



Case Number: 1401393/2021

# EMPLOYMENT TRIBUNALS

**Claimant:** Mrs B Mazur

**Respondent:** Southern Deacon Ltd

**Heard at:** Video Hearing Service

**On:** 18<sup>th</sup> March 2022

**Before:** Employment Judge Lang

## **Representation**

**Claimant:** Mrs B Mazur, in person accompanied by her daughter

**Respondent:** Not in attendance

# JUDGMENT

**UPON the Respondent failing to attend or be represented at this hearing,**

**AND UPON first considering the information available, the tribunal proceeded to hear the preliminary issue in the absence of the Respondent under Rule 47 of the Employment Tribunal Rules of Procedure 2013.**

**The claimant's claims for outstanding holiday and unpaid wages are dismissed on the basis that the tribunal does not have jurisdiction as they are out of time.**

# REASONS

1. The Claimant at the hearing requested that I provide written reasons and they are as set out below.

2. The hearing has taken place via the Video Hearing Service. There were some occasions when the connection was interrupted however, the elements of the hearing which were missed were repeated.
3. The Claimant is Ms B Mazur. She was employed as a cleaning technician for the Respondent, Southern Deacon Limited, from 1<sup>st</sup> November 2018 until the date of termination, namely 24<sup>th</sup> May 2019. Mrs Mazur's ET1 was received by the tribunal on 1<sup>st</sup> June 2021.
4. Ms Mazur's first language is not English and she has been supported by her daughter at this hearing, who has also at times acted as an interpreter. Her daughter has also assisted her with the tribunal process to date. At the start of the hearing I ensured that Ms Mazur was content to proceed with the support of her daughter. She confirmed she was. I ensured throughout that she, and her daughter, were able to tell me everything which they wished to. There was no application for a postponement for the appointment of an interpreter, and having had regard to the overriding objective, the fact that no interpreter had been requested either at or prior to the hearing and the assistance of Ms Mazur's daughter, I was satisfied Ms Mazur was able to have a fair hearing with her daughter's assistance.
5. The Respondent has not attended. Despite this hearing having been listed on 29<sup>th</sup> September 2021, Ms Smallbone, the director of the Respondent, emailed the Tribunal on 14<sup>th</sup> March 2022 indicating that she would be unable to attend due to childcare commitments and made a request to postpone. That request was considered by the Regional Employment Judge, on 17<sup>th</sup> March 2022. The request was refused due to the fact that the hearing had been listed since September 2021. The Respondent was informed they could renew any application on the morning of the hearing. Ms Smallbone responded by way of email to the Tribunal on 17<sup>th</sup> March 2022 at 13.24 emphasizing the childcare difficulties which she had, and that she would not be attending. She however, set out some points which she asked that the Tribunal consider as part of her case, that includes her case that these claims are out of time, that she has had no contact with the Claimant since her employment ended in May 2019 and that she disputes the claim. I have considered that email and its contents.

6. I started the hearing at 10.15 to allow Ms Smallbone the opportunity to join the hearing in case the position had changed, however, neither she, nor any representative of the Respondent, attended. I have proceeded with the hearing in accordance with Rule 47 of the Employment Tribunals (constitution and rules of procedure) Regulations 2013. In reaching my decision to proceed in the absence of the Respondent I have had regard to the fact that no further application for a postponement was made, the recent decision of the Tribunal on 17<sup>th</sup> March 2022, refusing the application for a postponement and the issues which I needed to determine at this hearing. I have also considered the overriding objective, in accordance with Rule 2.

