EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4105476/2020 (A)

5

Held via telephone conference call on 8 February 2021

Employment Judge A Kemp

10 **Mr Y Bubulchuk**	**Claimant** **In Person**
Mr K Khan	**First respondent** 15 **No appearance and** **No representation**
Sanderling Enterprise Limited	**Second respondent** 20 **No appearance or** **representation**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

25 1. The Employment Tribunal has jurisdiction to consider the claims by the claimant.

2. The Claim against the first respondent is dismissed.

3. The claims against the second respondent succeed, and the claimant is awarded the total sum of **TWO THOUSAND THREE HUNDRED AND** 30 **FIFTEEN POUNDS SEVENTY FIVE PENCE (£2,315.75)** payable to him by the second respondent.

4. The Tribunal reserves the issue of whether to impose a penalty on the second respondent for 14 days to allow it to make representations on that issue.

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REASONS

Introduction

1. This was a Final Hearing of claims made by the claimant against two respondents, Mr K Khan and Sanderling Enterprise Limited. It was conducted by telephone. The claimant is Russian, and gave his evidence through an interpreter Ms T Wimbush.

2. There are a number of claims, being (i) notice pay as a breach of contract, (ii) accrued holiday pay, (iii) for unlawful deduction from wages under Part II of the Employment Rights Act 1996, and (iv) for not providing the claimant with a Statement of Particulars of his employment.

3. The two respondents have not entered any Response Form and although informed of this Hearing did not participate in it.

The issues

4. The issues before the Tribunal were:

   (i) Was the Claim presented timeously, and if not is it within the jurisdiction of the Employment Tribunal? In that regard ascertaining the effective date of termination of employment was required.

   (ii) Which respondent was the claimant's employer?

   (iii) Was the claimant entitled to receive notice of termination of employment?

   (iv) Did the claimant have an entitlement at termination to pay for annual leave?

   (v) Were there unlawful deductions from the claimant's wages?

   (vi) If the claim succeeds in whole or part to what remedy is the claimant entitled?

The evidence

5. The claimant gave evidence himself, and spoke to a Bundle of Documents that had been prepared. In his evidence he also adopted a Statement within the Bundle setting out why the Claim was presented to the Tribunal when it was. He answered questions clearly and candidly.

5 **The facts**

6. The claimant is Mr Yuri Bubulchuk. He is Russian, and speaks limited English.

7. He was engaged to work as a Handyman following contact with Mr Kamran Khan, the first respondent.

10 8. The claimant commenced working on 9 September 2019. He worked 25 hours per week, over on average three days per week. He was paid £8.21 per hour for the work he did, being £205.25 gross and £197.02 net per week. Payment was made from an account not identified with either respondent directly.

15 9. On 3 October 2019 the first respondent answered a text query from the claimant to confirm that he, the claimant, had commenced work on 9 September 2019 and that the second respondent was his employer.

10. The claimant was provided with some payslips (not before the Tribunal) which gave the name of his employer as the second respondent.

20 11. On 10 April 2020 the first respondent telephoned the claimant and indicated that his employment would be ending. He did not give a specific date for that to happen. He said that he would pay for three weeks' wages.

12. The claimant sought by text on 16 May 2020 to the first respondent to learn when his employment was to end. He was sent on 21 May 2020 a P45 for
25 tax purposes which purported to have a termination date of 10 April 2020. It gave as the employer the second respondent.

13. The claimant received written details from Her Majesty's Revenue and Customs ("HMRC") indicating that the second respondent was his employer and had received "furlough" payments under the UK
30 Government Covid-19 Job Retention Scheme for the period 10 April 2020 to 1 May 2020 of 80% of the claimant's gross wages in accordance with

the scheme. Those payments had not been paid to the claimant. The claimant sent an electronic message to the first respondent on 19 May 2020 to ask about the payments due to him and sent a copy of the HMRC document.

5 14. On 19 May 2020 the claimant received a payment from one of the respondents for the sum of £510.48. Payment was from the same account that paid his wages, which had only the initials “FPI”. It was part payment of sums due to the claimant, but no details were provided.

