EMPLOYMENT TRIBUNALS

Claimant: **Mr S Joshua**

Respondent: **HMP Wandsworth (part of HM Prison and Probation Service)**

Heard at: **London South Employment Tribunal (remote) On: 18th February 202**

Before: **Judge M Aspinall (Sitting as an Employment Judge)**

Representation
Claimant: **Mr Joshua (in person)**
Respondent: **Mr Bershadski (of counsel, for the Respondent)**

JUDGMENT

Having heard and considered the evidence, the Judgment of the Tribunal is:

a. That the name of the Respondent is changed, by consent, to HMP Wandsworth (part of HM Prison and Probation Service);
b. That the claim for unlawful deduction from wages was presented after the time limit (s.23 Employment Rights Act 1996) had already expired and the Tribunal has no jurisdiction to hear it;
c. That the claim is struck out entirely.

REASONS

The issue and applicable law

1. The first preliminary issue raised before me was whether the Claimant had lodged his claim to the Tribunal in accordance with the time limit set out in s.23(2) Employment Rights Act 1996. That provision, so far as material reads:

23 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) ... (3A) …
(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.

A two part test

2. Under s23(4) the test is laid out for where a claim is presented outside the period of 3 months ("primary time limit") from the date on which the unlawful deduction is alleged to have been made:

i) It is firstly necessary to determine whether it was reasonably practicable to present the claim in time; and, if it was not
ii) to consider whether it was presented in a reasonable time after the primary time limit expired.

There is no general discretion given to the Tribunal to extend time and the Claimant has the burden of establishing that the test is satisfied in both parts.

The meaning of "reasonably practicable"

3. The expression "reasonably practicable" does not mean that the employee can simply say that his/her actions were reasonable and escape the time limit. On the other hand, an employee does not have to do everything possible to bring the claim. In *Palmer and Saunders v Southend-On-Sea Borough Council [1984] IRLR 119* it was said that reasonably practicable should be treated as meaning "reasonably feasible".

4. *Schultz v Esso Petroleum Ltd [1999] IRLR 488* is authority for the proposition that whenever a question arises as to whether a particular step or action was reasonably practicable or feasible, the injection of the qualification of reasonableness requires the answer to be given against the background of the surrounding circumstances and the aim to be achieved.

5. The matter of whether it is open to an employee ignorant of their rights to rely upon that lack of knowledge of those rights or lawful processes as a reason why it was not reasonably practicable to present a claim in time has been the subject of a number of decisions of the higher courts. In *Dedman v British Building and Engineering Appliances Ltd [1973] IRLR 379* Scarman LJ said the following:

"Does the fact that a complainant knows he has rights under the Act inevitably mean that it is practicable for him in the circumstances to present his complaint within the time limit? Clearly no: he may be prevented by illness or absence, or by some physical obstacle, or by some untoward and unexpected turn of events.

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. But what, if, as here, a complainant knows he has rights, but does not know that there is a time limit? Ordinarily, I would not expect him to be able to rely on such ignorance as making it impracticable to present his complaint in time. Unless he can show a specific and acceptable explanation for not acting within four weeks, he will be out of court." [my emphasis]

6. In that and subsequent cases it has been held that the question of whether bringing proceedings in time was not reasonably practicable turns, really, upon what the employee ought to have known *Porter v Bandridge Ltd [1978] ICR 943*, *Avon County Council v Haywood-Hicks [1978] IRLR 118*. It is also possible to discover in those authorities that where an employee is aware that a right to bring a claim exists it will be considerably harder to show that they ought not have taken steps to ascertain the time limit within which such claims should be presented.

7. In *Palmer v Southend-On-Sea Borough Council [1984] IRLR 119* (cited by counsel for the Respondent) following a review of the earlier authorities including *Dedman* and *Wall's Meat,* May LJ concluded that the question of whether a step was or was not reasonably practicable would include the advice given, or available, but that was a material consideration which would have to be taken into account along with all of the other circumstances.

8. Whether a claim has been presented within a reasonable period following the expiry of the primary time limit is for the Tribunal to consider by objectively taking all relevant matters into account per *Westward Circuits Ltd v Read [1973] ICR 301, NIRC.*

Background: The current status of the Claimant

9. The Claimant remains employed by the Respondent at HMP Wandsworth as a Prison Officer.

Background: The claim of unlawful deduction from wages

10. In this claim, the Claimant complains that a series of payments for extra work - completed at HMP establishments other than his own - in April, May, June and July of 2020 were not processed for payment, in the immediately following months, by the Respondent. He avers that the last of these (July 2020) ought to have been paid to him in August 2020; and that it was not.

