

Case Number: 2301796/2021



EMPLOYMENT TRIBUNALS

Claimant: Mr Marcelo Narcisco Felicio

Respondent: Hotrocks Food & Drink Limited

Heard at: London South Employment Tribunal (in person) On: 26 October 2022

Before: Employment Judge Chapman KC (sitting alone)

Representation

Claimant: In person without legal representation

Respondent: Joanna Veimou, Litigation Consultant, Peninsula Services

Interpreter (Portuguese): Lachesis Olegario Braick (present at Court to assist the Claimant)

JUDGMENT

JUDGMENT

1. It is the judgment of the Tribunal that, having regard to the applicable statutory time limits, it does not have jurisdiction to consider the Claimant's claims of: unlawful deduction of wages during a notice period; failure to pay outstanding accrued holiday pay; failure to pay a week in hand and, failure to provide a written statement of employment particulars.

REASONS

Issues

2. At the commencement of this Hearing on 26 October 2022, I had the benefit of discussing with the parties a list of issues which was helpfully produced in the Summary section of a Case Management Order that was made by Employment Judge Corrigan on 7 July 2022. This summary followed an earlier Case Management Order made by Employment Judge Fowell which was in substantially the same form. Both parties had, whether in person or by the Respondent's legal representative, attended (by CVP remote means) these earlier Preliminary Hearings and had been sent the case management directions and the List of Issues provided on these occasions.
3. The issues with which this judgment deals were identified by Employment Judge Corrigan (among other issues) as follows:
 1. Time limits
 - (1) Given the date the Claim Form was presented and the dates of early conciliation, the deadline for submitting the claims was 16 April 2021;
 - (2) The Tribunal will consider whether or not it can nevertheless consider the complaints, the issues are: (i) was it reasonably practicable for the claims to be made to the Tribunal within the time limit? (ii) if it was not reasonably practicable for the claim to be made to the Tribunal within the time limit, was it made within a reasonable period?
 - (3) As recorded at the last hearing [EJ Corrigan means here the Hearing before EJ Fowell on 18 January 2022], the Claimant submitted the claim by email (the wrong method) and when he realised the mistake he submitted it again.
4. EJ Corrigan's List of Issues went on to set out the further issues of substance with respect to claims of unauthorised deductions from wages; holiday pay entitlements; and, an alleged failure to provide written employment particulars (which, at the Hearings on 18 January 2022 and 7 July 2022 the Claimant confirmed were the only claims that he wishes to pursue in these proceedings).
5. On 21 October 2022, and by email sent to the Tribunal and copied to the Claimant, the Respondent applied to strike out the Claimant's claim on two grounds: first, on

the ground that the Tribunal lacked jurisdiction because the ET1 was presented out of time (an Application which, as I have indicated, follows the preliminary issue on EJ Corrigan's List); and, second, on the ground that the Claimant had failed to comply with a Case Management Order for provision of a witness statement (from him) by 21 July 2022 (as *per* EJ Corrigan's July 2022 Order). In this regard, the Respondent argued that rule 37(1), sub-paragraphs (c), (d) and (e) of the Employment Tribunals Rules of Procedure were all engaged and justified striking out the claim without more.

6. I indicated at the commencement of this Hearing that I wished first to hear from the parties on the jurisdictional (time-limit) issue and on the Respondent's strike out application pursuant to rule 37. I indicated that we would then take stock and I would provide a judgment on these preliminary matters before deciding whether and, if so, how to proceed on the substantive matters relating to these claims.
7. I have heard evidence and submissions from the parties which deals with these preliminary issues. I am grateful to the parties and to Ms Veimou, the legal representative for the Respondent (who also provided a skeleton argument), for the care and focus that they have brought to the issues before me. I am also grateful to Ms Braick, Portuguese interpreter, for her considerable assistance in providing simultaneous translation to the Claimant during the course of this Hearing.

Documents and witness evidence for this Hearing

8. A Bundle of documents was produced by the parties in advance of the Hearing. This was indexed and paginated and ran to 103 pages. It contained, among other things (and in this order): the ACAS Early Conciliation Certificates dated 9 February 2021 and 10 February 2021; the ET1 Claim Form; the ET3 Response Form; documentation relating to rule 37 strike out warnings and responses thereto; the record of the Preliminary Hearing on 18 January 2022; and then a number of documents relating to liability (from both parties) and as to remedy (again, from both parties). I have separately been provided with a witness statement each from

Mr Mendonca on behalf of the Claimant and for Mr Soares for the Respondent. I have also recently received an updated Counter-schedule from the Respondent which was copied to the Claimant (and which he confirmed that he had seen).