15. On 18 June 2020 the first respondent communicated with the claimant 10 electronically, referred to paying his former net salary for the period to 10 April 2020 and paid him a further sum of £252.80 for sums accepted to be due to that date.

16. The claimant did not receive the weekly payments for furlough paid to the second respondent for the claimant being in the sum of £174.40 per week 15 for each of the weeks commencing on 17 and 24 April and 1 May 2020 which were noted by HMRC as having been paid by HM Government to the second respondent for the claimant’s employment under the furlough scheme.

17. The claimant did not carry out any work for the first or second respondent 20 in the period after 13 March 2020, after being told that he was not to work by the first respondent in light of the Covid-19 pandemic. He remained at home.

18. The claimant did not have any paid annual leave during his employment with whichever of the respondents is found to be the employer.

25 19. The claimant did not receive notice of termination of employment or payment for notice at any stage from either respondent.

20. The claimant contacted the Work Rights Centre, Willesden for advice in early August 2020. They wrote to the first respondent on 4 August 2020 but did not receive a reply.

21. The claimant commenced Early Conciliation as against the first respondent on 13 August 2020 and as against the second respondent on 11 August 2020. In both cases the Certificate was issued on 9 September 2020.

22. The Claim Form was presented by the claimant to the Tribunal on 12 October 2020.

The Law

23. Wages are defined in section 27 of the Employment Rights Act 1996, and include “any sums payable to the worker in connection with his employment, including……holiday pay….”

24. There is a right to a written Statement of Particulars of Employment for a worker to receive after eight weeks of employment under the Employment Act 2002, and a remedy under section 38 in the event that that is not provided of between two and four weeks’ pay. To pursue such a remedy there must also be another claim that falls within the list of claims in Schedule 5 of that Act. The right to a minimum period of notice is provided for in section 86 of the Employment Rights Act 1996.

25. There are provisions under section 23(2) of the Employment Rights Act 1996, by which the claim must be commenced within three months of the date of payment of wages, where there is a series of deductions the last date of that series, and by sub-section (4) where the Tribunal is satisfied that it was not reasonably practicable to have presented the claim timeously if it was presented within such further period as the Tribunal considers reasonable. There are equivalent provisions for breach of contract claims under the Employment Tribunals (Extension of Jurisdiction) (Scotland) Order 1994 and the Employment Act 2002.

26. Before proceedings can be issued in an Employment Tribunal, prospective claimants must first contact ACAS and provide it with certain basic information to enable ACAS to explore the possibility of resolving the dispute by conciliation (Employment Tribunals Act 1996 section 18A(1)). This process is known as 'early conciliation' (EC), with the detail being provided by regulations made under that section, namely, the Employment Tribunals (Early Conciliation: Exemptions and Rules of Procedure)

Regulations 2014 SI 2014/254. They provide in effect that within the period of three months from the effective date of termination of employment (for a claim under section 188, for a claim of unlawful deduction from wages the provision is not applicable, and timebar starts with the termination of employment in fact on 2 February 2010) EC must start, doing so then extends the period of time bar during EC itself, and is then extended by a further month for the presentation of the Claim Form to the Tribunal

27. The question of what is reasonably practicable is explained in a number of authorities, usually in the context of unfair dismissal where essentially the same test applies. Initial guidance was given in ***Palmer and Saunders v Southend on Sea Borough Council [1984] IRLR 119***, a decision of the Court of Appeal in England. The following was stated:

> *"34. In the end, most of the decided cases have been decisions on their own particular facts and must be regarded as such. However, we think that one can say that to construe the words "reasonably practicable" as the equivalent of "reasonable" is to take a view too favourable to the employee. On the other hand, "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", as Sir John Brightman did in Singh's case and to ask colloquially and untrammelled by too much legal logic, 'Was it reasonably feasible to present the complaint to the Industrial Tribunal within the relevant three months?' is the best approach to the correct application of the relevant subsection.*
>
> *………..Dependent upon the circumstances of the particular case, an Industrial Tribunal may wish to consider the manner in which and reason for which the employee was dismissed, including the extent to which, if at all, the employer's conciliatory appeals machinery has been used. It would no doubt investigate what was the substantial cause of the employee's failure to comply with the statutory time limit, whether he had been physically prevented from complying with the limitation period for instance by illness or a postal strike or something similar. […] Any list of possible relevant considerations, however, cannot be exhaustive, and, as we have*

stressed, at the end of the day the matter is one of fact for the Industrial Tribunal, taking all the circumstances of the given case into account."

