Case Number: 3308912/ 2022

EMPLOYMENT TRIBUNALS

Claimant: Mrs K Simmons

Respondent: RJ Simmons Agricultural Services Ltd

Heard via CVP On: Tuesday 14th February 2023

Before: Employment Judge A Frazer

Representation:
Claimant: In person

Respondent: Mr D Bheeman (Counsel)

JUDGMENT AND REASONS

JUDGMENT

1. The Claimant's claim for unlawful deductions from wages is dismissed because it was presented outside of the three months' time limit and it was found to have been reasonably practicable for the Claimant to have presented it on time.

2. The Claimant's claims for disability discrimination (direct discrimination and a failure to make reasonable adjustments) do stand dismissed because they were presented outside of the three months' time limit and it was not just and equitable to extend time for presentation.

REASONS

Unlawful Deductions from Wages

1. Under s.23 (2) 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.

2. In this case s.23(2)(a) applies. Under s.23(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.

3. There are two aspects to the test of reasonable practicability. The Claimant has to satisfy the tribunal first of all that it was not reasonably practicable to present the claim within the three months' time limit. If he or she manages to do that the Tribunal must then go on to consider whether the claim was presented 'within such further period as the tribunal considers reasonable'.
   Findings

4. The Claimant brings claims for unlawful deductions from wages in relation to bonus payments and deductions from her salary. At the start of the hearing, it was established that the Claimant says that the time that she ought to have been paid a bonus and wasn't, was at the end of 2013. The last time that she says that she ought to have been paid the deductions from her salary payments was 5th April 2014. That is borne out by the spreadsheet the Claimant provided to the tribunal which dates the last in the series of deductions as being on 5th April 2014. For April 2015 and 2016 (i.e. before the Claimant was dismissed) in the right hand column is recorded a '0'. Therefore if the claim is presented as a series of deductions under s.23(3)(a) with some argument that the bonuses may have formed part of the deductions viz the salary payments, limitation would expire on 4th July 2014.

5. The claim was presented to ACAS on 14th June 2022 and the claim form itself was presented on 28th June 2022. Therefore, the claims are almost 6 years out of time. The Claimant did not pursue her complaints for the salary payments while in employment but did raise two grievances and had recourse to solicitors. The Claimant cannot remember what the extent of the

instruction of solicitors was, but it was likely to have been for the purposes of the disciplinary proceedings in 2016. The Claimant wanted to reach an amicable solution with the Respondent. There was clearly a dispute between the parties which commenced with a grievance from the Claimant in July 2016 following which disciplinary proceedings ensued. That was however some time after the payments were due and after limitation had expired.

6. Was it reasonably practicable for the Claimant to have presented a claim for unpaid wages in or around 2014? The Claimant says that she tried to suggest resolution of this issue in 2014 by suggesting to the Respondent that she be paid in shares at that point in time. That did not resolve the situation. It was put to the Claimant why did she not resolve it then and she said that she 'glazed over it'. The Claimant has said that she has suffered from impairment to her mental health. The evidence is that her mental health was affected post dismissal as this is recorded in her medical notes at the time in the entry on 11th October 2016. The problem is classified as 'neurotic depression reactive type'.

7. When looking at the timescale in terms of time expiring in July 2014 however, the time limits are strict. Reasonable practicability means reasonable feasibility. The Clamant wrote two detailed and articulate letters one on 26th July 2016 and one on 28th July 2016. Both covered a number of issues relating to her employment and financial matters between herself and Mr Simmons. Even if she had been suffering from some level of incapacity between 2014 and 2016 – and I didn't really have any evidence of that: most of the evidence of incapacity was post termination - I find that certainly her conduct in writing the grievance letters in 2016 displayed an ability to complain about matters and a willingness to do so. Notwithstanding this, there was no real evidence of it not being reasonably practicable in 2014 and I find that it would have been reasonably practicable for her to put a claim in by July 2014.

8. However if I were wrong on that point, on the evidence that I heard it would certainly have in any event been reasonable for her to present a claim by 28th July 2016 as she was able to raise two grievances. Around this time and leading up to the disciplinary she had engaged solicitors. She said that she may have been advised about time limits at that point but was not taking it in. I appreciate that she may have been distressed by events unfolding at this time but there is nothing before me to suggest that it would not have been open or possible for her to have presented a claim to the tribunal for her deductions

from wages. She would have known that this issue was still something that needed to be resolved. Instead it was not until 2021 when she was sorting through some documents that she realised that the monies were still owing. She stated that up until that point her mental health has been impaired to such a great extent that she was unable to focus on this alongside everything else. The letter dated 10th November 2021 and states:

> 'When having to provide evidence the recent court hearing on 21 October to extend maintenance I have become aware I have not received the net salary that I received from 1 November 2006.'

9. The Claimant then refers to a schedule compiled on 22 July 2021. The Claimant stated 'to avoid incurring further legal costs I am therefore seeking payment of this unpaid net income of £43, 704.35 within the next 14 calendar days from the date of this letter (24 November 2021)''. The wording suggests that the Claimant only became aware of the existence of the deductions then, but her evidence was that she was aware of them at the time as she had suggested that the debt be resolved by way of the payment of shares. It was her evidence that she only recollected this matter then which is why she wrote the letter.

