



EMPLOYMENT TRIBUNALS

Claimant: Mr S Cass

Respondent: Govdata Ltd

Heard at: Manchester (by CVP)

On: 29 July 2022

Before: Employment Judge McDonald (sitting alone)

Representatives

For the claimant: In person

For the respondent: Mr S Davies (solicitor)

JUDGMENT

1. The claimant's claim that the respondent made unlawful deductions from his wages was brought out of time.
2. Although it was not reasonably practicable for the claimant to have brought the claim within the primary three-month time limit, he failed to bring the claim within such further time as was reasonable. In those circumstances the claim fails and is dismissed.

REASONS

1. This was a preliminary hearing to decide whether the claimant's claims were brought in time. It was ordered by Employment Judge Doyle at the previous preliminary hearing on 11 April 2022. The claimant represented himself and Mr Davies represented the respondent. The hearing was held by CVP. I gave oral reasons for my judgment at the hearing. The claimant requested those reasons in writing.

2. As is usual, these written reasons are not word for word the same as the oral reasons I gave at the hearing. I have, for example, set out the relevant statutory provisions in full. Because the claimant indicated he may well seek to take matters further I have also made clear exactly what I decided. In the oral reasons I said that it was reasonably practicable for the claimant to have brought his claim sooner than he did. As I explain below for the avoidance of doubt, I found it was not reasonably

practicable for the claimant to have brought his claim within the primary 3 month time limit. However, I dismissed his claim because he failed to bring his claim within such further period as was reasonable.

3. In brief, there were three claims being brought by the claimant. The first was for notice pay, the claimant saying that he had been wrongfully dismissed, i.e. dismissed in breach of the notice requirement in this contract. In relation to that, the claimant told me that he accepted that the claim was out of time. That is because the time limit for bringing that claim runs from the effective date of termination, which in this case was 4 June 2021. That meant that the claim should have been brought at the latest by 3 September 2021. The claimant did not contact ACAS to begin Early Conciliation until 24 September 2021. The claimant said he had withdrawn his notice pay claim at the last hearing. There was no record of that on the Tribunal file. The claimant confirmed at this hearing that he did withdraw that notice pay/wrongful dismissal claim. For the reasons set out below I have not dismissed that claim in my judgment.

4. The second claim was in relation to expenses. As I explained to the claimant, expenses cannot be claimed under the unlawful deduction provisions of the Employment Rights Act 1996 ("ERA"). Section 27(2)(b) ERA makes it clear that expenses are excluded from the definition of "wages". That means that any expenses will have to be claimed by way of a breach of contract claim. The claimant confirmed that he was also withdrawing his breach of contract claim in relation to expenses. I have not dismissed that claim in my judgment for the reasons given in the next paragraph.

5. As I explained to the parties, rule 52 of the Employment Tribunal Rules of Procedure now says that when dismissing a claim following withdrawal the Tribunal shall issue a Judgment unless the claimant has expressed at the time of withdrawal a wish to reserve the right to bring a further claim against the respondent raising the same or substantially the same complaint and the Tribunal is satisfied there would be legitimate reasons for doing so. In this case the claimant has said that he does wish to consider bringing a further claim in relation to the breach of contract claims (both for notice pay and for expenses) against the respondent. The time limit for bringing such claims in the civil courts is the much longer time limit of six years. In those circumstances, given that the only bar to bringing the claim in the Employment Tribunal is the time limit point, it does seem to me legitimate for the Tribunal not to issue a Judgment dismissing the claims of breach of contract. Those claims are, however, withdrawn. The absence of a judgment dismissing them means that the claimant is not necessarily prohibited from bringing claims relating to the breach of contract claims in the relevant civil court.

6. The third claim is a claim for failure to pay wages. The claimant at the hearing accepted that he had been paid his wages for April, May and June 2021. His claim is that he had not been paid for the months prior to that. I find that meant that the last possible deduction in the series of deductions about which the claimant was bringing his claim was on 31 March 2021. I accept Mr Davies' submission on behalf of the respondent that the primary time limit for bringing a claim for unlawful deduction would run out on 30 June 2021. The question I had to decide was whether the claimant could show that it was not reasonably practicable for him to bring his claim within that time limit, and that he brought it within such further time as was reasonable.

The Law

7. In relation to a claim for deduction from wages, s.13(1) of the Employment Rights Act 1996 (“ERA”) says:

“(1) An employer shall not make a deduction from the wages of a worker employed by him unless-

the deduction is required or authorised to be made by virtue of a statutory provision of a relevant provision of the worker’s contract, or

the worker has previously signified in writing his agreement or consent to the making of the deduction.”

8. S.27(1) of ERA says:

“(1) In this Part 'wages', in relation to a worker, means 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 or otherwise”

9. S.13(3) of ERA says:

“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.”

10. In **New Century Cleaning Co Ltd v Church 2000 IRLR 27, CA** the majority of the Court of Appeal held that a worker would have to show an actual legal, although not necessarily contractual, entitlement to the payment in question in order for it to fall within the definition of “wages”.

11. When it comes to time limits for bringing an unlawful deduction claim, **s.23(2)** of the ERA says that an unlawful deductions claim has to be brought before the end of the period of three months beginning with the date of payment of the wages from which the deduction was made or (in the case of a series of deductions) beginning with the date of the last deduction in that series.

