



EMPLOYMENT TRIBUNALS

Claimant: Mr F Silveira

Respondent: Trak Employment Solutions Limited

Heard at: Bristol (via video)

On: 21 October 2022

Before: Employment Judge Danvers

Representation

Claimant: Mr Menezes (lay representative)

Respondent: Mrs McCulloch (lay representative)

JUDGMENT having been sent to the parties on **25 October 2022** and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

1. The Claimant seeks to pursue claims for unpaid wages and holiday pay.
2. At the start of the hearing the Claimant clarified that the final payment of wages in relation to which he says he was underpaid, was paid on 11 June 2021. It was agreed by the parties that the Claimant's last day of employment was 6 June 2021.
3. It is not in dispute that the Claimant commenced the Early Conciliation process with ACAS on 12 November 2021 (Day A). The Early Conciliation Certificate was issued on 23 December 2021 (Day B). The period from the day after Day A until Day B was 41 days.
4. The claim form was initially presented on 5 January 2022, but it was defective as it did not have an Acas number on it or the name of the Respondent. This was then rectified by the Claimant and by order of EJ Midgley on 9 March 2022, the claim was to be treated as presented 19 February 2022.
5. Accordingly, the claim was presented some eight months after the end of employment and the final deduction from wages in respect of which the Claimant complained. Even allowing for the 41 'stop the clock' days while

conciliation was taking place, the claim appeared to have been presented more than three months after the final deduction / end of employment.

6. It therefore fell to me to consider, as a preliminary issue, if the claim had been brought in time. As the Tribunal only has jurisdiction to hear a complaint that has been brought in time under the relevant statutory provisions, this is a matter that I had to consider notwithstanding that neither of the parties had raised the issue.

The Law

Statutory provisions

7. Pursuant to s.23 Employment Rights Act 1996 ('ERA 1996'):

(1) A worker may present a complaint to an employment tribunal —

(a) that his employer has made a deduction from his wages in contravention of section 13 (including a deduction made in contravention of that section as it applies by virtue of section 18(2))...

...(2) 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) in the case of a complaint relating to a payment received by the employer, the date when the payment was received.

(3) Where a complaint is brought under this section in respect of—

(a) a series of deductions or payments, or

(b) a number of payments falling within subsection (1)(d) and made in pursuance of demands for payment subject to the same limit under section 21(1) but received by the employer on different dates,

the references in subsection (2) to the deduction or payment are to the last deduction or payment in the series or to the last of the payments so received.

(3A) Section 207B (extension of time limits to facilitate conciliation before institution of proceedings) applies for the purposes of subsection (2).

(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.

...

8. Pursuant to the Employment Tribunals Extension of Jurisdiction (E&W Order) 1994 / 1623, an employee can pursue a claim of breach of contract in the employment tribunal. However, Article 7 provides that:

...an employment tribunal shall not entertain a complaint in respect of an employee's contract claim unless it is presented-

(a) within the period of three months beginning with the effective date of termination of the contract giving rise to the claim, or

(b) where there is no effective date of termination, within the period of three months beginning with the last day upon which the employee worked in the employment which has terminated, or

...

(c) where the tribunal is satisfied that it was not reasonably practicable for the complaint to be presented within whichever of those periods is applicable, within such further period as the tribunal considers reasonable.

9. In respect of a claim for holiday pay under the Working Time Regulations 1998, a worker may also present a complaint to an employment tribunal. Pursuant to Regulation 30:

(2) Subject to regulation 30B, an employment tribunal shall not consider a complaint under this regulation unless it is presented-

(a) before the end of the period of three months (or, in a case to which regulation 38(2) applies, six months) beginning with the date on which it is alleged that the exercise of the right should have been permitted (or in the case of a rest period or leave extending over more than one day, the date on which it should have been permitted to begin) or, as the case may be, the payment should have been made;

(b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three or, as the case may be, six months.

10. Regulation 30B and s.207B ERA 1996 provide that in working out when a time limit set by a relevant provision expires, the period beginning with the day after Day A (when Acas was notified of a claim) and ending with Day B (the day that the claimant received their Acas certificate) is not to be counted. Further, if a time limit set by a relevant provision would (if not extended) expire during the period beginning with Day A and ending one month after Day B, the time limit expires instead at the end of that period.

Case law

11. The Court of Appeal in *Palmer v Southend-on-Sea Borough Council* [1984] ICR 372 at paragraph 34 held that to construe the words 'reasonably practicable' as the equivalent of 'reasonable' would be to take a view too favourable to the employee; but to limit their construction to that which is reasonably capable, physically, of being done would be too restrictive. The best approach is to read 'practicable' as the equivalent of 'feasible' and to ask: 'was it reasonably feasible to present the complaint to the Industrial Tribunal within the relevant three months?'

12. In *Walls Meat Co Ltd v Khan* [1979] ICR 52 at p.56, Denning LJ held that the following general test should be applied in determining the question of reasonable practicability:

‘Had the man just cause or excuse for not presenting his complaint within the prescribed time limit? Ignorance of his rights – or ignorance of the time limit – is not just cause or excuse, unless it appears that he or his advisers could not reasonably have been expected to have been aware of them. If he or his advisers could reasonably have been so expected, it was his or their fault, and he must take the consequences.’

