EMPLOYMENT TRIBUNALS

Claimant: Mr J Mears
Respondent: DC Emergency Systems Ltd

Heard at: Manchester (remotely, by CVP) **On:** 24 February 2022

Before: Employment Judge McCarthy

REPRESENTATION:

Claimant: In person
Respondent: Ms A Smith (of Counsel)

JUDGMENT

The Judgment of the Tribunal is that:

1. The claim of unauthorised deductions from wages (presented under case numbers 2415100/2021 and 2415109/2021) was not presented in time despite it being reasonably practicable to do so and it was not presented within a further reasonable period.

2. The Tribunal does not therefore have jurisdiction to hear the claim. The claim under case numbers 2415100/2021 and 2415109/2021 is dismissed.

REASONS

Introduction

1. Oral Judgment was given on 24 February 2022. The claimant requested written reasons at the end of the hearing.

2. By a claim form presented on 7 December 2021 (case number 2415100/2021) and 8 December 2021 (case number 2415109/2021) (having entered early conciliation and having received a certificate against the respondent dated 1 November 2021), the claimant complained of a series of unauthorised deductions from his wages, specifically whether overtime should have been included in the calculation of his furlough pay.

3. At the hearing the claimant confirmed that the content of the claim presented under case number 2415109/2021 was a replica of the claim presented under case number 2415100/2021. Both cases had the same respondent (DC Emergency Systems Ltd) and referred to the same ACAS certificate.

4. By responses dated 12 January 2022, the respondent resisted the claim of unauthorised deductions from wages presented under case numbers 2415100/2021 and 2415109/2021. The respondent said that it had not made unauthorised deductions from the Claimant's wages.

Preliminary Issues

5. At the beginning of the hearing, before I heard any evidence, I had to deal with two preliminary issues.

Two Claim Forms

6. The claimant had submitted two claim forms and two hearings had been listed. As the respondent had pointed out in correspondence to the Tribunal, the claim forms appeared to be identical other than the named respondent in box 2.1.

7. The first claim form was presented on 7 December 2021 and assigned claim number 2415100/2021. I noted, from the Tribunal file, that the claimant had originally put Cliff Jenkinson as the name of the respondent in box 2.1 of his claim form. However, following receipt of emails and the ACAS certificate from the claimant, Employment Judge Allen had granted an amendment to the name of the respondent to DC Emergency Systems Ltd on 15 December 2021. The claimant confirmed to me that the correct name of the respondent was DC Emergency Systems Ltd.

8. Whilst the header of claim number 2415100/2021 was amended to include the correct name of the respondent, unfortunately, it does not appear that the respondent was provided with the information Employment Judge Allen requested was sent to them regarding the amendment of the Respondent's name. The respondent used the original Respondent's name (Cliff Jenkinson) when providing their Response.

9. The claimant then submitted another claim form on 8 December 2021 (case number 2415109/2021). This time the claimant put DC Emergency Services Ltd as the name of the respondent in box 2.1 of his claim form. The claimant confirmed that his claim for unauthorised deductions from wages in the claim form presented under case number 2415109/2021 was a replica of the one he had submitted the previous day. The Claimant's confirmed to me that he wished to pursue his claim under case number 2415100/2021 against DC Emergency Services ltd only.

10. The respondent responded to the claimant's claim under case numbers 2415100/2021 and 2415109/2021 (the grounds of resistance was the same for both claim numbers) on 12 January 2022.

11. On 17 February 2022, the respondent made an application for the claim against Cliff Jenkinson (2415100/2021) to be dismissed as a named respondent on the basis that Mr Jenkinson was a director of the named respondent, DC Emergency Systems Ltd, in case number 2415109/2021.

12. I informed the parties that I was making an Order, pursuant to the Employment Tribunal Rules of Procedure, that case numbers 2415100/2021 and 2415109/2021 would be joined and both heard today. I also informed the parties that there was no need to consider the respondent's application regarding Mr Jenkinson as the name of the respondent had already been amended by Employment Judge Allen on 15 December 2021 to DC Emergency services Ltd.

