



# EMPLOYMENT TRIBUNALS

**Claimant:** Miss Silvia Ranera Robles

**Respondent:** The Groucho Club

**Heard at:** London Central (via CVP)      **On:** 8 January 2021

**Before:** Employment Judge Nicklin

## Representation

Claimant: in person

Respondent: Mrs C Cooper (HR Director at Respondent)

**Note:** This has been a remote hearing. The parties did not object to the case being heard remotely. The form of remote hearing was V – video, conducted using Cloud Video Platform (CVP). It was not practicable to hold a face to face hearing because of the COVID-19 pandemic.

# JUDGMENT

1. The tribunal does not have jurisdiction to hear the claim for unpaid annual leave entitlement and notice pay.
2. The claim is dismissed.

# REASONS

## Introduction

1. By a claim form presented on 21 August 2020, the Claimant brings claims of:
  - a. Unpaid accrued annual leave entitlement pursuant to Regulation 14(2) of the Working Time Regulations 1998; and
  - b. Breach of contract, being a failure to pay notice pay upon termination of employment.

2. The Respondent is a private members' club in London. The Claimant was employed by the Respondent as a cloakroom attendant from 18 February 2015 until 18 June 2015 (a date which was in dispute but determined below). I was provided with a P45 showing a later leaving date of 10 October 2015, but the Respondent accepts that this is an error and the Claimant's employment terminated in June 2015.
3. The Claimant was therefore employed for a four-month period in 2015. Her claim concerns payment for any accrued but untaken annual leave entitlement for this period. The Claimant confirmed this is her statutory annual leave entitlement and is not based in contract.
4. In respect of her claim for notice pay, the Claimant confirmed at the hearing that she was claiming one week's notice pay based on her statutory minimum notice entitlement.
5. The Claimant told me that she had had difficulties obtaining a relevant payslip from the Respondent covering her final month's wages and had only received this on 23 June 2020, after which time she presented the claim.
6. The Respondent defends the claim solely on the basis that the complaints are both out of time. If the complaints are out of time and time is not extended, the tribunal will have no jurisdiction to hear them. I therefore decided that I needed to first determine whether the tribunal had jurisdiction to hear either complaint by considering the time limits in respect of each and whether time should be extended accordingly.

## Law

7. The Working Times Regulations 1998 ("WTR") provide for the entitlement to a statutory period of annual leave in Regulations 13 and 13A.
8. Regulation 14(2) provides for compensation to the employee following termination of employment:

*(2) Where the proportion of leave taken by the worker is less than the proportion of the leave year which has expired, his employer shall make him a payment in lieu of leave in accordance with paragraph (3).*
9. Regulation 30(1)(b) and (2) provide:

*(1) A worker may present a complaint to an employment tribunal that his employer—*

  - (a) ...*
  - (b) has failed to pay him the whole or any part of any amount due to him under regulation 14(2) or 16(1).*

*(2) An employment tribunal shall not consider a complaint under this regulation unless it is presented—*

*(a) before the end of the period of three months (or, in a case to which regulation 38(2) applies, six months) beginning with the date on which it is alleged that the exercise of the right should have been permitted (or in the case of a rest period or leave extending over more than one day, the date on which it should have been permitted to begin) or, as the case may be, the payment should have been made;*

*(b) 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 of three or, as the case may be, six months.*

10. In this case, the complaint must therefore be brought within 3 months of the date the payment in lieu of accrued annual leave should have been made. The tribunal can only extend time in accordance with Regulation 30(2)(b).

11. In respect of any contract claim for notice pay, such a claim is brought pursuant to the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994, as amended (“the Order”). Article 7 of the Order provides that the tribunal shall not entertain a complaint unless it is presented:

- a. within three months beginning with the effective date of termination of the contract giving rise to the claim; or
- b. where there is no effective date of termination, within the period of three months beginning with the last day upon which the employee worked in the employment which has terminated.

