



EMPLOYMENT TRIBUNALS

Claimant: Mr L Ziolczyk

Respondent: Takepayments Ltd (formerly Payzone UK Ltd)

Heard at: Bristol (by video)

On: 30 October 2020

Before: Employment Judge O'Rourke

Representation

Claimant: In person

Respondent: Mr A McCann – director

PRELIMINARY HEARING JUDGMENT

The Claimant's claims of unlawful deduction from wages and breach of contract in respect of pay in lieu of notice are dismissed, subject to s.23(4) Employment Rights Act 1996 and regulation 7 Employment Tribunal's Extension of Jurisdiction (E&W) Order 1994, for want of jurisdiction.

REASONS

Background and Issues

1. The Claimant was employed by the Respondent, (formerly known as Payzone UK Ltd) for approximately six months, as a sales representative, until his dismissal with effect 16 September 2019. As a consequence, he brought claims of unlawful deductions from wages and breach of contract in relation to pay in lieu of notice. He also brought a claim of unfair dismissal, but that has previously been struck out, as he did not have the requisite service to bring such a claim.
2. The Tribunal noted, on receipt of the claim that it appeared to have been brought out of time and that therefore the Tribunal may not have jurisdiction to hear it and accordingly this issue was listed for hearing today, by way of open preliminary hearing, conducted by video.

3. It was agreed between the parties that the limitation date, allowing for ACAS Early Conciliation, was 13 January 2020, but that the claim was presented a day late, on 14 January 2020.

The Law

4. I referred myself to s.23(4) Employment Rights Act 1996 (ERA) and regulation 7 of the Employment Tribunal's Extension of Jurisdiction (E&W) Order 1994, which state:

23(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.

and

7. An employment tribunal shall not entertain a complaint in respect of an employee's contract claim unless it is presented—

(a) within the period of three months beginning with the effective date of termination of the contract giving rise to the claim, or

(b)

(c) where the tribunal is satisfied that it was not reasonably practicable for the complaint to be presented within whichever of those periods is applicable, within such further period as the tribunal considers reasonable.

5. I also referred myself to the case of **Dedman v British Building and Engineering Appliances Ltd [1974] ICR 53 EWCA**, in which Lord Denning MR set out the principles to be considered in such a case, to include the reasons for the failure to meet the deadline, whether there was acceptable ignorance of the fact and other factors, such as awaiting information from the employer, or physical impediments etc. The burden of satisfying the Tribunal that it was not reasonably practicable to present the claim on time rests firmly on the claimant (**Porter v Bandridge Ltd [1978] IRLR 271 EWCA**).

The Facts

6. I heard evidence from the Claimant, who had also, in response to a direction from the Tribunal, provided an email setting out his reasons for not meeting the deadline. I also heard brief submissions from Mr McCann.
7. I summarise that evidence as follows:
 - a. The Claimant knew that the time limit expired on 13 January 2020.
 - b. He said that he was awaiting information from the Respondent as to the details of deductions made from his salary, before submitting

his claim. The Respondent said that they had provided that information several times, in the period following the Claimant's dismissal, but that their final email on this subject was on 25 November 2019 (which they considered mere repetition of earlier emails). The Claimant agreed that by that point, he had all the necessary information to commence his claim and indeed entered into Early Conciliation with ACAS on 28 November 2019.

- c. Early Conciliation ended on 13 December 2019, meaning that the time limit for presentation of the claim was now 13 January 2020, of which, as I've said, the Claimant was aware.
 - d. The Claimant said, however that he had not seen the Early Conciliation certificate, sent to him by email on 13 December 2019, until some later point. He had referred, in his email to the Tribunal, to having gone on holiday, over Christmas, to visit his ill grand-mother, in Poland, returning to UK on 8 January 2020. He was asked by the Tribunal when he had gone to Poland and he said around 20 December 2019. He said that while in Poland, he was in an isolated area, without internet access and so could not see the email until his return to UK. When challenged, therefore, as to why, if the ACAS emailed certificate was sent to him while still in UK, he had not seen it, *before* going to Poland, he changed his evidence and said that in fact he may have gone to Poland at some earlier point, presumably before the issue of the certificate.
 - e. He was then asked, if, as he said, he had not seen the emailed certificate until his return to UK, on 8 January 2020, why he had still not managed to submit his claim on time, given that he still had another five days to do so. In response, he again changed his evidence, stating that in fact he may not actually have seen the email until 13 January 2020. He said that he phoned ACAS that day and was told that the claim would be, if submitted the next day, be a day late, but that it may nonetheless be accepted.
 - f. When asked for further explanation on this point, he said that he had been worried about his grand-mother, still considered himself on holiday and was not, therefore, really '*focussed*' on the matter of his claim.
8. 'Reasonably Practicable'. Unlike the test in discrimination cases for extension of time (whether it is 'just and equitable' to do so), the test in deduction from wages and breach of contract claims is more stringent, i.e. whether or not it was reasonably practicable (or 'reasonably feasible') for a claimant to have presented their claim within time. While the 'just and equitable' test allows for consideration of the reason for the delay, the length of it, the effect of such delay on the cogency of the evidence, the speed with which a claimant took corrective action and the balance of prejudice to both parties, no such factors apply to the test I must apply. I considered the following factors:

- a. Ignorance of the Law – such ignorance must itself be reasonable. However, in this case, applying Dedman, the Claimant knew the deadline for the claim.
 - b. I make the following findings in respect of the reasons advanced by the Claimant:
 - i. On his own evidence, he was fully aware of the facts of his case, sufficient to present his claim, on 25 November 2019, approximately seven weeks in advance of the expiry of the time limit, so this point cannot be satisfactory explanation for missing the deadline.
 - ii. The Claimant's evidence on his state of knowledge of the EC certificate was unsatisfactory and contradictory. I consider, in fact that he was aware, on 13 December 2019, of the certificate's issue.
 - iii. Even were that not the case, I don't believe that in this 21st Century digital age that a clearly educated and intelligent man of thirty-five, would not, at least at some point in his time in Poland, have access to his emails.
 - iv. Even taking his case at the highest (based on his original and then contradicted evidence of having seen the certificate on 8 January 2020), he had no satisfactory explanation for not having met the deadline, in the five days still remaining to him. His stated lack of '*focus*' on this matter is well short of an acceptable explanation.
9. Conclusion. I conclude therefore that it was reasonably practicable for the Claimant to present his claim on time and that therefore he cannot rely on s.23, or regulation 7 and his claims are accordingly dismissed, for want of jurisdiction.

Employment Judge O'Rourke

Date: 30 October 2020