Response not yet accepted

13. The respondent had submitted a response to the claim under case numbers 2415100/2021 and 2415109/2021 on 12 January 2022, but these responses had not yet been accepted by the Employment Tribunal or provided to the claimant in advance of the hearing. The respondent had submitted their responses within the relevant time limit, and I confirmed, that having considered the responses and when they were submitted, I was ordering the acceptance of the responses.

14. As the Tribunal had not sent a copy of the respondent's responses to the claimant in advance of the hearing, and mindful of the overriding objective, I then discussed with the claimant whether he was in ready and prepared to proceed with the hearing today. I asked whether he had been provided with a copy of the respondent's ET3 forms and grounds of resistance by the respondent in advance of the hearing. He confirmed he had received these nine days prior to the hearing.

15. I discussed with the claimant whether he had had an opportunity to consider the respondent's responses to his claim before finalising his witness statement and agreeing the bundle. He confirmed that following receipt of the respondent's response he had made amendments to the original witness statement he had drafted. He then exchanged his updated statement with the respondent. As I didn't have a copy of the claimant's statement at the start of hearing, a copy of the claimant's updated statement was sent to my clerk for my immediate attention.

16. The claimant confirmed that he was ready to proceed today. There was an agreed bundle and witness statements had been exchanged. I was satisfied that a fair trial was still possible, and we proceeded with the hearing.

Claims and Issues

17. The claimant confirmed that his claim was for a series of unauthorised deductions from wages, specifically whether overtime should have been included in the calculation of his furlough pay between April 2020 and July 2021. The claimant also claimed that he had suffered financial loss in the form of bank charges because

of the alleged unauthorised deductions from wages.

18. The issues to be determined by the Tribunal were discussed and agreed at the outset of the hearing. The Issues were:

1) Were the claims presented in time?

2) What was the claimant entitled to be paid as wages for the period 1 April 2020 to 31 July 2021 inclusive? The claimant confirmed that the last in the series of deductions he was claiming was for the month leading up to 31 July 2021. He also confirmed that this salary payment would be made on the last Friday of each month. He said he had been paid properly from 1 August 2021 until the termination of his employment by reason of redundancy.

3) Did the claimant suffer financial loss by not being paid wages on time and if so, how much?

4) Did the respondent make authorised deductions from wages?

Procedure/Documents and Evidence Heard

19. I heard evidence from the claimant on his own behalf and from Mr Ash Mahar (a Human Resources Consultant) for the Respondent. I was provided with a witness statement for the claimant and Mr Mahar.

20. I was also provided with an electronic copy of an agreed bundle of documents, which included the claimant's schedule of loss, and the respondent's counter schedule of loss. The claimant had previously provided a hard copy bundle of documents to the tribunal. However, the claimant confirmed to me that this bundle could be disregarded as all the agreed electronic bundle included all the documents he wished to refer to.

Factfinding

21. The relevant facts are as follows. Where I have had to resolve any conflict of relevant evidence, I indicate how I have done so at the material point. References to page numbers are to the agreed bundle of documents.

22. The claimant was employed by the respondent, DC Emergency Systems Ltd, as a Service Technician from March 2009 until the termination of his employment by reason of redundancy. His base throughout his employment was Dukinfield, Cheshire but he would visit client sites to undertake work. The respondent carried out test and inspections on emergency lighting systems at client sites.

23. The respondent did not have an in-house Human Resources department but used a Human Resources consultant firm to provide Human Resources advice. Mr Maher was a Human Resources consultant who had provided the respondent with Human Resources advice since 2011.

24. The claimant was provided with a contract of employment at the start of his employment, but he had subsequently signed a further contract of employment dated 14 July 2011 (108 –117).

25. In June 2012 all employees, including the claimant, were sent updated contracts of employment (the "2012 contract") (124-129). The claimant, and all other employees, were given 12 weeks' notice that the 2012 contract would come into force on 17 September 2012 (58). The claimant did not sign and return the 2012 contract as requested but did not raise any objections to the new contract and continued to work for the respondent until 20 October 2021, some 9 years. There was no reference to overtime payments in this 2012 contract.

