EMPLOYMENT TRIBUNALS

Claimant: **Mr A Bullock**

Respondent: **Royal Mail Group Limited**

Heard at: **London South Employment Tribunal (by CVP)**

On: **21.03.2022**

Before: Employment Judge Dyal

Representation:

Claimant: in person

Respondent: Mr Powys, Solicitor

RESERVED JUDGMENT

1. The claims were presented out of time.
2. It was resonablly practicable to present the claim in time.
3. The tribunal does not have jursidcition to hear the claims which are accordingly dismissed.

REASONS

Background

1. The Claimant drafted the claim form himself. It is not easy to identify what claims are being made. We had a discussion of this at the outset of the hearing and identified the following claims that fall within the tribuanl's jurisdiction:

    a. Unauthorised deduction from wages, contrary to s.13 Employment Rights Act 1996;
    b. That he left the workplace in circumstances to which s.44(1)(d) ERA applied and was subjected to a detriment, namely a reduction in his wages.

2. Mr Powys did not pursue an application to strike-out on the basis that the claims lacked reasonable prospects of success on their merits. He recognised that there were core disputes of fact.

3. The issue for me to resolve was limitation: were the claims presented in time and if not should time be extended.

4. I had the benefit of a hearing bundle prepared by the Respondent and 6 pages of documents from the Claimant. The Claimant gave oral evidence and was cross-examined.

Findings of fact

5. The Claimant is, and was at the relevant times, employed by the Respondent as a part-time postman.

6. From around mid-August 2019, he experienced a number of serious events in the workplace and in the course of his work. On his case that led him to have an extended period of absence. I make no findings about the rights and wrongs of the underlying incidents but note that they included complaints about threats of violence and verbal abuse from co-workers.

7. The Claimant was absent from the workplace from around late February 2020 until 4 January 2021. There is some dispute as to whether that period of absence was or was not sick-leave. The Respondent essentially treated it as sick-leave and as a result of that the Claimant's pay reduced to half pay in around August 2020 with full-pay restored upon his return to work. The Claimant's case is that he was not on sick leave save at most for a small part of that period. In essence he had left the workplace because it was not safe for him to be there and not safe for him to return. His case is that the Respondent well knew this so could not properly treat his absence as sick-leave.

8. A number of internal procedures occurred during the course of the Claimant's absence. On 24 December 2020, the Claimant reached an agreement with the Respondent that he would return to work at a different location, and thus return to full-pay, on 4 January 2021.

9. The Claimant's contract of employment does not expressly state the terms as to the timing of payment. The Claimant was clear in his evidence to me however that employees of the Respondent including himself are always paid weekly. They are always paid on the Friday in arrears of the work they have done that week. If the Friday is a bank holiday then they are paid on the Thursday. I find that it was a term of the agreement implied by custom and practice that the last date for payment for a week's work was the Friday unless the Friday was a public holiday in which case it would be the Thursday.

10. In this case, the final occasion on which the Claimant was paid half-pay was Thursday 31 December 2020 (Friday 1 January 2021 was a bank holiday).

11. The Claimant returned to work on 4 January 2021 in accordance with the agreement of 24 December 2020 and was paid in full on Friday 8 January 2021 as expected.

12. The Claimant commenced Early Conciliation on 5 April 2021 and it ended on 17 May 2021. The claim was presented on 17 June 2021.

13. Some further important findings:

    a. The Claimant was a member of the Communication Workers Union at all relevant times, including throughout 2020 and 2021;
    b. The CWU assisted the Claimant with the internal procedures that were ongoing in 2020;

c. The Claimant is computer literate and is able to search for employment law advice online. He in fact did this and obtained the number for the ACAS advice line. He first spoke to ACAS in late 2020.
d. The Claimant had heard of the employment tribunal and knew generally that claims could be brought in the employment tribunal. His evidence was that he did not relate that to his own circumstances until around the end of 2020 when he spoke to ACAS. At that time, his focus was on trying to get the employer to hear an internal grievance.
e. The Claimant's evidence is that he did not become aware of time limits in the employment tribunal until he had a further discussion with ACAS a few weeks prior to commencing early conciliation. I accept that.
f. The Claimant's evidence is that he did not speak to his union about the possibility of bringing employment tribunal proceedings to recover the loss of wages. I accept this is factually true even though it is very odd. The Claimant had no good explanation as to why he did not speak to his union about this. He alluded simply to the union having preoccupations with covid related issues. The Claimant did not suggest, and if he had I would not have accepted, that this meant the union would have refused to assist him at the very least by providing basic advice about time limits.
g. The Claimant's evidence is that he understood his claim to be in time and still considers it to be in time on the basis that he was not actually paid normal pay until 8 January 2021. He had financial problems as a result of only being partly paid and thus he assumed and considers that time began running from the date he was properly paid on 8 January.
h. In evidence, the Claimant said that he did not ask his union for advice about whether his interpretation of when time ran from was correct. He accepted that he could have done but did not see a need to. He volunteered that he did not know what they would have said if he had asked.

