



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant MISS C CHARLES

and

Respondent CITICOURT AND CO LTD

Judgment

HELD AT: London Central (CVP video audio call) ON: 16 November 2020

BEFORE: Employment Judge Russell (sitting alone)

REPRESENTATION:

Claimant: Mr .Harris , Counsel

Respondent: Ms Bartin, Respondent Director

Judgment

1. The Tribunal has jurisdiction to hear the Claimant's claims for wrongful dismissal and or unauthorised deduction from wages and or breach of contract under inter alia section 23 ERA 1996.
2. The time limit for extension of the Respondent's filing if its ET3 under Rule 20 ET Rules is extended so that the defence is treated as being presented in time.
3. The Claimant's application to amend her claim to add in a claim of unfair dismissal under s 104 ERA 1996 is refused.

This Hearing

1. On 22 October 2020 a PHR took place at which EJ Klimov directed that a further open preliminary hearing should take place in relation to whether the claim has been brought in time and whether the Respondent's application for an extension of time for presenting a response should be granted. The Claimant also wishes to apply to amend her claim to include unfair dismissal under s.104 ERA 1996 for asserting a statutory right, namely the right not to suffer an unlawful deduction from wages under s.13 ERA 1996 and this application was also considered by me today.

Background and Findings/Issues

2. The Claimant was only employed by the Respondent (as Executive Assistant / Office Manager) for a short period . 20 August 2019 to 5 September 2019 . The Claimant alleges her dismissal on 5 September, during her probation period , arose primarily from her complaint as to non-payment of her August salary . Which , although she had not claimed constructive dismissal for non-payment of wages , had led her to not come into work for the last days of her employment because she could not afford the train/tube fares for what was a difficult commute to work . The Respondent , embarrassed by what they describe as an isolated incident of a failure to pay employee wages on time , alleges the Claimant was a poor performer and had been unacceptably late to work on a number of occasions which led to her dismissal .
3. The Respondent eventually paid the accrued pay due (to include August wages) on or about September 9 but sought to justify the apparent non-payment of wages for that part of September when the Claimant was employed based on the Claimant's unauthorised absence from work . Notwithstanding her legitimate reasons given for this .
4. The dispute as to notice and notice pay arises because the Claimant received an offer letter clearly referring to an entitlement of 1 months' notice during her probation period . Whereas under S 86 ERA (due to her short service) or her (unsigned) contract of employment she would have had no notice entitlement .Her claim to one month of notice pay seems to have merit but this was not for me to determine today.
5. The Claimant's further contractual claims are primarily for some holiday pay owing (although this may have been resolved through recent payments made by the Respondent) and unpaid salary for at least 3 days and perhaps the whole of the first week of September pre her dismissal . Her last payslip (for August) is unclear . And her P45 might be outstanding although if so, the Respondent acknowledged a legal obligation to provide this .
6. This hearing was however only to determine if the ET has jurisdiction to hear the above claims (and I determined it was) , validate the late served ET3 (if appropriate and I find that it was) and consider the Claimant's application to amend her claim to include a claim of unfair dismissal under section 104 ERA 1996 (which was refused). In consequence it is only the issues referred to above in paragraphs 4 and 5 which need to be resolved by the ET and this can be done over a full merits hearing limited to one day . It is listed accordingly in separate case management directions and to the extent the parties cannot now agree to resolve their differences themselves given the relatively small sums at stake and guidance given today.

Reasons/Findings

Limitation period for the Claim

7. Under s.13 ERA 1996 an employee has a right not go suffer unlawful deductions from their wages and under s.23 ERA 1996 may make a complaint to the ET. The time limits are set out in s.23:

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[in the case of a complaint relating to a deduction by the employer] the date of payment of the wages from which the deduction was made[and]

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.

8. The time limit provisions for the Claimant's other claims are set out in the same terms, under the Employment Tribunals Extension of Jurisdiction Order 1994, at Regulation 7(4).
9. The Claimant was not legally represented or indeed represented at all until this hearing and although she was a legal secretary has had no employment law expertise. The Claimant was in financial difficulties due to losing her job and not being paid and could not afford to instruct a solicitor .When she approached ACAS seeking advice on or about 5 September 2019 I accept her evidence (which she gave today on oath) that the advice she sought then related only to a possible breach of contract and not to an employment tribunal claim. She did not at any material time know of the 3-month time limit to file her claim and her evidence to that effect was not contradicted by the Respondent.
10. In the interim period between dismissal and filing her claim she had a number of demanding and upsetting personal issues to deal with . This included caring for her father who was seriously ill in the autumn of 2019 and sadly died in June 2020 through renal failure with many medical complications .The Claimant was very involved in attending to his needs dictated by his serious illness which worsened in the period between losing her job and his passing. Around the time the primary limitation period expired the Claimant had to move in with her father to provide care who was hospitalised at the start of 2020.
11. At the end of February / beginning of March 2020 the Claimant was also extremely ill and was told that she had Covid-19. She also suffered a miscarriage adding further to her stress and anxiety. Whilst not going through a timeline and or chronology of her illnesses and her father's condition it is understandable that the Claimant prioritised her own health and that of her family at what obviously an extremely difficult time. I

