EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4100014/2021 & 410015/2021

Final Hearing Held by Cloud Video Platform (CVP)
On 26 March 2021

Employment Judge M Robison

Mr D Glab	**First Claimant** **Represented by** **Ms A Wegorowska** **Partner**
Ms A Wegorowska	**Second Claimant** **In person**
Hotel in the Skye Ltd	**Respondent** **Not Present** **Not Represented**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that the claims have been lodged out of time and therefore the Tribunal does not have jurisdiction to consider them. These claims are accordingly dismissed.

REASONS

1. This hearing took place remotely by Cloud Video Platform (CVP).

2. This case had initially been listed to take place as a preliminary hearing on case management issues. Unfortunately, my instruction for that listing to be converted to a final hearing by Cloud Video Platform (CVP) (given that it is undefended) was overlooked. The hearing was converted to a final hearing by Cloud Video Platform (CVP) only the day before this hearing.

3. Ms Wegorowska explained that it was for that reason that she had not lodged documentary evidence upon which she relies with the Tribunal; she had expected time would be given to do so.

4. I decided in fulfilment of the overriding objective and given that this claim is undefended to proceed with the hearing in the absence of those documents being lodged. I explained that depending on the outcome of the hearing I may require Ms Wegorowksa to lodge documents with the Tribunal following the hearing.

5. Mr Glab was also present at the hearing but he was represented by Ms Wegorowska. I heard evidence on oath only from Ms Wegorowska

6. I found Ms Wegorowska to be an intelligent, well informed and candid witness, whose evidence I found to be entirely credible and reliable.

7. At this hearing, the focus was on the question of time bar, which is a matter of jurisdiction, because the claims are otherwise undefended.

Findings in fact

8. Having heard evidence, the Tribunal makes the following relevant findings in fact.

9. The first claimant commenced employment with the respondent as a junior sous chef on 7 May 2019. The second claimant also commenced employment as a head waiter on that same date.

10. The second claimant had worked on two previous occasions for the respondent, and when she was asked, while working in a recruitment agency, to source employees, she offered her services and those of her partner, Mr Glab, the first claimant.

11. It was initially agreed that they would each be paid on a salaried basis a gross wage of £20,000 per annum with free accommodation.

12. Although a contract to that effect was issued, that contract was never signed.

13. They had no set hours and were required to carry out duties as required by the needs of the business. The claimants did however “clock in” and “clock out” of work using a computerised system.

14. The claimants reached an agreement with Ms B Temmings, the proprietor of the respondent hotel, that if they worked a lot of overtime, that they would be entitled to take that time off during the winter months when the hotel was closed.

15. The hotel was due to close for the winter season from 1 November 2019 to 31 January 2020. The claimants understood that they could take paid annual leave at that time and that they did not require to be on the hotel premises.

16. In or around August or September 2019, a request was made to all salaried employees to identify the two weeks when they wished to take annual leave while the hotel was closed. The claimants put down for two months’ leave,

because they had been led to believe this was agreed between them and the respondent.

17. However, the claimants were under the impression that Ms Temmings considered their request to be insubordination and she advised them that there had been a misunderstanding on their part. Her position was that while the hotel would be shut during the winter season, the claimants were expected to stay at the premises and to do maintenance work etc. They were told that they were only entitled to two weeks' holidays.

18. As a result of this misunderstanding the claimants decided to hand in their notice. Mr Glab handed his into the head chef and Ms Wegorowksa handed hers into the general manager. They sent an e-mail giving two months' notice.

19. However, they did not work the full two months because they were told that they could leave early as there was no more work for them to do. The final date of employment was 21 October 2019.

20. When the claimants' decision to put in their notice and the reasons for it came to the attention of Ms Temmings, she said that she would reach an agreement with them regarding their concerns.

21. At a meeting which took place in November 2019, an agreement was reached that they would be paid holiday pay and the difference between salary and the hourly rate, based on the number of hours they had actually worked. They understood that the hourly rate was £9.25. In their calculations the claimant's deducted the sum of £845 each per month for accommodation. They confirmed that they had taken no holidays during the time of their employment.

22. The claimants were paid their normal salary for October. They believed that payment for holiday pay and in addition to their salary would be made into their bank account at the end of November.

23. No payment was made at that time, but the claimants gave the respondent further time to undertake the necessary calculations. The second claimant trusted Ms Temmings because she had worked for her twice before. No payment was made by 16 December 2019, so the claimants sent an e-mail asking for payment.

24. The claimants sent another chasing e-mail on 20 December because there was no reply. On this occasion they got an immediate reply, that the matter was “on the list”.

25. The claimant sent a follow up e-mail on 29 December 2019 asking for further information.

26. On 31 December 2019, Ms Temmings sent a e-mail looking for detailed additional information. She explained that the calculation was more complicated than she had expected particularly because there was a fault with the log in procedure which had calculated hours inaccurately. She asked for the following information: the number of holidays taken; the number of hours worked; the number of breaks taken over six hours work; the number of lunches and dinners taken at the hotel; and the number of training hours undertaken.