10. The Claimant did not contact ACAS or make enquiries until the following June. Given the wording of the letter it would have been reasonable for her to present a claim by November 2021. That evidence showed that at that point if she were able to write a letter of that nature, she would have been able to contact the CAB or ACAS or look on the internet. Given my findings that it would have been reasonably practicable for her to have presented claim by 2014 if I were wrong on that and wrong on it being reasonable for her to submit her claim by July 2016 it certainly would have been reasonable to do so by the November of 2021.

11. My primary finding is that it was reasonably practicable for the Claimant to have presented within the three months' time limit and by July 2014. In the alternative, the evidence has shown that there have been pockets of time when it was reasonable for the Claimant to have presented her claim. Indeed, the longer the time during which It is said by a claimant to be not reasonably practicable the less likely it is that the claimant will pass the threshold, which is a strict one.

Disability Discrimination

12. Under s.123 (1) Equality Act 2010 proceedings on a complaint within section 120 may not be brought after the end of—(a)the period of 3 months starting with the date of the act to which the complaint relates, or (b)such other period as the employment tribunal thinks just and equitable.

13. In Robertson v Bexley Community Centre [2003] IRLR 434 the following guidance was given inter alia:

(i) time limits are exercised strictly in Tribunal cases, in the interests of promoting finality and disposing of cases effectively and in accordance with the overriding objective;
(ii) there is no presumption that a discretion will be exercised in the requesting party's favour;
(iii) the onus is on the party seeking an extension of time to persuade a Tribunal to do so. That is the case because an extension of time is an indulgence. It is the exception and not the rule. It is not an entitlement nor even an expectation.

14. In British Coal Corporation v Keeble [1997] IRLR 336 EAT it was held that having regard to s.33 of the Limitation Act 1980 a court may have regard to the prejudice each party would suffer, the length and reasons for the delay, the cogency to which evidence would be affected, the extent to which the party sued co-operated with any requests for information, the promptness with which the Claimant acted once she knew of the facts giving rise to the cause of action and the steps taken by the Clamant to obtain appropriate advice once she knew of the possibility of taking action. In Department of Constitutional Affairs v Jones [2008] IRLR the Court of Appeal emphasised that these factors are a valuable reminder of what may be taken into account, but their relevance depends on the facts in each individual case and so tribunals do not need to consider the factors in each and every case.

15. The Claimant brings claims for failure to make reasonable adjustments and direct disability discrimination. The failure to allow her time for medical appointments was a matter of which she was aware when she wrote her grievances in July 2016 as they are mentioned in them. The Claimant was dismissed on 19th August 2016 so time would have expired on 18th November 2016. The Claimant has provided some medical evidence. I do not underestimate that this has been a particularly distressing time for the Claimant and that she has been profoundly

affected. She was employed for a very long time and sadly this situation has resulted in a lack of communication between herself and her sons. I have taken this into account. I have also taken into account the numerous health problems that the Claimant has suffered as borne out by her medical records and no doubt she has been focused on each scenario as it has unfolded. As she has said she has needed to focus on one thing at a time.

16. However I am concerned about the length of the delay in this case and that it would affect the ability to have a fair hearing. The Claimant herself has said that she has difficulty remembering matters from that time. My concern is that a delay of this length would in fact affect the recall of all witnesses involved in giving evidence. By the time that this case is listed for trial it is likely to be some 8 or even 9 years after events occurred.

17. I also find that since the Claimant knew post-dismissal of the issues around medical appointments at the very least, a period of nearly 6 years to seek advice is unreasonable. That is the case even considering the issues that she has endured to her health. The onus is on parties to act promptly once they know that they have a claim.

18. I was shown a settlement agreement that was entered into in May 2017 which purported to limit her ability to bring an ET claim (the agreement did not come with an independent advisor certificate). She stated herself that she did not believe that this was right or valid, but she did not seek advice of any kind. The Claimant was aware of the existence of solicitors and the CAB. She had had dealings with solicitors. There was an onus on her to make some reasonable enquiry as soon as possible and in any event even ask for assistance to help her access advice or make a claim. I appreciate that she was impaired by her mental health, but the time limits are strict and to ask for them to be extended is asking the court for an indulgence. I have some evidence that her health picked up to the extent that she was looking for work in 2019 and would therefore have had the capacity then to make some enquiry about advice then if she had not done this before. Even then presenting so long after the expiry of time limits is wholly unlikely to be just and equitable. The real concern is that this is so significantly out of time that it would be impossible to have a fair trial because the trial would likely be taking place some 9 years later by the time the case is managed and listed for trial. That is simply not equitable because of the affect it would have on the parties' recollections of events and the ability to have a fair hearing.

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Employment Judge A Frazer

17 February 2023.

JUDGMENT REASONS SENT TO THE PARTIES ON
13 April 2023
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FOR THE SECRETARY TO EMPLOYMENT TRIBUNALS