26. In evidence the claimant accepted that he had been sent the 2012 contract and Mr Maher confirmed that the new contract had been sent to all employees, including the claimant in June 2012. In evidence to me, the claimant said he was not aware of making any objection to the 2012 contract at any time. The claimant recalled that he had been offered another contract in 2015, which he had objected to and refused to sign.

27. Due to impact of the Covid 19 pandemic on the respondent's business, the claimant was placed on furlough on 1 April 2020. The clamant was sent a letter on 27 March 2020 explaining the terms of the Coronavirus Job Retention Scheme. The claimant agreed in evidence that he had agreed to go on furlough and to accept "80% of pay". The letter sent to him on 27 March 2020 refers to him being paid "80% of pay, subject to the rules of the Scheme" (59-60).

28. On 26 June 2020 the claimant raised a query regarding overtime payments being included in his furlough pay (61). On 29 June 2020 the claimant was informed that overtime payments were not included as they were voluntary payments and so not included in the calculation of furlough pay (62).

29. On 24 August 2020, the claimant was placed on flexible furlough (63). He was working part time and in some of the months he was on flexible furlough he received overtime payments in relation to the hours he was in work.

30. In evidence to me, the claimant said that in late 2020 he started speaking to ACAS, HMRC and the Citizens Advice Bureau about overtime not being included in his furlough payments. He said that he had a case worker but she had gone off sick at some point. When asked when he was aware that he could bring an employment tribunal claim, the claimant said that he received this advice probably in January 2021. The claimant was made aware of the process for bringing a claim and as a result started to ask for copies of his timesheets from the respondent.

31. The claimant did not raise with the respondent concerns about overtime payments not being included in his furlough pay again until 8 March 2021 (68). He was invited to a grievance meeting on 29 March 2021 (78) and attended this meeting on 13 April 2021. The claimant referred to having spoken to HMRC in his grievance letter.

32. The grievance outcome was sent to the claimant on 20 April 2021 (79-80). In the outcome it was noted that the hearing manager had investigated the claimant not signing the 2012 contract but had failed to find any supporting evidence of the claimant formally objecting to the 2012 contract or giving notice that he was working under protest.

33. On 7 July 2021 the respondent commenced consultation with the claimant regarding the redundancy of his role. On 30 July 2021, the claimant was informed that his role would be made redundant (83) and was provided with his full contractual notice of dismissal, which commenced on 1 August 2021. The respondent confirmed that the claimant would be paid his full contractual pay throughout his notice period despite still being on flexible furlough throughout his notice.

34. The claimant accepts that he received full pay during the period 1 August 2021 to the end of his employment on 20 October 2021 and received some overtime payments.

35. The claimant contacted ACAS for the purposes of early conciliation on 11 October 2021 and his certificate was issued on 1 November 2021 (1).

36. In evidence, the claimant said that he had delayed in contacting ACAS until 11 October 2021 due to dealing with disciplinary/grievance processes unconnected to the matters being discussed at this hearing. As at this date, there was no outstanding appeal to the claimant's grievance outcome of 20 April 2021, as he had chosen not to appeal the decision.

37. The claimant submitted his claim to the Employment Tribunal on 7 December 2021.

38. Allowing for early conciliation, the normal time limit for submitting his claim to the Employment Tribunal expired on 1 December 2021.

39. The claimant said in evidence that before bringing a claim in the Employment Tribunal in England he had submitted a claim to the tribunals in Ireland. He said this claim had been rejected on 25 November 2021. The claimant had no explanation for why he had sent his claim to Ireland, the claimant lived, and his work base, was in the North West of England.

40. In evidence to me the claimant said he had not submitted his claim in the correct tribunal until 7 December 2021 because he had been advised "to leave it till the last minute" and because he was still on flexible furlough.

Submissions

41. I heard closing submissions from both parties, with the respondent agreeing to provide their closing submissions first. Before the claimant made his closing submission, I reminded him twice of the questions that I needed to determine and went through the list of issues. I explained the primary time limit for submitting claims for

unauthorised deduction from wages and reminded him that he had said that the last deduction in the series of alleged unauthorised deductions was 31 July 2021.