27. The claimants were surprised at the request for this level of detail three months after the agreement had been reached. The claimants replied by e-mail on 15 January 2020, attaching a table with the information requested.

28. There followed a series of e-mails between the claimants and Ms Temmings. The claimants sent a follow up e-mail on 3 February 2020 and received a reply on 6 February 2020 advising she was chasing her accountant. The claimants sent another follow up e-mail on 13 February, and got an immediate reply advising that she was expecting the figures from her accountant the next day. After another follow up email on 18 February, she advised that checks were being made on tax and national insurance. On 27 February the claimants asked again about progress; then again on 7 March. She replied on 8 March

that she was waiting to hear from HMRC. On 17 March, the claimant asked if she had any news from HMRC. On 18 March she responded to advise that due to the social and economic dip caused by Covid 19 they could not provide a recalculation of wages at that time. On 26 March, the claimants e-mailed to ask if they could at least receive payment of holiday pay. The claimants heard nothing further from her or the respondent at all but waited things out because of the pandemic.

29. Having heard nothing by October 2020, the claimants contacted the Skye and Lochaber CAB by e-mail for advice. They were advised that the claim was out of time but that the respondent could not use the pandemic as an excuse not to pay them and advised them to make a claim in any event.

30. On 13 November 2020, the claimant sent an e-mail to the respondent, giving onw week to make the payment on the basis of their final calculations. Given no reply by 20 November 2020, the claimant sent two formal letters by tracked delivery to Ms Temmings, one to the hotel and one to her home address, giving her until 7 December 2020 to respond, failing which they would initiate legal action.

31. After taking advice from the CAB and from a friend who had previously lodged a claim against the respondent, they contacted ACAS to intimate early conciliation on 29 December 2020. The ACAS EC certificate was issued on 4 January 2021. The claimants lodged a claim on line that same day. That claim was rejected because the name of the respondent in the ET1 did not match the name in the EC certificate. The claimants resubmitted the claim by post and it was accepted as at 26 January 2021. The claimants were advised by letter dated 1 February 2021 that the claim had been accepted although it appeared to have been lodged out of time.

Relevant law

32. The law relating to time limits in respect of deductions to pay is set out in the Employment Rights Act 1996 ("the 1996 Act"). Section 13 of the 1996 Act states that an employer shall not make a deduction from wages of a worker employed by him unless the deduction is authorised by a statutory provision or a relevant provision of the worker's contract or he has the worker's consent.

33. Section 23(1) states that a worker may present a complaint to an employment tribunal that his employer has made a deduction from his wages in contravention of Section 13.

34. Section 23(2) states that an employment tribunal shall not consider a complaint unless it is presented before the end of the period of three months beginning with the day of payment of the wages from which the deduction was made.

35. Section 23(3) states that where a complaint is brought in respect of a series of deductions, the complaint must be presented within three months of the last deduction in the series.

36. Section 23(4) states that where the employment tribunal is satisfied that it was not reasonably practicable for a complaint to be presented before the appropriate date, the tribunal may consider the complaint if it is presented within such further period as the Tribunal considers reasonable.

37. The law relating to time limits in respect of arrears of holiday pay is contained in the Working Time Regulations 1998. Regulation 30(2) states that an employment tribunal shall not consider a complaint unless it is presented before the end of the period of three months beginning with the date on which it is alleged that 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 of three months.

38. Thus, where these types of claim are lodged out of time, the tribunal must consider whether it was not reasonably practicable for the claimant to present the claim in time, the burden of proof lying with the claimant. If the claimant succeeds in showing that it was not reasonably practicable to present the claim in time, then the tribunal must then be satisfied that the time within which the claim was in fact presented was reasonable.

39. The Court of Appeal has recently considered the correct approach to the test of reasonable practicability (*Lowri Beck Services Ltd v Brophy* [2019] EWCA Civ 2490). Lord Justice Underhill summarised the essential points as follows:

1) The test should be given "a liberal interpretation in favour of the employee" (*Marks and Spencer plc v Williams-Ryan* [2005] EWCA Civ 479, which reaffirms the older case law going back to *Dedman v British Building & Engineering Appliances Ltd* [1974] ICR 53);

2) The statutory language is not to be taken as referring only to physical impracticability and for that reason might be paraphrased as whether it was "reasonably feasible" for the claimant to present his or her claim in time: see *Palmer and Saunders v Southend-on-Sea Borough Council [1984] IRLR 119*….

3) If an employee misses the time limit because he or she is ignorant about the existence of a time limit, or mistaken about when it expires in their case, the question is whether that ignorance or mistake is reasonable. If it is, then it will [not] have been reasonably practicable for them to bring the claim in time (see *Wall's Meat Co Ltd v Khan* [1979] ICR 52); but it is important to note that in assessing whether ignorance or mistake are reasonable it is necessary to take into account any enquiries which the claimant or their adviser should have made;

4) If the employee retains a skilled adviser, any unreasonable ignorance or mistake on the part of the adviser is attributed to the employee (*Dedman*)…

5) The test of reasonable practicability is one of fact and not law (*Palmer*).