14. In his closing submissions the Claimant said that he feels hampered by autism. He said he did not know when it got in the way and when it did not. There is no medical evidence about this before the tribunal.

Law

15. In relation to presenting a claim about unauthorised deduction from wages, s.23 ERA says this:

> *(1) A worker may present a complaint to an [employment tribunal]*
> *(a) that his employer has made a deduction from his wages in contravention of section 13*
> *(including a deduction made in contravention of that section as it applies by virtue of section*
> *18(2)),*
> *…*
> *(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…*
> *(3) Where a complaint is brought under this section in respect of*
> *(a) a series of deductions or payments, or*
> *(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 reslevant*

period of three months, the tribunal may consider the complaint if it is presented within such further period as the tribunal considers reasonable.

16. That time limit is subject to the Early Conciliation regime:

207B Extension of time limits to facilitate conciliation before institution of proceedings
(1)This section applies where this Act provides for it to apply for the purposes of a provision of this Act (a "relevant provision").
(2) In this section—
(a)Day A is the day on which the complainant or applicant concerned complies with the requirement in subsection (1) of section 18A of the Employment Tribunals Act 1996 (requirement to contact ACAS before instituting proceedings) in relation to the matter in respect of which the proceedings are brought, and
(b)Day B is the day on which the complainant or applicant concerned receives or, if earlier, is treated as receiving (by virtue of regulations made under subsection (11) of that section) the certificate issued under subsection (4) of that section.
(3)In working out when a time limit set by a relevant provision expires the period beginning with the day after Day A and ending with Day B is not to be counted.
(4)If a time limit set by a relevant provision would (if not extended by this subsection) expire during the period beginning with Day A and ending one month after Day B, the time limit expires instead at the end of that period.
(5)Where an employment tribunal has power under this Act to extend a time limit set by a relevant provision, the power is exercisable in relation to the time limit as extended by this section.

17. In *Group 4 Night Speed v Gilbert* [1997] IRLR 398, the EAT held that time runs from the final date that payment could lawfully have been made under the terms of the contract rather than (if earlier) the date of the deduction itself.

18. Section 44 ERA provides as follows:

(1)An employee has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that—
(d) in circumstances of danger which the employee reasonably believed to be serious and imminent and which he or she could not reasonably have been expected to avert, he or she left (or proposed to leave) or (while the danger persisted) refused to return to his or her place of work or any dangerous part of his or her place of work…

19. Section 48 provides as follows:

48Complaints to employment tribunals.
(1)An employee may present a complaint to an employment tribunal that he has been subjected to a detriment in contravention of section… 44(1)…
(3)An employment tribunal shall not consider a complaint under this section unless it is presented—
(a)before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates or, where that act or failure is part of a series of similar acts or failures, the last of them, or
(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 months.
(4)For the purposes of subsection (3)—
(a)where an act extends over a period, the "date of the act" means the last day of that period, and
(b)a deliberate failure to act shall be treated as done when it was decided on;

and, in the absence of evidence establishing the contrary, an employer, a temporary work agency or a hirer shall be taken to decide on a failure to act when he does an act inconsistent with doing the failed act or, if he has done no such inconsistent act, when the period expires within which he might reasonably have been expected to do the failed act if it was to be done.
(4A)Section 207B (extension of time limits to facilitate conciliation before institution of proceedings) applies for the purposes of subsection (3)(a).

20. The onus of proving that it was not reasonably practicable to present a complaint within the primary limitation period is upon the employee. (*Porter v Bandridge Ltd 1978 ICR 943, CA 1150.)*

21. It is clear from *Palmer v Southend-on-Sea Borough Council* [1984] 1 WLR 1129, that:

    a. "not reasonably practicable" is best understood as meaning "not reasonably feasible";
    b. the tribunal should investigate the effective cause of failure to comply with statutory time limit.

22. There is some learning on the relevance and proper analysis when a claim is lodged late because of the employee's ignorance of the law or time-limit.

