 May 2018, the respondent informed the claimant that it was in the process of updating its casual worker database. It had decided to remove his name from its list because he had not worked any shifts for a significant period of time (page 18). The claimant did not reply to that letter. His P45 was issued on 18 May 2018 (page 20).
14. By emails on 23 February and 19 March 2019, the claimant asked the respondent for what he described as annual leave, bank holiday and severance pay for the period from November 2015 to May 2018 (page 26). The respondent explained that he had received all outstanding pay for accrued holiday in February 2016 and was owed nothing further (page 24).
15. On 18 April 2019, the claimant contacted ACAS to start early conciliation. A certificate was issued on 2 May 2019 (page 17). The claimant's claim form was accepted by the Tribunal on 11 July 2019.
16. In his claim form, the claimant gives the following reasons for presenting it late: he has been homeless, destitute, in detention by the Home Office (which he describes as "*a matter now yet to be settled in courts of law in London*") and without legal representation.

The claimant's evidence

17. The claimant explained to the Tribunal that he has been detained by the Home Office twice, from 7 to 22 December 2015 and in February 2019. He was released on 19 March 2019 following a judicial review hearing in the high court (C2). He confirmed that solicitors are representing him in the London-based claim which is do with unlawful detention. He stated that in fact that claim takes up little of his time because he has legal representation.
18. The claimant has also brought county court proceedings in Leeds based on the Home Office's actions generally. He started that claim in May 2016 and is running it himself. An application was due to be heard in February 2019 but was postponed owing to the claimant being in detention (C4). In April 2019 he initiated the third stage of an HMCTS complaints process because he is also unhappy about the way in which his county court claim has been handled (C3).
19. The respondent, the Home Office, the county court and the Tribunal have the same postal address in Leeds for the claimant, but he says that he does not live there. The house is owned by a friend who is mostly works away in

London. The claimant does not have a key and therefore has restricted access to his post. Although his claim form states that he was dismissed in May 2018, he explained that in fact he did not retrieve that letter from his friend's house until July 2018. He cannot remember the precise date on which he read it.

20. The claimant told the Tribunal that when he read the respondent's letter, a great deal of his time was taken up by his claim in Leeds against the Home Office. It took a lot of strain and energy out of him. He came to the conclusion that he did not have the time to start a Tribunal claim at that point. This state of affairs continued up until he was detained in February 2019. Being homeless and having no money means that each day he needed to find somewhere to sleep, and did not know where and when he would next eat. He could not think properly when he was hungry.
21. In cross-examination, the claimant said that after he started his county court claim in May 2016, he went to the court building in Leeds every day. He was the administrative driver of that claim. He says that the case was all-consuming and he had no time for anything else. When he read the respondent's letter in July 2018, he said that he thought that he had been unfairly dismissed and was owed notice and holiday pay, but did nothing because he was too busy with the county court claim. He therefore took no further action until February 2019 (when he emailed the respondent). Ultimately he says that he "*made a decision in July 2018 not to proceed [with a Tribunal claim] ... got a respite in February [2019] and decided I can also take on this ... I could have proceeded but made a decision because I was overwhelmed* (emphasis added)."
22. The claimant further explained to the Tribunal that he contacted the respondent in February 2019 while he was in detention. He was thinking about his release and did not want to find himself back on the streets. He was angry and destitute, and would still be prevented from working even after his release. He had no money or a proper address, and thought that his only option was to ask the respondent if they were prepared to pay him holiday and severance pay. While he was in detention he had time to think about how he might get some money and decided to email the respondent.
23. When the respondent refused to pay him anything, in April 2019 he received some advice from a Citizens' Advice Bureau (CAB), did some research online and found out about ACAS and the early conciliation process. In cross-examination he first said that from this time there was nothing to do on his county court claim while he waited for the outcome of his HMCTS complaint. However he later stated that after early conciliation ended on 2 May 2019, he was still busy with research on his county court claim.
24. The claimant also explained that in May 2019 he remained destitute and homeless. He therefore could not afford to print out a claim form or photocopy his documents. He also kept all of his documents at his friend's house in Leeds. At that time he was staying elsewhere and had to wait until he had enough money to be able to travel to Leeds to retrieve them.
25. In cross-examination, the claimant said that in around June 2019 he printed off the claim form and filled it out by hand. He took a few days to complete the form as he would do some work on it, then leave it for a while. He said that he then had to wait for a further period because the claim form "*asked for documents*" and he could not immediately afford to photocopy what he had. After further questioning, he accepted that the claim form does not state that

supporting documents must be provided. He simply thought that he ought to attach them. He says that by chance he received some money and was able to photocopy his claim form and documents, and eventually send them to the Tribunal.