9. I have not seen any witness statement from the Claimant (a matter about which the Respondent makes complaint in its Application to strike out). During the course of proceedings, the Claimant indicated that – in about July 2022 – he had provided a witness statement to the ET (only) by email. I asked him to locate this witness statement (if possible) during the short adjournment which took place today between 12.50 pm and 2 pm. In the event the Claimant was unable to locate any witness statement for himself and clarified that, at a time of stress and psychological distress, he had not understood what the Employment Tribunal had asked of him in this regard at the Preliminary Hearings on 18 January 2022 and 7 July 2022. There is no witness statement from the Claimant and, accordingly and in this regard, there has been no compliance by him with Orders made by this Tribunal on those two previous occasions.
10. As to oral evidence at the Hearing, it seemed to me appropriate to hear oral evidence on the preliminary matters as to jurisdiction and case management/strike out to which I have referred and, in the circumstances, I have heard sworn evidence from the Claimant and, albeit briefly, from Mr Soares. This was followed by the parties' submissions

Factual background

11. There is an issue between the parties as to the date of commencement of employment and also as to the manner in which the Claimant was paid for his work (for the Respondent) as a Grill Chef. The Claimant's case is that he commenced work for the Respondent on a full-time basis on 27 September 2019, whereas the Respondent's ET3 indicates that the relevant date was 15 November 2019 and Mr Soares' evidence in his witness statement is that employment commenced on 11 November 2019. This second date coincides with the date of a written zero hours contract between the Claimant and the Respondent which appears in the Bundle

of Documents at p. 37 and which apparently contains the signatures of the Claimant and of Mr Soares on the final page (which is p. 48 of the Bundle). The Claimant's evidence is that he has never seen this document before and that the signature which appears on the final page is not his signature.

12. It does appear from the pay slips which are in the Bundle between pp. 81 and 95 that the Claimant was paid on a fortnightly basis by means of BACS. These pay slips run from 11 April 2020 to 23 October 2020. It is, however, common ground between the parties that the Claimant ceased working for the Respondent and had an effective date of termination on 7 December 2020. This date coincides with a letter of resignation from the Claimant which is dated 21 November 2020 and which appears at p. 62 in the Bundle. The Claimant's evidence is that this letter was compiled in English on his behalf by a friend and that his (ie. the Claimant's) signature appears at the foot of this letter. The Claimant states in this letter that he is resigning from his post as Grill Chef with the Respondent and that he provides notice to terminate on 7 December 2020. As I have indicated, the parties accept that this was the effective date of termination and it is also common ground that the claims pursued by the Claimant in these proceedings arise out of events and payments/entitlements allegedly due before this date.
13. In the period after he ceased employment with the Respondent, the Claimant corresponded by text with Raquel, another employee of the Respondent, about payments allegedly due to him: see, English language translations of a text sent on 20 December 2020. In this text, the Claimant intimated legal proceedings in the event that he was not paid what he claimed to be owed.
14. On 29 December 2020, ACAS received an Early Conciliation Notification and issued a certificate in this regard by email on 9 February 2021 (ACAS EC reference R233683/20/04). There is a second ACAS certificate (reference R111553/21/64) which was received on 9 February 2021 and for which a certificate was issued by email on 10 February 2021.
15. The Claimant states that he tried to submit an ET1 by email to the wrong email address in February 2021 (the date he identified in this regard was 18 February 2021): see, documents at pp. 33 and 99 in the Bundle. He was challenged on the

absence of any email or document in this regard (and evidencing this) by the Respondent. In his oral evidence before me the Claimant indicated that stress and a psychological condition for which he was receiving treatment might have played a role in delaying the presentation of the ET1, but I have seen no supportive medical evidence in this regard and the explanations for delay provided by the Claimant do not clearly identify illness or a psychological condition as a reason for delay (by contrast to the use of an incorrect email address).

16. The ET1 was presented on 13 May 2021 and date-stamped received on that date.

Legal framework as necessary to the preliminary issues for determination

(1) Time limits

17. In most cases, Employment Tribunal proceedings must be started within the time limits that are set out in the statutory provisions conferring the right to bring the proceedings. Time limits are relevant to the question whether the Employment Tribunal has jurisdiction to entertain the claim at all.

18. The time limits (for the presentation of a claim) that are of relevance to the present case (and the claims set out in the ET1 and listed in the Case Summary attached to Employment Judge Corrigan's Case Management Order) are as follows:

- a. Unlawful deduction from wages: 3 months from the date of the last deduction pursuant to section 23(2) - (3) of the ERA 1996 which is (by section 23(3A)), subject to section 207B of the ERA 1996;
- b. Holiday pay on termination of employment: 3 months from the date when the payment should have been made pursuant to regulation 30(2) of the Working Time Regulations 1998;
- c. Failure to provide written particulars: 3 months beginning with the date when employment ceased pursuant to section 11(4)(a) of the ERA 1996.

