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# EMPLOYMENT TRIBUNALS

**Claimant:** Ms C Walsh  
**Respondent:** LB Building Control Limited  
**Heard at:** East London Hearing Centre  
**On:** 23 September 2020  
**Before:** Employment Judge Jones

## Representation

**Claimant:** In person  
**Respondent:** Mr McHugh (Company Director)

# JUDGMENT

The judgment of the Tribunal is that: -

- 1 The complaint of unlawful deduction of wages is struck out.**
- 2 The Tribunal has no jurisdiction to hear it as it was issued outside of the time limit set down in section 23 of the Employment Rights Act 1996 and it was reasonably practicable for a complaint under this section to be presented before the end of the relevant period of three months.**

# REASONS

1 This is a resumed hearing from 20 July 2020 before Employment Judge Burgher. At that hearing, the judge identified that the first issue for the Tribunal was whether we have jurisdiction to consider this claim, given the issue date and the dates of the Claimant's employment. Employment Judge Burgher adjourned the hearing to give both parties an opportunity to collate documents in support of their positions and to send those to the other side and to the Tribunal.

2 The hearing resumed today before me. The parties had sent documents and witness statements to each other and to the Tribunal, in accordance with Employment Judge Burgher's order.

3 I informed the parties that we would address the issue of the Tribunal's jurisdiction to consider the claim first. Even if the claim is meritorious, the Tribunal cannot consider it if it has no jurisdiction to do so.

4 The Claimant gave sworn evidence on this matter and Mr McHugh was able to cross-examine her on that evidence.

***Findings of fact***

5 The Claimant was employed by the Respondent as a Building Control Surveyor between 1 August 2016 and 30 August 2019.

6 The Claimant resigned her employment by email dated 8 August. The Respondent accepted her resignation. Her pay date was either the 24<sup>th</sup> or 30 August. The Claimant confirmed today that her employment ended on 30 August 2019.

7 The Claimant's contract of employment makes provision on termination of employment for a payment to be made to an employee in lieu of any accrued and unused holiday days. It was the Claimant's contention that she had not taken any leave during her employment, apart from 1 day and that she was therefore owed around 15 days leave accrued during the last holiday year.

8 This claim was issued on 5 March 2020. The ACAS early conciliation certificate confirmed that ACAS received notification from the Claimant on 28 January 2020 and that the certificate was issued on 28 February 2020.

9 In her evidence the Claimant confirmed that she had started a new job on 2 September 2019. She remained in that job until February 2020. She had been physically assaulted in August 2019 but was able to start a new job in September, where she remained until she left in February.

10 It was her evidence that she was in contact with the Respondent's directors up to November when she received reimbursement for some equipment that she had purchased and that it was then that it became apparent to her that it was not going to pay her for the accrued holiday. The evidence produced by the parties show that there had been communication between them, both in September and in November. The Claimant had a mobile phone which belonged to the Respondent which she believed had been stolen in or connected to the assault. She provided the Respondent with a crime number. However, at a later date the Respondent was able to retrieve the phone as it was later found in the car. The Claimant and the Respondent communicated about clearing the phone, which she subsequently did. The Respondent paid her the money that had been withheld in respect of the phone.

11 The Claimant confirmed that she did not seek legal advice or research how to make her claim in the employment tribunal. She went on to the HMCTS website and set up an account to be able to bring the claim. She therefore knew that she had the right to

bring the claim. Her evidence was that she then contacted ACAS and waited for them to respond to her.

12 The Claimant referred to emails that she had received from ACAS in November, which she said showed that she had issued her claim much earlier and that therefore, the Tribunal had jurisdiction to hear her case. She stated that she had an email from ACAS dated 30 November which confirmed that she had contacted them in November and she waited for them to come back to her to start the conciliation process, which they started in January. Her evidence was that ACAS gave her the number R111 206/20.

13 It was her case that she opened a file with HMCTS and began to complete her ET1 form and when she saw that she required an Early Conciliation Certificate number, she stopped completing the form and contacted ACAS. It is likely that the Claimant wanted the Tribunal to consider her as having started her claim in November.

14 She referred to letters from HMCTS in her possession which supported her position. She forwarded these to the Tribunal admin office. Even though this disclosure was late and was outside of the period that she had been given by EJ Burgher in the order dated 31 July, I allowed her to submit those documents late, because she is a lay person and because the Tribunal was aware of the serious consequences for her if her claim was found to be out of time. The Respondent had not had sight of these documents. If they had been relevant, I would have forwarded them to Mr McHugh for comment. Once the Claimant completed her evidence, I adjourned to consider her additional documents.

15 The documents were printed off by the clerk and placed on the Tribunal file. The Claimant forwarded four emails to the Tribunal today. Three had been sent to her by HMCTS on 30 November 2019. The subject matter of the first one, sent at 3:02:49 was '*complete registration request*'. The subject matter of the second, sent at 3:03:48 was also '*complete registration request*'. The third email sent to her at 3:14:01 had the subject matter '*complete your password reset request*'.

16 The fourth email was an email sent to both parties by a clerk here at London East Hearing Centre on 31 July 2020. That email attached a letter to both parties notifying them that the hearing on 31 July had been adjourned to today, 23 September.

17 There were no emails from ACAS.

### **Law**

18 Section 13 of the Employment Rights Act 1996 states that an employer shall not make deductions from wages of a worker employed by him except where the deduction is required by virtue of statute (such as tax and National Insurance) or a provision of the worker's contract. The employer can make deductions where the worker has previously signified her agreement or consent to the making of the deduction or the deduction relates to an overpayment of wages or expenses.