26. The claimant also confirmed that since 2016 he had thought that the respondent should be paying him at least for his accrued annual leave while he was prevented from working. He was aware of case law which confirmed the legal position. He decided not to start a Tribunal claim for holiday pay at that time because he hoped to return to work for the respondent once his immigration status had been resolved.

The relevant law

27. Section 111 of the Employment Rights Act 1996 (ERA) states that a Tribunal shall not consider a complaint of unfair dismissal unless it is presented before the end of a period of three months beginning with the effective date of termination. Section 23 of the ERA gives the same time limit for a complaint of unlawful deductions from wages, beginning with the date of payment of the wages from which the deduction was made, or the date of the last deduction if a series of deductions have been made.
28. Under Article 7 of the Extension of Jurisdiction (England & Wales) Order 1994, the same three-month time limit applies to breach of contract complaints and runs from the date of the termination of employment. Under regulation 30 of the Working Time Regulations 1998, the same time limit applies to claims for payment for annual leave during employment and on its termination, and runs from the date payment should have been made.
29. In all of the above cases, the time limit will be extended by any period of early conciliation, but only if it began within the initial three-month time limit.
30. However, where the Tribunal is satisfied that it was not reasonably practicable for a complaint to have been presented within the relevant time limit, the claim may be presented within such further period as the Tribunal considers reasonable. What is “*reasonably practicable*” and the length of the reasonable further period is a question fact for the Tribunal to decide. The burden of proof is on the claimant to show why he presented his complaint when he did.

Conclusion

31. The Tribunal first considers whether it was reasonably practicable for the claimant to have presented his complaints in time. The essential question is whether it was reasonably feasible to have presented the complaint within the relevant time limit (**Palmer v Saunders v Southend-on-Sea Borough Council 1984 IRLR 119**). The respondent also cites the case of **Asda Stores Limited v Kauser UKEAT/0165/07** which states:

“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.”

32. In summary, the Tribunal must look at the substantial cause of the claimant’s failure to comply with the time limit – that is to say, was any delay outside the claimant’s control? It must also consider whether the claimant knew he had the right to complain to a Tribunal. Any mistaken belief or ignorance must be reasonable. Finally, it will be relevant if the claimant was misled by the

respondent about any relevant matter, or if he received any advice and, if so, whether that advice was deficient in any respect.

33. First, from at least early 2016 the claimant considered that he had a potential claim for non-payment of holiday pay. He thought that his entitlement to annual leave continued to accrue while he was unable to work. He concluded this based on previous cases relating to sickness absence and accordingly wrote to the respondent in February 2016, following which he was paid a limited sum. He wrote again in 2019 asking for payment for the period up until May 2018.
34. The respondent has pointed out that there are a number of difficulties with this complaint, not only relating to the fact that awards of compensation are limited to the two years prior to presenting a claim, but also whether there has been a series of deductions or a series of free-standing claims each with their own time limit. In addition, the Tribunal notes that in ordinary circumstances the "*use it or lose it*" principle means that annual leave does not automatically carry forward from one year to the next, unless for example the worker has been prevented from taking leave owing to ill-health. Even then, the power to carry over leave is not open-ended.
35. In the circumstances, assuming that the claimant's leave year ran from the anniversary of his employment in August each year (as there is no definition of a leave year in his letter of engagement), it is likely that the time limit for any complaint based on holiday accrued prior to August 2017 expired at the very latest in November 2017.
36. Turning to the substantial cause of the claimant's failure to comply with the time limit, he explained that he took no action between February 2016 and May 2018 (that is to say, before his removal from the respondent's list of casual workers) because he hoped eventually to be able to return to work. He knew he had the right to complain, but chose not to pursue it at the relevant time. In the circumstances, the Tribunal concludes on balance that it was reasonably feasible for the claimant to have presented this complaint within the relevant time limit but he chose not to do so for practical reasons.
37. Secondly, a claim for payment for holiday accrued during the final leave year and as at the end of a worker's contract runs from when payment should have been made. The claimant's payslips indicate that he was paid on a weekly basis. As the claimant's P45 was issued on 18 May 2018, the Tribunal considers it likely that this was the time he would have received any outstanding amounts owing to him. As a result, the time limit for this complaint expired on around 17 August 2018.
38. Thirdly, the time limit for the complaints of unfair dismissal and notice pay runs from the effective date of the termination of employment. The claimant says the he did not read the respondent's letter of 16 May 2018 until July 2018, in which case (and in the absence of any other evidence) the relevant time limit for a dismissal effective from July 2018 expired in October 2018.
39. In considering the evidence of the claimant's circumstances during the period August to October 2018, the Tribunal does not underestimate the impact of homelessness and lack of income on the claimant's life generally. It accepts that his daily life was unpredictable and at times chaotic, and his resources were necessarily limited. He was not, however, in detention during this time. He confirmed in evidence that he was able to send and receive emails, do

