EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4113063/2018
Heard in Glasgow on 14 December 2018
Employment Judge: J Young

Mrs M Bark	**Claimant** **Represented by:-** **Mr J McHugh - Counsel**
Wigtownshire Women's Aid	**Respondent** **Represented by:-** **Mrs T Stirton -** **HR Consultant**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that:-
(1) under s23 (2) and (3) of the Employment Rights Act 1996 the Tribunal has no jurisdiction to hear the claimant's complaint of unauthorised deduction from wages which is dismissed
(2) although the claim of discrimination on the grounds of disability was presented out with the three month period provided for in s123 of the Equality Act 2010, the Tribunal is satisfied that in all the circumstances of the case, it is just and equitable to extend time to the date the application was made. The claim will accordingly proceed to a further Preliminary Hearing to be fixed to determine future procedure.

REASONS

Introduction

1 . The claimant presented a claim to the Employment Tribunal on 2 August 201 8 complaining that there had been unlawful deductions from her wages in terms of section 13 of the Employment Rights Act 1996. She also claimed that she has a disability in terms of section 6 of the Equality Act 2010 and that she was unfavourably treated in not being paid contractual sick pay because she was

not working full time hours in the year prior to absence starting 19 December 2017. The claimant maintains that arose in consequence of her disability namely working reduced hours as part of her phased return to work. Reference was made to sections 15(1) and 39(2)(d) of the Equality Act 2010.

2. The respondent does not accept that the claimant is disabled within the meaning of the Equality Act 201 0 and in any event has not been subject to any unfavourable treatment. It was also maintained that the claims are time barred and a Preliminary Hearing was set for 14 December 2018 to determine that issue.

3. It was also agreed at that time that a Joint Bundle of Productions would be prepared and that it should be sent to the representative for the respondent by 7 December 2018. The note on the Preliminary Hearing also canvassed possible amendment of the ET1 to include a complaint in terms of section 10 of the Employment Rights Act or of unfair dismissal or the raising of a new claim. It was noted that if there was to be an amendment to the ET 1 then that

4. By the date of the Preliminary Hearing the claimant had lodged a proposed amendment to the ET1 to include a claim under section 21 of the Equality Act 2010 for a failure to make reasonable adjustments in relation to payment of sick pay.

5. Additionally, the respondent had made application for the claims to be struck out under Rule 37(1)(a) of the Tribunal Rules of Procedure 2013 on the basis that they were vexatious and had no reasonable prospect of success.

6. At the Preliminary Hearing therefore the issues which were raised and required to be determined were:-
(1) should the claims be struck out in terms of the respondent's submission under Rule 37(1)(a) of Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013
(2) should the amendment be allowed
(3) whether the amendment was allowed or not were the claims of unlawful deduction from wages and/or discrimination time barred

7. It was determined that the order of events would be:-
(1) submissions on the issue of “strike out”
(2) submissions on the issue of whether or not the amendment should be allowed
(3) evidence from the claimant and submissions on the issue of time bar

8. After submissions on the issues of “strike out” and amendment I refused the application for strike out and allowed the proposed amendment. In respect of time bar, after evidence from the claimant and submission from Mr McHugh, an application was made by Mrs Stirton that she be allowed time to lodge written submission for the respondent with reference to the cases referred to by the claimant in the skeleton argument lodged on her behalf and which she had only seen that morning. Albeit that was opposed I allowed the respondent until 28 December 201 8 to lodge written submission on the cases referred to in the skeleton argument “and not otherwise” and for the claimant to make any response by 11 January 2019. These matters were covered in the Orders and Note following the Preliminary Hearing issued to parties.

9. The parties having lodged submissions and response a decision is now issued on the issue of time bar.
The hearing

10. At the hearing the claimant gave evidence and made reference to the documents contained in the Joint Inventory of Productions paginated 1-1 01 (JP-1 01). It is useful to summarise that evidence.
Evidence of the claimant

11. The claimant identified her payslip dated 25 November 2017 (JP43) which showed that she had been paid the sum of £2024.75 being her full salary for the pay period covered.