28. In ***Asda Stores Ltd v Kauser UKEAT/0165/07***, a decision of the Employment Appeal Tribunal, Lady Smith at paragraph 17 commented that it was perhaps difficult to discern how:

"'reasonably feasible' adds anything to 'reasonably practicable', since the word 'practicable' means possible and possible is a synonym for feasible. The short point seems to be that the court has been astute to underline the need to be aware that the relevant test is not simply a matter of looking at what was possible but asking whether, on the facts of the case as found, it was reasonable to expect that which was possible to have been done."

29. In ***Northamptonshire County Council v Entwistle [2010] IRLR 741*** there was a full summary of the authorities concerning the "not reasonably practicable" test, with particular reference to the position where a skilled adviser has been used by the claimant. Just because a solicitor had been acting for the claimant does not mean that the argument as to reasonable practicability cannot be made. It is a question of fact and circumstance. There may be occasions where despite the fact of or ability to take advice from a solicitor, it remained not reasonably practicable to have presented the Claim in time.

30. The burden of proof is on the claimant to prove that it was not reasonably practicable to present the complaint in time: ***Porter v Bandridge Ltd [1978] IRLR 271***

31. Where ignorance of the right, or some form of mistake, is alleged case law has established that that must be reasonable. In ***Wall's Meat Co Ltd v Khan [1979] ICR 52***, the Court of Appeal gave this guidance on the test:

"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 his or their fault, and he must take the consequences."

32. There is an expectation on the part of a prospective claimant of making reasonable enquiry about the rights and how to vindicate them, explained in ***Riley v Tesco Stores Ltd [1980] ICR 323.***

Discussion

33. I was entirely satisfied that the claimant gave credible and reliable evidence. He spoke to a Bundle of Documents put together with assistance of an adviser at the Work Rights Centre.

34. The first issue I addressed was who was his employer. I could easily understand why the claimant convened both respondents, as he had not been given any written particulars of employment, and it was not clear to him who his employers had been. The evidence overall was however sufficient to conclude that it was the second respondent. They have been providing detail to HMRC which allowed them to correspond with the claimant and provide details of national insurance contributions and latterly furlough payments made in respect of him, and the second respondent was the party shown on the P45. It was also the party the first respondent said in a text was the claimant's employer on 3 October 2019. The claimant did not provide any payslips but said that he did receive some and that they had the name of the second respondent on them. Given that evidence, it appeared to me that the second respondent was the employer and the claim against the first respondent required to be dismissed.

35. The second issue was jurisdiction. For that, I required firstly to try and identify the effective date of termination of employment, and the date by which payments to the claimant for wages would lawfully end. I was satisfied that payment of wages was a series for these purposes, and that the date of termination was the last payment in that series. Ascertaining the date of termination was not easy, through no fault of the claimant. He was told on 10 April 2020 that his employment was ending, but not given a specific date. Nothing was put in writing to him. He was told in the call that he would be paid three weeks' wages, but was not in fact paid those

sums. The HRMC records indicated that he was on furlough to the week commencing 1 May 2020, but the payments had not been passed on to the claimant. The P45 issued on 21 May 2020 had a date of termination of 10 April 2020 but that could not in law have been correct. Such a retrospective intimation of employment ending is not effective. That the claimant did not know of the termination was confirmed by his message to the first respondent on 16 May 2020 asking for it. Matters were then made more confused still by the message from the first respondent stating that he would pay the former net wage, not furlough payments, for the period to 10 April 2020 but not responding in any way to the copy of the HMRC records he had been sent showing the furlough payments to the second respondent for the claimant for the period to week commencing 1 May 2020.

