



EMPLOYMENT TRIBUNALS

Claimant: Mr S Ahmed

Respondent: F&I Online Limited, formerly known as Carfinance Plan Limited

Heard at: London Central Employment Tribunal (by CVP)

On: 12 January 2021

Before: Employment Judge Palca (sitting alone)

Appearances

For the claimant: In Person

For the respondent: Mr R Danaev (Director)

JUDGMENT

The claimant's claims are struck out. They were presented in proper form to the tribunal out of time, it having been reasonably practicable to have presented them within time, and the employment tribunal therefore does not have jurisdiction to hear them.

EXTENDED REASONS

Parties

- (1) The Claimant was employed by the respondent, a small finance company, as a sales executive, from 2 August 2018 until his employment was terminated with effect from 27 January 2020. By a claim form originally presented on 15 March 2020, following a period of early conciliation from 4 February 2020 to 4 March 2020, the claimant brought complaints of unlawful deductions from wages and failure to pay untaken holiday entitlement. His claim was rejected on 29 June 2020 because it named as respondent a director of his employer, rather than the employer itself, whereas it was his employer named on the Early Conciliation Certificate. On 6 July the claimant resubmitted his form, by post, but he addressed it to the Employment Appeals Tribunal rather than the employment tribunal. The revised form named his employer as Carfinance Plan Limited. That company has since changed its name to F&I Online Limited.

The issues

- (2) The issues between the parties which potentially fall to be determined by the Tribunal are as follows:
- (i) *Jurisdiction*: were the claimant's claims presented within time, and if not whether it was reasonably practicable for them to have been presented within the primary time limit and if not whether it was presented within a reasonable time thereafter.
 - (ii) *Unauthorised deductions*. Did the respondent fail to pay the Claimant's salary for January 2020 and any commission which he had earned in December 2019?
 - (iii) *Holiday Pay*. When is the respondent's holiday year? Did the claimant have any untaken holiday entitlement? If so, did the respondent fail to pay this?
 - (iv) Is the claimant entitled to additional compensation because he borrowed money to cover his expenses following the respondent's failure to pay him.

Hearing and Evidence

- (3) The hearing was a remote public hearing, conducted using the cloud video platform (CVP) under rule 46. The tribunal considered it as just and equitable to conduct the hearing in this way.
- (4) In accordance with Rule 46, the tribunal ensured that members of the public could attend and observe the hearing. This was done via a notice published on Courtserve.net No members of the public attended.
- (5) The parties were able to hear what the tribunal heard and see the witnesses as seen by the tribunal. From a technical perspective, there were minor difficulties regarding connectivity of the claimant while he was speaking, but these were overcome by asking him to repeat what he had said.
- (6) No requests were made by any members of the public to inspect any witness statements or for any other written materials before the tribunal.
- (7) The claimant produced a bundle of documents, and gave evidence on oath.

Facts

- (8) The Claimant was employed by the respondent (then called Car Finance Market Ltd) under a contract dated 2 August 2018. The contract included a lengthy "deductions from pay" clause, entitling the respondent to deduct from the claimant's wages deductions including
- (i) "any fines, penalties or losses sustained during the course of your employment and which were caused through your conduct, carelessness, negligence, recklessness or through your breach of the Company's rules or any dishonesty on your part;
 - (ii) any damages, expenses or any other monies paid or payable by the Company to any third party for any act or omission by you, for which the Company may be deemed vicariously liable on your behalf;

