Case No. 1400657/2020

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Mr T Kamm	AND	Breeze People Limited

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Bristol **ON** 8 April 2021

EMPLOYMENT JUDGE J Bax

Representation

For the Claimant: Did not attend
For the Respondent: Mr Bord (Director

JUDGMENT

The claims of unlawful deductions from wages/breach of contract and holiday pay were presented out of time and it was reasonably practicable for the Claimant to have presented them in time. The Tribunal did not have jurisdiction to hear the claims and they are struck out.

REASONS

1. This is the judgment following a Preliminary Hearing to determine whether or not the claimant's claims of unlawful deductions from wages/breach of contract and accrued but unpaid holiday were presented in time

Background

2. The claim relates to an invoice raised by the Claimant in respect of work he did for the Respondent between April 2016 and 7 July 2016. The Claimant raised the invoice on 28 December 2016. The Claimant had also ticked the

box in the claim for relating to holiday pay, but had not provided with any details in respect of that claim. The Claimant said in the claim form that that he was an employee. The Respondent disputed that the Claimant was either an employee or a worker within the meaning of section 230 of the Employment Rights Act 1996.

Application to postpone by the Claimant

3. On 17 April 2020, the claim was listed for a final hearing with associated directions on 22 January 2021. The parties were ordered to agree a bundle 14 days before the hearing and exchange witness statements 7 days before the hearing.

4. In the run up to the hearing the Respondent applied to postpone the hearing due to childcare commitments, in that due to the covid-19 restrictions no-one was available to look after his child. On 21 January 2021 the hearing was postponed and relisted for 17 February 2021.

5. On 24 January 2021, the Claimant e-mailed and said that he was working on a government campaign and was an essential worker and requested that the hearing on 17 February 2021 was postponed.

6. On 5 February 2021, Employment Judge Rayner granted the Claimant's application, and the parties were informed by e-mail on 5 February that the hearing would be relisted on 8 April 2021.

7. The Claimant did not contact the Tribunal to ascertain whether his application to postpone had been granted.

8. On 25 March 2021, the Respondent e-mailed the Tribunal and Claimant with a bundle for the hearing and said that the Clamant had not provided any information.

9. On 26 March 2021, the Claimant e-mailed the Tribunal, without copying in the Respondent and said that the last communication he had received was the e-mail on 21 January 2021 and said he would be happy to prepare a bundle but needed to be made aware of the revised hearing date.

10. On 1 April 2021, the Respondent sent the Tribunal and Claimant his witness statement and said that the Claimant had not exchanged anything or provided a calculation of his claim.

11. On 6 April 2021, the Claimant chased his e-mail dated 26 March 2021.

12. On 7 April 2021, the Claimant was informed that the hearing would proceed as listed on 8 April 2021. The Claimant responded at 1313 and said that he was unaware that the hearing had been listed on the 8th and that as an essential worker he would have had to provide his employer with notice to take time off to attend and asked for the hearing to be postponed. At 1629 Employment Judge Livesey directed that the Claimant was informed that he had not explained why the notice of hearing had not been received when other e-mail correspondence had, and the application would be considered at the hearing.

13. At 0921 on 8 April 2021, the Claimant e-mailed the Tribunal and said that he was not sure what was meant by, 'why the hearing notice had not been received', and that he would not ignore key dates. He had tried to take time off work, but had not been able to and therefore would be unable to attend.

14. The Claimant did not attend the hearing. The Tribunal office attempted to telephone the Claimant; however, the call was diverted to the Claimant's voicemail.

15. The Respondent opposed the application to postpone and did not accept that the Claimant had not received the notice of hearing. It was submitted that the Claimant had not complied with any of the case management directions, the claim had been presented more than a year ago and it was significantly out of time.

