Case Number: 2302244/2020

EMPLOYMENT TRIBUNALS

Claimant: Mr S Gould

Respondent: National Crime Agency

Heard at: Remotely by CVP **On:** 31 January 2022

Before: Employment Judge Harrington

Appearances
For the Claimant: In person and assisted by Mr Tully, TU representative
For the Respondent: Mr L Dilaimi, Counsel

JUDGMENT

1 The Respondent's application to strike out the Claimant's claims is well founded and succeeds.

2 The Claimant's claims are struck out in their entirety.

Introduction

[The references in square brackets are to page numbers in the Preliminary Hearing Bundle.]

1 This case comes before me today as an Open Preliminary Hearing to determine the Respondent's application to strike out the Claimant's claims as detailed in its letter dated 15 September 2020 [39].

2 By way of background the Claimant, Mr Gould, presented his ET1 to the Tribunal on 5 June 2020 [4]. The Claimant began his employment as an IT Service Manager with the Respondent on 1 April 2006 and he continues to be so employed. The Respondent, the National Crime Agency, is a government organisation with national responsibility for protecting the public from serious organised crime.

3 In his claim form, the Claimant refers to bringing a claim for arrears of pay and other payments arising from the application of the Respondent's policy for Shared Parental Leave ('SPL'). It is the Claimant's claim that he was financially disadvantaged in terms of pay by the way that the SPL policy was applied to him and he seeks recompense for this.

4 At box 9 of the ET1 form, the Claimant refers to a claim in the total sum of £7,500. He breaks this down into three sections:

4.1 A claim of £5000 for 9 weeks of shared parental leave at full pay that he originally intended to take;

4.2 A claim for £1,000 for the 'time taken for me to research, understand, seek support and respond to emails whilst being on my shared parental leave…' and,

4.3 A claim for £1,500 for 'time taken and ongoing impact of dealing with this issue over the last 2 years, which has impacted on my domestic life and the quality of the time I am spending with my family.' [11]

5 In the additional information provided by the Claimant, he refers to the alleged deduction to his pay happening in the July payroll [16-18].

6 The Respondent denies the entirety of the claim. In its ET3, and detailed in its letter of 15 September 2020, the Respondent submits that the Claimant's claims should be struck out. The Respondent refers to the claim for 9 weeks at full pay being brought out of time. In short, the Respondent refers to any alleged deduction being made in the July 2018 wages, which were paid to the Claimant on 25 July 2018. As the Claimant did not submit the claim to the Tribunal until 5 June 2020, the Respondent contends that the claim is out of time and that the Tribunal does not have jurisdiction to hear the claim. The Respondent also submits that the remaining two claims have no reasonable prospects of success as they do not refer to any alleged deduction from wages and are instead claims for additional compensation, which the Tribunal does not have jurisdiction to award as claimed.

7 In the event, whilst a Preliminary Hearing was listed by the Tribunal on 3 August 2021 to consider the Respondent's application [21], this matter comes before me today.

8 The Tribunal has been provided with the following:

8.1 Preliminary Hearing bundle paginated 1 – 110;

8.2 A further Response to the Grounds of Resistance provided by the Claimant;

8.3 Case Management Agendas from both parties;

8.4 Skeleton Argument produced on behalf of the Respondent.

9 The hearing was conducted remotely via the Cloud Video Platform (CVP). The Claimant represented himself and was assisted by Mr Tully, a PCS representative. The Respondent was represented by Mr Dalaimi of Counsel. I heard evidence from the Claimant and submissions from both parties. Due to a lack of available time, I reserved my Judgment.

Findings of Fact

10 This is not a case in which the salient facts are in dispute between the parties. As Mr Dalaimi observed, the Claimant was honest and credible when giving his evidence and his evidence should be taken at face value. I agree with those observations. Accordingly I make the following findings of fact, on the balance of probabilities:

10.1 The Claimant made an enquiry to the Respondent's Human Resources Department ('HR') regarding SPL on 23 October 2017.

10.2 The Claimant's daughter was born on 1 November 2017.

10.3 On 5 March 2018 the Claimant emailed his line manager advising of his intention to take 9 weeks of SPL and he submitted the relevant SPL form to his manager the following month. It was not until 16 May 2018 that the Claimant was advised by HR of issues with SPL.

10.4 After a meeting with HR on 11 June 2018, on 25 June 2018 the Claimant informed HR that he would be cutting his SPL short due to the outstanding issues.

10.5 The Claimant returned to work on 17 July 2018. On 18 July 2018 the Claimant was referred to the grievance policy and on 17 August 2018 the Claimant submitted his grievance.