12. She had an operation scheduled for 19 December 2017 in relation to one of the injuries sustained in her road traffic accident on 4 November 2014. She was to work until her last shift on 18 December 201 7 before being absent from work. This was a planned period of absence as she had been on a waiting list for this operation.

1 3. When she had spoken to her superior Mrs Williams (Manager of the Centre at which she worked) she had received an email to say that she would be entitled to normal wages by way of sick pay during this period of absence. However, on 18 December 2017 Mrs Williams had taken the claimant to her office and "said that she would not get pay but SSP only". The claimant asked Mrs Williams if she was sure this was correct and been told that was the case. The claimant then consulted with her Union representative Mr Colthart from Dumfries as she wished to challenge the issue of pay .

14. Her payslip dated 25 December 2017 (JP44) showed that she was paid full pay for three weeks (£1253.42) and SSP for one week (£89.35). Further payslips were received by the claimant dated 25 January 2018 and 25 February 2018 (JP45/46). Those payslips showed payment of SSP only. The payslips were sent by the claimant to Mr Colthart of her Union. She was advised that the Union were taking action on the matter by taking legal advice from the Union's legal advisors.

15. She received a further payslip dated 25 March 2018 (JP47). By that time the claimant had returned to work as from 1 March 2018 and so received her full salary for the pay period. Again the claimant forwarded that payslip to her Union representative. Again she considered that the Union were in discussion with their legal advisors on the issue.

16. She then was advised by her Union that the Scottish headquarters considered that there was a claim which should be raised against the respondent and that claim was then submitted. She advised that she had given the Union all the necessary information regarding the claim.

17. In cross examination she advised that Mrs Williams had not given a reason as to why only SSP would be paid in the period of absence but simply that it had been a mistake to say that she would be paid at her normal rate.

18. She confirmed that she had first spoken to Mr Colthart very shortly after she had received the first payment of SSP.

19. She further agreed that she had a welfare meeting with Mrs Williams on her

return to work on 1 March 2018 but did not recall a Union representative being there. She stated she had not raised any issues of sick pay at that meeting as it was her first day back and she was simply “desperate to get back" and did not wish to raise the issue with her superior.

20. She confirmed that she had mentioned her disability at the meeting of 1 March 2018. A different start time had been arranged for her as she had continued treatment for PTSD. She had advised Mrs Williams prior to that time of the position. She had not discussed matters directly with Mrs Williams after that meeting. Any discussion was with her Union representative.

21. She had discussed raising a grievance with her Trade Union representative. He was the one who would initiate that procedure. The matter had been put in the hands of her Union representative and the claimant relied on that advice.

22. She was not given information regarding time limits from the Union. She put her trust in them as the experts. The Union solicitors had got in touch with her to ask for certain details to complete the application form and they had then lodged the Tribunal application.

Submissions
For the Claimant

23. The skeleton argument submitted on behalf of the claimant was adopted and further submission made.

24. It was explained that the claimant’s advisors had relied on a mistaken belief that the latest deduction from her wages was on 25 March 2018. However that payslip (JP47) showed the claimant in receipt of her full wage with no SSP being deducted albeit off sick between 25 February - 1 March 2018.

25. On that basis therefore the last date for an ET application or referral to early conciliation would have been 25 May 2018. However in this case the date of receipt by ACAS of the early conciliation notification was 19 June 2018 and the date that ACAS issued the EC Certificate was 4 July 2018. The ET application had then been submitted on 2 August 2018.

26. It was submitted that there were two separate tests to be considered in respect of the claim for unlawful deduction from wages and the claim for discrimination on grounds of disability.

27. In relation to the claim for unlawful deductions the issue was whether or not it was “reasonably practicable” for the claim to have been lodged within three months of 25 February 2018 and, if not, then was it done in a reasonable time thereafter.