23. Lord Denning MR said this in *Dedman v. British Building & Engineering Appliances Ltd* [1974] 1 W.L.R. 171 at p177

    "It is difficult to find a set of words in which to express the liberal interpretation which the English court has given to the escape clause. The principal thing is to emphasise, as the statute does, 'the circumstances.' What is practicable 'in the circumstances'? If in the circumstances the man knew or was put on inquiry as to his rights, and as to the time limit, then it was 'practicable' for him to have presented his complaint within the four weeks, and he ought to have done so. But if he did not know, and there was nothing to put him on inquiry, then it was 'not practicable' and he should be excused."

24. Scarman LJ said this at p. 180:

    "Contrariwise, does total ignorance of his rights inevitably mean that it is impracticable for him to present his complaint in time? In my opinion, no. It would be necessary to pay regard to his circumstances and the course of events. What were his opportunities for finding out that he had rights? Did he take them? If not, why not? Was he misled or deceived? Should there prove to be an acceptable explanation of his continuing ignorance of the existence of his rights, it would not be appropriate to disregard it, relying on the maxim 'ignorance of the law is no excuse.' The word 'practicable' is there to moderate the severity of the maxim and to require an examination of the circumstances of his ignorance."

25. In *Porter v Bandridge Ltd 1978 ICR 943, CA 1150 the issue was put succinctly like this:*

    "…ought the plaintiff to have known and, if he did not know, has the applicant given a satisfactory explanation of why he did not know"

26. In *Marks & Spencer v Williams-Ryan* [2005] IRLR 562, Lord Phillips MR said this:

    20. The first principle is that s.111(2) should be given a liberal interpretation in favour of the employee. Lord Denning MR so held in Dedman v British Building & Engineering Appliances Ltd. In that case the relevant provision was more draconian

than s.111(2), in that it required a complaint to the employment tribunal to be made within four weeks of the dismissal unless the employment tribunal was satisfied that this was not 'practicable'. When the provision was changed to its present form, the EAT held that the same approach to construction should be adopted (see Palmer at pp.123–124) and, so far as I am aware, that approach has never been questioned.

21. In accordance with that approach it has repeatedly been held that, when deciding whether it was reasonably practicable for an employee to make a complaint to an employment tribunal, regard should be had to what, if anything, the employee knew about the right to complain to the employment tribunal and of the time limit for making such a complaint. Ignorance of either does not necessarily render it not reasonably practicable to bring a complaint in time. It is necessary to consider not merely what the employee knew, but what knowledge the employee should have had had he or she acted reasonably in all the circumstances. So far as that question is concerned, there is a typically lucid passage in the judgment of Brandon LJ in Wall's Meat Co Ltd v Khan [1978] IRLR 499 at p.503 which I would commend:

> *'With regard to ignorance operating as a similar impediment, I should have thought that, if in any particular case an employee was reasonably ignorant of either (a) his right to make a complaint of unfair dismissal at all, or (b) how to make it, or (c) that it was necessary for him to make it within a period of three months from the date of dismissal, an industrial tribunal could and should be satisfied that it was not reasonably practicable for his complaint to be presented within the period concerned.*
>
> *For this purpose I do not see any difference, provided always that the ignorance in each case is reasonable, between ignorance of (a) the existence of the right, or (b) the proper way to exercise it, or (c) the proper time within which to exercise it. In particular, so far as (c), the proper time within which to exercise the right, is concerned, I do not see how it can justly be said to be reasonably practicable for a person to comply with a time limit of which he is reasonably ignorant.*
>
> *While I do not, as I have said, see any difference in principle in the effect of reasonable ignorance as between the three cases to which I have referred, I do see a great deal of difference in practice in the ease or difficulty with which a finding that the relevant ignorance is reasonable may be made. Thus, where a person is reasonably ignorant of the existence of the right at all, he can hardly be found to have been acting unreasonably in not making inquiries as to how, and within what period, he should exercise it. By contrast, if he does know of the existence of the right, it may in many cases at least, though not necessarily all, be difficult for him to satisfy an industrial tribunal that he behaved reasonably in not making such inquiries.'*

27. In ***Cullinane -v- Balfour Beatty Engineering*** unreported UKEAT/0537/10, considered the second limb of the limitation test. In a passage that should be better known than it is, he stated that:

> *"…the question of whether a further period is reasonable or not, is not the same as asking whether the Claimant acted reasonably; still less is it equivalent to the question whether it would be just and equitable to extend time. Instead, it 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 the background where there is a primary time limit of 3 months."*

Discussion and conclusions

When did time run from?