42. Ms Smith, for the respondent, submitted that the claimant was out of time to bring his claim of unauthorised deductions from wages by six days and it was reasonably practicable for him to bring it in time. The Tribunal did not have jurisdiction to hear the claimant's claim and it should be dismissed.

43. Ms Smith submitted that there was no real explanation for delay, this was not a just and equitable test, I had to satisfy myself it was not reasonably practicable which was a tight rule and not about general discretion. In looking at whether it was presented in reasonable time thereafter, Ms Smith said I should look at the whole period not just the last piece of time. If I was not with the respondent on the time point, Ms Smith provided submissions on why there had not been any unauthorised deductions from the wages of the claimant.

44. The claimant submitted that he had not entered into ACAS conciliation earlier as he was still on furlough and redundancy notice. He really didn't know why he had made the mistake of sending it to Ireland and was not expecting to receive notices by email he was expecting them in paper form. He said that as far as he was aware going to ACAS re-set the time limit. He said he had no defence other than being out of work. He also provided some submissions in relation to the bank charges that he felt were attributable to the alleged unauthorised deductions from wages.

The Law

Unauthorised deduction from wages

45. Section 13(1) of the Employment Rights Act 1996 (ERA) provides that an employer shall not make a deduction from wages of a worker employed by him unless:

> **"(a) The deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision in the worker's contract; or**
>
> **(b) The worker has previously signified in writing his agreement or consent to the making of the deduction."**

46. A relevant provision in the worker's contract is defined by section 13(2) ERA as:

> **"(a) One or more written contractual terms of which the employer has given the worker a copy of on an occasion prior to the employer making the deduction in question; or**
>
> **(b) In one or more terms of the contract (whether express or implied) and, if express, whether oral or in writing, the existence and effect, or combined effect, of which in relation to the worker the employer has notified the worker in writing on such an occasion."**

47. A deduction is defined by section 13(3) ERA as follows:

> **"Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to**

the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion."

48. Wages are defined by Section 27(1) ERA as follows:

"any sums payable to the worker in connection with his employment including

(a) any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract of employment or otherwise…."

49. Section 23 ERA provides that a worker has a right to complain to an employment tribunal of an unauthorised deduction from wages. However, Section 23(2)-(4) ERA (see below) sets out the time limit for bringing such complaints. An employment tribunal will not have jurisdiction to consider a complaint under section 23 ERA if the complaint is not presented in time.

Section 23(2)-(4)

(2) "Subject to subsection (4), an employment tribunal shall not consider a complaint under this section 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, or
(b) ….

(3) Where a complaint is brought under this section in respect of –
(a) A series of deductions or payments, or
(b) …..

The references in subsection (2) to the deduction or payment are to the last deduction or payment in the series or to the last of the payments so received.

3A Section 207(B) (extension of time limits to facilitate conciliation before institution of proceedings) applies for the purposes of subsection (2).

(4) Where the employment tribunal is satisfied that it was not reasonably practicable for a complaint under this section to be presented before the end of the relevant period of three months, the tribunal may consider the complaint if it was presented within such further period as the tribunal considers reasonable."

Discussion and Conclusions

50. Section 23(1) gives workers the right to complain to an employment tribunal about deductions from wages in contravention of section 13 ERA. The claimant complains that his employer made a series of deductions from his wages from 1 April 2020 to 31 July 2021. Section 23(2) sets out the primary time limit for making such a complaint and states that, subject to subsection 23(4), the employment tribunal will not consider a complaint unless it is presented before the end of the period of three months

beginning with the last in a series of deductions. Section 23 (3A) extends the time limit to allow for early conciliation. It stops the clock during the early conciliation period.

51. The relevant dates for determining whether the claimant's claim was presented in time are as follows:

a. The claimant confirmed that the last in the series of alleged deductions was 31 July 2021.

b. The clamant contacted ACAS on 11 October 2021 and entered into early conciliation.

c. On 1 November 2021 the claimant was issued with a certificate by ACAS against the respondent;

52. Accounting for the extension of time limits provisions to facilitate conciliation under section 207B ERA, I find that the relevant time limit expired on 1 December 2021. Therefore, the last day that the claimant could present his claim in time was 1 December 2021. The claimant presented his first claim to the tribunal on 7 December 2021. A replica claim was presented on 8 December 2021. He therefore did not present his claim in time. His claim, submitted on 7 December 2021 under case no 2415100/2021, was presented out of time by six days.

