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EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4102041/2020

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**Held on 6, 7, 8, 9 and 10 December 2021
(By Cloud Video Platform)**

**Employment Judge: P O'Donnell
Members: Ms J Anderson
Mr D McFarlane**

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Ms J Murray

**Claimant
In Person**

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Tesco Personal Finance Plc

**Respondent
Represented by:
Mr MacDougall - Counsel
Instructed by:
Pinsent Mason**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is:-

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1. The claims for deduction of wages under Part 2 of the Employment Rights Act 1996 and for breach of contract relating to payments made on the termination of the Claimant's employment are dismissed under Rule 52 having been withdrawn by the Claimant.

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2. The claim for deduction of wages under Part 2 of the Employment Rights Act 1996 in relation to alleged deduction of wages made in the period February to August 2018 are struck out under Rules 37(1)(a) and 37(1)(c).

REASONS

Introduction

1. The Claimant has brought complaints of unfair dismissal, unlawful deduction of wages, breach of contract and disability discrimination. A final hearing starting on 6 December 2021 was listed to determine these claims.
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2. At the outset of the hearing, the Tribunal indicated that there were a number of preliminary issues which it considered needed to be determined before hearing any evidence. Most of these were resolved after discussion with parties as set out below but there was a strike-out application by the Respondent which was opposed by the Claimant which the Tribunal determined after hearing submissions. The Tribunal then proceeded to hear evidence in relation to the remaining claims (that is, unfair dismissal and disability discrimination). The hearing could not be concluded in the time allocated and a continued hearing was listed.
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3. The Tribunal gave its oral judgment on the strike-out application at the hearing. By agreement with the parties, the oral judgment indicated whether the application was granted or not but did not give full reasons at the time with these to follow in writing. This judgment are those written reasons. The Tribunal considered that it would assist the parties to have this judgment in advance of the continued hearing in relation to the remaining claims.
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4. The first issue was confirmation of the acts of discrimination relied upon by the Claimant as the basis of her discrimination claim. This was important as the Respondent's position in relation to time bar, disability status and knowledge of disability were contingent on what the alleged acts of discrimination were alleged to be.
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5. After some discussion with the parties and allowing the Claimant time to review the relevant documents, she confirmed that the acts of discrimination relied upon for the purposes of her discrimination claim were those set out in the Scott Schedule which appears at pp90-96 of the Respondent's bundle. For

the avoidance of doubt, all the page numbers referenced in this judgment are a reference to pages in the Respondent's bundle.

6. In light of that, Counsel for the Respondent confirmed that the Respondent accepted that a claim based on these alleged acts was in time, that the Claimant was a disabled person as defined in s6 of the Equality Act 2010 at the time of these alleged acts and that the Respondent had the necessary knowledge that the Claimant was disabled at the time of these alleged acts.
7. The second issue related to whether the hearing should deal with liability and remedy or just liability with remedy to be dealt with at a future hearing depending on the decision on liability. This arose because the Schedule of Loss prepared by the Claimant's previous agent indicated that damages for psychological injury were to be sought which would require some expert medical evidence.
8. In light of the fact that both parties did not object to the hearing being limited to liability only, the Tribunal ordered that the present hearing would deal with liability and any remedy would be reserved to a later hearing as appropriate.
9. The third issue related to the basis on which the Claimant's claims of unlawful deduction of wages and breach of contract were pursued. There had been earlier case management orders made for the Respondent to provide more information about the payments made to the Claimant and for the Claimant to then confirm the basis on which she pursued her claims relating to any alleged outstanding wages. The Respondent had provided the information but there had been no confirmation from the Claimant in relation to the basis on which these claims are pursued.
10. At the hearing, the Claimant confirmed that she accepted that she had been paid the correct amounts on termination of her employment and so she was withdrawing her breach of contract claim and her deduction of wages claim insofar as that relates to the payments made on termination of her employment.

11. The Tribunal indicated to the Claimant that it would dismiss those claims under Rule 52 and explained that this would bring those claims to an end and they could not be raised again. The Claimant did not object to these claims being dismissed and so the Tribunal dismissed those at the hearing. This judgment confirms that decision.

12. The Claimant also confirmed that she wished to pursue a claim for unlawful deduction of wages in relation to earlier alleged deduction of wages. The Respondent insisted on its strike-out application in respect of this claim and the Tribunal proceeded to hear submissions in respect of that application.

10 **Respondent's submissions**

13. The application was made on two grounds; Rule 37(1)(a) on the basis that the remaining claim for deduction of wages had no reasonable prospects of success; Rule 37(1)(c) on the basis that the Claimant did not comply with an earlier Order to set out the basis of the claim.

14. Mr MacDougall submitted that the Respondent had no fair notice of the claim; the Claimant had had numerous opportunities to specify this and had failed to do so.

15. Reference was made to the time limit for bringing a claim of unlawful deduction of wages and it was submitted that there was nothing to indicate that this claim had been lodged in time. On the face of it, the claim was out of time.

