



EMPLOYMENT TRIBUNALS

Claimant: Mr R Diamantini

Respondent: Wilmslow Catering Ltd

PRELIMINARY HEARING

Heard at: Manchester (in private; by CVP)

On: 15 January 2021

Before: Employment Judge Grundy (sitting alone)

Representatives

For the claimant: In person

Interpreter in Italian: Monica Sobrero

For the respondent: Mr S Tibbetts Counsel

JUDGMENT

- (1) The claimant's claim in respect of unlawful deductions was presented out of time and the Tribunal did not extend time. The Tribunal has no jurisdiction to hear the claim and it is struck out.
- (2) The claimant's claims in respect of discrimination were presented out of time and the Tribunal did not extend time for the claims to be brought. The Tribunal has no jurisdiction to hear the claims and they are struck out.
- (3) The other claims having been struck out the claimant's claim in respect of failure to provide written terms and conditions is also dismissed, as it is not a free-standing claim.

REASONS

Background

- (4) The background is set out in the Case Management Order of Employment Judge Robinson at page 28 of the bundle of documents before the Tribunal from a hearing held on 18 September 2020.

- (5) The claims in this matter relate to race discrimination and harassment, discrimination due to marriage/perceived sexual orientation, provision of an employment contract in writing and issues with regards to National Minimum Wage and unpaid wages. At that hearing the matters in dispute in relation to jurisdiction were clarified such that there were preliminary issues of jurisdiction before the claims could proceed in any form. The case management summary records at page 28 paragraph 4 "regarding the unlawful deduction of wages and the discrimination claims all of the alleged incidents occurred on or before 20 June 2019." I clarified with the parties at the outset of this hearing the issues.

Issues

- (6) Jurisdictional matters were raised by the respondent in the Grounds of resistance filed at page 41- 42 of the bundle. These were as follows –
- (a) The Tribunal only has jurisdiction to hear complaints under the Equality Act 2010 that are presented within 3 months (allowing for any ACAS extension) of the date on which the alleged act of discrimination occurred. s123 Equality Act.
 - (b) The Tribunal only have jurisdiction to hear a complaint pursuant to section 13 of the Employment Rights Act 1996 (unlawful deduction of wages) if such a complaint is presented within 3 months (allowing for any ACAS EC extension) of the last date of payment of wages from which the alleged deduction was made (s23(2)(a) ERA1996).
 - (c) The Tribunal has a discretion to hear a claim of unlawful deduction of wages where the tribunal is satisfied that it was not reasonably practicable for the claimant to have presented his claim within the limitation period and if the Tribunal is satisfied, that the further period in which the claim has been presented within is reasonable. section 23(4) of the ERA 1996.
 - (d) The Tribunal has a discretion to extend time in respect of the claims of discrimination and harassment under the EA 2010 where the tribunal is satisfied that the claimant has presented his claims within such other period that is considered just and equitable (s123(1)(b)).
- (7) Therefore the Tribunal was considering whether the claims were in time or not, and if not whether the time limit should be extended applying the legal tests to give the Tribunal jurisdiction. The claimant bearing the burden to show the same.

Procedure at this hearing

- (8) This was a remote hearing by CVP cloud video platform due to COVID-19 restrictions. I explained the ground rules at the outset and although virtual screens froze at one stage in the morning all parties were content to continue and could hear fully. Close to the outset I swore in the interpreter who has interpreted to a very high standard in to Italian. I say that because the claimant

has not objected to any interpretation and the language was technical in parts and clarified at those times. I explained to the parties that I would hear submissions from each party and the claimant in reply, although Mr Tibbetts also replied as a new matter was raised. Then I would give a ruling and consider case management if the case was to proceed. Judgment would be provided in writing in English.

Findings of Fact

- (9) The Tribunal has made findings in relation to those matters, which are relevant to this application, not all of the matters before it.
- (10) The claimant commenced employment as a waiter at respondent's premises on 7 April 2018 working a couple of nights a week. He brings claims of discrimination relating to different protected characteristics. The particular allegations appear to relate to inappropriate conduct by some of the respondent's staff or owners and an allegation of assault on 20 June 2019. The allegations appear to be pleaded quite generally they raise race, and sexual orientation discrimination and marriage discrimination. The claimant was asked for clarification and produced a statement at page 49, which again seems to have a scattergun characteristic to it.
- (11) The claimant's ET1 complaint referred to not having received a P45 until February 2020. This was described as violation five, however he did not at any point refer to that act as having been by way of discrimination until closing submissions in reply to Mr Tibbetts. In the CMO order of Employment Judge Robinson at paragraph 4 it confirms that the last act of alleged discrimination and any unlawful deduction occurred before 20 June 2019.
- (12) It follows therefore that is the primary limitation period in respect of both claims expires on 19 September 2019. The claimant presented his claims on 14 March 2020, he applied for and was granted an Early conciliation certificate on February 2, 2020 and the certificate was obtained on 2 March 2020.
- (13) It is common ground that despite the payslips in the bundle, the claimant did not receive payment in accordance with those pay slips as he was unwell from 20 June 2019 and did not return to work.
- (14) It is common ground he was paid for one previous shift in approximately mid August 2019 from the text messages between the claimant and one of the respondent owners. The WhatsApp/text messages in the bundle of documents are polite courteous and friendly.
- (15) The claimant produced two fit notes from 24 June to 6 December 2019. The fit notes refer to stress at work and a non-organic psychosis and refer to "NOS" which is interpreted as with "no obvious symptoms" (so it would seem). At the hearing the claimant produced a letter from a Bristol hospital which confirmed he was in hospital from 20 September 2019 to 3 October 2019, there is some contradiction between the claimant's illness and the courteous correspondence

in text/WhatsApp messages. The WhatsApp messages run from 5 July 2019 until the 28 November 2019.