### **Documentation**

7. In considering these claims I have received the following documentation:
  - i. The Claimant's ET1, received on 1<sup>st</sup> June 2021.
  - ii. The Respondent's ET3.
  - iii. ACAS certificate, dated 26<sup>th</sup> January 2021.
  - iv. A letter from the Respondent to the Claimant, dated 25<sup>th</sup> April 2019
  - v. An undated document setting out the Claimant's employment details including the holiday which is said to be owed.
  - vi. A payslip for May 2019.
  - vii. An email from the Claimant, dated 16<sup>th</sup> August 2021, disputing the claim was out of time *because I placed the claim before may* [sic], and which disputed the contents of the ET3.
  - viii. The various tribunal orders.
  - ix. The Claimant's bank statement, dated 2<sup>nd</sup> June 2019, which covers the period of 2<sup>nd</sup> May 2019 – 2<sup>nd</sup> June 2019. This statement was received on the morning of the hearing and each page is a separate attachment.
  - x. The correspondence to the tribunal in respect of the Respondent's attendance at this final hearing as detailed above, and the Claimant's response to that.
8. The order of 29<sup>th</sup> September 2021 set out the directions which the parties were to comply with. The Claimant has not provided a written calculation of her claim within the 14 days ordered. She did however, provide a figure which she claims within her ET1. I have not been provided with a bundle, nor does one appear to have been agreed.

I have not been provided with any witness statements. Although Ms Smallbone's latest email purports to be a statement, it does not contain a statement of truth. I have nonetheless taken that into account.

9. During the course of this hearing I have heard from the Respondent and her daughter directly.

### **The Claims**

10. Ms Mazur's claims are for payment for wages which she says were due to be paid to her on 31<sup>st</sup> May 2019, as well as for holiday pay which she states she is entitled to. The net sum she claims is £827.17.
11. I can consider the claim for wages in accordance with s.23 Employment Rights Act 1996. In so far as the claim for outstanding holiday pay is concerned I can consider this either an unlawful deduction of wages claim, or a claim pursuant to the Working Time Regulations 1998. As an alternative for both the claim for wages and holiday pay I have also considered what it would mean had the claim been brought as a breach of contract claim.
12. As a preliminary point I must consider whether or not I have jurisdiction to deal with them, or if they are out of time.

### **The Law – time limits**

13. Regulation 30 of The Working Time Regulations 1998 provides the framework for when a claim is made to the Tribunal under those Regulations. The relevant sections of Regulation 30 are as follows:

*(1) A worker may present a complaint to an employment tribunal that his employer—*

*(a) has refused to permit him to exercise any right he has under—*

*[(i) regulation 10(1) or (2), 11(1), (2) or (3), 12(1) or (4), 13 or 13A;]*

*(ii) regulation 24, in so far as it applies where regulation 10(1), 11(1) or (2) or 12(1) is modified or excluded; . . .*

- [(iii) regulation 24A, in so far as it applies where regulation 10(1), 11(1) or (2) or 12(1) is excluded; or*
- (iv) regulation 25(3), 27A(4)(b) or 27(2); or]*
- (b) has failed to pay him the whole or any part of any amount due to him under regulation 14(2) or 16(1).*
- (2) [Subject to [[regulation] 30B], an employment tribunal] shall not consider a complaint under this regulation unless it is presented—*
  - (a) before the end of the period of three months (or, in a case to which regulation 38(2) applies, six months) beginning with the date on which it is alleged that the exercise of the right should have been permitted (or in the case of a rest period or leave extending over more than one day, the date on which it should have been permitted to begin) or, as the case may be, the payment should have been made;*
  - (b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three or, as the case may be, six months.*

14. Regulation 30B provides for an extension of time, of up to one month to facilitate conciliation before the institution of proceedings.

15. Section 23 of the Employment Rights Act 1996 sets out the statutory framework for instigating complaints to the Employment Tribunal for a claim for a deduction in wages. Subsection 2 sets out the relevant time limit, and subsections 3-4 provide for certain situations in which time may be extended.

