RM

EMPLOYMENT TRIBUNALS

Claimant: **Mr M Cook**

Respondent: **Balfour Beatty Group Employment Limited**

Heard at: **East London Hearing Centre**

On: **30 August 2022**

Before: **Employment Judge M Yale**

Representation:

For the Claimant: **In person**

For the Respondent: **Mr Cook (Counsel)**

JUDGMENT having been sent to the parties on 22nd September 2022 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013.

REASONS

1. The Claimant was employed by the Respondent between 6th May 2014 and 29th October 2021. He was employed as an Electrical Project Engineer, until he was made redundant. During the period from 24th June 2019 to 1st March 2021, the Respondent was assigned to work on Crossrail at Whitechapel. This a period included a period of furlough.

2. The Claimant brings a claim for Unlawful Deduction from Wages under section 13(1) of the Employment Rights Act 1996, that representing enhanced pay for working on the Crossrail project, which he claims he was denied. There is a related claim for Breach of Contract for those same payments.

3. Today's hearing was an Open Case Management Hearing to determine whether or not those claims were brought within time and, thus, whether the Employment Tribunal has jurisdiction to hear them.

4. The last payment date was 4th March 2021 for the period leading up to 1st March 2021.

5. I heard evidence from the Claimant and took into account assertions made in the Claim Form. The Claimant was cross-examined on behalf of the Respondent.

6. The Claimant said that, shortly after starting work at Crossrail, he asked verbally about the enhanced pay. He was told he would need to speak to the Project Manager, which he did, but the Project Manager told him the payment was discretionary.

7. The Claimant asked the Project Manager twice, accepting, in evidence that he was not sure he was not entitled to the payments, but then took the Project Manager's response at face value. The Claimant accepted in his ET1 Claim Form "I possibly should have raised a grievance at that time". The Claimant then went on to explain why he did not take that course. The Claimant accepted, in evidence, that he was a Union member and could have sought Union advice. The Claimant accepted there were people above the Project Manager, who he could have asked, and he accepted he could have discussed matters with the JIB.

8. In fact, the Claimant did not visit this issue again with the Respondent until 27th October 2021, after he had spoken to a Union representative about his pending redundancy on 29th October 2021. ACAS were engaged on 12th January 2022, who issued a certificate on 22nd February 2022, and an ET1 was received at the Employment Tribunal on 16th March 2022.

Law:

9. Dealing first with the Wages Act claim of unauthorised deductions. Section 23(2) and (4) of the Employment Rights Act 1996 state:

> (2) Subject to subsection (4) below, 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 deductions was made.
>
> […]
>
> (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 it if is presented within such further period as the tribunal considers reasonable.

Conclusions:

10. In my judgment it was reasonably practicable for the Claimant to have brought this claim within the primary time limit. The Claimant accepted he was unsure of the position and asked the Project Manager twice. That doubt should have led the Claimant to seek advice from the Union or from the JIB. He said he did not appreciate the full ambit of the JIB but he knew if its existence and should have made enquiries. The Claimant accepted in the documentation he submitted, and in evidence, that he should have taken the matter further at the time.

11. Moreover, he acknowledged, in writing and in evidence, that he had worked at another Crossrail site in Woolwich on 1st March 2021, where enhanced payments were authorised, albeit after the fourth time of asking. The fact that similar payments were authorised at Woolwich should have caused the Claimant to query the position sooner in relation to Whitechapel.

12. In my judgment, had the Claimant taken advice from the Union, of which he was a member, from JIB or even pursued matters when he found he was being paid the payments at Woolwich to which he says he was told he was not entitled to at Whitechapel, it was reasonably practicable to have brought the claim within time.

13. For those reasons the claim for unauthorised deductions from wages is dismissed.

14. There is also, however, a second limb to this case, that of Breach of Contract. The Breach of Contract claim also has a time limit of three months but those three months run form the effective date of termination, which was 29th October 2021. It is conceded by the Respondent that the claim was brought within three months of the effective date of termination. However, the issue here is whether the claim was outstanding at that time, as no claim under the Wages Act had been made by the date of termination.

15. There are conflicting authorities on this point. In Hendricks v Lewden Metal Products Ltd EAT 1181/95 the EAT held that the claim, in similar circumstances, was not outstanding on the date of dismissal because there had been no complaint under the Wages Act and that claim was now out of time. However, in Mitie Lindsay Ltd v Lynch EAT 0224/03, a more recent case, it was held that the breach of contract action is separate from the Wages Act action and that proceedings for Breach of Contact in the Employment Tribunal are not precluded because a Wages Act claim in respect of the same monies would be out of time.

16. It was submitted to me that I should follow Hendrix because otherwise the time limits under the Wages Act legislation have no effect and someone could bring a claim that was 10 or 20 years old. I do not accept that reasoning. There is a time limit of 6 years for breach of contract claims and they must be brought within 3 months of termination of employment. The period of 3 months for a Wages Act claim would apply to employees who remain employed and are not entitled to claim for breach of contract in the Employment Tribunal. The purpose of The Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 was to avoid the need for claims to be brought both in the Employment Tribunal and the County Court. A claim for Breach of Contract could be made in the County Court for these payments. In my judgment, therefore, it is in keeping with the purpose of the 1994 Order to allow the breach of contract claim to proceed.

_____

Employment Judge M Yale
Dated: 11 October 2022

REASONS SENT TO THE PARTIES ON
Date: 13 October 2022

.....
FOR THE TRIBUNAL OFFICE