10.6 The Claimant commenced ACAS Early Conciliation on 22 October 2018. The Claimant was aware that this had to be done 'within three months of when salary was deducted' [17]. An EC Certificate was produced on 6 December 2018 [106]. At that stage the Claimant was also aware that he had to bring an Employment Tribunal ('ET') claim no later than 5 January 2019. This is referred to within the information included with his ET1 [17].

10.7 Just prior to this deadline, the manager who had considered the Claimant's grievance met with the Claimant and advised of the findings and an offer which the Respondent proposed to settle the grievance. On 4 January 2019, and following discussions with his wife, the

Claimant accepted the offer. The Respondent sent a final approved report on 22 January 2019 and the Claimant formally responded on 28 January 2019. Consequently, the Claimant chose not to bring an ET claim at this time as he understood that he had reached an agreement with the Respondent which addressed his complaints.

10.8 Unfortunately, despite the settlement offer having been accepted, on 21 February 2019 the Claimant was advised by Payroll that the additional payment, which had been agreed, was now on hold. Following the Claimant chasing for further information, on 6 March 2019 the Claimant was informed that he would not actually be paid in accordance with the agreement [73]. The previous managerial decision, leading to the agreement with the Claimant, had been overturned by the Respondent's HR department.

10.9 Understandably, this came as a great shock to the Claimant. He had carefully considered whether to accept the offer and, following his acceptance, he was completely taken by surprise that the Respondent no longer intended to adhere to the agreement.

10.10 On 14 June 2019 the Claimant was advised to raise an appeal against the decision by HR to review and amend the recommendations of the outcome to the Claimant's grievance. The Claimant did not consider getting legal advice at that stage. His understanding was that his previous claim 'had expired'. He didn't have a particular plan but decided to go through with the appeals process as advised by HR. He thought this was the correct way to proceed as he presumed that if he brought an ET claim, he would be referred back to complete the appeals process first in any event. Accordingly, on 24 June 2019, the Claimant submitted an appeal.

10.11 The Claimant received a temporary promotion in December 2019.

10.12 The Claimant received the outcome of his appeal on 10 February 2020 [91].

10.13 Around 9 - 13 March 2020 the Claimant had to attend a course which concluded with an IT examination. Following this, the Claimant's situation was affected by the Covid Pandemic. Whilst the Claimant had keyworker status, his daughter's nursery was closed from the beginning of the pandemic until the end of May 2020. Throughout this time the Claimant was working full time, on call in a customer facing role and his wife was also homeworking. As the Claimant's role was IT, it was business critical in keeping the work of the Respondent going. The Claimant later received a commendation for his hard work during this time.

10.14 Understandably, the Claimant's health was affected. The Claimant contacted employee assistance around May 2020 and, in due course, he received some talking therapy.

10.15 The Claimant understood that he had a three month period from February 2020, when the outcome to his grievance was produced, to bring an ET claim. It was on that basis he obtained a further ACAS EC Certificate on 7 May 2020 [3] and then brought his claim on 5 June 2020.

Parties' Submissions

11 Mr Dalaimi referred to the two parts of the Respondent's application. He reiterated the Respondent's submission that the claim for 9 weeks pay had been brought out of time. In so far as the remaining two claims were concerned, he submitted that these had no reasonable prospects of success – they were not claims that could be brought before the Tribunal. If anything, there were matters that could form the basis of an application for a Preparation Time Order, which a party could seek following a determination that their claim to the Tribunal was successful.

12 Mr Dalaimi highlighted the ACAS process in December 2018 and that 5 January 2019 was the last date upon which the claim could have been presented. As detailed above, on 4 January 2019 the Claimant was told by the Respondent that they would make a payment to him. It was the Respondent's submission that notwithstanding the fact that the Claimant accepted this offer, he should still have presented a claim to the ET.

13 In considering the circumstances of this case, Mr Dalaimi described it as a harsh case where the discretion of the Tribunal to extend time for bringing a claim ought not to be exercised. Whilst it was a harsh outcome, Mr Dalaimi submitted that it was what the law demands.

14 With reference to the two EC Certificates, Mr Dalaimi contended that the second certificate had no affect. Only one certificate is required in respect of proceedings relating to any matter. Any additional certificate issued by ACAS in relation to that same matter will have no relevance to the other statutory provisions relating to early conciliation.