16. I considered rule 30A of the Tribunal rules of procedure

17. The Court of Appeal established in Teinaz v London Borough of Wandsworth [2002] ICR 1471, CA that while the discretion to postpone is broad, it must be exercised judicially. The discretion must be exercised 'with due regard to reason, relevance and fairness', and subject to the overriding objective

18. In O'Cathail v Transport for London [2013] ICR 614, CA, Lord Justice Mummery stressed that the overriding objective requires fairness to *both* parties. It is not necessarily predetermined by the situation of one of the parties, such as the potentially absent claimant who is denied an adjournment. There are two sides to a trial, which should be as fair as possible to both sides. It is necessary to balance proceeding in the absence of one party, against the right of the other party to have a trial within a reasonable period of time and the public interest in the prompt and efficient adjudication of cases.

19. I also took into account the Presidential Guidance on postponements.

20. It was unlikely that the Claimant did not receive the notice of hearing. All other correspondence had been received by him, at the same e-mail address, in relation to the preparation of the hearing, including a bundle from the Respondent. There was no suggestion that the correspondence had been sent to the wrong address. The Claimant did not provide any information as to checks he had undertaken regarding the e-mail being diverted to his junk box or that he was having difficulty with his e-mails at that time. Further it was strange that after applying to postpone the hearing listed on 17 February 2021 he did not contact the Tribunal to find out what was happening if, as on his case he had not received any correspondence since he was informed on 21 January 2021 that the claim had been relisted.

    There are limited Tribunal resources, and the claim was for less than £400. There needs to be a proportionate use of Tribunal time and resources. The subject matter of the claim took place in 2016 and 2017 and the claim was presented more than a year ago. The claim had been listed on 2 previous occasions and both parties had previously sought postponements. Further the Claimant had not sought to comply with any of the case management directions, including setting out the calculation for his claim.

21. Having regard to the overriding objective, and that I was not satisfied that the Claimant had not received the notice of claim, the application to postpone was refused and the claim was heard in the Claimant's absence.

The Evidence in relation to time limits

22. I heard from Mr Bord, a director, on behalf of the Respondent. I was also provided with a bundle of documents of 35 pages by the Respondent.

The facts

23. I found the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after listening to the factual and legal submissions made by Mr Bord.

24. On 28 December 2016, the Claimant sent an invoice for work done for the Respondent's client, HP, between 18 April 2016 and 7 July 2016. The Claimant also sent an invoice regarding training for Papa John's.

25. The Claimant was sent payment on 20 January 2017.

26. On 10 February 2017, the Claimant e-mailed the Respondent [p15-16] and said that there had been a shortfall and that he had only received £2,979. The same day Mr Bord responded [p14] and said that they had checked the records and that the Claimant had not worked 2 of the days claimed and that the training had been paid for and the payment was correct.

27. After further correspondence Mr Bord on 16 May 2017 [p10], said that he had checked the training payments and the Claimant had been paid and they were willing to pay £12 travel expense and otherwise their stance had not changed.

28. On 17 May 2017 the Claimant asked for a full breakdown and said he had 6 years to legally claim back his wages.

29. On 31 December 2019, the Claimant e-mailed the Respondent and said that his accountant had noticed his last e-mail had not been responded to.

30. I accepted the Respondent's evidence that the Claimant had been removed from its books in September 2017 and that he had been informed of his removal.

31. The Claimant appeared to suggest from his e-mails that it had not been realised that his e-mail of 17 May 2017 had not been responded to. He did not suggest that there was anything physically preventing him from presenting his claim in time. The Claimant was aware that he could bring a claim for unpaid wages in May 2017 when he referred to having 6 years to bring a claim. There was not a suggestion that the Respondent had misrepresented anything to him. The Claimant appeared to have taken some advice from his accountant, but there was no evidence as to what that advice was.

The Law

32. S. 23 of the Employment Rights Act 1996 provides

*(1) A worker may present a complaint to an [**employment** tribunal]—*

(a) that his employer has made a deduction from his wages in contravention of section 13 (including a deduction made in contravention of that section as it applies by virtue of section 18(2)), …

*(2) Subject to subsection (4), an [**employment** tribunal] shall not consider a complaint under this section unless it is presented before the end of the period of three months beginning with—*

(a) in the case of a complaint relating to a deduction by the employer, the date of payment of the wages from which the deduction was made, or

(b) in the case of a complaint relating to a payment received by the employer, the date when the payment was received.

