



EMPLOYMENT TRIBUNALS

Claimant: Miss Hayley Walker

Respondent: Casa Care Limited T/A Care Watch South Warwickshire

PRELIMINARY HEARING

Heard at: Midlands West Employment Tribunal (via CVP)

On: 16th September 2022

Before: Employment Judge Steward (sitting alone)

Appearances

For the claimant: In Person with the assistance of Mr Overton

For the respondent: Mr Evans (Counsel)

JUDGMENT

1. The claim of the claimant, Ms Walker, was presented outside of the time limits in sections 48(3) and 111(2) of the Employment Rights Act 1996 and therefore fails and is dismissed.

WRITTEN REASONS

2. Ms Walker worked as a live in carer, on a one to one basis, providing specialist end of life care to vulnerable individuals over a 24 hour period. She commenced the employment on the 18.8.2014 and the employment came to an end on the 20.4.2018. These dates were not disputed by the respondents. Any claim should have been presented within 3 months of the last purported deduction in the series as prescribed by the ERA 1996 S.23(2) and (3).
3. The original judgment was promulgated by mistake. It was a judgment that incorporated some written reasons. In the circumstances I am acceding to the request that I reconsider that judgment on my own initiative providing full written reasons in accordance with Rule 62.
4. The claimant brought one complaint in her claim form presented to the tribunal on the 12.11.2019 following an ACAS early conciliation period from the 3.11.19 to the 8.11.19. The claim referred to in the claimants ET1 was 'underpayment of the

national minimum wage'. This clearly is and was confirmed to be a reference to unlawful deductions from wages.

5. In this part of the hearing, I am dealing as a preliminary issue with time limits in relation to Ms Walkers case.

6. In accordance with ERA sections 48 and 111, Ms Walker must persuade me that it was not reasonably practicable for her to present her claim within the primary time limit of 3 months plus early conciliation extension. If she persuades me of that, then I have to consider whether the claim form was presented within a further reasonable period.

7. In the Claimant's claim form the following is stated

7.1 "When leaving the this employer, Miss Walker contacted ACAS (May2018) as **she was fully aware of the 3 month time limit**. As it was concerning national minimum wage she was informed HMRC would be appropriate to carry out enforcement"

7.2 "*this case has been ongoing for 16 months to present. During this time, HMRC have; failed to correspond (any contact has been on behalf of Miss Walker), failed to appoint Miss Walker a case worker, failed to investigate, failed to inform Miss Walker they had terminated the case on 3 separate occasions leaving Miss Walker to believe her case was still in the process of investigation and ongoing*"

7.3 "*over all the unjustifiable delays and failure to investigate by HMRC has resulted in Miss Walker being out of time for a tribunal*"

8. In the claimant witness statement prepared for the Preliminary Hearing, the Claimant states the following:

8.1 "*presenting my case at this stage, I recognize, it is out of the three month time scale*"

- 8.2 *“prior to filing my complaint concerning underpayments of national minimum wage, my understanding of raising an employment tribunal claim was that it should be treated as a last resort in the event an alternative dispute resolution cannot be achieved, and that I would have three months to complete this subject to my last pay reference period”*
- 8.3 *“my last pay reference period with Casa Care Ltd was 18 May 2018 and being conscious of time limit, I contacted ACAS, who confirmed my understanding of an Employment Tribunal was correct”*
9. Ms Walker gave evidence in the hearing and was cross examined. Her evidence did not depart from the fact that she was aware of the time limits and had no medical or technical reasons why she had not presented her claim within the time limits. The claim was presented 19 months after her last pay day. It was significantly out of time.
10. In considering whether it was not reasonably practicable for Ms Walker to present her claim on time:
- 10.1 it is a question of fact;
- 10.2 *“to construe the words “reasonably practicable” as the equivalent of “reasonable” is to take a view that is too favourable to the employee. On the other hand, “reasonably practicable” means more than merely what is reasonably capable physically of being done ... [one should] ask colloquially and untrammelled by too much legal logic – “was it reasonably feasible to present the complaint to the [employment] tribunal within the relevant three months?”...” Palmer and Saunders v Southend-on-Sea Borough Council [1984] 1 All ER 945;*
- 10.3 I must answer the question *“against the background of the surrounding circumstances and the aim to be achieved”* – Schultz v Esso Petroleum Ltd [1999] 3 All ER 338 – and take into account all relevant circumstances, which may include: the manner of, and reason for, the dismissal; whether the employer’s conciliation machinery had been used; the substantial cause of the claimant’s failure to comply with the time limit; whether there was any physical impediment preventing compliance, such as illness, or a postal strike; whether, and if so when, the claimant knew of her rights; whether the employer had misrepresented any relevant matter to the employee; whether the claimant had been advised by anyone, and the nature of any advice given; and whether there was any substantial fault on the part of the claimant

or her adviser which led to the failure to present the complaint in time (see Palmer and Saunders);

