



EMPLOYMENT TRIBUNALS

Claimant: Mr A Ekoue
Respondent: Samworth Brothers Limited t/a Bradgate Bakery

Heard at: Leicester Hearing Centre, 5a New Walk, Leicester, LE1 6TE
On: 3 and 4 October 2022
Before: Employment Judge Adkinson sitting alone

Appearances

For the claimant: In person
For the respondent: Mr C Finlay, solicitor

JUDGMENT

UPON hearing the evidence and the submissions of each party

AND UPON the claimant withdrawing his claim that the respondent failed to pay him holiday pay for bank holidays for the period 30 April 2020 to 31 December 2020

It is ORDERED that

1. The claim for failure to pay holiday pay is out of time. It was reasonably practicable to present the claim in time. The Tribunal lacks jurisdiction to consider it and so it is dismissed
2. The claim for failure to pay for bank holidays for the period 30 April 2020 to 31 December 2020 is dismissed on withdrawal
3. The claim for failure to pay statutory sick pay is out of time. It was reasonably practicable to present the claim in time. The Tribunal lacks jurisdiction to consider it and so it is dismissed and
4. The claim for failure to pay statutory shared parental pay is dismissed.

REASONS

1. The claimant pursues 3 claims: one relates to unpaid holiday pay; one relates to unpaid sick pay and one relates to unpaid pay for shared parental leave. I set out the details below. There was a fourth claim that related to holiday pay in respect of bank holidays. The claimant has withdrawn that. Therefore I have dismissed it on withdrawal.

2. The respondent denies the claims.

Hearing

3. The hearing took place at Leicester. Everyone attended the hearing centre.
4. The claimant represented himself. His first language is French. He acted through an interpreter. On the first day the interpreter was Ms C Ebbing, and on the second day it was Mr K Eter. Neither party raised with me any suggestion that there were difficulties with the interpretation. Nothing happened that gave me any reason to think that there were issues with interpretation.
5. The respondent was represented by Ms C Finlay, Solicitor.
6. Mr A Ekoue gave oral evidence to the Tribunal on his own behalf. Mr D Ball gave evidence to the Tribunal on behalf of the respondent. Each witness adopted their own written witness statement as their evidence. Each party cross-examined the other's witness.
7. Mr Ekoue's statement was in English. He confirmed to me he can read and write English and speak it reasonably well in an informal setting. Therefore he wrote his statement in English and he understood what it said. His statement was quite clear and easy to read. He used the services of the interpreter only because he feared the Tribunal room would be a lot more formal than daily life and because there may be difficult concepts or special words used that he would not be able to understand. In the circumstances, I am satisfied therefore that his statement can be taken as an accurate record of what he wanted to say even though it is not in his first language. The fact he used an interpreter at the hearing is irrelevant to the decisions that I must make.
8. There was an agreed bundle of documents in a file. It consisted of about 300 pages.
9. Each party at the end of the case presented their arguments to me about why they should succeed.
10. I have taken into account the arguments, documents to which I was referred and the evidence of each witness.
11. Because Mr Ekoue does not speak English as his first language I decided to reserve and to write out my decision afterwards in order that Mr Ekoue can take time to read it and understand it. The parties agreed to this approach.
12. No party has suggested this hearing was unfair. I am satisfied it was a fair hearing.
13. At the start of the hearing, the respondent sought permission to amend its response to correct some factual errors relating to the days of the week that Mr Ekoue worked and to correct some dates. After discussing the issue with him, Mr Ekoue agreed to the amendment. They corrected some obvious errors. It did not change the substance of the response or raise new issues for me to consider. I granted permission therefore because no party was prejudiced by the amendment.