(3) Where a complaint is brought under this section in respect of—

(a) a series of deductions or payments, or

(b) a number of payments falling within subsection (1)(d) and made in pursuance of demands for payment subject to the same limit under section 21(1) but received by the employer on different dates,

the references in subsection (2) to the deduction or payment are to the last deduction or payment in the series or to the last of the payments so received.

[(3A) Section 207B (extension of time limits to facilitate conciliation before institution of proceedings) applies for the purposes of subsection (2).]

*(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.*

*[(4A) An **employment** tribunal is not (despite subsections (3) and (4)) to consider so much of a complaint brought under this section as relates to a deduction where the date of payment of the wages from which the deduction was made was before the period of two years ending with the date of presentation of the complaint.*

(4B) Subsection (4A) does not apply so far as a complaint relates to a deduction from wages that are of a kind mentioned in section 27(1)(b) to (j).]

*[(5) No complaint shall be presented under this section in respect of any deduction made in contravention of section 86 of the Trade Union and Labour Relations (Consolidation) **Act** 1992 (deduction of political fund contribution where certificate of exemption or objection has been given).]*

33. There appeared to be an unparticularised claim in respect of accrued but untaken holiday pay. Reg 30 of the Working Time Regulations 1998 Provides

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

(a) has refused to permit him to exercise any right he has under—

[(i) regulation 10(1) or (2), 11(1), (2) or (3), 12(1) or (4), 13 or 13A;]

(ii) regulation 24, in so far as it applies where regulation 10(1), 11(1) or (2) or 12(1) is modified or excluded; . . .

[(iii) regulation 24A, in so far as it applies where regulation 10(1), 11(1) or (2) or 12(1) is excluded; or

(iv) regulation 25(3), 27A(4)(b) or 27(2); or]

(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) [Subject to [[regulation] 30B], 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.

[(2A) Where the period within which a complaint must be presented in accordance with paragraph (2) is extended by regulation 15 of the Employment Act 2002 (Dispute Resolution) Regulations 2004, the period within which the complaint must be presented shall be the extended period rather than the period in paragraph (2).]

…

34. If the Claimant was alleging that the failure to pay his invoice was a breach of contract arising or outstanding on termination of his employment Article 7 of the Employment Tribunals Extension of Jurisdiction (England & Wales) Order 1994 provides:

*Subject to [[article] 8B], 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) 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,*

*[(ba) where the period within which a complaint must be presented in accordance with paragraph (a) or (b) is extended by regulation 15 of the **Employment** Act 2002 (Dispute Resolution) Regulations 2004, the period within which the complaint must be presented shall be the extended period rather than the period in paragraph (a) or (b)], or*
*(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.*

35. Put simplistically, with effect from 6 May 2014, a prospective claimant must obtain an early conciliation certificate from ACAS, or have a valid exemption, before issuing Employment Tribunal proceedings.

36. The relevant law relating to early conciliation ("EC") and EC certificates, and the jurisdiction of the Employment Tribunals to hear relevant proceedings, is as follows. Section 18 of the Employment Tribunals Act 1996 (“the ETA”) defines “relevant proceedings” for these purposes. This includes in Subsection 18(1) Employment Tribunal proceedings unlawful deductions of wages under s. 23 of the Employment Rights Act 1996, claims under reg. 30 of the Working Time Regulations 1998 in relation to holiday pay and a contract claim under the Employment Tribunals Extension of Jurisdiction (England & Wales) Order 1994.

37. Section 207B of the Employment Rights Act 1996 (there are similar provisions in relation to the Working Time Regulations and the Extension of Jurisdiction Order) provides: (1) This section applies where this Act provides for it to apply for the purposes of a provision of this Act (a "relevant provision”). But it does not apply to a dispute that is (or so much of a dispute as is) a relevant dispute for the purposes of section 207A. (2) In this section - (a) Day A is the day on which the complainant or applicant concerned complies with the requirement in subsection (1) of section 18A of the Employment Tribunals Act 1996 (requirement to contact ACAS before instituting proceedings) in relation to the matter in respect of which the proceedings are brought, and (b) Day B is the day on which the complainant or applicant concerned receives or, if earlier, is treated as receiving (by virtue of regulations made under subsection (11) of that section) the certificate issued under subsection (4) of that section. (3) In working out when a time limit set by a relevant provision expires the period beginning with the day after Day A and ending with Day B is not to be counted. (4) If a time limit set by a relevant provision would (if not extended by this subsection) expire during the period beginning with Day A and ending one month after Day B, the time limit expires instead at the end of that period. (5) Where an employment tribunal has power under this Act to extend a time limit set by a relevant provision, the power is exercisable in relation to the time limit as extended by this section.