11. The Respondent notes that the last allegedly unlawful deduction was made on 31st August 2020 - that being the last working day of that month (payments always being made on the last working day). They noted - and the Claimant agreed - that he had been paid for his salary and any other relevant payments but not for these extra payments. For the purposes of completeness, although not relevant to the issue of timeliness of the claim being laid, the Respondent says that these extra amounts were not paid as the Claimant had failed to comply with the Respondent's published policy and instructions in respect of working at establishments other than his own; some of which policies had been amended in light of the pandemic and the need to avoid transmission.

The issue of time

12. The Respondent argues that the claims were laid out of time. If, they say, the last payment in the series was properly due on 31 August 2020, the claim should have been laid before the Tribunal or ACAS by no later than 30 November 2020. In fact, the Early Conciliation application to ACAS was made on 4 January 2021 and completed on that same day. The ET1 claim was, ultimately, before the Tribunal on 7 January 2021.

Discussion and decision

13. The Claimant told me, and I accept, that he was following through an internal procedure via the hierarchy of HMP Wandsworth. He also told me that he had come to believe that he could not bring a claim to ACAS or to the Tribunal until he had completely exhausted his internal options.

14. The Claimant did contact make contact with ACAS on 4 January 2021 and an Early Conciliation certificate was produced on that day. The Claimant presented his ET1 to the Tribunal 3 days later on 7 January 2021.

15. The primary time limit began to run on the day on which the Claimant was not paid the extra wages which, he says, were properly due to him. In this case, that day is 31 August 2020. The primary time limit expired - pursuant to s.23(2) of the Employment Rights Act 1996 - on 30 November 2020.

16. To benefit from any extension of time from the ACAS early conciliation procedure the Claimant needed to contact ACAS 'within 3-months' of 31 August 2020. That is by 30 November 2020 at the latest. He did not do so until 4 January 2021 and so his claim was presented late.

17. The issue that fell for me to decide was whether or not it had been reasonably practical or feasible for the claim to have been presented in time. In arguing that it was not, the Claimant relies on his pursuance of communications through the internal hierarchy of HMP Wandsworth - up to the Governing (or Number One) Governor. He also preys-in-aid his lack of knowledge of the Tribunal and its procedures. He impressed upon me that he believed that he could not make a claim to the Tribunal until he had been through that internal route and that, in fact, he did lodge his claim within one month of exhausting that process (which is not, in fact, accurate as I shall come to below)

18. In addressing the points made by the Claimant, I have looked at the chronology to see whether it assists him:
    - 31 August 20: payment of extra wages not made for July (or preceding months) on the basis that his claims for such had been refused for payment;
    - October 20: Claimant begins to work upwards through the prison hierarchy;
    - 30 November 20: last day of primary time limit to file a claim;
    - 3 December 20: Claimant reaches top of hierarchy - Governing Governor - and has exhausted the route;
    - 4 January 21: Claimant contacts ACAS for Early Conciliation; certificate issued same day;
    - 7 January 21; Claimant lodges claim with Employment Tribunal.

19. Dealing with the question of whether the Claimant was correct to await the end of the internal route he was following, as I have set out above, his thinking that time began to run from the end of his internal communications was misconceived as a matter of law. I am satisfied that, although he had talked himself into believing that to be the case, he was incorrect. I am also satisfied that, despite his erroneous belief, he was properly aware of the lawful process to be followed - indeed, he did so, by contacting ACAS before the Tribunal. He simply did so out of time.

20. Even if I accepted that he was awaiting the outcome of the internal process, it does not follow that the claim was as soon as possible after the primary time limit expired. That internal process effectively ended on 3 December 2020 with the Number One Governor and it was more than one month later that the Claimant contacted ACAS and the Tribunal.

21. Whatever sympathy I may feel for the Claimant in terms of understanding and navigating an alien system, I am given no leeway or discretion and must apply the tests for reasonable practicability as they have been understood and laid down by the higher courts. In all of the circumstances, I cannot conclude that there was any good explanation for why it was not reasonably practicable for the claim to be presented in time and even less can I find that it was, then, presented in a reasonable time once the primary time limit had elapsed.

22. This Tribunal, therefore, has no jurisdiction to hear a claim for unlawful deduction from wages in these circumstances. As that is the only head of claim incorporated into the Claimant's claim, the whole claim must be struck out.

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Employment Judge Aspinall
Date: 18 February 2022

Sent to the parties on
Date: 8 August 2022