14. On the second day, Mr Ekoue suggested Employment Judge Victoria Butler has made an error when she recorded details of the claims that he was pursuing. He had not provided a written document setting out what those errors were. He had not given advance notice to the respondents of the alleged errors. It was her list that we had used to identify the claims and issues at the start of the hearing and which he agreed represented his claims.
15. I did not allow Mr Ekoue permission to amend his claim. I applied **Vaughan v Modality Partnership [2021] ICR 535 (EAT)** and the cases cited in that decision. The error was something he should have known about well before the hearing and, at the latest, he should have raised it at the start of the hearing when I asked if there any issues I had to deal with. He did not present an amendment in writing so I could not see what correction he proposed. All the matters he wanted to raise or could raise were well within his knowledge.
16. Besides the Learned Judge had ordered that any party who wanted to correct her list of issues (or anything else in the order) should write to the Tribunal within 14 days of the order being sent to them. It was sent to them on 17 January 2022. He had had a chance to suggest the correction. A significant amount of time had passed since. There was no good reason for the delay. The respondent had prepared on the basis the list was accurate and conducted cross-examination the previous day on the basis it was accurate. The balance of hardship and prejudice fell in the respondent's favour.
17. Though I have set out my decision in discrete parts, the hearing was one composite hearing.

Issues

18. Employment Judge Victoria Butler identified the issues in her order that was sent to the parties on 17 January 2022 in paragraph 6 of the case management order.
19. Ignoring the withdrawn claim, they are
 - 19.1. **The holiday pay claim:** A claim for holiday pay for the period April 2019 to March 2020. He says he has received payment in the amount of £1519.65 and avers a shortfall of £653.85;.
 - 19.2. **The sick pay claim:** A shortfall of statutory sick pay for the period 4th of June 2020 and 6th of August 2020
 - 19.3. **The shared parental leave pay claim:** A shortfall in pay while she was on shared parental leave between 17th of September 2020 and the 3rd December 2020
20. In addition I am satisfied that I must consider whether the claims are in time. Mr Ekoue suggested that Employment Judge Victoria Butler had already decided the claims were in time. I disagree. Having read paragraphs 3, 7 and 12 of her case management summary, I am satisfied that she had made no such determination of the issue and left it for the final hearing. The opening words of paragraph 12 "If the respondent makes applications in respect of time limits..." suggest the question of time limits was something

she had not decided, otherwise there would be no possibility of any such application. In addition her judgment sent to the parties on 17 January 2022 does not rule on the issue.

21. The law only allows me to decide cases that are either presented in time or where I have exercised a power to extend time so the claim is effectively presented in time. If neither of those situations apply then I do not have the jurisdiction to consider the claim, whatever its merits. Because it has not been considered already, I must consider it as part of my decision.

Some common background

Dates of presentation of the claim and early conciliation

22. The claim was presented to the Tribunal on 30 December 2020. Early conciliation through ACAS commenced on 26 November 2020. It ended on 30 November 2020.
23. Mr Ekoue had presented a number of claims to the Tribunal that ran alongside this one. The first of which I am aware was presented on 26 June 2020.
24. Mr Ekoue ceased to be an employee on 31 December 2020.

The holiday pay claim

How he put his claim

25. Mr Ekoue's claim is that he was not paid what he was entitled to. He says he is owed £653.85.
26. However at the hearing he attempted to put the claim a different way. Instead he sought to say that the respondents refused to let him take leave to which he was entitled. That is that the issue that Employment Judge Victoria Butler identified. Mr Ekoue never sought to have that corrected. It is not the claim he presented to the Tribunal. He made no application to amend his claim to argue this point. It is the case as presented that matters and against which the claimant's case is to be judged: **Chandhok v Tirkey UKEAT/0190/14 (EAT)**. The claim is not simply a document to get things started. In my opinion in the absence of an amendment to add the allegation, his allegation that the respondent did not let the claimant take his leave is one that I do not have jurisdiction to decide. However I will express my views on it because I heard evidence about it.

Legal basis of the claim and time limit

27. It is clear that the claim could proceed as either
- 27.1. A claim for unauthorised deduction from wages under the **Employment Rights Act 1996 Part II**, or
- 27.2. A claim for breach of the **Working Time Regulations 1998**.
28. I was not addressed on the particular legal basis for the claim. In my view it makes no difference since at the heart of this dispute is a factual issue alone.
29. In addition in each case the time limit is the same: 3 months to present the claim, and I can only extend time if it was not reasonably practicable to

present the claim in time, and it was presented in a reasonable period thereafter: **Employment Rights Act 1996 section 23** and **Working Time Regulations 1998 regulation 30**. The time limit for the claim under the **Employment Rights Act 1996** starts when the deduction was made. The time limit for the claim under the regulations commences when payment should have been made or the employee should have been permitted to take leave.