19. These three month time limits are, in common, subject (where they have not been met) to a provision that the relevant claim may be presented "*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 the period” of three months. The burden as to reasonable practicability in this regard falls on the Claimant. I bear in mind that the statutory provision as to extension on reasonable practicability grounds is to be given a liberal interpretation in favour of the Claimant (see, **Dedman v British Buildings** [1974] ICR 53 (CA)) and that reasonable practicability involves practical considerations of fact to be considered by the Tribunal. There is a helpful summary of the legal framework in **Lowri Beck Services Ltd v Brophy** [2019] EWCA Civ 2490. I bear in mind that ignorance of legal rights may provide a ground for the reasonable practicability extension provided that the ignorance of such rights was itself reasonable (see, for example, **Walls Meat v Khan** [1979] IRLR 52 (CA)) and that illness or psychological distress – when sufficiently evidenced – may also provide a basis for an extension of time as long as such illness etc. provides a basis on which it may be concluded that it was not reasonably practicable to present the claim in time.

20. It is common ground in this case (and appears to have been confirmed at previous Preliminary Hearings) that, in the event that the relevant three month time limit has not been met, there are no remaining claims over which the Tribunal will have jurisdiction.
21. As to section 207B this relevantly provides that where, as here, the early conciliation rules apply and the Claimant has complied with the requirement to notify ACAS of his intention to bring claim before an Employment Tribunal, the usual time limit is suspended during the conciliation period (that is, from the date on which ACAS receives the Claimant’s notification until the day that the Claimant receives or is deemed to receive the early conciliation certificate).
22. The ET1 Claim Form in the present case was, as I have indicated, presented on 13 May 2021. The relevance of section 207B of the ERA 1996 in the present case is that if the effective date of termination was 7 December 2020 (and all relevant deductions and entitlements were due on or before that date), then the 3 month time limit would, at the latest, be 6 March 2021 (ie. 3 months less one day). ACAS early conciliation commenced (to take the earlier certificate) on 29 December 2020 and the certificate was issued by email on 9 February 2021. This means that time

was suspended for a further 41 days after the 6 March 2021 deadline: accordingly, proceedings (as extended) should have been commenced by filing of an ET1 by 16 April 2021 (the date identified by EJ Corrigan in her Case Management Order of 7 July 2022). In fact, and as I have indicated, the ET1 was not presented until 13 May 2021.

Conclusions

23. It follows from the chronology and the discussion above that I conclude that these claims were presented out of time.
24. As to reasonable practicability, the Claimant bears the burden with respect to this issue. I do not accept that he has discharged this burden:
 - a. It is perfectly clear that the Claimant was aware of his potential right to bring this claim as early as 20 December 2020 when the email at p. 75 (intimating a legal action) was sent;
 - b. Moreover, the Claimant was also able to liaise with ACAS and to participate in the early conciliation procedure in late December 2020 and through to early February 2021;
 - c. While the Claimant does have limited facility in English (and required the assistance of a Portuguese interpreter today), he has been able to elicit the assistance of friends and colleagues for the purposes of correspondence and his factual evidence that he initially sent the ET1 to the wrong email address (but did not then follow this up with the Tribunal before filing an ET1 on 13 May 2021) does not seem to me sufficient to discharge the burden of establishing that it was not reasonably practicable to present the claims in time;
 - d. The Claimant's references in his oral evidence today to a psychological condition does not seem to me directed to whether this condition was such (absent any supportive medical evidence) that it was not reasonably practicable for him to present the claim in time and, as I have indicated, the Claimant was clearly able to intimate legal proceedings and to engage with ACAS during this

- time (I would add that the Claimant's document at p. 99 does not refer to the psychological condition as a reason for the delay).
25. In the circumstances, and given my conclusion as to reasonable practicability, it is not necessary for me to consider whether the Claimant presented the ET1 during a further "*reasonable period*".
26. As to the Respondent's Application to strike out under rule 37, I regard this as a draconian Order which ought to be deployed only where a fair hearing becomes (effectively) impossible as a result of the non-compliance with an Order of the Tribunal. The absence of any witness statement from the Claimant is a serious matter and the fact that he attended two preliminary hearings with the assistance of an interpreter at which he was specifically directed to provide (for himself) a witness statement may be regarded as a most significant omission and failure to comply with case management directions. However, if it had been necessary for me to do so, I would have considered that the case materials and other documents which are available to both parties would have enabled this hearing safely to proceed, allowing the Respondent such time as it needed (at the conclusion of the Claimant's oral evidence) to respond to the same.
27. This concludes the judgment of the Tribunal.

Employment Judge Chapman KC

Dated: 26 October 2022

Note

Written reasons will not be provided unless a written request is presented by either party within 14 days of the sending of this written record of the decision.

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