15 If the Tribunal was minded to exercise the discretion to extend time for the presentation of the claim, Mr Dalaimi highlighted the considerable delay before the claim was eventually brought. Whilst it was said that from 5 January until 6 March 2019, the Claimant thought that he would be paid in accordance with the agreement, there was then a significant passage of time from 6 March 2019 until the outcome of the appeal process on 10 February 2020. It was the Respondent's case that it was reasonable for the Claimant to have brought a claim during that period of time. The Claimant had the benefit of Union advice and it was reasonable to expect the Claimant to have been advised to bring an ET claim in parallel to the ongoing appeals process.

16 On behalf of the Claimant, Mr Tully referred to the rewriting of the Respondent's policies. The recommendations from the original grievance were accepted and therefore it seemed to the Claimant and Mr Tully that the appeal process was the quick resolution to the Respondent's poor decision to not make the payment as recommended at the conclusion of the grievance process. It was following receipt of the outcome to the appeal that the thought was triggered to bring an ET claim. Mr Tully referred to the fact that, in hindsight, they should have proceeded to bring an ET claim earlier.

17 Mr Gould referred to trusting that the Respondent would follow through on the offer made, which he had accepted. Further, that he had to consider this matter outside of his significant existing work commitments.

Legal Summary

18 Under Section 23 of the Employment Rights Act 1996 ('ERA 1996') a worker may present a complaint to an employment tribunal if his employer has made a deduction from his wages in contravention of Section 13 or Section 18. A claim will only arise once the disputed deduction has actually occurred – in other words, it is only when an employer fails to pay a sum due by way of remuneration that a claim for an unlawful deduction can arise. It is at this point that the employer can be said to have failed to pay that which was properly payable on a given occasion within the meaning of section 13 ERA 1996.

19 The rules on time limits are also set out in section 23 ERA 1996. In Section 23(2) a complaint must be made within a period of three months beginning with, in the case of a complaint relating to a deduction by the employer, the date of the payment of the wages from which the deduction was made, subject to any extension of time available through the ACAS Early Conciliation process.

20 An ET may allow a complaint to be presented outside the three month limit if it is made '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 within the relevant period of three months' (section 23(4) ERA 1996).

21 The 'not reasonably practicable' formula therefore has two limbs. Firstly, the employee must show that it was not reasonably practicable to present his claim in time (the burden of providing this resting firmly on the applicant) and then, if he succeeds in doing so, the tribunal must be satisfied that the further time beyond the primary time limit within which the claim was in fact presented was reasonable.

22 In the case of Palmer and Saunders v Southend-on-Sea Borough Council [1984] IRLR 119 May LJ identified the question as being,

"was it reasonably feasible to present the complaint to the [employment] tribunal within the relevant three months?"—is the best approach to the correct application of the relevant subsection."

23 A claimant may refer to ignorance or a mistake on his part as to the existence of a relevant employment right or the existence of the limitation period. The Tribunal must then consider the question of whether, in light of the evidence about that ignorance or mistake, it was reasonably feasible for the litigant to have presented the complaint to the employment tribunal within the relevant primary period. If a claimant's ignorance results from negligent advice from a professional adviser, it will be held that it was reasonably practicable for the claimant to submit the claim in time and the time limit will not be extended (Dedman v British Building and Engineering Appliances Ltd [1974] 1 All ER 520). The Tribunal will be required to consider whether the mistake by the adviser was reasonable, as the Dedman doctrine is dependent on an unreasonable mistake or ignorance on the part of a professional adviser.

24 Sometimes an employee will delay making a claim in the erroneous belief that the time limit for presentation of the ET1 is held in abeyance during an internal appeal process. There must be some factor, beyond the mere invocation of an internal appeal process, which justifies the failure of the claimant to meet the primary time limit (see Palmer v Southend-on-Sea Borough Council [1984] IRLR 119, [1984] ICR 372, CA; Bodha (Vishnudut) v Hampshire Area Health Authority [1982] ICR 200, EAT; Times Newspapers Ltd v O'Regan [1977] IRLR 101, EAT; Singh v Post Office [1973] ICR 437, NIRC). In the Bodha case, in a passage expressly approved by the Court of Appeal in Palmer, Browne-Wilkinson J said:

"There may be cases where the special facts (additional to the bare fact that there is an internal appeal pending) may persuade an [employment] tribunal, as a question of fact, that it was not reasonably practicable to complain to the … tribunal within the time limit. But we do not think that the mere fact of a pending internal appeal, by itself, is sufficient to justify a finding of fact that it was not "reasonably practicable" to present a complaint to the … tribunal'.'

25 The Court of Appeal in Schultz v Esso Petroleum Ltd [1999] IRLR 488 when considering whether it was reasonably practicable to have presented a claim in time, noted that it was essential to have regard to the fact that the claimant was hoping to avoid litigation by pursuing alternative remedies. As a result, the fact that the claimant left it late, which then led to his missing the deadline when he became incapacitated during the final part of the limitation period, did not deprive him of the escape clause.