His work and the contract of employment and Mr Ekoue's work

30. Mr Ekoue was employed latterly as a hygiene operative. He was a member of a team of operatives at the respondent's food processing factory. Hygiene is self-evidently important in the factory. The hygiene team needs a minimum number of operatives to be able to maintain acceptable hygiene standards.
31. Mr Ekoue's contract of employment contains the following relevant clauses.
32. Clause 9.4 confirmed that pay was weekly, one week in arrears. The pay week ran from Sunday to Saturday inclusive. I accept therefore Mr Ball's evidence that an employee who worked say Friday, Saturday, Sunday and Monday would have Friday and Saturday paid on one payslip, and Sunday and Monday on the payslip a week later.
33. The contract continues
 - "12.1 Our holiday year is from April to March.
 - "12.2 You are entitled to 20 days paid holiday during the holiday year, inclusive of any bank or public holidays (bank holidays) that fall on a day on which you are contracted to work. Your holiday entitlement accrues a rate of 1.66 days in each complete calendar month of service in a holiday year.
 - "12.3 All holidays must be agreed in advance by your line manager All holidays must be taken in line with the applicable holiday booking procedure.
 - "12.4 You must take all your holiday in the current holiday year as holiday may not be carried over into the following year save as required by law. You will not be given payments in lieu of any holiday not taken, save in accordance with clause 13.2 below on termination of your employment."
34. Clause 13 confirms how holiday pay is calculated. At the time it was calculated by reference to a 12-week average as the regulations then provided.

His work pattern

35. When Mr Ekoue commenced his employment, he worked a shift pattern of 4 days at work and 4 days not at work (i.e. "4-on and 4-off"). Taking a full working week as 5 days, he therefore worked $\frac{4}{5}$ of a full working week. He was on this working pattern at the start of April 2019.
36. On 18 January 2020 his working hours increased. He now worked 5 days per week (i.e. a full working week) from Friday to Tuesday inclusive. This was his working pattern at the end of March 2020.

The need to book leave and restrictions

37. The respondent requires adequate cover of its hygiene team. To achieve that it limits the number of people who may take leave at any one time.
38. Mr Ekoue says he was not aware of any requirement to give adequate notice of the need to book holiday. I reject his evidence on this.
39. Firstly there is a document called the Bradgate Brief. This is a newsletter for staff. The newsletter on 27 January 2020 highlighted issues with quality and customer complaints about plastic. The newsletter also said:
“Holidays: A reminder to book any outstanding holidays you may have as we are fast approaching the end of the holiday year.”
Mr Ball told me that managers or team leaders would brief employees in their team on the contents. I accept this. It is an inherently plausible process. It would seem counterintuitive for example to write a document about e.g. quality issues and complaints about plastic but then not take active steps to draw the attention of staff members to them. I see no reason why the respondent would write about the need to take holidays but then not highlight it at the meeting.
40. I also accept that the newsletter was put on a staff noticeboard. Mr Ekoue complained there were a lot of documents on the notice board. That may be so. However he did not suggest it was never put there or that he was denied a reasonable opportunity to read it.
41. It also seems to me to be inherently plausible that this issue about booking holidays was raised. There is no benefit to this respondent of staff not taking their leave – their processes are set up to accommodate it. In addition it is common sense that requesting holiday at the last moment is likely to be more difficult to accommodate than requesting it in advance. Therefore I think it is more credible the respondent would highlight this to promote the smooth running of their operation.
42. Finally the respondent’s letter to Mr Ekoue on 1 April 2020 on the topic of why they refused him leave mentions that the issue of giving plenty of notice was raised on 6 and 27 January and 3 February 2020. I have no reason to doubt the accuracy of those dates.
43. The letter also referred to the handbook which says
“All holidays must be taken in the current holiday year and may not be carried over into the following year or paid in lieu. All holidays should be booked at least two weeks in advance and must be authorised by your team leader/manager and will normally be given on a first come first served basis.”
I was not taken to the handbook. However Mr Ekoue did not suggest this quote was incorrect or that he was denied access to the handbook. Given my findings above and the nature of the work, I accept the handbook says this and he would have had reasonable access to it

His attempts to book leave

44. On 4 March 2020 Mr Ekoue tried to book 8 days of holiday. The respondent was able to allocate only 5 days of the requested leave otherwise they would be short-staffed.
45. On 25 March 2020 Mr Ekoue complained he had been denied the opportunity to take leave and sought payment for the days he was unable to take.
46. The respondent replied on 1 April 2020 as quoted above.