36. It appeared to me that the earliest date on which the claimant knew that his employment had ended was 21 May 2020, when he received the form P45. The purported date of termination on that form is not effective in law, but it was clear by that time that the employment had come to an end. The onus is on the employer to communicate termination. An indication that there would be on 10 April 2020 which was ambiguous at best does not do so. The claimant was still unaware of the position at 16 May 2020. I consider that his employment continued therefore to the point when it was clear that it had terminated, that date being 21 May 2020. On that basis his claim was in time, with conciliation having commenced within three months. In any event, even if the termination was earlier, as suggested in the P45 as 10 April 2020, I was satisfied in light of the lack of information provided by the respondents, their lack of clarity, and the inconsistency in treatment as to furlough payments, putting that at its lowest, that the claimant could not reasonably practicably have presented the Claim Form timeously and did do so within a reasonable time. He is Russian, speaks limited English, sought to resolve matters himself and when that failed then sought advice. He acted properly and responsibly. The claim was presented within a reasonable period of time. The Tribunal therefore has jurisdiction.

37. I then considered the remedy that the claimant sought. He is entitled under section 86 of the Employment Rights Act 1996 to a minimum period of notice of one week, or £205.25.

38. I accepted that he had not had any days of paid annual leave during his employment. His entitlements to that, as holiday pay, arises under the Working Time Regulations 1998, with the entitlement for those whose employment ends set out in Regulation 14. I calculate that the entitlement accrued during the period of his employment is 11.2 days. The earnings were £205.25 for on average three days per week, which is the equivalent of £68.42 per day. The total is therefore £766.30.

39. The third claim is for unlawful deduction from wages in respect of three weekly furlough payments for the weeks commencing 17 and 24 April and 1 May 2020. The payment for those weeks had been paid to the second respondent by HM Government, according to the form provided by them to the claimant, but not passed to the claimant. Each payment was 80% of his earnings, in the sum of £174.40. The total of them is £523.20. There were no further payments recorded as having been made to the second respondent for the claimant's employment for 8 May 2020 onwards, although the claimant was, I have held, still employed by the second respondent. The position for the period 8 to 21 May 2020 is however very unclear as there was no furlough payment, yet no work could be done, and in all the circumstances no award for that period is made.

40. The final claim is for the failure to provide a written statement of particulars under the 2002 Act. I am satisfied that in the circumstances of the failure to provide any documentation at all it is appropriate to award the maximum amount of four weeks' pay, being the total of £821.

41. The total sum that I award is therefore the amount of £2,315.75.

Penalty

42. Employment Tribunals have a discretionary power in certain circumstances to order employers who lose a claim to pay a financial penalty to the Secretary of State, under the Employment Tribunals Act

1996 section 12A, which was inserted by section 16 of the Enterprise and Regulatory Reform Act 2013. It has subsequently been amended.

43. The provision is as follows:

"**12A Financial penalties**

(1) Where an employment tribunal determining a claim involving an employer and a worker—

(a) concludes that the employer has breached any of the worker's rights to which the claim relates, and

(b) is of the opinion that the breach has one or more aggravating features,

the tribunal may order the employer to pay a penalty to the Secretary of State (whether or not it also makes a financial award against the employer on the claim).

(2) The tribunal shall have regard to an employer's ability to pay

(a) in deciding whether to order the employer to pay a penalty under this section;

(b) (subject to subsections (3) to (7)) in deciding the amount of a penalty.

(3) The amount of a penalty under this section shall be—

(a) at least £100;

(b) no more than £20,000.

This subsection does not apply where subsection (5) or (7) applies.

(4) Subsection (5) applies where an employment tribunal—

(a) makes a financial award against an employer on a claim, and

(b) also orders the employer to pay a penalty under this section in respect of the claim.

(5) In such a case, the amount of the penalty under this section shall be 50% of the amount of the award, except that—

(a) if the amount of the financial award is less than £200, the amount of the penalty shall be £100;

5 *(b) if the amount of the financial award is more than £40,000, the amount of the penalty shall be £20,000.*

(6) Subsection (7) applies, instead of subsection (5), where an employment tribunal—

(a) considers together two or more claims involving different
10 *workers but the same employer, and*

(b) orders the employer to pay a penalty under this section in respect of any of those claims.