28. It was conceded that the case law was against the claimant in this respect. The claimant had relied on expert advisers namely her Trade Union and their legal advisors. A mistake had been made in that it was thought that the wage slip of 25 March 2018 contained a deduction but when the wage slips were reviewed it was clear that there was no deduction in respect of pay in that period. It was conceded that it was practicable to be able to lodge the claim in respect of unlawful deductions in time.

29. In respect of the claim for discrimination on grounds of disability the test in

section 123 of the Equality Act 2010 was that proceedings should not be "brought after the end of the period of three months starting with the date of the act to which the complaint relates or such other period as the Employment Tribunal thinks just and equitable". The start of the period would be 25 February 2018 and to allow this claim it would be necessary for the Tribunal to think it "just and equitable" to extend time.

30. It was submitted that the discretion given to the Tribunal under the "just and equitable" test was broader than that given under the "not reasonably practicable" formula.

31 . Reference was made to **British Coal Corporation v Keeble [1997] IRLR 336** where it was indicated that the discretion to grant an extension of time under the "just and equitable" formula was wide. There were different factors which required to be taken into account being:-
(a) The length and reasons for the delay
(b) The extent to which the cogency of the evidence is likely to be affected by the delay
(c) The extent to which the party sued had cooperated with any requests for information
(d) The promptness with which the claimant acted once he or she knew of the facts giving rise to the course of action; and
(e) The steps taken by the claimant to obtain appropriate professional advice once he or she knew of the possibility of taking action

32. In respect of those factors:-
(a) there was no fault on the claimant personally and that was a significant factor to be taken into account
(b) in respect of cogency of evidence reference was made to DPP v **Marshall [1998] ICR 518** where it was stated the issue was whether it was possible to have a fair trial. There was no reason to consider that was prejudiced in this case. There was no delay to cause evidential delay. All the facts were still in play. There was no real dispute over the documents. The issue was one of interpretation and the effect of the Equality Act
(c) There was no issue about the respondent's cooperation.
(d) and (e) As soon as the claimant was aware she was only to be paid SSP she contacted her Union. She sent the wage slips received thereafter to them. The Union took advice and indicated that in their view there was a claim. At all times the claimant had put matters into the hands of expert advisors. Unfortunately in this case they had let her down.

33. Reference was made to **Virdi** v **Commissioner of Police of The Metropolis [2007] IRLR 24** where it was held that the claimant should not be held responsible for the failings of his/her solicitors. Accordingly in that case it was held that it would be wrong to refuse to extend time on the just and equitable basis when matters had been put into the hands of expert advisors.

34. Reference was also **made** to **Robinson v Bowskill and others [2014] ICR Digest D7** which held that in the case of a claimant putting a claim into the hands of his solicitor or experienced representative the claimant was putting forward an explanation capable of being a satisfactory explanation for delaying the presentation of the claim. In that case an extension of time was granted.

35. It was emphasised that the claimant had acted promptly in this case and there was no forensic or evidential prejudice. There was a mistake on the part of her representatives. In those circumstances it would be just and equitable to extend time.

For the Respondent

36. For the respondent it was submitted that the claimant's Union representative had been in touch with the respondents around 12 January 2018 and so there had been plenty of time to make this claim. Also it was stated that there was no grievance raised by the claimant and there had been sufficient time to follow that course.

37. It was also as indicated submitted that the respondent would wish time to comment on the skeleton argument which had been produced with particular

reference to the cases which had been cited.

38. That application was opposed but with some hesitation I allowed time for the respondent to make a written submission.

39. Unfortunately the written submission produced for the respondent is entirely unhelpful. No account appears to have been taken of the direction given at the time and emphasised in the note following the Preliminary Hearing that the written submission should relate to the authorities cited and not otherwise. I do not know why that direction was ignored.

