



EMPLOYMENT TRIBUNALS

Claimant: Mr A Konjusinskis

Respondent: Kepak Kirkham Limited

Heard at: Manchester

On: 1 November 2021
3 November 2021
(in chambers)

Before: Employment Judge Ainscough
(sitting alone)

REPRESENTATION:

Claimant: In person

Respondent: Ms A Stokes, Solicitor

JUDGMENT

The judgment of the Tribunal is that:

1. The claim for unfair dismissal contrary to section 103A of the Employment Rights Act 1996 was not brought within the three month time limit in accordance with section 111(2)(a) of the Employment Rights Act 1996.
2. It was reasonably practicable for the claimant to bring the claim within that time limit and as a result the claim for unfair dismissal is out of time and is dismissed.
3. The claim for unlawful deduction from wages contrary to section 13 of the Employment Rights Act 1996 was not brought within the three month time limit in accordance with section 111(2)(a) of the Employment Rights Act 1996.
4. It was reasonably practicable for the claimant to bring that complaint within the three month time limit and therefore the claimant's claim for unlawful deduction from wages is out of time and is dismissed.

REASONS

Introduction

1. The claimant was employed by the respondent from 26 February 2007 until 11 August 2020 when he was dismissed for gross misconduct.
2. On 9 November 2020 the claimant started early conciliation proceedings with ACAS and received the certificate concluding that process on 9 December 2020.
3. On 23 February 2021 the claimant submitted his Employment Tribunal application complaining that he had been unfairly dismissed because he had made a protected disclosure and further, that he had suffered an unlawful deduction from wages at the end of 2018 and beginning of 2019.
4. On 29 March 2021 the respondent submitted the ET3 form in response disputing the claims.
5. The matter was listed for a public preliminary hearing to determine whether the claimant's claims were in time.

Evidence

6. The respondent produced a bundle of 54 pages with the relevant documentation. The claimant had been asked on several occasions by the respondent's representative to submit documentation for inclusion within that bundle but had not done so.
7. The claimant provided an explanation about the lodging of the claim in an email on 3 September 2021. In addition, the claimant provided evidence to the Tribunal during the preliminary hearing. I also heard submissions from both parties on this preliminary issue.
8. The claimant was assisted throughout the preliminary hearing by an interpreter.

Issues

9. The issues to be determined at the preliminary hearing were as follows:
 - (a) Whether the claims for unfair dismissal and unlawful deduction from wages were brought within the time limit set out at section 111(2)(a) of the Employment Rights Act 1996;
 - (b) If not, was it reasonably practicable for the claimant to bring those complaints within the time limit?
 - (c) If not, did the claimant bring the claims within such further period as the Tribunal considers reasonable?

Relevant Findings of Fact

10. The claimant was dismissed for gross misconduct on 11 August 2020. At the time of the claimant's dismissal he was a member of a trade union.

11. On 14 August 2020 the claimant prepared and submitted a three page appeal against his dismissal. The claimant attended appeal hearings on 24 September 2020, 29 September 2020 and 1 October 2020. The claimant's appeal was unsuccessful.

12. The claimant sought advice from his trade union and following that advice submitted an application for early conciliation with ACAS on 9 November 2020. At the same time, the claimant's trade union representative sought legal advice as to the merits of the claim.

13. In or around the week commencing 7 December 2020 the claimant received that legal advice. On 9 December 2020 the claimant received the certificate from ACAS ending the period of early conciliation. The time limit for lodging any claim with the Tribunal was 9 January 2021.

14. The claimant paid his submission to the trade union on 20 November 2020. The claimant paid his submissions to the trade union every month. In light of this, I determine that the claimant remained a member of the trade union up to 20 December 2020. The claimant did not make a payment on this date because he had decided he could not afford to do so after his dismissal.

15. On 1 September 2020 the claimant obtained new employment with an employment agency until May 2021. In May 2021 the claimant began a new job. Throughout this period the claimant continued to work except for approximately two days when he was absent from work with ill health.

16. Following receipt of the ACAS certificate, the claimant had a conversation with ACAS in which he was told he would need the last two numbers of the reference on the certificate in order to lodge a claim.

17. At the end of January 2021, the claimant tried to log back into the Employment Tribunal claim form system. The claimant was unable to do so because he did not have a record of his memorable word.

18. By 23 February 2021 the claimant had discovered his memorable word on his phone and was able to log back into the system and submit the claim form.

Relevant Legal Principles

19. Section 94 of the Employment Rights Act 1996 provides that an employee has a right not to be unfairly dismissed by his employer.

