



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mrs T Loukaides

v Innovco Trading Ltd t/a Innovation Schoolwear

Heard at: Watford

On: 17 July 2020

Before: Employment Judge R Lewis

Appearances:

For the Claimant: Mr E Loukaides, the Claimant's husband

For the Respondent: Mr Gilbert Consultant (Peninsula Business Services)

JUDGMENT having been sent to the parties on 1 September 2020 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

REASONS

1. The claimant was employed by the respondent in a sales capacity. It was common ground that the claimant's employment ended on 7 June 2019, and that she had less than two years' service.
2. The claimant started early conciliation on 2 September 2019 and Day B was 2 October. Her claim was received at the tribunal on 4 November 2019. The ET1 form was almost completely blank, apart from ticked boxes, which indicated claims for holiday pay and commission, and a failure to issue written terms and conditions of employment.
3. By its response, the respondent asserted that the claim was out of time, so the tribunal had no jurisdiction to hear it. It conceded that no written terms of employment had been issued. It denied all other claims. On 20 January 2020 the respondent applied for strike out, on grounds that the claim was out of time.
4. The file came before Judge Bartlett on rule 26 referral. On 4 February the claimant was ordered to provide additional information about her claim. Paragraph 4 of Judge Bartlett's order required her to give information about the termination of her employment. On 11 February the tribunal sent the parties notice of this hearing, and of the issue to be decided. On 5 March, in response to Judge Bartlett's order, the claimant sent the tribunal a

witness statement containing the following:

“On 1 November 2019 at 3pm I attempted to submit the online application. After several failed attempts my husband, who is acting as my representative, contacted the employment tribunal on telephone number and spoke to a Becky Jo. My husband explained to her the problems he was having and she confirmed that there was a problem with the online applications being received on that day, 1 November 2019. She advised him to try again on Monday 4 November 2019 and that she would make a note on the file that this application was being submitted late due to technical problems at the employment tribunal’s offices.”

5. On 26 March the respondent applied again for strike out. The file came before Judge Alliott, on whose direction a letter was sent on 5 May, which concluded with the following:

“The parties are informed that the tribunal system shows that on Friday 1 November 2019 32 online claims were received at Watford, including ones at 15:00, 15:30, 15:31, 16:00, 16:31 and 17:00. Also that there is no administrative staff member called Becky Jo, although there is a Becky and a Jo. State that if the claimant wishes to evidence her statement with a screenshot or telephone record or other supporting document she should send it to the respondent and the tribunal by 19 May 2020.”

6. At the start of this hearing, I endeavoured to clarify a number of the issues. There was an adjournment to enable Mr Gilbert to take further instructions on the system of commission payments. I asked administrative staff in the tribunal whether the information given by Judge Alliott could be interrogated any further. It could not, although I was provided with a print-out of all cases received on 1 November 2019, not including times of receipt. I then heard brief submissions.
7. Mr Loukaides explained the commission system. As I understood it, the system was that calculations were undertaken quarterly, and commission was paid to the claimant on income received from her sales in that quarter. I was not today concerned with whether that was what was done in practice.
8. I was told (but could make no finding) that the claimant had received her final pay of a commission payment of about £574.00 on 7 June in respect of customers who had paid by that date. Mr Loukaides named customers who had paid the respondent in July and August; Mr Gilbert said that commission for those sales had been paid between July and September. That is disputed.
9. Mr Loukaides said that the claimant had not brought the claim until 1 November 2019 (which she understood was the last day) with a view to resolving matters. He had tried to upload the ET1 from his office computer, and had noted his difficulties. He is himself a regulated professional, and understands the importance of time limits, and of contemporaneous records. The claimant would have no interest in delaying to 4 November, once she had decided to proceed. Her account of events had been consistent since 5 March 2020.
10. Mr Gilbert in reply said that there was no evidence which explained the discrepancy between the claimant’s inability to present her claim on 1 November, and the tribunal’s record of receipt of claims on the same day.

He also submitted that it was not reasonable, having been unable to present a claim on 1 November, to delay to the following Monday, 4 November.

11. This claim was a claim for unlawful deductions, including holiday pay. The question under s.23(2) of Employment Rights Act 1996 was whether the claim was 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.”

12. That period was to be extended by the one month ‘stop the clock’ provisions of early conciliation. The parties agreed that the correct calculation was that the claimant’s last day for presenting this claim was 1st November 2019. (In my view, it was in fact 2nd November, but that does not make a difference).
13. While I accept that the claimant is to be lauded for seeking to resolve this dispute amicably, she understood the time limit, understood its importance, and chose to wait to the last day. That was not prudent, allowing for any contingency which could arise that day.
14. Furthermore, this was not a case where there was a process of negotiation. The respondent, as I understood it, remained intransigent and there was no negotiation at any time after 7 June.
15. While I do not disbelieve what is said in the claimant’s witness statement (which is second-hand information) I am unable to reconcile it with the print out from the tribunal of normal business being undertaken that day, and the information set out in Judge Alliot’s letter.
16. I accept that Mr Loukaides spoke to a member of the tribunal staff. In doing so, he may have been given information which he understood to be legal advice and which was not necessarily correct legal advice. However, that does not change my view. First, it is not the function of the tribunal staff to give advice to one side in a dispute. I understand that the recorded message received by all callers to the tribunal makes this point. Secondly, the summary given in the claimant’s witness statement is unlikely to be accurate: the office staff know, for example, that the online systems operate 24/7, so that claims are often presented at weekends and out of hours. Certainly there was nothing to stop the claimant trying again any time up to 23:59 that day or the next day.
17. There was no independent extrinsic evidence to make good the claimant’s assertion that it had not been reasonably practicable to present the claim on the day on which it was presented; and ample evidence to the contrary.
18. While I might have reached a different conclusion if my question were is it just and equitable to extend time, my decision is that it has not been shown that it was not reasonably practicable for the claim to have been brought within the time limit and therefore the tribunal has no jurisdiction to hear it. If I had to decide the further question, or of whether it was brought within a

further period of time which was reasonable, I would have found with the claimant that it was reasonable even if wrong to wait from Friday to the next business day on Monday.

Reconsideration

- 19. The parties appeared to agree that this claim applied only to sums which fell due and payable on termination of employment on 7 June. I raised the question of the application of this claim to sums which were due and payable after that date. Time to present those claims does not run from the effective date of termination, but from the date of under-payment. At this hearing, I accepted Mr Gilbert’s argument that in fact this point did not matter in this case, because the claimant had had the full month after Day B and time was not extended by the question of the precise date upon which payment was made.
- 20. On drafting these Reasons I am however concerned that that submission was wrong, and I was wrong to accept it. Say commission that was due and payable on 31 August was not paid in full. The claimant had been through early conciliation for that claim: Mr Gilbert’s submission had the effect that the last date for bringing that claim was reduced from statutory primary limitation (29 November) to 1st or 2nd November.
- 21. It may well therefore be that the correct course was to strike out only any claim based on an alleged underpayment occurring on or before 5 July 2019; and to permit any claim based on an underpayment between 6 July and 4 November 2019 to proceed.
- 22. The burden would fall on the claimant to identify, with reference to evidence of payment, any claim based on a payment made on or between 6 July and 4 November 2019. Likewise, the burden would fall on her to prove the net amount of such shortfall.
- 23. In accordance with the above, I have reconsidered my judgment on my own initiative under rule 73, and directed a hearing under rule 72(3) at which I will deal with reconsideration, and if the Judgment is varied, then hear and determine the claim.

Employment Judge R Lewis

Date: ...14/10/20.....

Judgment sent to the parties on

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For the Tribunal office