40. The written submission produced repeated the submissions made at the Preliminary Hearing and raised certain new matters of alleged unsatisfactory behaviour. It repeated the grounds for the application to strike out the claim. It repeated the submission at the Preliminary Hearing that the case had no reasonable prospect of success and that the respondent believed the claim to be "vindictive and vexatious". That matter had already been decided. It replayed the respondent's position on the interpretation of their sick pay policy and made application that the Tribunal award expenses "incurred by the respondent in defending this vexatious claim under section 37(1)(a) of the Employment Tribunal Rules of Procedure". The sum of £5095.80 was sought.

41. The response from the claimant to those submissions was also to notes that the written submission for the respondent was "silent on the case law points raised at the PH" and given that the order of the Tribunal had not been complied with indicated that the respondent's submissions should be disregarded in their entirety.

42. At the same time various points were made in relation to the written submissions which had been produced and indicated that the respondent's conduct was unreasonable to the extent that an order for expenses should be made against them. In the submissions an application was made for an order for expense in respect of the work occasioned in dealing with the written submissions.

Conclusions

43. The evidence by the claimant that she had taken the advice of her Trade Union representative once she was aware that her pay would be restricted to SSP during a period of absence from 19 December 2017 is accepted. It was not challenged in cross examination that the claimant had taken that step. Neither

was it challenged that she had issued her subsequent payslips up to 25 March 2018 to her Trade Union representative and had been advised that they were assessing her claim by taking legal advice. I accepted that the claimant had provided all necessary information and that there was no delay on her part.

44. While it was stated that the claimant had not entered into the grievance process with the respondent that is not an issue that would relate to the question of whether or not the claim was presented in time or whether it was just and equitable to extend time. I did not see what difference it would make whether the claimant had entered into the grievance procedure or not. In any event the respondent's position is very robust in stating that they do not believe the claimant has any claim in respect of sick pay. Entering the grievance process would not have assisted the claimant by in some way extending time for her to lodge an ET claim.

45. There was also an acknowledgement from the respondent that they had engaged with the claimant's Trade Union representative in respect of these matters at least in January 2018 which corroborated the claimant's position that she had relied on her advisors.

46. Essentially, therefore, I accepted the position that the claimant had taken advice from her Union who in turn had taken legal advice on the claim. There was then a mistaken belief that there had been a deduction from the salary paid in terms of the payslip of 25 March 201 8 whereas in fact the last deduction was in respect of the payslip dated 25 February 2018. That mistaken belief caused the ET application to be made outwith the 3 month time period allowed both for unlawful deduction of wages under section 23 of the Employment Rights Act 1996 and in respect of the claim for disability discrimination under section 123 of the Equality Act 2010.
Claim for Unlawful Deduction of Wages

47. As was pointed out the test in respect of this claim was whether or not it was "reasonably practicable for the complaint to be presented before the end of the period of 3 months".0

48. It was properly conceded that the case law was against the claimant in assessing whether it was reasonably practicable for the claim to be presented within the prescribed time limit. That has been the position ever since **Dedman v British Building and Engineering Appliances Limited 1974 ICR 53.** That case indicated that if "a man engages skilled advisors to act for him - and they mistake the time limit and present the claim too late - he is out. His remedy is against them". That principle has been followed for some time into such cases as **Agrico UK Limited v Ireland EATS0025/05** and affirmed by the Court of Appeal in **Marks and Spencer Pic v Williams-Ryan 2005 ICR 1293.** In short a solicitor's fault will defeat any attempt to argue that it was not reasonably practicable to make a timely complaint to the Tribunal. Trade Union representatives also counts as "advisors" in this context. If they assist a claimant with his or her case they are generally assumed to know the time limits and to appreciate the necessity of presenting claims in time.

49. In those circumstances it cannot be said that the fault of the advisors in this case meant that it was not "reasonably practicable" for the complaint to be presented in time. The Tribunal therefore has no jurisdiction to hear the complaint of unauthorised deduction from wages under section 13 of the Employment Rights Act 1 996.