20. Section 111 of the Employment Rights Act 1996 provides that the Tribunal should not consider a complaint of unfair dismissal unless it is presented to the Tribunal:

“(a) before the end of the period of three months beginning with the effective date of termination; or

- (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 months.”**

21. A complaint of unlawful deduction from wages is made via section 13 of the Employment Rights Act 1996 which provides for a right not to suffer unauthorised deductions. Section 23 of the Employment Rights Act 1996 provides that in such cases an Employment Tribunal will not consider a complaint 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...**

(iii) **where a complaint is brought under this section in respect of (a) a series of deductions or payments...the references in subsection (2) of the deduction or payment are to the last deduction or payment in the series.”**

22. Subsection (4) provides that where a Tribunal is satisfied that it was not reasonably practicable for the complaint to be presented before the end of three months, the Tribunal may consider the claim if it is presented in such further period as the Tribunal considers reasonable.

23. Section 207B(2)-(4) of the Employment Rights Act 1996 provide:

“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.”**

24. The Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 provides that an employee can bring a claim for damages outstanding on termination of employment. Non-payment of wages are damages for the purposes of this Order.

25. Any such claim must be brought within three months of the date of termination or within the relevant time limit as extended by the early conciliation process. If the claim is out of time, a Tribunal can extend time to a date it considers it reasonable to do so, if it was not reasonably practicable for the employee to bring the claim within the original time limits.

26. In **Schultz v Esso Petroleum Co Ltd (1999) IRLR 488** the Court of Appeal determined that a claimant should not be penalised for not lodging a claim whilst

pursuing an internal appeal during the earlier part of the primary time limit, despite becoming too ill to lodge the claim in the latter part of the primary time limit. A claimant was entitled to focus his/her efforts on internal resolution before resorting to litigation.

27. In **University Hospitals Bristol NHS Foundation Trust v Williams UKEAT/0291/12** the Employment Appeals Tribunal determined that a Tribunal must assess whether a claim was submitted within a reasonable further time period after the expiry of the original time limit. The test is different to the standard required for compliance with the original time limit which demands the Tribunal assess what was reasonably practicable.

28. In **Locke v Tabfine Ltd t/a Hands Music Centre EAT 0517/10** the Employment Appeals Tribunal reiterated that the Tribunal must focus on what was reasonable for the claimant to do in the circumstances, once the primary time limit had expired.

29. Something is “reasonably practicable” if it is “reasonably feasible” (see **Palmer v Southend-on-Sea Borough Council [1984] ICR 372**, Court of Appeal). Ignorance of one’s rights can make it not reasonably practicable to present a claim within time as long as that ignorance is itself reasonable. An employee aware of the right to bring a claim can reasonably be expected to make enquiries about time limits: **Trevelyan (Birmingham) Ltd v Norton [1991] ICR 488**.

30. In **Marks and Spencer Plc v Williams-Ryan [2005] ICR 1293** the Court of Appeal reviewed some of the authorities and confirmed in paragraph 20 that a liberal approach in favour of the employee was still appropriate. What is reasonably practicable and what further period might be reasonable are ultimately questions of fact for the Tribunal.

Submissions

Respondent’s Submissions

31. It was the respondent’s position that the claim for unfair dismissal was 45 days out of time and the claim for unlawful deduction from wages was approximately one year and nine months out of time.

32. The respondent did not believe the claimant had explained the delay in bringing the claims, until he sent the email of 3 September 2021.

33. The respondent contended that the claimant failed to provide any documentary evidence to support the reasons for the delay or his assertion that he suffers from depression.

34. The respondent submitted that the claimant knew of the right to bring the claims and admitted in cross examination that he knew that there was potentially a three month or six month deadline to submit the claim.

35. It is the respondent’s case that whilst prior to the expiry of the initial deadline the claimant’s trade union membership came to an end, the claimant had received trade union advice and spoken to ACAS. The respondent submitted the claimant

also had the ability to search the internet. The respondent maintained that any lack of knowledge on the claimant's behalf was not reasonable.

36. The respondent submitted that despite the claimant having no medical evidence to support his contention that he suffers from depression, the claimant had admitted in evidence that he was able to work from September 2020 onwards.

37. The respondent submitted that two days absence between December 2020 and February 2021 did not demonstrate incapacity to submit a claim. The respondent also submitted that it is not clear why the claimant was able to submit his claim on 23 February 2021.

38. The respondent contended that the claimant only discovered the technical issues at the end of January/beginning of February and would have been directed to a helpline on the website. It was the respondent's position that it was not reasonable that it took in excess of three weeks for the claimant to seek support.

Claimant's Submissions

39. The claimant was adamant that he did not know the time limit for lodging the claim. The claimant contends that ACAS did not inform him of the time limit. The claimant submitted that the ACAS paperwork did not specify the relevant time limit.