26 However in London Underground Ltd v Noel [1999] IRLR 621 a firmer approach was taken. There it was held reasonably practicable for the

claimant to have presented an unfair dismissal claim in time notwithstanding the fact that the claimant had been induced not to bring a claim by an offer of alternative employment made by the employer before the expiry of the time limit, which was then withdrawn after it. The Court of Appeal overturned the decision of the tribunal and held that the offer of alternative employment made by the respondent employer before the expiry of the time limit did not constitute a 'special fact' rendering it not reasonably practicable to present an unfair dismissal claim in time since the claimant knew all the facts necessary to make a complaint in time, and the fact of the offer and its subsequent withdrawal did not alter that position. The court acknowledged that the result was hard on the claimant, and made the point that if the test had simply been one of reasonableness, she would have been entitled to succeed. But as the test remained one of reasonable practicability, this required a stricter interpretation.

27 In Cullinane v Balfour Beatty Engineering Services Ltd UKEAT/0537/10 (5 April 2011, unreported*)*, Underhill J stated that the question whether a further period is reasonable requires *'an objective consideration of the factors causing the delay and what period should reasonably be allowed in those circumstances for proceedings to be instituted'*, having regard to the 'strong public interest' in claims being brought promptly, and against a background where the primary time limit is three months. Underhill J further stated that if the delay between the expiry of the primary time limit and the eventual presentation of the claim is objectively unreasonable on the above basis, the fact that it was caused by the fault of the claimant's advisers, rather than by the claimant himself, will not make any difference to that conclusion. The approach taken by Underhill J in Cullinane was expressly endorsed by Judge Hand QC in Balfour Beatty Engineering Services v Allen UKEAT/0236/11 (24 October 2011, unreported). Referring to the relevance of an adviser's conduct, he stated:

"Whether or not the conduct of the solicitor will render the further period reasonable or unreasonable is certainly something that should be taken into account and, it seems to me, whether or not the solicitor has made an error that can be characterised as negligence is also a most relevant consideration." In summary, therefore, if the period between expiry of the primary time limit and lodging of the claim is, in all the circumstances, unreasonable, that will remain the case even where it is the adviser's fault that this is the case.

28 With regards to ACAS Early Conciliation, it is to be noted that only one certificate is required in respect of 'proceedings relating to any matter' in ETA 1996 s 18A(1), and that any additional certificate issued by ACAS in relation to that same matter will have been issued outside the statutory scheme and have no relevance to the other statutory provisions relating to early conciliation (Commissioners for HM Revenue & Customs v Garau [2017] ICR 1121, EAT and E.On Control

Solutions Ltd v Caspall UKEAT/0003/19 *(19 July 2019, unreported) at [51]*). In Harvey on Industrial Relations and Employment Law, it is stated that this conclusion is necessary, amongst other matters, to prevent a claimant from gaining additional time limit advantages by submitting EC Form after EC Form relating to the same parties and the same matter.

29 The Respondent also referred me to the case of Romero v Nottingham City Council UKEAT/0303/17/DM – only one certificate is required for 'proceedings relating to any matter'. A second certificate, where obtained and relating to the same matter, has no impact on the limitation period. An ET may conclude that two certificates both relate to the same 'matter', that the claim was made out of time and that, since it was reasonably practicable for it to have been made in time, there was no jurisdiction to hear it.

Tribunal's Conclusions

30 In reaching my conclusions I have considered the entirety of the evidence I have heard and seen. I have also taken into account the Respondent's written submissions and closing oral submissions from both parties.

31 This case involves a consideration of whether a claim has been brought outside of the relevant time limit and, if so, whether it should be allowed to proceed in any event. In the relevant provisions on time limits, Parliament has set down a primary time limit which, in the ordinary course of events, is reasonably practicable for would-be litigants to meet. Therefore the first matter for me to consider is why it was missed in this case. The burden of proof is on the Claimant to show a reason or reasons which rendered it not reasonably practicable to meet the limitation period.

32 I accept the Claimant's account as to the relevant dates concerning the alleged deduction. It was in respect of the July 2018 payment that the relevant alleged deduction was made. Following the Claimant taking some advice from his Union, he understood the relevance of this date, and that understanding triggered his contact with ACAS in October 2018. It is agreed by the parties that 5 January 2019 was the last date upon which that claim could have been presented.