Claim of Disability Discrimination

50. As was submitted a very different test applies to this claim. Employment Tribunals have a discretion to hear out of time discrimination claims where they consider it “just and equitable to do so” (s123 Equality Act 2010). The escape clause is therefore broader than the issue of whether it was “reasonably practicable” to lodge a timeous complaint. Therefore whereas incorrect advice by a solicitor or Trade Union representative would not save a late Tribunal claim for unauthorised deduction of wages the same is not true when the claim is one of discrimination.

51 . In **Chohan v Derby Law Centre 2004 IRLR 685** the Court of Appeal held that the claimant should not be disadvantaged because of the fault of her advisors in bringing a late claim for sex discrimination. It was indicated that otherwise a respondent would be in receipt of a windfall. It also found following **British Coal Corporation v Keeble** that a Tribunal should consider all the circumstances and had erred in exercising its discretion without considering the checklist set out in The Limitation Act 1980.

52. Similar observations were made in **Anderson v George S Hall Limited EAT0631/05 and Wright v Wolverhampton City Council EAT01 17/08.** There it was held that incorrect advice received by a Trade Union official before and after the claimant submitted out of time discrimination claims should not be ascribed to the claimant and an extension of time should be granted. It is not the case that the fault should be attributed to a claimant where he/she has placed the matters into the hands of a skilled representative. These cases supplement the position in the cases cited in the submission for the claimant.

53. The checklist in The Limitation Act 1 980 was also referred to in the submission made for the claimant and I accept in this case that the reason for the claim being out of time was due to the mistake of the claimant’s advisors; that there is no indication that the cogency of any evidence is likely to be affected by any delay; that the claimant acted promptly once she was aware that her wages were to consist only of SSP and that she immediately took expert advice.

54. Accordingly the factors to be assessed in accord with **British Coal Corporation v Keeble** favour the claimant. A Tribunal also has to balance the degree of prejudice to a claimant caused by the operation of a limitation period against the prejudice to the respondent if the case were allowed to proceed. In this case I find that the balance favours the claimant. There was no submission made by the respondent that the delay would affect the evidential basis of the respondent’s case. It was not stated that there would be any prejudice caused as a consequence of the delay by reason of witness unavailability or the cogency of evidence being affected. Indeed the respondent’s position is that they simply rely on their interpretation of the documentation governing sick pay.

55. In those circumstances I consider that it would be just and equitable to extend time to the date of presentation of the application to the Employment Tribunal. It would appear that a mistake in this case was to consider that the last act of discrimination was the issue of the payslip on 25 March 2018 and if that had been the case then the claim would have entered the early conciliation process within time. In those circumstances I do consider that it would be just and equitable to extend time for presentation to the claim to 2 August 201 8 and that the matter should proceed to a Hearing on the case of disability discrimination.

56. Both parties have now raised the issue of expenses in their submissions. I think it would be appropriate, if the parties wish to proceed with these applications, for them each to submit a separate application detailing the particular rules upon which they would rely within the Tribunal Rules 2013; the reasons they would rely on those rules; the circumstances which would give rise to their claim; the amount of the claim and a breakdown as to how that claim is arrived at giving time spent and hourly rates involved. The Tribunal can then consider how best to proceed to give “a reasonable opportunity” to the paying party to make representations in response in terms of Rule 77.

57. Finally, I would wish to apologise to the parties for the delay in issuing this Judgment on time bar. While the written submission for the respondent and response for the claimant were lodged timeously those documents did not reach me until relatively recently and therefore there has been delay in the production of this Judgment. Given the Judgment made the claim of disability discrimination should proceed and it would be appropriate to fix a further Preliminary Hearing to discuss future procedure.

Employment Judge: Jim Young
Date of Judgment: 08 March 2019
Entered in register: 11 March 2019
and copied to parties