40. The claimant also submitted that it was difficult to obtain medical evidence about his health condition during the pandemic. The claimant informed the Tribunal that he requires the assistance of an interpreter to attend medical appointments.

41. The claimant complained that the trade union representation was not adequate and as a result he ended his membership. The claimant submitted that he relied upon ACAS for help. The claimant submitted that it would be an injustice to not hear his case because the complaints need to be aired in public.

42. The claimant submitted that had he known about the time limit he would have submitted the claim within the time limit as it was not in his interest to delay.

Discussion and Conclusions

Were the claims brought within the time limit?

43. Section 207B(4) of the Employment Rights Act 1996 provides that if the original time limit would expire between the date early conciliation was started and one month after receipt of the early conciliation certificate, the time limit for lodging the claim is one month after receipt of the certificate.

44. In the claimant's case he was dismissed on 11 August 2020. The claimant started early conciliation on 9 November 2020. The original time limit to lodge the claims was within three months of the date of dismissal – 10 November 2020. The claimant received the early conciliation certificate on 9 December 2020. One month after this date was 9 January 2021.

45. As the original time limit expired between the date early conciliation started and one month after receipt of the early conciliation certificate, the time limit for

lodging the claim was 9 January 2021. The claimant lodged his claims on 23 February 2021 and therefore the claims are out of time.

Was it reasonably practicable for the claimant to bring the claims within the original time limit?

46. The claimant contended that he was, even on submission of the claim form, unaware that there were time limits for submission of a claim. In evidence, the claimant said that he submitted it when he did because he knew he needed to and made reference to either a three month or a six month time limit.

47. Up until 20 December 2020 the claimant had access to trade union advice. The trade union advised the claimant of his right to appeal and assisted him with the appeal hearing. In addition, the trade union also advised the claimant about his right to start ACAS early conciliation prior to bringing a claim. The trade union went so far as to obtain independent legal advice from a lawyer.

48. Whilst English is not the claimant's first language, it is clear from the evidence he gave that he understood enough English to prepare a lengthy appeal document, attend the appeal hearings and consider the advice from the lawyers. Whilst I have not been privy to the legal advice, it is more likely than not that either the trade union or the lawyers would have made reference to the time limits for lodging a claim.

49. In addition, the claimant had contact with ACAS. In evidence, the claimant recalled a conversation with ACAS in which he was told he would need the last two numbers of the reference on the certificate to lodge his claim. The ACAS early conciliation system creates a reference at the outset that consists of an "R" number of six digits and a reference to the year. In the claimant's case his number was R216252/20.

50. At the end of early conciliation, the numbers 3 and 4 were added to that reference to confirm the end of that process. The whole reference needs to be quoted on the Employment Tribunal claim form – R216252/20/34. In fact, the early conciliation certificate states in the last paragraph, "please keep this certificate securely as you will need to quote the reference number (exactly as it appears above) in any Employment Tribunal application concerning this matter".

51. I determine that it was more likely than not that during that conversation with ACAS about the last two digits of that reference, there was a discussion about the submission of an Employment Tribunal application and the time limits for doing so.

52. Even if I were to accept that the trade union, ACAS and the lawyers did not tell the claimant about the time limit within which to lodge a claim, between 9 December 2020 and 9 January 2021 the claimant was capable of working except, for approximately two days. Whilst the claimant says that he was ill with depression, he was able to work. It is therefore more likely than not that the claimant had the ability to research what he needed to do in the absence of advice from anybody else.

53. I therefore do not accept that the claimant's ignorance of a time limit was reasonable and conclude that it would have been reasonably practicable for the claimant to lodge his claim by 9 January 2021.

54. The claimant, from the date of his dismissal on 11 August 2020 until the date he left the trade union on 20 December 2020, was capable of going through an appeal process and providing instructions. The claimant was similarly capable of consulting with a trade union representative and lawyers to obtain advice. The claimant has presented no evidence, either in document form or in witness evidence, that he had an illness that prevented him from researching the time limit and submitting the claim within the required time.

55. For this reason, the claims are out of time and are dismissed.

56. In light of my determination that the claimant's claim for unlawful deduction from wages contrary to section 13 of the Employment Rights Act 1996 is out of time, I have considered whether the claimant would, in the alternative, be able to pursue a claim for breach of contract in accordance with the provisions of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994.

57. The claimant's alleged non payment of wages from 2018 to 2019 was outstanding on termination of employment. However, the time limit for bringing that claim was within three months of the termination of his employment. I similarly determine that it would have been reasonably practicable for the claimant to bring any breach of contract claim within the prescribed time limit and this alternative claim is also dismissed.

Employment Judge Ainscough
Date: 5 January 2022

JUDGMENT AND REASONS SENT TO THE PARTIES ON
10 January 2022

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