(7) In such a case—

(a) the amount of the penalties in total shall be at least £100;

15 *(b) the amount of a penalty in respect of a particular claim shall be—*

(i) no more than £20,000, and

(ii) where the tribunal makes a financial award against the employer on the claim, no more than 50% of the amount
20 *of the award.*

But where the tribunal makes a financial award on any of the claims and the amount awarded is less than £200 in total, the amount of the penalties in total shall be £100 (and paragraphs (a) and (b) shall not apply).

25 *(8) Two or more claims in respect of the same act and the same worker shall be treated as a single claim for the purposes of this section*

(9) Subsection (5) or (7) does not require or permit an order under subsection (1) (or a failure to make such an order) to

be reviewed where the tribunal subsequently awards compensation under—

(a) section 140(3) of the Trade Union and Labour Relations (Consolidation) Act 1992 (failure to comply with tribunal's recommendation),

(b) section 117 of the Employment Rights Act 1996 (failure to reinstate etc),

(c) section 124(7) of the Equality Act 2010 (failure to comply with tribunal's recommendation), or

(d) any other provision empowering the tribunal to award compensation, or further compensation, for a failure to comply (or to comply fully) with an order or recommendation of the tribunal.

(10) An employer's liability to pay a penalty under this section is discharged if 50% of the amount of the penalty is paid no later than 21 days after the day on which notice of the decision to impose the penalty is sent to the employer.

(11) In this section—

"claim"—

(a) means anything that is referred to in the relevant legislation as a claim, a complaint or a reference, other than a reference made by virtue of section 122(2) or 128(2) of the Equality Act 2010 (reference by court of question about a non-discrimination or equality rule etc), and

(b) also includes an application, under regulations made under section 45 of the Employment Act 2002, for a declaration that a person is a permanent employee;

"employer" has the same meaning as in Part 4A of the Employment Rights Act 1996, ...

"financial award" means an award of a sum of money, but does not including anything payable by virtue of section 13

"worker" has the same meaning as in Part 4A of the Employment Rights Act 1996, …….".

5 44. This power was granted to tribunals, according to the Explanatory Notes to the 2013 Act by which that amendment was introduced:

"to encourage employers to take appropriate steps to ensure that they meet their obligations in respect of their employees, and to reduce deliberate and repeated breaches of employment law".

10 45. The Explanatory Notes also comment on the factors that a Tribunal might take into account as follows:

"An employment tribunal may be more likely to find that the employer's behaviour in breaching the law had aggravating features where the action was deliberate or committed with malice,
15 *the employer was an organisation with a dedicated human resources team, or where the employer had repeatedly breached the employment right concerned. The employment tribunal may be less likely to find that the employer's behaviour in breaching the law had aggravating features where an employer has been in operation*
20 *for only a short period of time, is a micro business, has only a limited human resources function, or the breach was a genuine mistake."*

46. I have considered the actions by the second respondent set out above, particularly what appears to be a failure to pass on to him furlough payments received from HR Government, and proposing a date of
25 termination on a P45 which was before those payments ceased, may be in breach of the rights of the claimant and have one or more aggravating features such that a penalty under section 12A of the Employment Tribunals Act 1996 might fall to be imposed. That penalty can be one half of the award made, which in this case totals £2,315.75, such that a penalty
30 of up to £1,157.87 may be considered.

47. Before I consider whether to issue such a penalty and if so in what sum, I propose to give the second respondent 14 days in which to make written

representations as to why I should not do so, or if I do what the amount of the penalty ought to be, having regard to the circumstances and the second respondent's ability to pay such an award, all as provided for in section 12A itself. I shall reserve the decision on penalty for 14 days to allow the respondent to provide a written response accordingly. In doing so it may wish to confirm whether it has paid the sum awarded to the claimant above.

Conclusion

48. I find in favour of the claimant, and make the awards set out above, as against the second respondent which is the employer. The claim against the first respondent is dismissed.

Employment Judge: A Kemp
Date of Judgment: 10th February 2021
Entered in Register: 19th February 2021
Copied to Parties