Payslips, holiday entitlement and holiday taken

47. The respondent conceded for simplicity that Mr Ekoue worked $\frac{3}{4}$ ths of the year at 4-on and 4-off, and $\frac{1}{4}$ of the year on a 5-day week. Strictly, because the change was mid-January it is not quite accurate, because he spent less than 3 months of the April 2019-March 2020 year on a 5-day week. However it is more favourable to the claimant to take the respondent's concession, so I do so.
48. The respondent calculated his entitlement therefore for April 2019 to March 2020 as follows
- $$= \frac{3}{4} \times 20 + \frac{1}{4} \times 28$$
- $$= 15 + 7$$
- $$= 21 \text{ days}$$
49. I accept this calculation is accurate. It reflects the number of days worked and how it divides over the year in which Mr Ekoue's working pattern changed from 4-on 4-off to 5 days per week.
50. Examination of the payslips shows that between April 2019 and March 2020 he took 22 days leave for which he was paid. Mr Ekoue has not shown me any days where he took holiday but was not paid.

Denial of leave

51. Mr Ekoue was denied 3 days leave that he wanted to take when he made his request at the start of March 2020.
52. **Regulation 15(1)** of the **Working Time Regulations 1998** required Mr Ekoue to give notice of his intention to take leave that is twice as long as the leave he wanted to take.
53. **Regulation 15(2)** and **15(4)** entitles an employer to prevent a person taking leave provided they give notice that is twice as many days in advance of the notice declining leave as the length of leave which the employer wishes to stop the employee taking leave. It is recognised that this may result in an employee losing their entitlement to holiday where the employer does not act unreasonably: **Lyons v Mitie Security [2010] ICR 628 (EAT)**.
54. I am satisfied that the respondent denial of leave was reasonable. Firstly they did grant him the majority of this leave. It seems implausible they would grant him the majority of his leave but then unreasonably deny him 3 days. Secondly his request was late, even though he had been reminded on 3 occasions, in the staff handbook and in the staff bulletin to book early. I

accept the respondents require a minimum number of members of the team to be present. This is a food production business and hygiene is obviously important. It is reasonable and plausible they would not go below the numbers of hygiene operatives required to maintain a safe place of work.

55. Mr Ekoue did not complain that the respondent failed to give him sufficient notice of the denial of his request. Therefore I have no reason to doubt that the respondent complied with the notice requirements when declining his request.

Time for bringing the claim

56. I have not gone into the detail of establishing the exact date that Mr Ekoue accrued the right to bring a claim. It is on any case about 1 April 2020 at the latest. On a rough calculation therefore he had until about 30 June 2020 to present a claim. Whatever the precise start and end date, it is plain his claim was presented well outside of the 3-month time limit.
57. He did not commence early conciliation until nearly 5 months later and well outside the time limit for presenting a claim. He also delayed for more than a month after conciliation ended.
58. He provided no evidence to me about why it was not reasonably practicable for him to bring the claim in time. He told me he had spoken to ACAS on a number of occasions, showing he was capable of seeking advice. He did not suggest they misled him about the time limit. He also presented a claim on 26 June which shows he knew how to present claims to the Tribunal and was capable of presenting them.

Law and conclusions

Time limit

59. I have already identified the relevant time limit is 3 months, and test for extending time limits depends on whether it was not reasonably practicable to present the claim in time, and if not, whether he presented within a reasonable time thereafter.
60. Previous cases have explained the approach I should take to whether something was reasonably practicable.
- 60.1. The words should be given a 'liberal construction in favour of the employee' **Dedman v British Building and Engineering Appliances Ltd 1974 ICR 53 (CA)**;
- 60.2. It is a factual question: **Wall's Meat Co Ltd v Khan 1979 ICR 52 (CA)**;
- 60.3. It is for the claimant to prove it was not reasonably practicable to present the claim in time.
- 60.4. The focus is on what could be done: **Schultz v Esso Petroleum Co Ltd [1999] ICR 1202 (CA)**; **Asda Stores Ltd v Kauser EAT 0165/07 (EAT)**.
61. I conclude that it was reasonably practicable to bring the claims in time. He has provided no evidence from which I could conclude it was not reasonably practicable for him to present the claim either. In addition he has shown he

was capable of presenting claims much earlier than he presented this claim and of presenting claims before the time limit expired (because he did so), he could take advice or guidance (because he spoke to ACAS), he delayed for a further month after conciliation and has not explained that delay.