- (16) The claimant was unfit to submit a claim during the period of the fit notes until late November.
- (17) There is then a gap from the end of November 2019/beginning of December 2019 to the claim on 14 March 2020 I have heard no reason why the claimant was not fit to submit his claims from towards the end of November/beginning of December to 14 March 2020.
- (18) There is no evidence from late November, early December that the claimant's health prevented him from submitting a claim.

Brief Submissions of the parties

- (19) The submissions are referred to in brief form. The claimant asserts he was unwell after 20 June 2019 referable to the assault alleged. He relies on fit notes supplied. He relies on bank statements regarding payments not being made but he was not at work then. He relied on the medical report shown virtually to the Tribunal regarding hospitalisation between 20 September and 3 October 2019. Latterly he alleged the failure to promptly provide the P45 until January 2020 was related to discrimination.
- (20) Mr Tibbetts' asserted the claimant's claims were out of time, and there were no grounds for extension applying each of the legal tests. He referred to the chronology and the content within the text/WhatsApp messages to try to refute the claimant's illness. He submitted that even if the claimant's last payment was on 16 August 2019 time would expire on 15 November and there remained no grounds for extension. He asserted there was a lack of reasons given for the claimant's inaction thereafter. He drew the Tribunal's attention to matters of prejudice having regard to the extent of the delay, relating to witness non availability and reasons for the delay and balance of prejudice. He referred the Tribunal to the relevant law, providing case citations for the claimant.

The law to be applied

- (21) The statutory provisions are set out in paragraph 6 above. In respect of the unlawful deduction of wages claim in order to extend time, the tribunal have to apply a two stage test, firstly that it was not reasonably practicable for the claim to be presented within three months and if it is satisfied that then it has to be satisfied that the claim was presented within a further period which the Tribunal considers reasonable. The burden rests on the claimant and reasonable practicability is a high test.
- (22) The Tribunal took account of the judgments in **Porter and Bandidge [1978] ICR943 EWCA**, **RBS plc v Theobald UK EAT /0444/06**, **Asda Stores Ltd v Kauser UKEAT/ 0165/07** and **Cullinane v Balfour Beatty Engineering Services Ltd UKEAT 0537/10** which requires "an objective consideration of the factors causing the delay and what period should reasonably be allowed for

proceedings to be instituted having regard to the strong public interest in claims being brought promptly and where the primary time-limit is three months”.

- (23) The law in respect of the extension on “just and equitable grounds” in respect of the discrimination claims is accepted to be a broader test. The Tribunal considered **Robertson v Bexley Community Centre 2003 IRLR 434**. The Tribunal also considered the factors in s33 of Limitation Act 1980, in particular the extent of the delay, the reasons for the delay and the balance of prejudice.

Conclusions

- (24) All acts referable to the unlawful deductions claim and the discrimination claims occurred before 20 June 2019 save potentially for the fact of a payment of one day of wages in mid August 2019. The P45 aspect is not sufficiently particularised as an allegation of discrimination and there is no freestanding claim relating to a failure to provide a P45.
- (25) Looking at the period between 20 June 2019 and 14 March 2020, I accept that the claimant was ill at the outset for that time and I also accept that he was hospitalised in accordance with the dates above, and notwithstanding the polite text messages it seems likely the claimant was ill and unable to deal with matters for some time until mid November. However, there is no explanation for the claimant failing to deal with matters from mid November through December through January through February and up to 14 March.
- (26) In the circumstances and taking into account the strict rules regarding the time limits, the claimant has not shown why it was not reasonably practicable for him to bring the claim in respect of unlawful deductions within a short period after the expiry of the primary time limit of three months whether that be three months from 20 June 2019 or August 2019. There is then the period outlined above from December January February until 14 March when there is a lacuna/hole/gap such that 14 March is not a reasonable period in which to then present the claim. On any view the Tribunal is unable to exercise its discretion in the claimant's favour.
- (27) For the same reasons as above the original discrimination claims are out of time.
- (28) In respect of the just and equitable extension in respect of the discrimination aspects, I have found that more difficult given there is an allegation of assault which could be a serious matter if based on discriminatory grounds. I have therefore looked back at the scattergun approach of the allegations, and considered they do lack clarity and coherence.
- (29) I am not strongly persuaded by the respondent's submission individuals have left the employ of the respondent as there is a reference to banter in the ET3 relating to the oral allegations, but overall I am not persuaded to extend the time limits. The same reasoning applies to the claimant between June and November but again there is nothing happening in December, January, February to March 14 2020. Despite the ACAS conciliation in February this does not save the inaction before.

- (30) For the avoidance of doubt the claim brought for failure to provide written terms and conditions is not free-standing and falls with the lack of jurisdiction on the other claims.

Employment Judge Grundy
Date: 15 January 2021

JUDGMENT AND REASONS SENT TO THE PARTIES ON
1 February 2021

FOR THE TRIBUNAL OFFICE

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