- (iii) on termination of employment, any holiday pay paid to you in respect of holiday granted in excess of your accrued entitlement;
 - (iv) any other sums owed to the Company by you, including, but not limited to, any overpayment of wages, outstanding loans or advances, or relocation expenses”.
- (9) The contractual provisions regarding holiday pay at clause 7 included:
- (i) The holiday year runs from 1st Jan to 31st Dec.
 - (ii) Full-time employees are entitled to 28 days’ holiday a year, inclusive of any bank/public holidays that they may be permitted to 3 take, calculated at the rate of 1/52nd of the annual entitlement for each complete week of service remaining in the current holiday year
 - (iii) You will not be permitted to carry over any unused holiday entitlement into the following holiday year except with the express written consent of the Company and you will not be entitled to payment for any such unused holiday entitlement (save on termination of employment).
 - (iv) On termination of your employment, if you have taken more or less than your annual holiday entitlement an appropriate adjustment shall be made to any payment of salary or benefits from the Company to you. For these purposes, a day's salary will be calculated at the rate of 1/260th of your annual salary.
 - (v) The Company reserves the right to require you to take any outstanding holiday during your notice period.
- (10) The claimant worked for the respondent for a period and then in late December 2019 found alternative employment. He resigned and was put on garden leave until 27 January 2020. The respondent told the claimant that it would pay him full salary and any commission due on 31 January 2020. In late January 2020 the respondent told the claimant that he had acted negligently by paying money to a dealership which was not FCA authorised. They did not pay him the sums to which the claimant believes he was entitled.
- (11) On 4 February 2020 the claimant began an early conciliation process. The claimant correctly named his employer by its then name, Carfinance Plan Limited. The early conciliation certificate was issued on 4 March 2020.
- (12) On 15 March 2020 the claimant submitted an ET1. That form named Mr R Danaev as his employer, rather than the correct corporate employer named on his contract of employment. His narrative began “My claim is against my previous employer Roman Danaev, director of Car Finance Plan Limited”.
- (13) By letter dated 29 June 2020, the claimant was informed by the employment tribunal that his claim had been rejected because the respondent was not the same as the respondent named in the ACAS early conciliation certificate. The letter told him that he could apply for a reconsideration of the decision within 14 days, or could appeal it to the Employment Appeals Tribunal (EAT). On 6 July 2020 the claimant wrote a brief letter, posted to the EAT rather than the employment tribunal, changing the name of his employer to the correct name,

and asking for reconsideration. The tribunal accepted the form, deeming it to have been presented on 10 July 2020.

Law

- (14) Complaints of unauthorised deductions from wages must be presented to the tribunal within the period of 3 months beginning with the date the deduction was made, or the date the payment should have been made or within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period. The term wages is defined to include salary, commission and holiday pay. Deduction includes non-payment. - sections 13, 23 and 28 Employment Rights Act 1996 (ERA).
- (15) Where employment is terminated during the course of a leave year, and when he leaves the proportion of leave to which he is entitled is more than the leave he is actually taken, he is entitled to a payment in lieu of the untaken leave calculated in accordance with Reg 14 Working Time Regulations 1998 (WTR). Reg 14 goes on to state *“A relevant agreement may provide that, where the proportion of leave taken by the worker exceeds the proportion of the leave year which has expired, he shall compensate his employer whether by a payment, by undertraining additional work or otherwise”*. Claims for payment in lieu of untaken holiday entitlement must be brought within 3 months of the date the payment should have been made, or within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period (s30 WTR). "Relevant agreement" is defined at s2 WTR as *“a workforce agreement which applies to [the worker], any provision of a collective agreement which forms part of a contract between him and his employer, or any other agreement in writing which is legally enforceable as between the worker and his employer”*.
- (16) When calculating the date by which presentation of claims should be made, any time taken during an early conciliation process is ignored (s207B ERA).
- (17) Given that payment of the sums claimed by the claimant was due on 31 January 2020, and that the early conciliation process lasted from 4 February 2020 until 4 March 2020, the claimant's claims should have been presented, in their proper form, by 29 May 2020.

Submissions

- (18) The respondent argued that the claimant had not submitted the correct form within time. He was an experienced person who knew how contracts worked. At some point he was legally represented. He submitted the correct respondent to ACAS. He had threatened to sue Mr Danaev personally, and Mr Danaev speculated that this was why he, rather than the corporate employer, had been named in the ET1.
- (19) The claimant argued that he had submitted the original form in time, that naming of Mr Danaev rather than the corporate employer was an error due to lack of

experience, and that when the tribunal had written to him telling him that his application form had been rejected he had filled in the reconsideration form within the time limit set out in the letter and had sent it off. It had taken some time for the tribunal to contact him, and he had been contacting the tribunal and visiting them meanwhile.