28. In my judgment time ran from 31 December 2020 at the latest in relation to both complaints.

29. In relation to the wages claim 31 December 2020 was the last occasion on which wages which (on the Claimant's case should have been paid in full) were paid at half-pay. 31 December 2020 was also the date upon which payment fell due under the contract. That was therefore the date on which time began to run in respect of pay for the week commencing 28 December 2020.

30. If there was a series of deductions, time ran from 28 Demecember 2020, in relation to preceding weeks' in which the Claimant was paid half pay. If there was not a series of deductions time ran from even earlier points. It makes no different to my analysis (below) whether there was a series of deductions or not.

31. I do not accept that time ran from 8 January 2021 as the Claimant contends. There was no deduction from the Claimant's wages on that occasion nor any reason to anticipate that there would be one (since it had been agreed he would return to work from 4 January 2021 and thus the barrier to full pay had been removed). The Claimant was properly and timeously paid his wages. 31 December 2020 was thus the final deduction.

32. In my view the analysis is the same in relation to the s.44 ERA claim. The last date on which the Claimant arguably suffered a detriment was 31 December 2020. It was agreed that he would return to work on 4 January 2021 and the payment terms were that he would be paid for that week's work on 8 January 2021. The Claimant did not have an expectation to be paid more swiftly than that and even if he had that would not have been a reasonable expectation. There was thus no further detriment after 31 December 2020. He may have continued to feel the consequences the detriments (the under payments of his wages) after 31 December 2020, in that he was struggling financially, but that is a different point.

33. If there was a series of deductions, time ran from 31 December 2020, in relation to preceding weeks' in which the Claimant was paid half pay. If there was not a series of deductions time ran from an even earlier point. It makes no different to my analysis (below) whether there was a series of deductions or not.

34. Likewise if there was an act extending over a period, that period ended on 31 December 2020. It did not continue beyond that because by 24 December 2020 there was an agreement in place that meant the Claimant would return to work in the following working week after 31 December 2020 and resume full pay. Further, that is what in fact happened.

Was it reasonable practicable to present the claim in time?

35. Based upon the evidence I have heard the reason why the Claim was not presented in time is because the Claimant assumed that time ran from 8 January 2021, being the date on which he was finally properly paid.

36. Assuming my analysis of the date from which time ran is correct and the Claimant's is incorrect, the question then arises whether the Claimant's ignorance of the correct position was reasonable ignorance.

37. In my judgment it was not:

    a. The Claimant is a litigant in person and I bear that firmly in mind. However, he is also reasonably able. It was plain to me today that he is an intelligent man. He is certainly able to find out where to get advice, seek advice and take advice.
    b. There was plenty of time for the Claimant to take advice. From August 2020 onwards he considered his pay to have been wrongly reduced to half pay;
    c. From around December 2020 the Claimant knew that there was an employment tribunal and that it was potentially somewhere that he might seek legal redress for the loss of pay.
    d. The Claimant knew that he was not an expert in employment tribunal proceedings and that it was something that he could seek assistance with;
    e. The Claimant became aware of time-limits weeks before he started early conciliation.
    f. The Claimant was a member of the CWU. The Claimant could have sought the Union's advice about time limits. He chose not to do so. If he had done so then he would surely have been told that time ran from 31 December 2020 at the latest or at least the only sensible course was to proceed on the basis that that is when time ran from.
    g. It was well open to the Claimant to seek the Union's advice on time-limits but he also had the ability to seek advice from other sources, whether that be general information on the internet, ACAS or other free-sources legal advice.

38. The Claimant referred very briefly to having autism in his closing submissions but there is no evidence before me that his autism was material to the presentation of the claim. It would be quite wrong of me to assume that his autism made it less or not reasonable practicable to present the claim. Particularly in a case in which the evidence before me more widely shows:

    a. The Claimant was capble of finding sources of advice;
    b. The Claimant was capable of taking advice;
    c. The Claimant was capable of starting and finishing Early Concilation on his own
    d. The Claimant was capable of drafting a very detailed claim and presening it.

39. Stepping back and looking at matters in my round, in my judgment the claim was presented out of time in circumstances in which it was reasonably practicable to present the claim in time. The tribunal therefore does not have jurisdiction to hear the claims.

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Employment Judge Dyal
Date 22 March 2022