19 Section 27 of the same Act states that the word 'wages' includes any fee, bonus, commission, holiday pay or other emolument referable to her employment, whether payable under a contract or otherwise.

20 Section 23(2) of the same Act states that an employment tribunal shall not consider a complaint under this section unless it has been presented before the end of the period of three months beginning with the date of payment of the wages from which the deduction was made. Subsection (4) states that when 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.

21 How does a tribunal decide whether it was reasonably practicable to present a claim in time? And if it was not, what is a reasonable time thereafter?

22 The law states that the question of what is or is not reasonably practicable is essentially one of fact for the employment tribunal to decide. In the case of *Walls Meat Co Ltd v Khan* [1979] ICR 52 CA Lord Denning explained the test like this:

*'It is simply to ask this question: had the man just cause or excuse for not presenting his complaint within the prescribed time? Ignorance of his rights -- or ignorance of the time limit -- is not just cause or excuse unless it appears that he or his advisers could not reasonably be expected to have been aware of them. If he or his advisers could reasonably have been so expected, it was all his fault and he must take the consequences '.*

23 The matter was again part of the decision in the case of *Palmer and Saunders v Southend-on-Sea Borough Council* [1984] 1 All ER 945. In that case May LJ reviewed the authorities and stated as follows: *"reasonably practicable" means more than merely what is reasonably capable physically of being done..... Perhaps to read the word "practicable" as the equivalent of "feasible" ..... And to ask ..... was it reasonably feasible to present the complaint to the employment tribunal within the relevant three months?"... Is the best approach to the correct application of the relevant subsection".*

24 In the case of *Schulz v Esso Petroleum Ltd* [1999] IRLR 488, the Court of Appeal stated that the tribunal must answer this question against the background of the surrounding circumstances and the aim to be achieved.

25 Where the claimant satisfies the tribunal that it was not reasonably practicable to present his claimant time, the tribunal must then go on to consider whether it was presented within a reasonable time thereafter. In making this assessment the tribunal must exercise its discretion reasonably and with due regard to the circumstances of the delay the tribunal has to look at the particular circumstances of each case and make a decision.

26 In the case of *James W Cook & Co. (Wivenhoe) Ltd v Tipper* (1990) IRLR 386 – a period of two weeks was held to be reasonable and in the case of *Walls Meat* referred to above, four weeks was held to be reasonable on the particular facts of that case.

#### Decision

27 It is clear to this Tribunal that the Claimant's last day of employment was 30 August 2019. Her last pay date was either 24 August or 30 August. The date of payment of wages from which the deduction was made was 30 August 2019. That was the day the

Claimant would have expected the Respondent to pay her all payments owed to her, including payment for any accrued but untaken holiday.

28 The Claimant referred to her holiday pay in subsequent communication with the Respondent but that did not extend the date for payment of the wages from which the deduction was made.

29 The claim should have been issued 3 months, less one day thereafter. The claim should have been issued by 29 November 2019.

30 The evidence shows that the Claimant tried to complete registration with HMCTS on 30 November. She did not complete her ET1 form. She did not submit an ET1 form. There was no evidence of contact with ACAS earlier than the date on the Claimant's Early Conciliation Certificate, which is 28 January 2020. The Tribunal's conclusion is therefore that the Claimant first contacted ACAS about this matter on 28 January 2020.

31 Although it appears that the Claimant opened an account or tried to do so with HMCTS on 30 November 2019, once she found out about the requirement to contact ACAS, she did not do so until 28 January. The Tribunal was given no reason for the significant delay.

32 The Claimant was attempting to resolve matters with the Respondent between the end of her employment and the attempt to open an account with HMCTS in November. There is no requirement to go through internal procedures before issuing your claim. The communication between the parties appears to be mainly about the telephone and the allegation that the Claimant had not completed all her reports, rather than specifically about holiday pay.

33 As the Claimant had not contacted ACAS until 28 January, she does not get the benefit of any extension of time in which to lodge her claim.

34 It is this Tribunal's judgment that the claim for failure to pay holiday pay should have been brought within 3 months less one day of the last pay date. In this case that would have been by 29 November. The Claimant failed to do so. The claim was issued out of time.

35 The test the Tribunal has to apply to decide whether we have jurisdiction to hear it is whether it was reasonably practicable for the Claimant to have issued her claim within the statutory time limit.

36 It is this Tribunal's judgment that the Claimant was aware of her right to claim. When she was not paid her outstanding holiday pay in her final wage, she became aware that she had a claim against the Respondent. In this Tribunal's judgment, this was on 30 August 2019.

37 The Tribunal was not given any reason why the Claimant did not issue her claim between 30 August and 29 November. When the Claimant tried to open an account with HMCTS on 30 November, she was already outside of the statutory time limit.

38 She then did not contact ACAS until 28 January. The Tribunal was not given any reason why the Claimant failed to contact ACAS earlier. She was given every opportunity

today to give the Tribunal any relevant information. In her email dated 4 August to the Tribunal she referred to being upset during her employment and having a panic attack just before her resignation. No reference was made today to any similar matter after her resignation. The Tribunal was not told what happened between 30 November and 28 January to cause her to not take any action to take this matter forward in that period of time. There was no communication between the parties in that period and the Claimant was employed and working.

39 In this Tribunal's judgment, taking the particular circumstances of this case, that it was reasonably practicable for the Claimant to have issued her ET1 claim within the statutory time period. Taking all the above into consideration, it was reasonable feasible that the Claimant could have issued the claim within time. The Claimant had no just cause or acceptable excuse for not doing so.

40 The Tribunal has no jurisdiction to hear this claim and it is struck out.

Employment Judge Jones

24 September 2020