online research for his county court claim and attended the civil court building in Leeds daily to try to find out what was happening as his claim progressed.

40. However, and most importantly, where a claimant is generally aware of his or her right to make a claim, ignorance of the time limit will rarely be acceptable as a reason for any delay. This is because a claimant who is aware of their rights will generally be taken to have been put on notice that there is a time limit and should therefore take steps to find out what it is (**Trevelyan Ltd v Norton 1991 ICR 488**). In the claimant's case, among other things he says that when he read the respondent's letter of May 2018 he was aware that he had potential claims but took a decision not to pursue them but to concentrate on resolving his immigration status (quoted in emphasis at paragraph 21 above).
41. The Tribunal also takes into account the claimant's evidence in terms of the time he says that he devoted to his county court claim. The Tribunal views that evidence with some scepticism. Generally, it tended to shift when the claimant was challenged (for example, as summarised at paragraph 23 above). It was also occasionally contradictory (for example, he could not always afford to travel to Leeds, but also maintained that he was attending the county court on a daily basis). On the facts of the case as found, the Tribunal is therefore satisfied that it was reasonable to expect that which was possible (namely to have started the early conciliation process online and thereafter submit a Tribunal claim) to have been done during the period August to October 2018.
42. Further and separately, even if the Tribunal had been persuaded that it had not been reasonably practicable for the claimant to have presented his complaints in time, it would have next considered whether they were nevertheless presented within a further reasonable period. In the respect, the Tribunal must consider the particular circumstances and the reason for the delay during the entire period up until the presentation of the claim. Most importantly, it must also be satisfied both as to the truth of any assertion of ignorance and whether that ignorance was reasonable.
43. The respondent further relies on the case of **Nolan v Balfour Beatty Engineering Services UKEAT/0109/11** which states that when considering whether to extend time and the reasonable further period, Tribunals should always bear on mind the general principle that claims should be progressed efficiently and without delay.
44. The claimant maintains that being detained in February 2019 in fact gave him some breathing space from the daily grind of his personal circumstances, which allowed him to think about running a Tribunal claim. He therefore emailed the respondent while in detention and thereafter, sought advice from a CAB after his release and started early conciliation in April 2019. He does not say that he was misled by the respondent or any advice he obtained at around this time.
45. In the circumstances, the Tribunal is not satisfied that the claimant has shown that his actions were reasonable during the entire period leading up to the valid presentation of his Tribunal claim. In particular, early conciliation ended on 2 May 2019. The claimant essentially maintains that from that time he could not afford the administrative costs associated with presenting his claim, including having to wait to be able to afford to travel to Leeds to retrieve his documents from his friend's house.

46. The claimant says that he "*felt*" that he needed to print off a claim form, complete it by hand, and copy and attach a significant number of documents running to over 60 pages, including bank statements covering almost 3 years and weekly payslips covering 8 months. The claimant accepted that the claim form does not state that he must attach and send all of his documents. The Gov.uk website also states that claims can be made online. The Tribunal is therefore not persuaded that the claimant's mistaken conclusions about the mechanics of presenting a claim (which caused further delay following early conciliation) were reasonable.
47. The Tribunal does not therefore have jurisdiction to hear the claimant's complaints of unfair dismissal, breach of contract, and unlawful deductions from wages and/or holiday pay under the Working Time Regulations 1998. These complaints are therefore dismissed.

Employment Judge Licorish
Date: 17 September 2019