62. It follows the claim is out of time. I do not have jurisdiction to consider it. Therefore it is dismissed.

Alternative conclusions

63. Alternatively I would have dismissed the claim on the merits anyway. He was entitled to 21 days of paid leave in the April 2019-March 2020 holiday year. He took 22 days. The payslips show he was paid for all of those days. Therefore he has not suffered a loss.
64. As I noted above, strictly the complaint he was denied leave is not one before me. However I have heard evidence and can comment on it. If it were a claim before me I would have dismissed it. Based on my findings of fact he requested leave too late. He had been warned of the need to make a prompt request. He did not do so. The respondent accommodated him so far as possible. They could not accommodate 3 of the days requested. Based on my findings of fact, that refusal to let him take leave was reasonable because it would have adversely impacted the respondent's hygiene requirements at short notice. There is no suggestion the respondent gave insufficient notice.

The sick pay claim

65. This claim consists of 2 parts:
- 65.1. **Part I:** An alleged underpayment of statutory sick pay for the week ending 4 June 2020;
- 65.2. **Part II:** An alleged underpayment of the same on 6 August 2020.
66. This is a claim for unauthorised deductions from wages under the **Employment Rights Act 1996 part II.**

Time limits

67. Without deciding, I treat these both as a series of deductions. It is most beneficial to the claimant to do so. Time starts to run therefore from 6 August. The last day to present a claim is 5 November 2020. The claimant did not do so.
68. I repeat the facts above about the lack of evidence to show it was not reasonably practicable for him to bring a claim, that he was able to present a claim in June. I also repeat the law about time limits and how to apply the test of reasonable practicability.
69. For the same reasons set out above, I am satisfied that it was reasonably practicable for the claimant to have presented his claim in time. Therefore the claims were presented too late. I have no jurisdiction to consider them. I would therefore dismiss them.
70. However even if they were in time (or I extended it), the only remedy I would have granted is a declaration that part of the claim was well-founded. I would not have awarded compensation.

71. I set out my reasons below.

Part I

Background

72. The claim revolves around the following facts:
- 72.1. Mr Ekoue has a period of sickness leave.
 - 72.2. He was entitled to statutory sick pay. Though he claims a higher rate of statutory sick pay, at the time the weekly rate was £95.85 per week and that is what I will work with.
 - 72.3. In his pay slip for week 9 (week ending 4 June 2020, when he worked 5 days per week) he was away from work for 5 days. He therefore should have received £95.85. In fact he received £76.68. He was short one day's pay of £19.17
 - 72.4. In his pay slip for week 10 (week ending 11 June 2020) he received £115.02. This is equal to 1 week and one day of statutory sick pay.
73. Mr Ekoue said the payslips were incorrect. However he did not allege he did not receive the monies that the payslips say he should have received. Rather he says that he should have received a full week's statutory sick pay in week 9 – i.e. the figure was wrong.
74. The respondent is not able to explain why week 9's figure was short by one day. They aver it could be anything from a mistake to late notification of sickness meaning the payroll could not be accurately processed. In my view that is not good enough. The respondent has or should have available to it sufficient records to be able to explain what appears to be at best unusual and at worst an error.
75. Therefore I am left with the following:
- 75.1. Common ground that the claimant was entitled to a week's statutory sick pay for weeks 9 and 10,
 - 75.2. Common ground that he was underpaid by one day in week 9,
 - 75.3. No satisfactory explanation about why that occurred or on what basis it occurred. In my opinion speculation about the cause is not good enough because it is not evidence, and
 - 75.4. Nothing in the contract of employment or any other written document that shows the claimant consented to be paid less in week 9 than the week's statutory sick pay to which he was entitled.
76. Claims for statutory sick pay are actionable as claims for unauthorised deductions from wages because they fall within the **Employment Rights Act 1996 section 13** and the definition of wages.
77. None of the exceptions in **section 14** would apply.
78. In my opinion there was an unauthorised deduction from wages in the circumstances of this case. Applying **section 24** I would therefore have had to declare this part of the claim well founded.

