EMPLOYMENT TRIBUNALS

Claimant: **Miss R Jones**

Respondent: **Community Lives Consortium**

Heard at: **Cardiff via CVP** **On: 14 May 2021**

Before: **Employment Judge S Moore**

Representation:
Claimant: In person
Respondent: Mr Shuttleworth, Solicitor

JUDGMENT having been sent to the parties on 14 May 2021 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. The claim was presented on 8 May 2020. The last alleged unlawful deduction was made on 31 January 2020. The primary limitation date was therefore 30 April 2020. Accordingly the claim was not presented within the time limits prescribed in S23 (2) Employment Rights Act 1996. The issue to be determined was therefore whether it was not reasonably practicable to have presented the claim in time and if so whether it presented within such further period of time as reasonable in accordance with S23 4() ERA 1996.

2. I heard evidence from the Claimant and had sight of documents submitted by both parties.

3. I have made the following findings of fact on the balance of probabilities.

4. On 20 December 2019 the Claimant attended her GP surgery, she was unwell and experiencing symptoms of stress, anxiety and depression. She

was subsequently signed off sick as certified by a Fit Note dated 20 December 2019 for 21 days. The same day, the Claimant informed Ms Morris, her former supervisor (Walsingham were her former employers before the TUPE transfer) of the situation by a WhatsApp message and emailed a copy of the fit note. This was also posted the following day.

5. The Claimant then returned to work on 13 January 2020. On this date the Claimant's employment transferred to the Respondent by way of a TUPE transfer. On 14 January 2020 the Claimant's access to Walsingham's email system was terminated and as such she was unable to access her payslips.

6. The Claimant received her wages on 31 January 2020 from Walsingham and received significantly less wages than she was expecting to receive. It should be noted that under the contract of employment between Walsingham and the Claimant she was entitled to receive company sick pay bar 3 days SSP waiting days and therefore she was expecting to receive somewhere in the region of her normal salary.

7. The Claimant did not receive a pay slip from Walsingham and was also unable to access the company systems and therefore immediately queried this with the HR Department and chased for a copy of her pay slip which was subsequently received on 3 February 2020 by email.

8. The pay slip showed a deduction, of £889.09 which was labelled as an "OSP adjustment". The Claimant was not informed why the adjustment had been made and subsequently embarked on an email exchange with the HR team. This deduction caused the Claimant financial hardship and left her unable to pay her household bills.

9. The Claimant continued to chase Walsingham HR for an explanation on 3, 12, 25 and 27 February 2020. She was promised a letter of explanation, none was forthcoming. The Claimant was being advised by her UNISON branch as early as 3 February 2020 and they were being copied in on the emails. On 5 March 2020 the Claimant informed Walsingham that if she did not receive a reply by 9 March 2020 she would assume that it was an unlawful deduction from wages and instruct solicitors to lodge a claim.

10. The Claimant gave evidence today. I found the Claimant to be a very credible witness who gave clear answers and accepted, when asked by Mr Shuttleworth, that she had been advised by her Union and also a family friend who was a qualified solicitor. She was aware that there were time limits and that the time limit was 3 months although she believed it to be 3 months minus 3 days to bring a claim and she was aware of the need to contact ACAS to initiate Early Conciliation before she could bring such a claim.

11. The Claimant had previously informed the Tribunal in an email dated 13 August 2020 that she believed her trigger point for lodging the claim to be 15 February 2020, but during her evidence today told the Tribunal this was a typo. She had actually been advised the trigger date was the "date of the payslip" namely 3 February 2020 by a family friend who was a solicitor and understood this was the correct date as this was the date she received the payslip and became aware there was an alleged non entitlement to company sick pay.

12. The Claimant also told the Tribunal that the union had advised the trigger date for the three month period was the date of the payment.

13. On 16 March 2020 the Claimant became acutely unwell with further bouts of anxiety, stress and depression. I accepted the Claimant's oral evidence about the extent of her illness. The Claimant had experienced a previous period of anxiety and depression evidenced by Med 3 Certificates only a few months earlier, and I have no reason to doubt the Claimant's evidence in this regard. The Claimant told the Tribunal that she was very unwell and unable to get out of bed on occasions. She was signed off sick from 16 March 2020 until June 2020 and left the Respondent's employment on 14 June 2020.

14. By 1 May 2020 the Claimant was well enough to contact ACAS and initiated early conciliation against Walsingham. On 6 May 2020 she learned from ACAS that she had lodged the early conciliation against the incorrect Respondent given the TUPE transfer and initiated a further early conciliation against the Respondent and lodged the ET1 2 days later.