Tribunal decision

40. The claimants' employment terminated by their resignation effective 21 October 2019.

41. There are strict time limits relating to the lodging of claims in the employment tribunal. These strict rules must be adhered to or the Tribunal has no jurisdiction to hear the case, that is the Tribunal is not entitled to allow the case to continue, and the Tribunal has no power to hear it.

42. The time limit for lodging these types of claims is within three months of the day the wages were due, discussed above. Arguably, if payment was due on the last day of November 2019, the claims should have been lodged within three months less one day of that date, that is by 28 February 2020 at the very latest. In fact, the claim was not lodged properly until 26 January 2021.

43. There is no question therefore that these claims have been lodged out of time, and indeed they were lodged almost 11 months after the time limit expired.

44. Even if claims are lodged out of time there are some limited circumstances when claims can be allowed late. The Employment Judge has a discretion to allow a claim late within certain narrow parameters. The law states that a claim of this sort can be accepted out of time where it is "not reasonably practicable" to have lodged it in time, so long as it is lodged in a reasonable amount of time after it became reasonably practicable.

Was it reasonably practicable for the claimants to present the claim in time?

45. The burden of proof is on the claimants to show that it was not reasonably practicable for the claim to have been presented in time.

46. This phrase has been interpreted by the appeal courts, and in the case of *Palmer* the test is whether it was "reasonably feasible" for the claim to have been lodged in time.

47. This issue was more recently considered by the Court of Appeal in the case of *Lowri* and five guiding principles from previous case law have been identified, as set out above, which I have considered.

48. The claimant's evidence was that they trusted Ms Temmings and believed that she would pay them what she had agreed to pay them. They thought they were being decent allowing her plenty of time to pay, and to make the necessary calculations. They did not want to pressurise her over Christmas, and waited until after Christmas to follow up their request.

49. Indeed, had the claimants lodged their claims by the end of February they would not have been out of time. But they did not. They made further requests by e-mail and ultimately accepted the respondent's excuse that they could not fulfil the agreement at that time because of the pandemic. This resulted in a further delay until they contacted the CAB in October.

50. The claimants clearly did not know at that point in time about the time limit rules. The claimants are Polish with limited knowledge of the British employment tribunal system. On the question of whether the ignorance was reasonable, it would appear that the claimants were not aware of the three month time limit until they were given advice by the CAB. I accept that they were until that time ignorant of the time limit, and I accept that as Polish workers unfamiliar with the British employment tribunal system, that ignorance was reasonable.

51. This is a question of fact for me to determine, not law. Applying the test, giving a liberal interpretation in favour of the employee, and acknowledging that I am considering not only physical impracticability but other barriers to lodging the claim, and accepting that the claimant's ignorance was reasonable, I am prepared to accept that it was not reasonably practicable for the claimants to have lodged their claim within the requisite time limit.

Did the claimant lodge his claim within a reasonable time thereafter?

52. However, even if I accept that it was "not reasonably practicable" for the claimants to have lodged their claim prior to getting advice from the CAB, the problem for the claimants is that they then waited again before taking steps to lodged the claim in the employment tribunal.

53. Despite being advised in October 2020 that any claim was already out of time (the claimant referred to an e-mail from the CAB dated 29 October) the claimants waited a further three to four months before lodging the claim.

54. This was the real difficulty for the claimants in this case because I am of the view that once the claimants became aware of the issue of time limits, they should have acted quickly to lodge their claim.

55. Instead they wrote again to the respondent, giving them yet more time to respond. I appreciate that the claimants were reluctant to pursue the matter in court, and clearly reluctant to lodge a claim in the Tribunal against Ms Temmings as the owner of the hotel given their relationship with her. However, their patience and that delay has operated against them.

56. Ms Wegorowska explained, describing herself as naïve, that they believed they might get a response to their letter of 7 December 2020. They were conscious that the holiday season was coming up and so they wanted to wait until January 2021 to lodge their claim and everything was operating normally.

57. They wanted to give the company time to pay and doing things “the legal way” was a very last resort for them. They did not undertake legal research and they find themselves in this position due to their good intentions.

58. However, this explanation and rationale is not something which I can take into account. In all the circumstances of this case, I could not say that, once the claimants knew about the time limit, and once it became reasonably practicable for the claimants to lodge their claim, that they did so within a reasonable time thereafter.

Conclusion

59. It is very unfortunate that the claimants’ good intentions and reluctance to pursue a claim in the Tribunal should mean that they are not permitted to pursue a claim at all. While I make no comment on the substantive claim, the claimants describe having reached an agreement with the respondent which was apparently not implemented. It may be that a valid claim could be pursued in another forum such as the sheriff court.

60. However, applying the strict time limit rules applicable to the employment tribunal, which relate to the matter of jurisdiction, I have concluded that while it was not reasonably practicable for the claimants to lodge the claim in time, the claim was not lodged within a reasonable time thereafter. The Tribunal therefore does not have jurisdiction to hear the claims which must be dismissed.

Employment Judge: M Robison
Date of Judgement: 9 April 2021
Entered in register: 28 April 2021
and copied to parties