16. It was submitted that the onus is on the Claimant to prove any deduction and there is no evidence in either the Respondent's bundle or the Claimant's bundle that would allow the Claimant to discharge this burden.

17. The relevant Order for the non-compliance ground was made on 27 August 2020 and is at p73. Paragraph 2.1 of the Order required the Respondent to provide information to the Claimant regarding her wages and this was done. Paragraph 2.2 sets out the requirement placed on the Claimant to provide

further information regarding the basis of the deduction of wages claim. It was submitted that the Claimant has not provided this information and must be taken as acceptance that the figures provided by the Respondent are correct or it amounts to non-compliance.

5 18. In rebuttal of submissions made by the Claimant, Mr MacDougall made reference to p16 of the bundle which is part of the ET1 and the fourth line of that page. He submitted that the Claimant was aware of the overpayment made to her and that this was not wages for the purposes of Part 2 of the Employment Rights Act.

10 19. The Claimant was aware of the deduction and alleges it was a mistake as early as March 2018. She was also aware of the subsequent deductions that had been made. These were said to be caught by the period of time for which the August 2020 Order required the Respondent to provide information.

15 20. There remains no evidence of any deduction from wages from the period in 2018.

Claimant's submissions

21. The Claimant made the following submissions.

20 22. The deductions were made over 6 months and this is set out in her ET1 at p16; it was said that there was an overpayment but no explanation was given and she had to pay back this sum over 6 months. The deductions were made up to 24 August 2018.

23. This had caused the Claimant financial difficulties as well as anxiety and stress. She had raised it with the union but they did not do anything about it.

25 24. In response to a question from the Judge about why she did not raise the issue earlier, the Claimant replied that she never thought about it and did not know

she could do anything about it. She raised it internally but could not speak to payroll.

Relevant Law

25. The Tribunal has power to strike-out the whole or part of claim under Rule 37:-

5 *At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds—*

(a) *that it is scandalous or vexatious or has no reasonable prospect of success;*

10 (b) *that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious;*

(c) *for non-compliance with any of these Rules or with an order of the Tribunal;*

15 (d) *that it has not been actively pursued;*

(e) *that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out).*

20 26. A Tribunal should be slow to strike-out a claim where one the parties is a litigant in person (*Mbuisa v Cygnet Healthcare Ltd EAT 0119/18*) given the draconian nature of the power.

27. In considering whether to strike-out, the Tribunal must take the Claimant's case at its highest and assume she will make out the facts she offers to prove unless those facts are conclusively disproved or fundamentally inconsistent with

contemporaneous documents (*Mechkarov v Citibank NA 2016 ICR 1121, EAT*).

28. The approach to be taken by the Tribunal in addressing the issue of strike-out under Rule 37 was summarised by Burton J, in *Bolch v Chipman* [2004] IRLR 140:-

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a. The Tribunal must reach a conclusion whether the ground under Rule 37 is made out.

b. Even if it is, the Tribunal must decide whether a fair trial is still possible.

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c. If a fair trial is not possible, the Tribunal must still consider whether strike-out is a proportionate remedy or whether a lesser sanction would be proportionate.

d. If strike-out is granted then the Tribunal needs to address the effect of that and exercise its case management powers appropriately.

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29. Section 23(2) of the Employment Rights Act 1996 (ERA) states that the Tribunal shall not consider a complaint of deduction of wages unless it is presented within 3 months of the date of payment of the wages. Where there are a series of deductions then s23(3) states that the time limit runs from the last deduction in that series.

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30. The Tribunal has discretion under s23(4) to hear a claim outwith the time limit set in ss23(2) and (3) where they consider that it was not reasonably practicable for the claim to be presented within the 3 month time limit and it was presented within a further period that the Tribunal considers to be reasonable.

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31. Under s207B ERA, the effect of a claim entering ACAS Early Conciliation is to pause the time limit until the date on which the Early Conciliation Certificate is issued. The time limit is then extended by the period the claim was in Early

Conciliation or to one month after the Certificate is issued if the Early Conciliation ends after the normal time limit.

5 32. The burden of proving that it was not reasonably practicable for the claim to be lodged within the normal time limit is on the claimant (*Porter v Bandridge Ltd* [1978] IRLR 271).

33. In assessing the “reasonably practicable” element of the test, the question which the Tribunal has to answer is “what was the substantial cause of the employee's failure to comply” and then assess whether, given that cause, it was not reasonably practicable for the claimant to lodge the claim in time
10 (*London International College v Sen* [1992] IRLR 292, EAT and [1993] IRLR 333, Court of Appeal and *Palmer and Saunders v Southend-on-Sea Borough Council* [1984] IRLR 119).