- (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) in the case of a complaint relating to a payment received by the employer, the date when the payment was received.*
- (3) Where a complaint is brought under this section in respect of—*
  - (a) a series of deductions or payments, or*

*(b) a number of payments falling within subsection (1)(d) and made in pursuance of demands for payment subject to the same limit under section 21(1) but received by the employer on different dates,*

*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 207B (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 is presented within such further period as the tribunal considers reasonable.*

*[(4A) An employment tribunal is not (despite subsections (3) and (4)) to consider so much of a complaint brought under this section as relates to a deduction where the date of payment of the wages from which the deduction was made was before the period of two years ending with the date of presentation of the complaint.*

16. In certain circumstances, as outlined within the statute, a claimant may bring a claim in the Employment Tribunal for breach of contract pursuant to Article 3 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994/1623. Article 7 of that Order sets out the time limits which must be complied with for such a claim to be made:

7. *[Subject to [\[article 8B\]](#)<sup>2</sup>, an employment tribunal]<sup>1</sup> shall not entertain a complaint in respect of an employee's contract claim unless it is presented-*
- (a) within the period of three months beginning with the effective date of termination of the contract giving rise to the claim, or*
  - (b) where there is no effective date of termination, within the period of three months beginning with the last day upon which the employee worked in the employment which has terminated, or*

*[(ba) where the period within which a complaint must be presented in accordance with paragraph (a) or (b) is extended by [regulation 15](#) of the [Employment Act 2002 \(Dispute Resolution\) Regulations 2004](#), the period within which the complaint must be presented shall be the extended period rather than the period in paragraph (a) or (b).]<sup>3</sup>*

*(c) where the tribunal is satisfied that it was not reasonably practicable for the complaint to be presented within whichever of those periods is applicable, within such further period as the tribunal considers reasonable.*

Article 8B provides the extension of time for up to one month to enable the conciliation procedure to be complied with.

17. Therefore, the starting point for a claim to be brought under any of the statutory instruments identified, subject to the conciliation extension, is that it must be brought within three months. Each statutory provision however, provides the ability for the time period to be extended if the tribunal is satisfied that it was not reasonably practicable for a complaint to have been presented within the relevant period. If so satisfied the tribunal may consider the complaint if it presented within such a period as the tribunal considers reasonable. The test under each of the statutes is the same.
18. I have reminded myself of the words of Sir John Donaldson (P) in *Hammond v Haigh Castle & CO. Ltd [1773] I.C.R 148* at 151 where it is made clear that a claim is presented to a tribunal *when it is received by the tribunal, whether or not it is dealt with immediately upon receipt.*
19. In considering if it was reasonably practicable for the claim to have been presented within the relevant period, there is no definition of the term reasonably practicable. I have considered the Court of Appeal decision in *Palmer and Another v Southend-on-Sea Borough Council [1984] I.C.R. 372* where having reviewed the authorities it was noted that perhaps, the question to ask is “*was it reasonably feasible to present the complaint to the industrial tribunal within the relevant three months?*” — *is the best approach to the correct application of the relevant subsection.*”
20. The authorities, including *Palmer*, make plain that the question of what is reasonably practicable is a question of fact and is a matter for the tribunal to decide. The authorities also make plain that the burden on proving that it was not reasonably practicable rests upon the Claimant (see *Porter v Bandridge Ltd 1978 ICR 943, CA.*)

21. When considering a claimant's knowledge on the ability to bring a claim, I have considered the case of *Dedman v British Building Engineering Appliances Ltd. 1974 ICR 53, CA* and Lord Scarman's words, that when considering the Claimant's lack of knowledge I must consider "*what were his opportunities for finding out that he had rights? Did he take them? If not, why not? Was his misled or deceived?*" The Court of Appeal in *Porter* when considering this quotation outlined the test is not whether the claimant knew of his or her rights but whether he or she ought to have known of them. In *Porter* the Court of Appeal considered that the Claimant, who waited 11 months, before bringing a claim ought to have known of his rights.
22. If I were to consider that it is not reasonably practicable for the claim have been presented in the prescribed time, I must go on to consider if the presentation of the claim was within *such further period as the tribunal considers reasonable*. The Employment Appeal Tribunal in *University Hospitals Bristol NHS Foundation Trust v Williams EAT 0291/12* confirmed that the question to be asked at this stage *is whether the claim has been presented within a reasonable time after the time limit expired*.
23. Again, the authorities make plain that what amounts to a further reasonable period of time is a matter of fact for the tribunal to decide.

