



EMPLOYMENT TRIBUNALS

Claimant: Mrs A Blezard
Respondent: Gloucestershire Hospitals NHS Foundation Trust
Heard at: Bristol **On:** 26th April 2022 (On Paper)
Before: Employment Judge P Cadney

Representation:

Claimant:

Respondent:

RECONSIDERATION JUDGMENT

The judgment of the tribunal is that:-

- i) The claimant's application for reconsideration of the judgment is dismissed..

Reasons

1. On 18th March 2022 I heard a preliminary hearing at which I dismissed the claimant's claim for unlawful deduction from wages as having been submitted out of time. She has not sought written reasons for that decision but has sought a reconsideration of it. In the absence of written reasons this reconsideration will be longer and more detailed than usual. I will set out briefly the history of the dispute and the litigation and my reasons for dismissing the claim. By the time of the hearing the only live claim falling within the jurisdiction of the tribunal was that for unlawful deduction from wages (it was the only claim identified from the claim form and accepted at the ET1 stage) but for completeness sake I will set out the position in respect of all of the claims identified on the ET1.
2. On 6th October 2021 the claimant submitted a claim in which she claimed "Financial detriment, breach of employment contract, and unlawful non-payment of wages." The claimant's claim related to non-payment of overtime worked on 1st and 29th June and 13th July 2020. The claimant's case is that her contractual right is for Time Off In Lieu (TOIL) when there are unexpected

shift overruns. She contends that this is unfair and that she and other staff should be permitted to choose between TOIL or being paid overtime. As she put it in her County Court claim "*I believe that to be forced to take TOIL is financially detrimental and potentially a breach of my contract of employment and unlawful non-payment of wages*".

Breach of Contract/ Financial Detriment

3. Breach of Contract - The tribunal's jurisdiction as to breach of contract only arises on termination of employment, and as the claimant is still employed by the respondent it has no jurisdiction to hear any such claim.
4. In any event the claimant's case is not that there has been any express breach of her contract of employment, but rather that she was treated unfairly by the application of the terms of her contract. It is not in dispute that the provisions relating to TOIL/overtime are contractual and have been agreed with the trade unions during the collective bargaining process. The claimant's claim as set out in her witness statement is that joint effect the TOIL/overtime provisions in the contract is that members of staff can work up to two hours twenty five minutes of overtime per week without being entitled to either TOIL or overtime and that "*..I have brought my claim to the Employment Tribunal to establish if this is lawful.*" There is no right to be paid overtime simply by reason of working longer than specific contractual hours. Any rights arising from working beyond an employee's contracted hours are determined by the terms of the contract itself and it is not open to the employment tribunal to create a right to paid overtime if the contract does not provide for it.
5. In any event the tribunal has no freestanding jurisdiction or right to impose or re-write contractual terms agreed between the parties if in the view of the tribunal those terms are "unfair" to one party; and that in reality this is not a claim for breach of contract but an invitation to the tribunal to re-write the contract. For the assistance of the claimant and the avoidance of doubt the terms of a contract are those agreed between the parties, in this case via collective agreement between the respondent and the relevant trade unions. The tribunal has no general power to re-write or disapply any agreed contractual terms, either generally or for the benefit of a specific employee.
6. Financial Detriment - There is no cause of action for a claim for "financial detriment" in the tribunal, but in any event and as set out above in the extract from her claim to the County Court, the claimant's case is that the financial detriment is the contractual requirement to take TOIL rather than paid overtime and this claim is therefore simply another way of expressing the breach of contract claim; that the application of the contractual terms is unfair to her.

Unlawful Deduction From Wages

7. The brief history of the claim is as follows. As is set out above the claimant complains that on three occasions in June and July 2020 she was required to take TOIL and did not have the contractual option to take paid overtime. There is an exchange of emails in July 2020 in which the claimant requested to be

- allowed to do so, but was not. On 11th October 2020 the claimant lodged a formal grievance which was heard in January 2021 but was unsuccessful. She appealed, and the appeal was heard in March 2021 but was unsuccessful in relation to being permitted to take paid overtime instead of TOIL.
8. On 7th April 2021 the claimant sent a letter before action pursuant to the CPR ; and on 1st May the claimant presented a claim in the County Court claiming £22.47 and a claim fee of £25. A detailed letter dated 28th May 2021 set out the history of the dispute and the respondent's position that that there was no breach of contract and no legal liability to pay the amount claimed; but that given the sums involved it would do so. The County Court ordered the claimant to provide her bank details and after a hearing she did so and the amount was paid, concluding the County Court proceedings.
 9. The County Court hearing took place on 28th September 2021 and on the same day the claimant contacted ACAS and on 6th October 2021 issued the current claim in the tribunal.
 10. The respondent sought a strike out of the claim on a number of bases. Firstly that the claim was futile because any sums owing had already been paid (S25(23) Employment Rights Act 1996); and that it was an abuse of process and/or subject to the res judicata principle in that the claim before the tribunal was an identical claim for an identical sum that had already been determined in the County Court. Finally it asserted that the claim was out of time. As I accepted that the claim was out of time I did not express any view as to the merits of the other points.
 11. The law is correctly set out in the respondent's skeleton argument. In essence a claim for unlawful deduction from wages must be made within three months of the last deduction. Assuming that any overtime due in July 2020 should have been paid at the latest by the end of August 2020 the primary time limit would expire on 30th November 2020. As the claimant did not consult ACAS until 28th September 2021 she does not get the benefit of any extension of time. The claim presented on 6th October 2021 is therefore clearly out of time.
 12. The claimant's position is that she did not accept that any limitation applied as she was still in dispute with the respondent as to the underlying contractual position and that the issue of time did not arise. The claimant's position reflects the fact that she appears not centrally to be concerned with the payment of the money, but is seeking a forum, firstly the County Court and now the Employment Tribunal, which will either disapply the contractual terms to which she objects, or to re-write the contract in terms more favourable to her. As set out above, the tribunal does not have the freestanding power to do this in any event.
 13. In my judgement, as expressed orally, the respondent is correct. A claim for unlawful deduction from wages is a claim for a specific sum due on a specific day which has not been paid. The tribunal has to identify the amount allegedly deducted and when it should have been paid in order to determine the point from which time began to run; and in my judgment that must have been 31st

August 2020 at the latest and it follows that the claim was presented out of time.

14. The tribunal has the discretion to extend time if it concludes that it was not reasonably practicable to have presented the claim with the primary time limit and that it was presented within a reasonable time thereafter (s23 (4) ERA1996). As set out orally the fact that internal proceedings were ongoing would not normally prevent it from being reasonably practicable to bring a claim. However, even if I could have drawn the contrary conclusion in the claimant's favour, I took the view that on any analysis it was reasonably practicable to have brought the claim by 1st May 202, in that on that date the claimant did bring legal proceedings in respect of the same sum in the County Court having done sufficient research to have correctly complied with the requirement to send a letter before action before doing so. The fact that she brought the claim in a different forum does not in my view displace the inevitable conclusion that it was at the latest by that point necessarily reasonably practicable to have brought a claim in the Employment Tribunal had the claimant chosen to do so.
15. It follows that the claim for unlawful deduction from wages was out of time and was dismissed.
16. There is nothing in the application which sets out any basis for considering that there is a reasonable prospect of the original decision being varied or revoked and according the application is refused

Employment Judge Cadney

Date: 26 April 2022

Judgment sent to the Parties: 18 May 2022

FOR THE TRIBUNAL OFFICE