12. Article 7(c) provides for an extension of that time limit 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.*

13. The Court of Appeal in Palmer and Saunders v Southend-on-Sea Borough Council [1984] IRLR 119, confirmed:

*Perhaps to read the word “practicable” as the equivalent of “feasible” as Sir John Brightman did in [Singh v Post Office [1973] ICR 437, NIRC] and to ask colloquially and untrammelled by too much legal logic—“was it reasonably feasible to present the complaint to the [employment] tribunal within the relevant three months?”—is the best approach to the correct application of the relevant subsection (per May LJ at para 34).*

14. On the issue of ignorance of the Claimant’s rights to pursue a claim, in Wall’s Meat Co Ltd v Khan [1979] ICR 52, Lord Denning observed [at 61]:

*where a person is reasonably ignorant of the existence of the right at all, he can hardly be found to have been acting unreasonably in not making inquiries as to how, and within what period, he should exercise it. By contrast, if he does know*

*of the existence of the right, it may in many cases at least, though not necessarily all, be difficult for him to satisfy an industrial tribunal that he behaved reasonably in not making such inquiries.*

### **Issues**

15. The issues I needed to decide were therefore:

- a. What was the date of termination of employment?
- b. What was the date any payment in lieu of annual leave should have been made?
- c. Are the claims out of time based on those dates?
- d. If so, was it reasonably practicable for the claims to have been presented within the time limit?
- e. If not, was the claim presented within a further reasonable period?

### **Evidence**

16. I heard evidence on oath from the Claimant and considered the documents she sent to the tribunal. At my direction, the Claimant sent these to the Respondent by email during the hearing as they had not been provided in advance. The Respondent did not have any questions for the Claimant nor any further evidence to call. Both parties made oral submissions following the Claimant's evidence.

### **Findings of Fact**

17. I find that the Claimant's employment terminated on 18 June 2015, following her last day worked on 17 June 2015. I accept the Claimant's evidence that she was called into a meeting on 18 June, told that her employment had ended and that she was not asked to work any notice period. I have not had any evidence from the Respondent to contest or contradict that.

18. Since the Claimant's account of the meeting on 18 June 2015 is unchallenged, I find, as she explained in her evidence, that she asked to be paid her statutory holiday entitlement during the meeting. She subsequently chased her payslip in the expectation that her leave entitlement would be paid. That is consistent with the Claimant having known of her right to statutory annual leave and having asked for payment at the meeting.

19. The Claimant's last pay date was 10 July 2015. This was the date when any final payments should have been made, including her hours worked in June 2015. There was a pay date in August 2015, but this was only for a small tax refund.

20. I find that the Claimant did not receive her payslip for July 2015 that month. The emails in November 2015 show that the Claimant had to continue to press the Respondent to provide what was missing.

21. However, I find that the Claimant believed, in July 2015, that her pay did not include all of the payments she was expecting (both in respect of any notice pay and accrued annual leave entitlement). As she explained in evidence, the payment in July was lower than what she thought she would receive, accounting for the hours worked.

22. The Claimant then returned from a period away in Spain in September 2015. At some time between September and October 2015, she called the Respondent asking for her final payslips. The Claimant then attended a meeting in October 2015 with Naomi Fawcett, the Head Receptionist at the time, again asking for her payslips.
23. These requests were followed by an email to Matthew Hobbs (of the Respondent) on 19 November 2015, chasing again. On the same date, Ms Fawcett sent an email to the Claimant attaching her P45 and her payslips were sent out by post.
24. I find that, despite the efforts to chase, the Claimant received all payslips in the post except for July 2015. In her email to Ms Fawcett on 22 November 2015 she says very clearly that she still had not received this particular payslip.
25. The Claimant then made no further contact with the Respondent about this issue until she sent a further email in mid-June 2020, which is around 4 ½ years after the last communication.
26. The Claimant did not chase the Respondent for any payslip or challenge the Respondent about either annual leave entitlement or notice pay between November 2015 and June 2020.
27. Following an email from the Claimant to the Respondent in mid-June 2020, all payslips were emailed to the Claimant promptly by reply on 23 June 2020. This finally included the July payslip showing that no accrued annual leave entitlement and no notice pay had been paid. The Claimant then proceeded with the ACAS conciliation procedure and then presented her claim.
28. I make the following findings about the delay in presenting the claim, based on what the Claimant told me (which was not challenged by the Respondent):
- a. The Claimant did not seek any legal or other advice about her employment rights at any time;
  - b. In 2015, she thought she would need a lawyer to assist her in bringing any claim and could not afford to pay for such assistance but no reasons were given for why she thought such an adviser would be required;
  - c. The Claimant did not know about ACAS in 2015, but subsequently found out and then learned of her legal right to be provided with a payslip;
  - d. The Claimant felt frustrated and angry that she had not obtained the payslip for July after her requests in 2015. She thought that the Respondent had acted dishonestly and ignored her. She did not, therefore, contact them any further;
  - e. The Claimant did not take any steps to find out about her rights after she had failed to obtain the payslip in 2015 until she took action in 2020.