53. As the three month time limit in section 23(2) (with extension for ACAS conciliation) is subject to the provisions of Section 23(4), I then moved to consider whether it was reasonably practicable for the claimant to present his claim before the end of the relevant period of three months (plus the extension for ACAS early conciliation). I was mindful that the burden rests on the claimant to show that it was not reasonably practicable.

54. On the basis of my findings of fact, I find that it was reasonably practicable for the claimant to present his claim before the end of the relevant period of three months (plus the extension for ACAS early conciliation).

55. The claimant said in evidence that he started to take advice from the Citizens Advice Bureau at the end of December 2020 and was aware that he could bring an employment tribunal claim around January 2021. As a result of this advice, he started to gather evidence for that claim, requesting time sheets from his employer. The claimant was not ignorant of his rights to bring a claim or reasonably ignorant of the time limit to bring a claim.

56. The claimant also raised a grievance and when this was not upheld, on 20 April 2021, he did not choose to raise a claim at that point. He also did not appeal against the grievance outcome and so there was no outstanding appeal subsisting around the relevant time limit.

57. On 1 August 2021, the claimant moved onto full pay as on notice of redundancy. He could have contacted ACAS at this point but delayed until 11 October 2021. In evidence, the Claimant's explanation for the delay in contacting ACAS was that he was dealing with a grievance/ disciplinary matter. However, he confirmed these

disciplinary/grievance matters were unconnected to the issues we were discussing at the hearing. There was no outstanding appeal to a relevant grievance, no relevant internal proceedings pending which he felt he needed to wait for before contacting ACAS or presenting a claim. He already knew the respondent's position on his grievance.

58. The claimant did make any reference to any illness during the hearing, by way of explanation for the delay in presenting his claim.

59. The claimant contacted ACAS on 11 October 2021, when he was still within the primary time limit. He was issued with a certificate on the 1 November 2021 by ACAS and still had a period of one month to prepare and present his claim to the relevant employment tribunal.

60. The claimant said that he had then sent a claim to the employment tribunal in Ireland. There was no reason for him to do this. In evidence he had said he had been aware of the process for bringing an employment tribunal claim since January 2021, he had a case worker, he was resident in the UK, his work base was in the North West of England and he lived in the North West of England. He said his claim was rejected by the employment tribunal in Ireland on 25 November 2021, which would still have meant he could have submitted his claim to Manchester employment tribunal in time. I asked the claimant why he had delayed in submitted his claim to the Manchester employment tribunal once his claim had been rejected by the employment tribunal in Ireland, he told me he didn't check his emails. His actions were not reasonable.

61. I also noted that the claimant told me in evidence that had been "advised to submit his claim at the last minute".

62. Mindful that this was not a just and equitable test and one of general discretion but one where I had to satisfy myself that it was not reasonably practicable for the claimant to present his claim in time, I concluded that it was reasonably practicable for the claimant to have presented his complaint before the end of the relevant period of three months. As a result, I did not need to consider the second question of whether the claim was presented within such further period as the tribunal considers reasonable. However, had I been satisfied it was not reasonably practicable for the claim to be presented before the end of the relevant period of three months, on the basis of my findings of fact, I would not have considered it was presented within a further reasonable period.

63. As the claimant did not present his claim, under case numbers 2415100/2021 and 2415109/2021, before the end of the relevant period of three months (with extension for ACAS early consideration) when it was reasonably practicable for him to do so, the Tribunal does not have jurisdiction to consider his claim and so his claim under case numbers 2415100/2021 and 2415109/2021 is dismissed.

Employment Judge McCarthy

Date: 1 April 2022

JUDGMENT AND REASONS
SENT TO THE PARTIES ON

Date: 4 April 2022

FOR THE TRIBUNAL OFFICE