Case No: 1405797/2019

EMPLOYMENT TRIBUNALS

Claimant: Ms Hannah Ballard

Respondent: Isobels Ltd

Heard at: **Bristol (by Cloud Video Platform)** **On:** **21 May 2020**

Before: **Employment Judge Midgley**

Representation
Claimant: In person, attended by Mr T Francis (fiancé)
Respondent: Mr Damien Williams, Director

JUDGMENT

1. The Tribunal does not have jurisdiction to hear the claimant's claim of unlawful deduction of wages.

2. The claim was presented outside the statutory time limit an it was reasonably practicable for it to have been presented within the time limit.

REASONS

The format of the Hearing

1. The hearing was conducted by the parties attending by video conference (Kinly Cloud Video Platform). It was held in public with the Judge sitting in open court in accordance with the Employment Tribunal Rules. It was conducted in that manner because the parties consented and a face to face hearing was not possible in light of the restrictions imposed by the Health Protection (Coronavirus, Restriction)(England) Regulations 2020 and it was in accordance with the overriding objective to do so.

2. I was provided with the documents from the Tribunal file, including the ET1, ET3 and the Claimant's email explaining the reasons for the late presentation of the claim. During the hearing Mr Williams read out a text message dated 16 November 2019 from his phone, the contents of which were agreed as accurate by the claimant.

The claim and the issues for the Preliminary Hearing

3. By a claim form presented on 22 November 2019 the Claimant brought claims of unlawful deduction of wages contrary to s.13 ERA 1996.

4. The claimant was employed by the Respondent from 1 December 2016 until 25 January 2019 as a member of the bar staff.

5. The parties agreed therefore that the claim was presented outside the statutory time limit contained in section 23(2)(b) ERA 1996 and the issue to be determined was whether it was reasonably practicable for the complaint to be presented before the end of the relevant period of three months and, if not whether it was presented within such further period as the Tribunal considers reasonable for the purposes of section 23(4) ERA 1996.

The Procedure Hearing and Evidence

6. I had evidence from the Claimant, which was given by affirmation, who answered questions from me and from Mr Williams for the respondent. Mr Williams read out a text message sent by the claimant to Mr Williams on 16 November 2019 in relation to tips, as indicated above, the content of which the claimant agreed was accurate.

7. I heard arguments from both of the parties as to whether I could or should permit the claim to be presented out of time and for it to continue.

The Facts

8. The claimant was employed by the respondent as a member of the bar staff and worked without issue or complaint between 1 December 2016 and 25 January 2019. The Claimant and Mr Williams, whom managed the staff, had a positive and mutually supportive relationship.

9. There is a dispute between the parties as to whether or not there was an agreement that the employees and workers would receive a higher hourly rate of pay, to assist them with obtaining mortgages, but in consequence would not receive tips as a separate element of pay. I do not need to decide that issue as it is one for the final hearing, but it provides the background to the issues before me.

10. In general, I found the claimant to be an honest and straightforward witness and one who was articulate, intelligent, and generally savvy in the use

of technology and the Internet. I accept Mr Williams suggestion that the claimant has a certain amount of business nous and has set up her own business since leaving the respondent (although that latter matter is not of great relevance to my decision).

11. The claimant had worked in the hospitality industry prior to working for the respondent. In consequence, and also because she regularly ate in bars and restaurants, the claimant was aware that tips were taken by bar staff and waiters and waitresses and that, in general, they would receive the tips in their pay in two forms: for tips received as cash payments, generally by way of cash in an envelope at the end of the week or month, secondly for tips paid through debit cards and credit cards, as a separate category of pay in the payslips at the end of each month.

12. Following the end of the claimant's employment by the respondent, on 14 November 2019 the claimant had dinner with a friend who was a regular customer at the respondent's restaurant. He informed her that he had recently seen a program on the BBC which focused on a claim by multiple claimants who had worked for the Ask Italia group in which they claimed that they had not been paid for the tips that they had taken whilst working.

13. As a result of that discussion the claimant became aware that tips were treated as an element of wages for the purposes of their contract of employment. In consequence, on 16 November 2019 she sent a text message to Mr Williams advising him that a number of staff were considering making a claim for the tips which they had taken whilst working for the respondent but in respect of which she alleged they had received no pay. She did not however suggest that she was amongst their number and to that extent the text message was somewhat disingenuous.

14. The claimant subsequently consulted the Citizens Advice Bureau about her rights, and they confirmed her belief that she was entitled to treat tips as an element of her wages and was therefore entitled to bring a claim for unpaid wages to the employment tribunal. It was the former aspect of which the claimant was unaware, she was at all times aware of the right to bring a claim for unpaid wages in the employment tribunal and that the statutory time limit for doing so was three months.

15. Because no payment was forthcoming from the respondent, the claimant approached ACAS and initiated early conciliation on 22 November 2019. An Early Conciliation Certificate was issued the same day.