13. In the same case (at p.61), Brandon LJ drew a distinction between a Claimant who is ignorant of the right to claim, and a Claimant who knows of the right to claim but is ignorant of the time limit:

‘While I do not, as I have said, see any difference in principle in the effect of reasonable ignorance as between the three cases to which I have referred, I do see a great deal of difference in practice in the ease or difficulty with which a finding that the relevant ignorance is reasonable may be made. Thus, where a person is reasonably ignorant of the existence of the right at all, he can hardly be found to have been acting unreasonably in not making inquiries as to how, and within what period, he should exercise it. By contrast, if he does know of the existence of the right, it may in many cases at least, though not necessarily all, be difficult for him to satisfy an industrial Tribunal that he behaved reasonably in not making such enquiries.’

14. Per Scarman LJ in *Dedman v British Building and Engineering Appliances Ltd* [1974] ICR 53 at p.64, where a claimant is ignorant of his rights, the tribunal must ask further questions: ‘What were his opportunities for finding out that he had rights? Did he take them? If not, why not? Was he misled or deceived?’
15. In *Palmer* the Court of Appeal also approved the position that the existence of a pending internal process does not in and of itself justify a finding it was not reasonably practicable to present a claim in time.
16. In considering whether a claim was presented in such further time as was ‘reasonable’, the tribunal does not need to be satisfied that the claim was presented as soon as ‘reasonably practicable’. Such further time as was ‘reasonable’ is a less stringent hurdle and is a matter of fact for the Tribunal *University Hospitals Bristol NHS Foundation Trust v Williams EAT 0291/12*.

Findings of fact

17. I accept the following evidence given by the Claimant:
- (a) The Claimant had formed the view that he had been underpaid in June 2021.
 - (b) He was not aware of his right to bring a complaint about his underpayment until November 2021, when he went to see the

Citizens Advice Bureau ('CAB'). He notified ACAS of a claim on the same day.

- (c) The Claimant found the CAB via the internet.
- (d) He raised concerns about the underpayment of wages with the Respondent for the first time in September 2021 and the Respondent gave him different reasons for the underpayment.
- (e) Between receiving the Acas certificate on 23 December 2021 and submitting his claim on 5 January 2022 the Claimant was busy working night shifts.
- (f) The Claimant had assistance submitting his claim form and the mistakes on his claim form, which led to it being rejected, were accidents.

Conclusions

- 18. For the purposes of considering time limits at this stage, I have focussed on the date of the final alleged deduction / end of employment (11 June 2022 / 6 June 2022).¹
- 19. It is not in dispute that the Claimant did not present his claim within a period of three months beginning with the effective date of termination / final deduction. This is the case even taking account of the provisions extending time in respect of Acas conciliation.
- 20. I therefore have to consider:
 - (a) if it was reasonably practicable for the Claimant to have brought his claim within three months of the final alleged deduction / end of employment; and,
 - (b) if it was not reasonably practicable, whether he brought his claim within such further period as was reasonable.
- 21. I have concluded that it was reasonably practicable for the Claimant to have brought his claim in time for the following reasons.
- 22. On the Claimant's own account he started being underpaid from the start of his employment and as of the end of his employment in June 2021 he knew he had been underpaid.

¹ Had I found that the final alleged deduction was in time, for the purposes of any earlier unlawful deductions claims I would then have had to consider whether the earlier deductions formed part of a series of deductions / were in time.

23. The Claimant used the internet in November 2021 to find the CAB and visit them. During that visit he was made aware of his rights and he thereafter notified ACAS of a claim.
24. The Claimant gave no reason why he could not have taken this step between June and October 2021 save that he had complained to the Respondent. However, the existence of internal proceedings does not render it not reasonably practicable to bring a claim (*Palmer*).
25. In any event, here the Claimant did not start those discussions until September 2021 and they do not explain his failure to take action between June 2021 and September 2021. The Claimant mentioned he went to Goa, but this was not during the relevant period.
26. Accordingly, the Claimant had opportunities to find out he had rights to make a complaint, namely by using the internet to conduct research or, as he did in the end, find a source of advice such as the CAB. However, he failed to take advantage of that opportunity until November 2021 and there does not appear to be a good reason for that failure. There is no suggestion that the Respondent misled him in respect of his rights, the Claimant simply did not take steps available to him to investigate those rights.
27. Further, even if I had found that it was not reasonably practicable for the Claimant to submit his claim in time, I would have found he did not bring his claim within such further period as reasonable. The Claimant acted promptly in notifying Acas of a claim once he became aware of his rights and I do not consider the delay between receiving the Acas certificate and submitting his claim was unreasonable given the Christmas period and that the Claimant was working nights. However, further delay was caused by the Claimant failing to fill out the claim correctly despite receiving help. In particular, he failed to fill out the ACAS certificate number and the Respondent's name and details. I do not find this failure, which caused further delay, to have been reasonable.
28. Accordingly, I find that the Claimant's claims were not brought in time and the tribunal does not have jurisdiction to consider them.

Employment Judge Danvers
21 November 2022

REASONS SENT TO THE PARTIES ON
28 November 2022 By Mr J McCormick

FOR THE TRIBUNAL OFFICE