38. where the EC process applies, the limitation date should always be extended first by S.207B(3) or its equivalent, and then extended further under S.207B(4) or its equivalent where the date as extended by S.207B(3) or its equivalent is within one month of the date when the claimant receives (or is deemed to receive) the EC certificate to present the claim — Luton Borough Council v Haque [2018] ICR 1388, EAT. In other words, it is necessary to first work out the primary limitation period and then add the EC period. It is then necessary to ask whether that date is before or after 1 month after day B (issue of certificate). If it is before the limitation date is one month after day B, if it is afterwards it is that date.

39. The question of whether or not it was reasonably practicable for the claimant to have presented his claim in time is to be considered having regard to the following authorities. In Wall's Meat Co v Khan [1978] IRLR 499, Lord Denning, (quoting himself in Dedman v British Building and Engineering Appliances [1974] 1 All ER 520) stated "it is simply to ask this question: has the man just cause or excuse for not presenting his complaint within the prescribed time?" The burden of proof is on the claimant, see Porter v Bandridge Ltd [1978] IRLR 271 CA. In addition, the Tribunal must have regard to the entire period of the time limit (Wolverhampton University v Elbeltagi [2007] All E R (D) 303 EAT).

40. In Palmer and Saunders v Southend-on-Sea BC [1984] IRLR 119the headnote suggests: "As the authorities also make clear, the answer to that question is pre-eminently an issue of fact for the Industrial Tribunal taking all the circumstances of the given case into account, and it is seldom that an appeal from its decision will lie. Dependent upon the circumstances of the particular case, in determining whether or not it was reasonably practicable to present the complaint in time, an Industrial Tribunal may wish to consider 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. It may be relevant for the Tribunal to investigate whether, at the time of dismissal, and if not when thereafter, the employee knew that he had the right to complain of unfair dismissal; in some cases the Tribunal may have to consider whether there was any misrepresentation about any relevant matter by the employer to the employee. It will frequently be necessary for the Tribunal to know whether the employee was being advised at any material time and, if so, by whom; the extent of the advisor's knowledge of the facts of the employee's case; and of the nature of any advice which they may have given him. It will probably be relevant in most cases for the Industrial Tribunal to ask itself whether there was any substantial failure on the part of the employee or his adviser which led to the failure to comply with the time limit. The Industrial Tribunal may also wish to consider the manner in which and the reason for which the

employee was dismissed, including the extent to which, if at all, the employer's conciliatory appeals machinery had been used.

41. To this end the Tribunal should consider: (1) the substantial cause of the claimant's failure to comply with the time limit; (2) whether there was any physical impediment preventing compliance, such as illness, or a postal strike; (3) whether, and if so when, the claimant knew of his rights; (4) whether the employer had misrepresented any relevant matter to the employee; and (5) whether the claimant had been advised by anyone, and the nature of any advice given; and whether there was any substantial fault on the part of the claimant or his adviser which led to the failure to present the complaint in time.

42. In addition, in Palmer and Saunders v Southend-on-Sea BC, and following its general review of the authorities, the Court of Appeal (per May LJ) concluded that "reasonably practicable" does not mean reasonable (which would be too favourable to employees), and does not mean physically possible (which would be too favourable to employers) but means something like "reasonably feasible".

43. Subsequently in London Underground Ltd v Noel [1999] IRLR 621, Judge LJ stated at paragraph 24 "The power to disapply the statutory period is therefore very restricted. In particular it is not available to be exercised, for example, "in all the circumstances", nor when it is "just and reasonable", nor even where the Tribunal "considers that there is a good reason" for doing so. As Browne Wilkinson J (as he then was) observed: "The statutory test remains one of practicability … the statutory test is not satisfied just because it was reasonable not to do what could be done" (Bodha v Hampshire Area Health Authority [1982] ICR 200 at p 204).