## **Conclusions**

### **Issue 1: date of termination**

29. The Claimant's effective date of termination of her employment was 18 June 2015. There was no further period of employment for any notice period and her employment had not been brought to an end before that date.

Issue 2: What was the date any payment in lieu of annual leave should have been made?

30. As the final payment date after termination of employment was 10 July 2015, this was the date that any unpaid accrued annual leave entitlement should have been paid. The Claimant was expecting the leave entitlement to be included with wages owing for hours worked in June as part of this July payment. As the Claimant's employment had ended, there is no reason why such a payment would be made at any later date.

Issue 3: are the complaints out of time?

31. Both complaints were presented substantially out of time. The 3-month time limit for the notice pay claim ran from 18 June 2015 and the 3-month time limit for the annual leave entitlement claim ran from 10 July 2015. The last dates to present the complaints were therefore 17 September 2015 and 9 October 2015 respectively. The claim was not presented until 21 August 2020.

Issue 4: Was it reasonably practicable for the complaints to be presented within the time limit?

32. In my judgment, it was reasonably practicable for both complaints to be presented within the time limits. This is because:

- a. Whilst the Claimant chased the Respondent for her July payslip, there has been no good reason advanced to demonstrate why steps could not have been taken within the time limit to find out how she could bring a claim regarding her statutory holiday pay and notice pay. The Claimant knew at the point of her employment being terminated that she had a right to be paid her annual leave entitlement because she asked for it at the meeting on 18 June 2015. She was also aware that her employment had been terminated immediately without any notice period;
- b. The Claimant did not receive her payslip for July when it was expected and, whilst this was frustrating for her, she had received previous payslips and, in my judgment, knew or ought reasonably to have known that she was entitled to one. It was reasonably practicable to have taken steps to find out what she could do in the absence of the payslip, including the prospect of a claim to the tribunal about the failure to provide one, if necessary;
- c. The Claimant did not believe she had been paid her notice pay and annual leave entitlement in July because her pay was lower than she expected. This is what caused her to chase for her payslip. In my judgment, she was on notice to the fact that she had not been paid the amounts forming the basis of this claim.
- d. Sometime after her employment ended, the Claimant travelled to Spain and it was only upon her return in September 2015 that further efforts to obtain the payslip were made. This meant that the meeting with Ms Fawcett in October 2015 took place when the claim was already out of time or was near to being out of time. It was already unreasonable to wait until then to take further steps.
- e. The Claimant did not seek advice, but it is clear that, in 2020, she took steps to

learn about ACAS and what claims she could bring to the tribunal. There is no good reason why this could not have been done in 2015, especially given that she was aware of her statutory entitlement. Whilst the Claimant says that the Respondent was ignoring her about the payslip, in my judgment it would have been reasonably feasible for the Claimant to have set about preparing a claim within the time limit, rather than allowing time to pass without a payslip in hand.

- f. In the circumstances, there is no explanation for why the complaints were left, after November 2015, until the Claimant again made contact with the Respondent in June 2020. The claim has been presented years later with no evidence of any steps being taken during the intervening period.

Issue 5: If not reasonably practicable, was the claim presented within a further reasonable period?

33. In my judgment, even if I had found that it was not reasonably practicable to present the claims within the time limits, the claim has not been presented within a further reasonable period. In excess of 4 ½ years delay after the time limits expired is unreasonable. The Claimant's own evidence was that she became frustrated with the Respondent by November 2015 after her attempts to obtain the July payslip. No further action was taken and the matter was left without good reason.

34. As the Respondent argued, it is now unable to provide relevant information about what did or did not happen at the time, given the delay. This is a very long time to wait to bring the claim and, in my judgment, it is unjustified in the circumstances.

Outcome

35. In respect of both parts of the test to extend time for either complaint: I find that it was reasonably practicable to have presented the claim in time and, even if it had not been, the long delay in waiting to present the claim means it was not presented within a further reasonable period.

36. Accordingly, the tribunal does not have jurisdiction to hear either complaint and the claim is dismissed.

Employment Judge Nicklin

Date: 14 January 2021

JUDGMENT & REASONS SENT TO THE PARTIES ON

15<sup>th</sup> Jan 2021.

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FOR THE TRIBUNAL OFFICE