take account of the case of *Schultz v Esso Petroleum Company Ltd [1999] IRLR 488* by reference to the Claimant's own illness and stress throughout this period.

12. It is not reasonable to say the obligation upon her was binary in that she could have focussed on her family and still filed a claim. It was not reasonably feasible for her to do so and in this respect I have taken account of *Palmer v Southend-on-Sea BC [1984] ICR 372* case in construing the reasonably practicable formula as the same question as "was it reasonably feasible to present the complaint to the industrial tribunal within the relevant three months?". And I find that it was not.
13. The last in time breach upon which she relies arises at the end of September 2019 when she should have received her September pay. She was therefore out of time in presenting her claim (which she did on 20 March 2020 having submitted an ACAS conciliation form on 29 January 2020 and received her conciliation certificate on 19 February 2020). However, I accept the Claimant's contention that she did not realise the time would not be extended having contacted ACAS or paused during the conciliation period given it was commenced too late. And that this is a reasonable misunderstanding / mistake to make. That the rule that time would not be paused in these circumstances is not widely known by a lay person.
14. I find that not only was it not reasonably practicable for her to have filed her claim in time but that she then did so within a reasonable further period able given surrounding events. Including the fact that the Respondent continued to promise payment of any outstanding amount due to her. But primarily because the pressures on the Claimant (particularly in respect her own and her father's health) also continued after the end of the primary limitation period.
15. The Respondent reminds me that in deciding what is a reasonable further period, the tribunal must take all the circumstances into account to achieve a fair balance. It is not concerned only with difficulties faced by the Claimant. That an extended further period may be unreasonable if the employer would face difficulties of substance in answering the claim. But the Respondent does not have such a difficulty given that the claim as continues is a straightforward factual dispute as to a contractual right /obligation. And I have taken all circumstances into account and not just the Claimant's difficulties.
16. Finally ,in deciding whether to exercise its discretion to allow an extension of time the ET must weigh all the relevant factors including the prejudice to any parties and the ET can take into account the merits of any defence: *Kwik Save Stores v Swain [1997] ICR 49*. And I have done so . The defence to the principal claim of notice pay due seems weak.

Respondent's Application under Rule 20 ET Rules

17. Dealing briefly with the Respondents' application to extend time for the service of its ET3. Under Rule 16 of the ET rules, the Respondent has 28 days to submit a response from when the ET1 was sent to them. The ET3 must be rejected under Rule 18 if it is served out of time unless an application is made under Rule 20 to

extend time. They have done so and this application is successful with particular regard to the balance of prejudice between the parties and the fact that the Respondent's office was closed due to the covid pandemic and so the Tribunal claim form was not received at the time it was sent (which I accept was the case).

18. The Respondent should have had a system to ensure that post was dealt with whilst the office was closed. And some blame falls on them in this respect but in these unprecedented times the delay here in the ET3 being filed, which has not unduly prejudiced the Claimant, is understandable and accepted.

Application to Amend the Claim to include a s104 ERA complaint

19. The Claimant states this is just a relabelling of her claim and that she has already set out in the claim form that she did not receive her salary on the due date and complained to the Respondent about it repeatedly. That the Respondent failed to pay even though the Claimant had been promised further payment and , given that she was then dismissed ,no further facts need to be pleaded. But in the claim form she does not claim or state her dismissal was statutorily unfair, accepts she could have done so , did not raise this at the previous Preliminary Hearing and it is a distinct new statutory claim .

20. The Claimant's existing claims are out of time though now permitted to continue. A new claim would be considerably out of time given that the dismissal was over 13 months ago.

21. For these reasons and balancing the prejudice between the parties I do not allow the Claimant's requested amendment .I apply the principles in relation to amendment set out in *Selkent Bus Co Ltd v Moore [1996] IRLR 661* and have considered the nature of the amendment, the applicability of time limits and the timing and manner of the application before rejecting it.

EMPLOYMENT JUDGE - Russell
17 November 2020
Order sent to the parties on

18/11/2020