- 10.4 if the claimant is ignorant of her rights and/or of the relevant time limits, this is a relevant consideration but is far from conclusive. In the present case, Ms Walker was not ignorant of time limits, but was, attempting to deal with the claim by way of conciliation. The claimant sought to resolve matters via a voluntary form of alternative dispute resolution the HMCR Social Care Compliance Scheme. When that ceased on the 31.3.19 and she was told that HMCR would investigate her minimum wage act complaint. She states she was only definitively told the HMRC closed her case on the 31.10.19 and she went to ACAS 3 days later. *“The performance of an act, in this case the presentation of a complaint, is not reasonably practicable if there is some impediment which reasonably prevents, or interferes with, or inhibits, such performance. The impediment may be physical, for instance the illness of the complainant or a postal strike; or the impediment may be mental, namely, the state of mind of the complainant in the form of ignorance of, or mistaken belief with regard to, essential matters. Such states of mind can, however, only be regarded as impediments making it not reasonably practicable to present a complaint within the period of three months, if the ignorance on the one hand, or the mistaken belief on the other, is itself reasonable. Either state of mind will, further, not be reasonable if it arises from the fault of the complainant in not making such inquiries as he should reasonably in all the circumstances have made, or from the fault of his solicitors or other professional advisers in not giving him such information as they should reasonably in all the circumstances have given him.”* Wall’s Meat Co Ltd v Khan [1979] ICR 52, CA.
11. This is a claim which is significantly out of time. The first question for me is: why was the claim form not submitted in time? Ms Walker decided to attempt to go down the conciliation/arbitration route as aforementioned. When she was questioned, she accepted that she knew of the time limits. She was not physically incapacitated and had access to legal advice and the internet. It is clear that when leaving the employment, she contacted ACAS (May 2018) within the requisite time frame to bring the claim. She was aware of the time limits and its highly likely that when she contacted ACAS and decided to adopt the alternative dispute resolution with HMRC she would have been told about the time limits by ACAS. There is a definite dismissal date: 20.4.2018. There is a 3 month time limit starting from then, which expired on 20.7.2018 . The early conciliation period ended after 20.7.2018. The claimant therefore had a month and a day from the end of the early conciliation period within which to present her claim. I am quite sure that ACAS would have told the claimant that. Even if ACAS got it wrong, it is highly unlikely they would have got it wrong by more than a day here or there.
12. On any view, there was no reason or reasonably practicable reason why the claim could not have been presented within the correct time limit. The burden of proof is on the claimant to satisfy me that it was not reasonably practicable to present the claim on time. There was no real explanation of why it was not presented on time. The suggestion that HMRC were dealing with the claim is not in my view a sufficient reason. The claimant knew about the time limits and was aware of them when she contacted ACAS in May 2018. She is computer literate and was fully

aware of the rules. There was no medical reason why she could not submit the claim on time. The claim is a relatively straightforward one- and the-time limits are easy to follow. Though I have every sympathy for the way that Ms Walker went about things the time limits are clear. she has, I am afraid, not begun to satisfy me that it was not reasonably practicable for the claim to be presented within the primary time limits.

13. I'm afraid this claim does not cross the first hurdle as it was reasonably practicable for her to submit the claim on time.
14. S.111 (2)(b) ERA 1996 states that "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 3 months". The claim was presented 19 months after the last pay day. The claimant chose to pursue the claim via HMRC but was able at any time over that 19 month period to present the claim to the employment tribunal but she chose not to. The 3 month period came to an end on the 20.7.18. The claim was presented almost 15 months later. There was no good reason presented to the tribunal by the claimant to explain why there was such a long delay. The claimant decided to pursue the claim via the HMRC. She was fully aware of the time limits and the duty to present the claim within 3 months. If it had not been reasonably practicable to present the claim within 3 months, and in my view it was reasonably practicable, then the period of a further 15 months to present the claim was a period which was not reasonable.
15. In all the circumstances, I am not satisfied that it was not reasonably practicable for the claim to be presented on time; nor, if it was not reasonably practicable for it to be presented on time, that the claim form was presented within a further reasonable period. The claim therefore fails because of time limits and I dismiss it.

EJ Steward on

16th September 2022 (and
reconsidered on the 22nd January 2023)