### **Factual Background**

24. It is accepted that Ms Mazur was employed as a cleaning technician. I find her employment ended, and therefore her effective date of termination is 24<sup>th</sup> May 2019. I make that finding in accordance with what I was told by the Claimant, the ET1 and the letter of 25<sup>th</sup> April 2019 as sent from the Respondent to her confirming her last day of employment would be 24<sup>th</sup> May 2019. The Respondent accepted the employment ended in May 2019.
25. In accordance with the letter of 25<sup>th</sup> April 2019, and from what I have been told, I accept the date for Ms Mazur's final pay would have been 31<sup>st</sup> May 2019.
26. The claim was notified to ACAS on 26<sup>th</sup> January 2021. The date of the ACAS certificate is 26<sup>th</sup> January 2021.



27. The claim was presented to the tribunal on 1<sup>st</sup> June 2021, this being the date it was stamped as received. It was also accepted by the Claimant, through her daughter, that it would have been around this date that it was received as she initially contacted the tribunal on 24<sup>th</sup> May 2021, and was told to complete an ET1 form. I have not seen that correspondence but accept what is said about it.
28. The claim was plainly presented outside of time, with the alleged non-payment occurring 2 years and 1 day after the payment was to be made.

Why was there a delay?

29. I took the time to hear from Ms Mazur and her daughter and explore the reason for the delay in bringing the claim. They have told me several reasons why they did not present the claim sooner and I have set them out in the following paragraphs.
30. To begin, with I was told there was no initial plan to bring proceedings. Ms Mazur worked alongside two colleagues and I was told their employment also ended, but I was told it was due to the Respondent's bankruptcy. It was said that the Respondent re-employed previous colleagues and Ms Mazur had expected to be re-employed as well. She believed that she would be paid the sums owed. I note that the letter from April 2019 ended the Claimant's employment because of Ms Smallbone's upcoming maternity leave. There is no evidence before me of any bankruptcy proceedings. I was told that the Claimant did try and make contact with the Respondent however, the number was unavailable, Ms Mazur and her daughter speculated the number may have changed. It is accepted that no contact was made, both from what they tell me but also the Respondent's email of 17<sup>th</sup> March 2022 where it is explained there has been no contact with the Claimant since May 2019.
31. I was also told that Ms Mazur did not know how to issue proceedings at this time and her daughter offered to assist her.
32. When asked why Ms Mazur had not issued within 3 months of the money being due I was told that she was *stressed* and *scared*. When I explored what she meant by being scared I was told that she was scared she would be threatened. There is no evidence that the Respondent has ever behaved in this manner, nor was any further detail given. I was

told Ms Mazur was stressed because of her language and that is why she had not taken any steps to recover the money owed.

33. I was later told that Ms Mazur wanted to give the Respondent more time to pay due to the circumstances that the Respondent found herself in (namely the suggested financial difficulties) although I accept the contemporaneous evidence of the letter of 25<sup>th</sup> April 2019 which notes that Ms Smallbone was due leave for maternity leave, and Ms Mazur hoped that the money would be paid back. All the time Ms Mazur did not take any steps to recover the sums as she thought that the money would be paid to her and did not want to give the Respondent *more trouble*. When asked why she waited two years, I was told that she did not know.
34. I was told that neither Ms Mazur nor her daughter knew what to do. They learned about the possibility of bringing a claim through others, who Ms Mazur had worked with and had made a claim, as well as using the internet. Ms Mazur confirmed that she has had access to the internet throughout and she has had the support of her daughter. However, she learned about the process as others she worked with had similar difficulties. Those difficulties were in 2019 although she only found out about them last year when they were told the previous colleagues had been successful.
35. There was a delay from January 2021 because Ms Mazur and her daughter were waiting to hear from the tribunal and ACAS and again they did not know what action they should take.
36. I explained the tests which I needed to apply and in response I was told that no steps were taken by Ms Mazur because she *believed she would get the money back* and would *not give the Respondent more trouble* given the difficult situation she believed the Respondent was in.

### **Conclusions**

Was the claim presented in time?

37. No. The effective date of termination is the 24<sup>th</sup> May 2019. The date for the payment to have been received by Ms Mazur was 31<sup>st</sup> May 2019. The claim was presented to the

tribunal on 1<sup>st</sup> June 2021. The claim has been presented over 2 years since the alleged breach, or a deduction took place.

