



EMPLOYMENT TRIBUNALS

Claimant: Mr K Hebditch
Respondent: Weston Super Mare Town Council
Heard at: BRISTOL **On:** 16.04.2021
Before: EMPLOYMENT JUDGE DAVID HUGHES

Representation

Claimant: In person
Respondent: Grace Nicholls (counsel)

JUDGMENT

1. The Claim for unlawful deduction of wages is dismissed on the basis that the Tribunal lacks jurisdiction to determine it, having regard to the date of presentation.

REASONS

- 1 The Claimant has been employed by the Respondent since January 2017, as a box office administrator. In the course of argument on 16.04.2021, he told me that he has been selected for redundancy, but that does not form part of the issues before me. I mention it merely because, until the hearing, my understanding was that he remained employed by the Respondent, and indeed it may be the case that he is still employed by the Respondent.
- 2 The Claimant's case as set out in his ET1 is as follows: It is said that he started working for the council in January 2017, and until July 2019, was contracted to work 12 hours per week. He told me in evidence, and it was not disputed, that his working week was four hours each day Monday to Wednesday. At the end of July 2019, the Claimant's

contractual position changed, his working hours increasing to 16 hours per week, and I understand that overtime ceased to be an issue thereafter, at least insofar as this claim is concerned.

- 3 The Claimant contends that, in the period January 2017 to July 2019, he carried out overtime averaging three to four hours a week, when the theatre in which he worked held events outside his contracted hours, usually in the evenings. His case, put simply, is that the overtime he says he worked gave rise to an entitlement to holiday, which he accrued but did not take. He wishes to be paid for that accrued but untaken holiday. He claims that his total hours overtime worked in that period was 373 hours.
- 4 His ET1 puts it as follows: "*the claimant would like their holiday pay re calculated for the period January 2017 to July 2019 taking into account their regular overtime, and for the town council to update their holiday pay policy to correctly follow the law*".
- 5 The claimant issued his claim on the 25th of July 2020. There is an ACAS early conciliation certificate, with the date of receipt of EC notification given as the 12th of June 2020 and the date of the issue of the certificate the 30th of June 2020.
- 6 The Respondent takes a time point against the Claimant. It contends that, in accordance with the Employment Rights Act 1996 s23(2), the Tribunal shall not consider a complaint for a wages claim under the Employment Rights Act unless it is presented before the end of the period of three months beginning with the date of payment of the wages from which the deduction was made. Respondent contends that similar time limits apply in respective claims under the Working Time Regulations 1998. The Respondent's position is that it was reasonably practicable for the Claimant to bring his claim within that time period, but that he failed to do so.

- 7 The Respondent further makes the point that section 23 (4A) of the Employment Rights Act provides that the Tribunal is not to consider so much of a complaint for wages as relates to a deduction where the date of payment of wages from which the deduction was made was before the period of two years ending with the date of presentation of the complaint. The Respondent contends that this would prohibit any claim for the period prior to the 25.07.2018.
- 8 The parties were sent a letter dated the 13th of November 2020, by the Tribunal. The second paragraph of the letter reads as follows;
- The case file has been referred to Employment Judge Bax, who directs that this case will now be listed for a 3-hour Hearing. The Hearing will deal with whether the claim was issued in time and if not, whether it has been reasonably practicable for it to have been.*
- 9 The notice of hearing sent to the parties on the 14th of December 2020 listed the case for three hours, and provided that that listing was to decide the case including remedy (if appropriate) or such parts of the claim as remain outstanding following initial consideration or any preliminary hearing.
- 10 I had not seen the notice of listing of hearing before this morning. I had seen the letter with Employment Judge Bax's direction, however, and have considered the question of whether the proceedings were issued in time as a preliminary point.
- 11 There seemed to me to be two issues to be decided in determining this point. Firstly, when did the time period for bringing this claim start. Secondly, if the answer to that is unfavourable to the claimant, whether it was reasonably practicable for him to have issued proceedings in the time in the three months after the start of the time period.
- 12 I find that the time period in this case started at the end of July 2019.