16. As indicated the claimant then presented her claim on 22 November 2019.

17. I accept the claimant's evidence that she was ignorant of the fact that tips would be treated as an element of wages the purpose of the Employment Rights Act and the law of contract more generally. She candidly accepted that

there was no physical impediment to her presenting the claim, had she known of the facts that tips are to be treated as an element of wages for the purposes of section 13 ERA 1996.

The Relevant Law

18. Section 13 ERA 1996 provides as follows

> "(1) An employer shall not make a deduction from wages of a worker employed by him unless –
>
> (a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or
>
> (b) the worker has previously signified in writing his agreement or consent to the making of the deduction.
>
> (3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion."

19. Section 23 ERA 1996 contains the right to present a claim to the Tribunal and the limitation period for exercising that right. The relevant provisions are as follows:-

> "(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 the 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.
>
> (3) Where a complaint is brought under this section in respect of –
>
> (a) a series of deductions or payments or
>
> (b)…[not relevant]
>
> The references in subsection (2) to the deduction or payment are to the last deduction or payment in the series or to the last of the payments so received.

(4) where the employment tribunal is satisfied that it was not reasonably practicable for a complaint under this section to be presented before the end of the relevant period of three months, the tribunal may consider the complaint if it is presented within such further period as the tribunal considers reasonable."

20. When a claimant seeks to excuse late presentation of his or her ET1 claim form on the ground that it was not reasonably practicable to present the claim within the time limit, the test to be applied is simply to ask: "has the man just cause or excuse for not presenting his complaint within the prescribed time?" (Wall's Meat Co v Khan [1978] IRLR 499 per Lord Denning, quoting himself in Dedman v British Building and Engineering Appliances Ltd [1974] ICR 53, CA). Four general rules apply to that test:

20.1. S.23(4) ERA 1996 (and its equivalents in other applicable legislation) should be given a 'liberal construction in favour of the employee' (Dedman).

20.2. what is reasonably practicable is a question of fact and thus a matter for the tribunal to decide. An appeal will not be successful unless the tribunal has misdirected itself in law or has reached a conclusion that no reasonable tribunal could have reached. As Lord Justice Shaw put it in Wall's Meat Co Ltd v Khan [1979] ICR 52, CA: 'The test is empirical and involves no legal concept. Practical common sense is the keynote and legalistic footnotes may have no better result than to introduce a lawyer's complications into what should be a layman's pristine province. These considerations prompt me to express the emphatic view that the proper forum to decide such questions is the [employment] tribunal, and that their decision should prevail unless it is plainly perverse or oppressive'

20.3. the tribunal must have regard to the entire period of the time limit (Wolverhampton University v Elbeltagi [2007] All ER (D) 303 EAT);

20.4. the onus of proving that presentation in time was not reasonably practicable rests on the claimant. 'That imposes a duty upon him to show precisely why it was that he did not present his complaint' — Porter v Bandridge Ltd [1978] ICR 943, CA. Accordingly, if the claimant fails to argue that it was not reasonably practicable to present the claim in time, the tribunal will find that it was reasonably practicable — Sterling v United Learning Trust EAT 0439/14.

21. In Palmer and anor v Southend-on-Sea Borough Council [1984] ICR 372, CA, the Court of Appeal conducted a general review of the authorities and 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'. Lady Smith in Asda Stores Ltd v Kauser

EAT0165/07 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'.

22. The factors which may be considered, as the headnote in Palmer suggests are:

> "…the substantial cause of the employee's failure to comply with the statutory time limit; whether he had been physically prevented from complying with the limitation period, for instance by illness or a postal strike, or something similar. It may be relevant for the Tribunal to investigate whether, at the time of dismissal, and if not when thereafter, the employee knew that he had the right to complain of unfair dismissal; in some cases the Tribunal may have to consider whether there was any misrepresentation about any relevant matter by the employer to the employee. It will frequently be necessary for the Tribunal to know whether the employee was being advised at any material time and, if so, by whom; the extent of the advisor's knowledge of the facts of the employee's case; and of the nature of any advice which they may have given him. It will probably be relevant in most cases for the Industrial Tribunal to ask itself 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 Industrial Tribunal may also wish to consider the manner in which and the reason for which the employee was dismissed, including the extent to which, if at all, the employer's conciliatory appeals machinery had been used.

23. Subsequently in London Underground Ltd v Noel [1999] IRLR 621, Judge LJ stated at paragraph 24 "The power to disapply the statutory period is therefore very restricted. In particular it is not available to be exercised, for example, "in all the circumstances", nor when it is "just and reasonable", nor even where the Tribunal "considers that there is a good reason" for doing so." As Browne Wilkinson J (as he then was) observed: "The statutory test remains one of practicability … the statutory test is not satisfied just because it was reasonable not to do what could be done" (Bodha v Hampshire Area Health Authority [1982] ICR 200 at p 204).