33 The Claimant refers me to the outcome to his grievance and the fact that the Respondent provided him with a resolution which he decided to accept. It was for this reason, because he had reached an agreement with the Respondent as to a further payment that he would receive, that the Claimant tells me that he chose not to bring his claim to the ET. It is agreed that the relevant manager set out a proposal to resolve the dispute between the parties on 4 January 2019 – on the cusp of the last date upon which the Claimant understood that he needed to present his claim. I do note from an examination of the chronology that

the Claimant had not received the written notification of the outcome to the grievance at that point and did not do so until some days later. However, on balance, I am satisfied that the Claimant accepted the Respondent's settlement proposal in good faith and that it could not have been anticipated by the Claimant when he accepted on 4 January 2019 that the Respondent would later withdraw their agreement.

34 There is conflicting case law as to whether the desire to avoid litigation and accept a respondent's proposal to resolve a complaint equates to it being 'not reasonably practicable' to bring a claim within the primary limitation period. I have considered this point in detail. In the case of Noel, an emphasis was put on the test being one of reasonable practicability and the need for a stricter interpretation beyond what is simply reasonable.

35 As stated I am entirely satisfied that the Claimant accepted the Respondent's settlement offer to bring an end to this matter and avoid the need for tribunal proceedings. However I must consider whether the acceptance of the Respondent's offer amounted to it being not reasonably practicable to bring his ET claim in time. Whilst the application of this test results in a harsh outcome for the Claimant, I have felt bound to conclude that this circumstance did not amount to it being not reasonably practicable to bring the claim. The Claimant could have continued with the process and brought his ET claim, notwithstanding having reached an agreement with the Respondent, and then the claim could have been withdrawn once the agreement had been fulfilled.

36 In my judgment, it is on this basis that the Claimant has not shown that it was not reasonably practicable to present his claim in time.

37 Notwithstanding this conclusion, I have also proceeded to consider whether the Claimant then presented the claim within a reasonable time thereafter. Again, I was unable to find in the Claimant's favour on this limb of the test.

38 The Claimant was advised to appeal the HR decision to overturn the grievance outcome. The Claimant followed this route and was subjected to an extremely lengthy appeals process which did not produce an outcome to the appeal until February 2020. I accept that these delays were not of the Claimant's making, that he regularly chased the Respondent for an outcome and that he was thanked by the Respondent for his patience.

39 Whilst I am sympathetic to the fact that the Claimant placed significant trust in the Respondent's appeal process, it was always a possibility that the process would result in an outcome unfavourable to the Claimant. The Claimant was aware of the time limits – it was this knowledge that had directed him to previously make contact with ACAS. He also had access to advisers at his Union. In light of this, it

remained encumbant on the Claimant to bring his claim promptly. It was not reasonable to wait for such an extended period of time for the appeal process to conclude or, to put it another way, the Claimant's claim was not then presented within a reasonable time when it was received in June 2020.

40 In reaching this conclusion, I have also taken into account that there was a further period of time, following the outcome of the appeal process in February 2020, when the claim could and should have been presented. Whilst I entirely accept the evidence given by the Claimant concerning the circumstances of the Covid-19 Pandemic and the negative effect this had on the Claimant's working situation, his family life and mental health, there were periods of time earlier in March 2020, for example, prior to attendance on his work course, when a claim could have been presented.

41 Accordingly I am not satisfied, even if I had concluded that it was not reasonably practicable for the claim to be presented within the primary time limit, that the Claimant has shown he then presented the claim within a reasonable time thereafter. There was a further very significant delay following him being informed in March 2019 that the Respondent would not follow through with the originally agreed settlement before he presented his claim. I do not accept that a second ACAS EC Certificate assists the Claimant with the applicable time limits. I do not accept that when he presented his claim on 5 June 2020, that this was within a reasonable time.

42 Accordingly, the claim for the alleged deduction of 9 weeks pay has been presented out of time and the Tribunal does not have the jurisdiction to consider the claim.

43 Insofar as the remaining two parts of the Claimant's claim is concerned, I accept the Respondent's submissions that these are not claims which can be properly put before the Tribunal as amounting to an unlawful deduction from earnings. At best, they could form the basis for an application for a Preparation Time Order which may be made by a party following a claim succeeding before the Tribunal. For this reason, the remaining parts of the Claimant's claim have no reasonable prospects of success and I strike them out on this basis.

44 In summary whilst I have sympathy for the Claimant's situation and the fact that the Respondent's own questionable conduct, in reneging on the settlement proposal and taking an extended period of time to produce an outcome to the Claimant's appeal, shaped his decision as to when to present his claim to the Tribunal, I am satisfied that the application of the relevant provisions on time limits require that the entirety of the Claimant's claims are to be struck out.

Employment Judge Harrington
2 March 2022

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