- 13 The Claimant's contract of employment was changed at the end of July 2019. Until then, he was contracted to work 12.5 hours per week, not the 12 he says. His contract refers to his working hours at clause 5, which in turn refers to paragraph 9 of a summary, which is also before me. It is clear that the Claimant was expected to work flexibly.
- 14 Paragraph 13 of the summary refers to paid holiday entitlement, stating it to be 21 days plus the normal 8 bank/public holidays. Paragraph 13 also refers to 2 extra statutory leave days, and provides that part time employees' holiday entitlement is pro rata.
- 15 Insofar as unclaimed holiday is concerned, clause 6.2 of the contract of employment provides as follows:
- Upon termination of your employment you will be entitled to pay in lieu of any holiday accrued in your last holiday year but not taken. If you have taken holidays in excess of entitlement the Council shall be entitled to deduct the excess pay from your final salary payment.*
- 16 It is not disputed that the Claimant was paid monthly. His claim, in his ET1, is made with reference to a time period expressly stated to end in July 2019. The Respondent's position is that, taken on its face, that is when the time period for him to bring a claim starts.
- 17 The Claimant's answer to this is to say that annual leave was calculated over the year 1st April to 31st March. In his statement for these proceedings, he says that his holiday is calculated annually, so therefore his pay in lieu of accumulated but untaken holiday pay would only be known by the end of March 2020.
- 18 The Respondent answers this point directing my attention to the wording of the statute. It says that the wages from which a deduction would have been made, on the Claimant's case, are those of July 2019.

- 19 I think that the Respondent is right about that. Although the holiday year is provided, by para 12 of the summary of employment terms, to run from 1st April to 31st March, I do not think that this has the effect of meaning that payments that represented an entitlement alleged to have arisen by the end of July 2019, did not become an entitlement until March 2020. That is, of course, leaving aside the point that the contract of employment only provides for a right to payment in lieu of accrued but untaken holiday in the final year before termination.
- 20 That means that I have to consider the second issue – was it not reasonably practicable for the Claimant to have presented his complaint before the end of 3 months from the end of July 2019?
- 21 I have significant sympathy with the Claimant on this point. His explanation – that he had raised the issue internally, and wanted to wait for an answer from the Respondent – is one that it would be hard to characterise as unreasonable. I was told by him that things take time in an organisation like the council, and he was visibly aggrieved when describing to me what he felt were different accounts he received when he raised the issue orally with his line manager, accounts that he believes were misleading.
- 22 I do not have to decide whether the Respondent was unduly slow in dealing with the issue internally. What seems to me to be important is, that it is not contended by the Claimant that he was misled by the Respondent, or anyone else, about his right to bring these proceedings, or the time limit for doing so.
- 23 The Claimant said that he thought the Tribunal would not look on it favourably if he had started proceedings without waiting for the Respondent to give him an answer. However, he agreed that he had accessed the ACAS website as early as April 2018, having googled holiday pay. He was a little evasive when it was suggested that he was fully aware of his rights and his ability to challenge his employer's

decisions at all times, saying in answer to that suggestion that he thought his actions would be the same as any other person.

- 24 I am satisfied that the Claimant was aware that he could bring a case to this Tribunal in respect of his pay dispute from April 2018, and remained aware of that from that time. He had accessed the ACAS website from April 2018, and had raised the matter internally.
- 25 I am not satisfied that it was not reasonably practicable for him to have issued proceedings before the end of 3 months after the end of July 2019.
- 26 The Claimant said that he feared consequences if he had brought a claim. But he had raised the matter internally in April 2018, and he told me that he continued to press his line manager orally, without any negative comeback. Although he linked his selection for redundancy to this dispute, that was not, as I understand it, a factor at any time relevant to the preliminary issue, and I infer from the way it was raised today that it only arose after these proceedings were issued. The lack of any negative comeback after he raised the pay issue in April 2018 means, I think, that any fear of repercussions had he brought a claim would not have been reasonable.
- 27 I have already said that it was not contended that the Respondent had misled the Claimant in any way relevant to the preliminary issue.
- 28 There is no question of any illness or disability impacting on the Claimant's ability to have brought his claim within the time period.
- 29 I find that the Claimant did not bring his complaint earlier than he did because he was waiting for the Respondent to make a decision. That does not mean that it was not reasonably practicable for him to have brought them in time. I was referred to the authority of Bonha -v-

Hampshire Area Health Authority¹, but have in mind in particular the test in Palmer -v- Southend-on-Sea Borough Council².

- 30 Having found that the complaint was not made before the end of the period of 3 months, beginning with the date of payment of wages from which the deduction was made, being, in this case, the end of July 2019, and that it was reasonably practicable for it to have been presented within that time, it follows that, by reason of the Employment Rights Act 1996 s23(2), the Tribunal has no jurisdiction to consider the claim.
- 31 When I explained by decision to the parties, the Claimant indicated orally that he would like to have my reasons in writing. For that reason, I have prepared a judgment with reasons.

Employment Judge Hughes
Date: 18 April 2021

Judgment and Reasons sent to the Parties: 29 April 2021

FOR THE TRIBUNAL OFFICE

¹ [1982] I.C.R. 200

² [1984] 1 W.L.R. 1129