12. That time limit is extended by the rules relating to ACAS Early Conciliation so long as Early Conciliation is begun within that primary three-month time limit (**Pearce v Bank of America Merrill Lynch and ors EAT 0067/19**).

13. If the claim is brought outside that time limit the Tribunal does not have jurisdiction to hear it unless the Tribunal is satisfied (i) that it was not reasonably practicable for the claim to be presented before the end of the relevant period of three months and (ii) that it was presented within such further period as the Tribunal considers reasonable (**s.23(4) of ERA**).

14. When it comes to the meaning of “reasonably practicable”, the courts have said that that means “reasonably feasible” (**Palmer v Southend-on-Sea Borough Council [1984] ICR 372, CA**). In **Marks and Spencer Plc v Williams-Ryan [2005]**

ICR 1293 the Court of Appeal confirmed that a liberal approach in favour of the employee was still appropriate. What is reasonably practicable and what further period might be reasonable are ultimately questions of fact for the Tribunal.

15. When it comes to ignorance of one's rights that can make it not reasonably practicable to present a claim as long as that ignorance is itself reasonable. In **Porter v Bandridge Ltd 1978 ICR 943, CA**, the Court of Appeal, ruled that the correct test is not whether the claimant knew of his or her rights but whether he or she ought to have known of them. An employee aware of a right to bring a claim can be expected to make enquiries about time limits: **Trevelyan's (Birmingham) Ltd v Norton [1991] ICR 488 EAT**.

Findings and conclusions

16. I heard evidence from Mr Cass, who was cross examined by Mr Davies. I accept Mr Cass's evidence that he did not bring his unlawful deduction claim before 30 June 2021 (when the primary time limit for doing so expired) because he genuinely believed the respondent when he was told he would be paid the money owed in his final pay packet on 30 June 2021. I find that that belief was in the context of his having been paid his wages for April, May and June 2021.

17. Mr Davies submitted that by 30 June 2021 the claimant would have lost all faith in the respondent given that he had been dismissed in an abrupt and (from the claimant's point of view) completely unacceptable way on 4 June 2021. He suggested it was simply not credible that the claimant would delay bringing a claim based on the respondent's assurances. While I accept that there is something in that, I do find that the respondent's reassurance that the wages would be paid in the last pay packet on 30 June 2021 led the claimant to decide not to take action within the primary time limit. I find that that misleading reassurance meant that it was not reasonably practicable for the claimant to bring his claim until after that date, i.e. until after the initial time limit had expired.

18. Once beyond that date, however, I find the claimant took no steps to establish what his rights to bring a claim were or to initiate such a claim by starting Early Conciliation through ACAS. I find he did not act reasonably in failing to do so. There was no barrier to him seeking out legal advice. I accept as sincere his evidence that having served in the military for all his working life prior to joining the respondent in late 2020 he was not familiar with working in a civilian context and had never been in the position of an employer failing to pay him his wages. However, I accept Mr Davies's submission that sources of advice about how to bring a claim to the Employment Tribunal are readily available for someone like Mr Cass who is clearly intelligent and able to carry out internet searches.

19. I find therefore that from 30 June (or at least 1 July 2021 when it was evident there was no payment into his bank account from the respondent) it was reasonable to have expected Mr Cass to have made enquiries to establish what his rights were and take steps to bring a Tribunal claim by approaching ACAS to initiate the early conciliation process. Even allowing for the time needed to do that, I find it would have been reasonable for Mr Cass to have brought his claim by the end of July 2021 at the latest. There was no barrier making it not reasonably practicable for to him to do so. He did not bring the claim until 24 September 2021, nearly 2 months later.

20. If I am wrong about that, I find that it would have been reasonable for him to do so at the very latest from the end of August 2021. That is because on Mr Cass' own evidence while on holiday in the last two weeks of August he spoke to someone who had HR knowledge who mentioned the possibility of bringing a claim through ACAS. I do not suggest that that amounted to taking detailed legal advice. However, it seems to me that having been made aware of the existence of ACAS as a route to take to seek a remedy for the non-payment it was not reasonable for Mr Cass to have delayed further in seeking out information about how to bring a claim and contacting ACAS to initiate early conciliation.

21. I do accept that once the claimant had taken advice from a solicitor on 23 September 2021 he acted promptly in bringing a claim the following day. The difficulty for him is that his evidence does not explain why he did not taken advice sooner. He did explain to me that part of that reason was that he had decided that in essence this was something that he would just have to live and learn from. What changed his mind was a conversation with a friend on 20 September 2021 who persuaded him that he should not put up with the way the respondent treated him. Even taking into account what the claimant says about the difference between civilian life and military life, I do not think that that satisfies the threshold required to show that it was not reasonably practicable to have brought his claim earlier.

22. In conclusion, therefore, what I find is that although it was not reasonably practicable for the claimant to have brought his claim by the original time limit deadline of 30 June 2021, he did not bring it within such further period as was reasonable. There was nothing to prevent him bringing the claim at the latest by the end of July 2021. He did not do so and in those circumstances his claim of unauthorised deductions from wages is out of time, fails and is dismissed.

23. The respondent in this case has brought an employer's contract claim. The respondent will confirm within 14 days whether it still pursues that claim. If it does not the hearing listed for 30 September 2021 will not proceed. If the employer's contract claim is not withdrawn then that hearing will go ahead to deal with that claim.

Employment Judge McDonald
Date: 15 August 2022

JUDGMENT AND REASONS SENT TO THE PARTIES ON
18 August 2022

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