24. The question of whether or not it was reasonably practicable for a claimant to present his claim in time, in circumstances where it is argued that they were ignorant of their rights to claim requires the Tribunal to be satisfied, both as to the truth of that assertion and that the ignorance was reasonable on an objective inquiry; see Porter v Bandridge Ltd [1978] ICR 943, CA; Avon County Council v Haywood-Hicks [1978] ICR 646 EAT and Riley v Tesco Stores Limited [1980] ICR 323 .

25. The Tribunal must then go on to decide whether the claim was presented

'within such further period as the tribunal considers reasonable.' In other words, the exception will only apply if the tribunal decides that the period between the expiry of the time limit and the eventual presentation of the claim was reasonable in the circumstances. That test does not require the tribunal to be satisfied that the claimant presented the claim as soon as reasonably practicable after the expiry of the time limit in order to allow the claim to proceed. Rather, it requires the tribunal to apply the less stringent test of asking whether the claim was presented within a reasonable time after the time limit expired (see University Hospitals Bristol NHS Foundation Trust v Williams EAT 0291/12). That said, a tribunal is unlikely to accept a late claim where the claimant fails to act promptly once the obstacle that prevented the claim being made in time in the first place has been removed.

26. What amounts to a 'further reasonable period' for the purposes of S.111(2)(b) is essentially a matter of fact for the tribunal to decide on the particular circumstances of the case. There is no hard and fast rule about what period of delay is reasonable and the extent of the delay is just one of the circumstances tribunals will need to consider. The tribunal must conduct an objective consideration of the factors causing the delay and of what period should reasonably be allowed in those circumstances for proceedings to be instituted against the general background of the primary time limit and the strong public interest in claims being brought promptly (see Cullinane v Balfour Beatty Engineering Services Ltd and anor EAT 0537/10)

27. The objective consideration requires that tribunals should have regard to all the circumstances of a case, including what the claimant did; what he or she knew, or reasonably ought to have known, about time limits; and why it was that the further delay occurred (see Nolan v Balfour Beatty Engineering Services EAT 0109/11)

Conclusions

28. Addressing each of the factors identified in Palmer in turn, I find as follows:

28.1. the substantial cause of the claimant's failure to comply with the statutory time limit was her ignorance of the fact that tips are treated as an element of the wages properly payable to employees for the purposes of section 13 ERA 1996;

28.2. there was no physical impediment to the claimant presenting the claim within the limitation period, as she accepted;

28.3. the claimant knew both of her right to bring a claim for unlawful deduction of wages and of the time limit applying to that right at the point at which her employment terminated;

28.4. this was not a case where there was any misrepresentation about the wages, the claimant knew what was happening to the wages in the

sense that she was fully aware that they were being taken by staff but not being paid to them. Those are the material matters for the purposes of a claim of unlawful deduction of wages.

28.5. The claimant received advice from the Citizens Advice Bureau and to a lesser extent from ACAS after the primary time limit in section 23 ERA 1996 had expired. There was no error in that advice.

29. The essential issue, therefore, applying the decisions in Porter, Hayward-Hicks and Riley is first whether the claimant's assertion that she was ignorant of the law is truthful and secondly, if it was, whether it was objectively reasonable in the circumstances.

30. I have found that the claimant's argument that she was ignorant of the fact that tips are treated as an element of wages for the purposes of section 13 ERA 1996 is truthful. Consequently, I must go on to consider whether that ignorance was itself objectively reasonable. In reaching my conclusion on that issue I bear in mind that the claimant is technically savvy, has access to the Internet and Google and other sources of advice and information and generally has a good business knowledge. I also bear in mind that the question of tips was regularly discussed among staff with the respondent. A simple Google search brings up the Government information page on tips as the first item. The claimant was always aware of the pertinent facts within the statutory limitation period and could have conducted such a search with ease.

31. Taking all those matters into account, I conclude that it was not objectively reasonable for the claimant to have been ignorant of the fact that tips are treated as an element of wages for the purposes of the Employment Rights Act 1996. The consequence is that the tribunal does not have jurisdiction to hear the claimant's claim and the claim is dismissed.

32. For the sake of completeness, had it been necessary for me to consider whether the claim was presented within a reasonable period after the expiry of the time limit, if it were not reasonably practicable for the claimant to have presented a claim within the statutory time limit, I would have concluded that it was. The total period of delay from the point at which the claimant was aware of her right to claim for the tips was eight days, during which she made an approach to the respondent, consulted the Citizens Advice Bureau and contacted ACAS to initiate conciliation before issuing her claim.

Employment Judge Midgley

Date 21 May 2020

Judgment sent to parties: 2 June 2020

FOR THE TRIBUNAL OFFICE