Was it reasonably practicable for the claim to have been made in the prescribed period?

38. I am not persuaded that it was not practicable for the claim to have been brought within the prescribed period. On Ms Mazur's case she was owed money. She knew that money was owed as at 31<sup>st</sup> May 2019. She tried to contact the Respondent by phone, but to no avail, to the point there was speculation the number had changed. From that point she has not taken any steps to identify if she had a claim or how to bring it. She has waited in the hope the sums would have been paid, even though she tells me she had colleagues in the same position, who were taking legal action (although she told me she found out about this after the event). I note she had access to the internet and had the support of her daughter. Therefore, I am of the conclusion that the Claimant therefore ought to have known that she could have brought a claim, and ought to have taken steps. In reality she has not done anything.

39. Whilst I have been told various reasons, in addition to the knowledge point, on why there was a delay in bringing the proceedings in my judgment they do not mean it was not feasible for the claim to have been brought. There is no evidence in respect of threats nor of bankruptcy. Whilst Ms Mazur may have been stressed because of her language skills, with the assistance of her daughter (who has been available throughout) her case has been put before the tribunal and I have been told about her case. I am not therefore persuaded that this has meant it was not reasonably practicable for the claim to have been made in time.

**Was the claim brought in a reasonable period?**

40. Even if I had considered that it was not reasonably practicable for the Claimant to have brought her claim within the prescribed period I am not persuaded that the claim was brought within a reasonable period of time.

41. Ms Mazur has not taken any action. Whilst she was aware of other claims being brought yet did not appear to take any action at the time she found out. The ACAS certificate is dated 26<sup>th</sup> January 2021, the time to the presentation of the claim to the tribunal (1<sup>st</sup> June 2021) in itself exceeds the statutory time limit for bringing these types of claim

within the Employment Tribunal. Contact was only made with the Tribunal on 24<sup>th</sup> May 2021 which then led to the presentation of the claim.

42. There are therefore a series of delays, the first from the 31<sup>st</sup> May 2019 when the sums were due until 26<sup>th</sup> January 2021 when ACAS were contacted. The second, from 26<sup>th</sup> January 2021 when the ACAS certificate was issued until 24<sup>th</sup> May 2021 when contact was made with the tribunal in about starting a claim. The third was from 24<sup>th</sup> May 2021 until 1<sup>st</sup> June 2021 when the claim was presented. That has cumulated in delays of over two years.
43. I do not consider that a claim brought in January 2021 would have been a reasonable period, nor do I consider waiting a further period of just under four months from the issuing for the ACAS certificate to contacting the Employment Tribunal about making a claim to be reasonable. The week from being told to complete the ET1 to presenting the claim is a more reasonable period. However, in looking at the total period and the delays I do not consider them to be reasonable. In considering the question of whether the claim was brought in a reasonable period in my judgment there is no good explanation for these delays.

A two year limit?

44. It was raised with me after my decision about there being a two year time limit to bring a claim rather than the three month limit I have identified. For the reasons I have set out I do not agree there is a two year time limit. In the event there is a series of deductions section 23 of the Employment Rights Act 1996 would enable me to go back for a maximum of two years, however, there is no series of deductions in this case, and the claim was presented after the two year period in any event.
45. I have within my decision considered this misunderstanding (as it was raised within email correspondence when challenged on the time point that it was brought within 2 years, and Ms Mazur and her daughter have told me that they were unsure of what to do). However I have concluded that Ms Mazur ought to have known about the claim within the three month period, so it goes without saying that she should have known by the time the claim went through the ACAS procedure, as to the correct position. This does not therefore alter my decision on either limb of the test.

**Conclusion**

46. For the reasons outlined above I am of the conclusion that Ms Mazur's claims are brought out of time and therefore the tribunal does not have jurisdiction. They are therefore dismissed.

**Employment Judge Lang**

**Date: 21 March 2022**

Judgment & reasons sent to parties: 11 April 2022

FOR THE TRIBUNAL OFFICE