79. However I would have awarded no compensation for the following reasons:
80. Mr Ekoue made no claim for ancillary compensation for things like extra charges he incurred from his bank because of the shortfall. The law does not entitle me to award compensation for “inconvenience” or “injury to feelings”. **Section 24(2)** is limited to “financial losses”. This Tribunal has also taken this same view before: see **Richardson v Howards Garage (Weston) Ltd ET Case No.1401179/12**. While it is not binding, I remind myself I should only depart from prior decisions of this Tribunal if I consider the earlier decision to be wrong. I do not. Therefore there is no compensation due on this ground.
81. **Section 24** would require me to order the payment of the unpaid wages, in this case £19.17. However **section 25(3)** requires me to reduce the amount by any sum that the respondent appears to have already paid in respect of the unauthorised deduction. The payslip for week 10 contains an extra day’s payment. That extra is £19.17 – the amount of the underpayment the previous week. I would therefore have applied this provision and concluded that the claimant has already been compensated for the deduction. The amount due on this ground is also zero.

Part II

82. There is a second aspect to this claim. Mr Ekoue complains he was away ill and so entitled to statutory sick pay in week 18. The pay slip is dated 6 August 2020. He was in fact paid statutory sick pay for only 3 days at the rate of £19.17 per day.
83. Because he is paid 1 week in arrears (see his contract) I accept the respondent’s contention this payslip refers to the week 26 July to 1 August 2020. In that period he had 3 working days: Sunday 26, Monday 27 and Tuesday 28 July 2020. His next working day would have Friday 31 July 2020 and Saturday 1 August 2020. He was paid therefore for these 3 working days when away ill.
84. Correspondence between the parties (in particular the respondent’s letter of 31 July 2020 written by Ms T Gibson) confirm Mr Ekoue commenced paternity leave on 31 July 2020. He was not therefore absent for sickness – whether or not he was sick. Therefore he had no entitlement to statutory sick pay for those days. He had no entitlement to statutory sick pay in the period 29 or 30 July 2020 because he was not absent from work because of illness.
85. I am satisfied he has been paid what he was owed. Therefore this part of the claim would have failed.

The shared parental leave pay claim

86. The circumstances are as follows:
- 86.1. On 7 August 2020 the claimant’s application for shared parental leave was received by the respondent. The application was a “birth” case as opposed to an “adoption” case.
- 86.2. He requested 52 weeks of leave from 19 July 2020 to 18 July 2021.

- 86.3. There was a discussion between Ms M Berry and the claimant evidenced by hand-written notes she made. In summary she explained to him that he was not entitled to 52 weeks off – it had to be shared with the mother and take account of any maternity leave she was taking. On 1 September 2020 he confirmed his partner and he had agreed he would take 24 weeks.
- 86.4. Me Ekoue completed an amended request for shared parental leave and signed it on 10 September 2020. On the form he claimed his 24 weeks but acknowledged he would be paid only for 11 weeks.
- 86.5. His leave began the next day: 11 September 2020.
87. The effect of the **Statutory Shared Parental Pay (General) Regulations 2014 regulation 10** is that the maximum amount of **paid** leave is 39 weeks and it is apportioned between mother and father. Mother had taken 4 weeks of maternity leave and 24 weeks of shared parental leave. Therefore there was only $39-24-4 = 11$ weeks available of **paid** leave available.
88. I have considered the payslips. They show that in total 11 weeks of shared parental pay was paid to Mr Ekoue.
89. It is correct that in the first week (recorded on payslip for week 24, paid 17 September 2020) he was paid only £43.20 gross of statutory shared parental pay instead of £151.20: in other words 2 days statutory shared parental leave pay. I am satisfied this is because of when his leave started on 11 September 2020. Only that and 12 September 2020 would have appeared on his payslip.
90. It is also correct that his final payment of shared parental pay was only for 5 days. This was because that was all that remained at the end of the 11 weeks.
91. I conclude he has received what he was entitled to when he was entitled to it. Therefore this claim must fail.

Employment Judge Adkinson

Date: 6 October 2022

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