15. The Claimant had at all times been communicating with Walsingham and not the Respondent about the underpayment. The Claimant only realised the claim had to be brought against the Respondent when it came to light during contact with ACAS.

The Law

16. S23 (2) Employment Rights Act 1996 provides that an employment tribunal shall not consider a complaint under this section unless it is presented to the tribunal before the end of the period of three months beginning with the date of payment of the wages from which the deduction was made. Under S23 (4) where the employment tribunal is satisfied that it was not reasonably practicable for the complaint to be presented before the end of the relevant period of three months the tribunal may consider the complaint if it presented within such further period of time as the tribunal considers reasonable.

17. The burden of proof is on the Claimant to show it was not reasonably practicable to have presented the claim in time. The Tribunal must go on to consider whether the further time in which the complaint was presented was reasonable. These are questions of fact for the Tribunal (*Palmer v Southend-on-Sea Borough Council [1984] IRLR 119)*.

18. If the Claimant has relied on bad or incompetent advice from professional advisors the remedy usually lies with a professional negligence claim against those advisors particularly if the advisor is a solicitor *(Wall's Meat and Trevelyans (Birmingham) Ltd v Norton [1991] ICR 488, EAT, Dedman v British Building & Engineering Appliances Ltd [1973] IRLR 379 CA).*

19. Ignorance by the Claimant of the right or procedure to bring a will not be grounds for an extension unless the ignorance was reasonable in the circumstances *(Wall's Meat Co Ltd v Khan [1979] ICR 52, C.A.).*

20. However, the Court of Appeal held in *Marks & Spencer plc v Williams-Ryan [2005] IRLR 562* that the *Dedman* principle was not an absolute bar and in that case on the facts did not extend to advisors from the CAB.

Submissions

21. Mr Shuttleworth referred me to the *Marks and Spencer* case and also *Reed in Partnership v Fraine [2011] UKEAT 0520.* The Respondent submitted that the emails showed the Claimant was aware of her rights to bring a claim. She also had the required knowledge and was being supported by two representatives namely her union and the family friend and the union should be held to the same standard as qualified solicitors. In relation to the illness from March 2020 there was no documentary evidence. She was not ignorant of times limits and had received advice.

Conclusions

22. The Claimant was aware, and had been advised, of a three month time limits albeit she had a mistaken belief that time started to run from 3 February 2020 when she received the payslip and notification of the deduction. She also had a mistaken belief the claim needed to be brought against her former employer as they had underpaid her. This was evident from the initiation of early conciliation against Walsingham on 1 May 2020 as well as her earlier communications trying to recover the underpayment all with Walsingham.

23. She was also being advised by two separate advisors, firstly her Union, UNISON, branch representative and also a family friend who was a qualified solicitor, but there was no formal retention of that solicitor in representing her.

24. I do not consider that advice from a family friend, albeit a solicitor should be held to the same account as formally retained legal advisors.

25. The advice from the union had been correct but the Claimant had not acted upon it.

26. I considered it a relevant question as to why had the Claimant not followed the advice that she had quite clearly been given. In my judgment it is clear this was due to the period of ill health that she experienced from 16 March 2020 onwards. Up to 5 March 2020 the Claimant was pursuing Walsingham on a regular and determined basis. It had caused her hardship. Around the time she became unwell all communication from the Claimant and efforts to recover payment of her wages ceased. This corroborated the Claimant's description of her health at that time.

27. For these reasons I find, due to the Claimant's health, it was not reasonably practicable to have presented the claim within the time limit.

28. I have gone on to consider whether the further time in which she presented the claim following the process on 6 May, and lodging the claim 2 days later, was a reasonable period.

29. I consider that a further period of 6 days was a reasonable period in which to bring the claim. The Claimant took action when she felt well enough to start dealing with the matter on 1 May 2020 and promptly thereafter as soon as she was aware of the error in the early conciliation certificate as to the identify of the employer.

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Employment Judge S Moore
Dated: 2 June 2021

JUDGMENT SENT TO THE PARTIES ON 3 June 2021

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FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS M Mr N Roche

NOTE:
This is a written record of the Tribunal's decision. Reasons for this decision were given orally at the hearing. Written reasons are not provided unless (a) a party asks for them at the hearing itself or (b) a party makes a written request for them within 14 days of the date on which this written record is sent to the parties. This information is provided in compliance with Rule 62(3) of the Tribunal's Rules of Procedure 2013.