34. One of the most common reasons why a claimant will not lodge their claim within the normal time limit is either ignorance of, or a mistake regarding, the
15 application of the relevant time limit. The leading case on this is *Wall's Meat Co Ltd v Khan* [1978] IRLR 49 where, at paras 60-61, Brandon LJ stated :-

20 “the impediment [to a timeous claim] may be mental, namely, the state of mind of the complainant in the form of ignorance of, or mistaken belief with regard to, essential matters. Such states of mind can, however, only be regarded as impediments making it not reasonably practicable to present a complaint within the period of three months, if the ignorance on the one hand, or the mistaken belief on the other, is itself reasonable.”

35. The test for whether it was reasonable for the claimant to be aware of the time limit is an objective one and the Tribunal should consider whether a claimant
25 ought to have known of the correct application of the time limit (see *Porter, Khan, Avon County Council v Haywood-Hicks* [1978] IRLR 118).

36. Ignorance or mistake “*will, further, not be reasonable if it arises from the fault of the complainant in not making such inquiries as he should reasonably in all the circumstances have made*” (as per Brandon LJ in *Khan*).
37. Where the Tribunal concludes that it was not reasonably practicable for the claimant to have lodged his claim in time then it must go on to consider whether it was lodged in some further period that the Tribunal considers reasonable.
38. This is a question for the Tribunal to determine in exercising its discretion (*Khan*) but it must do so reasonably and the Tribunal is not free to allow a claim to be heard no matter how late it is lodged (*Westward Circuits Ltd v Read* [1973] ICR 301).
39. In assessing the further delay, the Tribunal should take account of all relevant factors including the length of the further delay and the reason for it. It will also be relevant for the Tribunal to assess the actual knowledge which the claimant had regarding their rights (particularly the application of the time limit) and what knowledge they could reasonably be expected to have or investigations they could reasonably be expected to make about their rights (*Northumberland County Council v Thompson* UKEAT/209/07, [2007] All ER (D) 95 (Sep)).

Decision

40. In relation to the application under Rule 37(1)(a), the Tribunal considers that the remaining claim under Part 2 of the ERA does not have reasonable prospects of success for the following reasons.
41. The claim was clearly lodged out of time; the alleged deductions took place over a period ending in August 2018 and the ET1 was not presented until April 2020. This was clearly outside the three month time limit set down in s23 ERA.

42. Further, it was reasonably practicable for the claim to have been lodged in time. The reason why the claim was not lodged timeously was that the Claimant was not aware of her rights. This, unfortunately, does not provide a valid excuse in circumstances where the Claimant had not taken any apparent steps to investigate her rights and identify that she could have brought a claim to the Tribunal at that time. The Tribunal also notes that the Claimant was in receipt of advice from her trade union at the time and so could have sought further information or advice from them.
43. There is, therefore, no reasonable prospects of the Tribunal exercising its discretion to hear this claim out of time.
44. The Tribunal also considers that the claim would not have reasonable prospects of success in relation to the substantive merits of the claim. The deductions were made to recover an overpayment and such deductions are excluded under s14 ERA (as opposed to not being “wages” as submitted by Mr MacDougall). There was no basis before the Tribunal on which it was said that the overpayment was not correct. Although the Claimant may have had limited information at the time, the Respondent had disclosed information about her pay during the Tribunal process and there was still no basis presented by the Claimant on which it was said that there was no overpayment.
45. For these reasons, the Tribunal considers that the claim under Part 2 of the ERA did not have reasonable prospects of success in relation to both the time limit point and the substantive merits of the claim. In these circumstances, the Tribunal allowed the Respondent’s application under Rule 37(1)(a) and struck out this claim.
46. The Tribunal also granted the Respondent’s application under Rule 37(1)(c) for non-compliance with the August 2020 Order. The Claimant had not complied with that Order and did not seek to argue that she had done so.
47. The Tribunal should be clear that, when saying that the “Claimant” has not complied with the Order, it recognises that the Claimant was represented at

the time and has not come to a view as to whether the non-compliance with the Order was a matter which can be laid at the feet of the Claimant or at those of her representative.

5 48. There having been non-compliance with the Order, the Tribunal has to consider whether a fair trial is still possible. The Tribunal considers that a fair trial is not possible as the Respondent has not had fair notice of the Claimant's case. As set out above, the Claimant has not set out any basis on which it is said that she was not overpaid and so the Respondent does not know what evidence it requires to lead or submissions it might need to make in order to answer the Claimant's case. The Tribunal is conscious that the proceedings had reached the point of a final hearing and that there had been a significant period of time since the claim was lodged during which fair notice could have been given.

15 49. In these circumstances, the Tribunal allowed the Respondent's application under Rule 37(1)(c) and struck out this claim under this Rule as well as Rule 37(1)(a).

50. For the avoidance of doubt, the claims of unfair dismissal and disability discrimination were not affected by this decision and the final hearing proceeded to hear evidence in relation to these claims.

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Employment Judge: P O'Donnell
Date of Judgment: 20 January 2022
Entered in register: 20 January 2022
25 **and copied to parties**