44. Where a Claimant is generally aware of his or her rights, ignorance of the time limit will rarely be acceptable as a reason for delay. This is because a Claimant who is aware of their rights will generally be taken as to have been put on inquiry as to the time limit (e.g. Trevelyans (Birmingham) Limited v Norton [1991] ICR 488).

45. Underhill P as he then was considered the period after the expiry of the primary time limit in Cullinane v Balfour Beattie Engineering Services Ltd UKEAT/0537/10 (in the context of the time limit under section 139 of the Trade Union & Labour Relations (Consolidation) Act 1992, which is the same test as in section 111 of the Act) at paragraph 16: "The question at "stage 2" is what period - that is, between the expiry of the primary time limit and the eventual presentation of the claim - is reasonable. That is not the same as asking whether the claimant acted reasonably; still less is it equivalent to the question whether it would be just and equitable to extend time. It requires an objective consideration of the factors causing the delay

and what period should reasonably be allowed in those circumstances for proceedings to be instituted - having regard, certainly, to the strong public interest in claims in this field being brought promptly, and against a background where the primary time limit is three months."

Conclusions

When should the claims have been presented?

46. The Claimant's last payment was on 16 May 2017 and therefore any deduction from wages would have occurred at the latest on that date Therefore the claim should have been presented by 17 August 2017, subject to pausing by reason of early conciliation via ACAS. The Claimant notified ACAS on 25 January 2020 and the certificate was issued on 29 January 2020. The referral to ACAS was after primary limitation had expired and therefore there was no extension of time in this regard. The claim form was presented on 3 February 2020 and therefore the unlawful deduction from wages claim was presented 2 years 6 months out of time.

47. The Claimant was removed from the Respondent's books in September 2017 and applying a generous interpretation of when that occurred, the holiday pay and breach of contract claims should have been presented by the end of December 2017, subject to pausing by reason of early conciliation via ACAS. The Claimant notified ACAS on 25 January 2020 and the certificate was issued on 29 January 2020. The referral to ACAS was after primary limitation had expired and therefore there was no extension of time in this regard. The claim form was presented on 3 February 2020 and these potential claims were therefore presented at least 2 years 1 month out of time.

Why the Claimant did not present the claim in time and why was it presented when it was?

48. The only suggestion from the Claimant was that he was unaware that his e-mail dated 17 May 2017 had not been responded to. The Claimant did not suggest that there was any physical reason or impediment as to why he could not present the claim.

Whether, and if so when, the claimant knew of his rights?.

49. The Claimant was aware of his rights on 17 May 2017 when he said that he had 6 years to bring a claim. The 6 year limitation period applies to claims brought in the County Court. The Claimant was aware that he was entitled to bring a claim for the outstanding amount on his invoice. He was mistaken as to the time limit, however, by knowing that he had the right to bring a

claim he should have made enquiries as to what the time limit should be in the Employment Tribunal.

50. There was no evidence that the Respondent had misrepresented any relevant matter regarding bringing a claim to the Claimant.

Whether the Claimant had been advised by anyone, and the nature of any advice given?

51. The Claimant had spoken to his accountant, but it is unknown what he was advised.

Was it reasonably practicable to present?

52. The Claimant was aware that he could bring a claim at the same time as the last payment was made to him. In the circumstances it would have been reasonable for the Claimant to have made enquiries at that time. It would have been reasonably feasible for the Claimant to have presented his claim in time and therefore it would have been reasonably practicable for him to have so done.

53. Accordingly, time was not extended, and the claim was presented out of time and it was struck out for lack of jurisdiction.

54. In any event the claim for unlawful deductions from wages was presented more than 2 years after the last alleged deduction and therefore under s. 23(4A) the Tribunal did not have jurisdiction to hear that claim.

Employment Judge J Bax
Date: 8 April 2021

Judgment sent to Parties: 21 April 2021

FOR THE TRIBUNAL OFFICE