Conclusion

- (20) The test for whether the tribunal can grant an extension of time in applications for compensation for unlawful deductions from wages and unpaid holiday entitlement is a very strict one. The tribunal must consider whether it had been reasonably practicable for the claim to have been submitted in time. Only if it determines that it was not reasonably practicable may the tribunal go on to consider whether it was presented within a reasonable time following the expiry of the time limit. There is no concept that time might be extended because it may be just and equitable to do so.
- (21) In the present case, the claimant knew the identity of his employer, having correctly identified it in his application for early conciliation. The fact that he was able to identify the nature of his causes of action against the employer is evident in that he lodged an ET1 (albeit one that was rejected) within the relevant time limits. There was no new material fact that was drawn to his attention following the expiry of the time limits. The claimant did not argue that illness or some other reason had prevented him from lodging the form in time, only that he had completed it in error, and had remedied the position promptly once brought to his attention. It is very unfortunate that, because of the pandemic, it took the tribunal some time to come back to him informing him that his claim had been rejected. It is also evident when it did so, despite the fact that the claimant said that he was asking the tribunal to reconsider its decision, that he accepted it by naming his correct employer and resubmitting the form to the tribunal, rather than presenting reasons why the tribunal’s decision had been incorrect.
- (22) In all the circumstances, the tribunal concluded that it had been reasonably practicable for the claimant to have submitted his ET1, correctly naming the respondent, before the relevant time limit had expired. The tribunal therefore concluded that it did not have jurisdiction to consider the claimant’s claims against the respondent, and that they should be struck out.

Employment Judge Palca

18th jan 2021

Sent to the parties on:

25/1/21

For the Tribunal:

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APPENDIX

Judicial Mediation: What is it? How it can help you as an employer or employee?

How does mediation work

Mediation is a way of resolving disputes between employers and employees without the uncertainty, stress, costs, time of going to a tribunal. The advantages for both parties are:

- The mediator, who is an Employment Judge, helps the parties try to find a solution to their dispute in a constructive, positive way – unlike the adversarial nature of litigation.
- Although the mediator helps the parties find a solution, the mediation day is for the parties. The mediator does not tell the parties what to do or what they should settle for.
- The mediator will talk to each party in turn to discuss what they want, trying to bridge the gap between them. It is not essential for the parties to meet, but usually helps.
- The parties can agree terms which cannot be ordered by a tribunal, such as a reference.
- Judicial Mediation (JM) can be arranged quickly and easily unlike tribunal hearings.
- Trying to settle matters with mediation is not a sign of weakness, as some believe.

What you need to know about judicial mediation with a judge as mediator

- Judicial mediation (JM) is offered for claims likely to take at least 3 days in the Tribunal.
- It can take place at any time after the employer's response (ET3) has been filed with the tribunal – up until the tribunal decision.
- The fact that the ACAS conciliation failed does not mean it is not worth having a JM. It is a very different process, involving detailed discussions about settlement options.
- JM is voluntary. Both parties must agree to mediate. A party can withdraw at any time.
- The discussion is confidential; what is said at the mediation cannot be repeated either in the tribunal or to anyone not in the mediation.
- What a party says to the mediator is confidential – to enable a free and frank discussion.
- A party can have their adviser or a friend with them at the mediation.
- The mediation usually happens remotely, which can be via a platform such as Zoom or Teams or even by phone.
- If the mediation is unsuccessful, the judge conducting it will never be the judge for the final hearing.

How can judicial mediation (JM) help you?

- JM is focussed on finding a solution to the dispute rather than fighting it out with no certainty about the result.
- It can save a lot of time and stress for both parties by avoiding a tribunal hearing.
- It removes the blame, aggression and anxiety often involved with going to a tribunal.
- The parties can move on with their lives without the uncertainty of litigation.
- There is now a backlog of cases in the tribunal which means you may have to wait quite a while to get a Hearing.
- A judgment dismissing a claim after mediation does not go on the public register.
- Most mediations lead to an agreement acceptable to both parties.