



EMPLOYMENT TRIBUNALS

Claimant: Ms J Woodley

Respondent: Boots Opticians Professional Services Ltd

Heard at: East London Hearing Centre

On: 9 March 2023

Before: Employment Judge Ross

Representation

Claimant: Did not appear and was not represented

Respondent: Ms Moss (Counsel)

JUDGMENT

1. The Claim is dismissed.

REASONS

1 By a Claim presented on the 20 August 2022, the Claimant brought complaints for unlawful deduction from wages and breach of contract in respect of notice pay. By its response, the Respondent defended the claim and alleged that the Tribunal did not have jurisdiction to hear the Claim on the ground that the complaints were time barred.

2 Employment Judge Gilbert directed that there should be a public Preliminary Hearing to determine the issues set out in the notice of preliminary hearing (which was at page 30-31 of the Bundle prepared for this hearing).

3 On the ET1 claim form, the Claimant's representative is stated to be Rita Monaghan.

4 On the 8 March 2023, Ms Monaghan sent in written representations to the Tribunal. In addition, Ms Monaghan emailed the Tribunal 14:06 on the 8 March 2023. I do not need to repeat that email correspondence, but suffice to say it was treated as an application to postpone on the grounds of the medical treatment that Ms Monaghan was due to undergo on the 8 March 2023. The email continued that if the case proceeded to be heard, the Tribunal should take into account the written representations that she provided.

5 In response to Ms Monaghan's email, by letter dated the 8 March 2023, sent at around 15:57, the Employment Tribunal replied to say that the email from Ms Monaghan had been treated as an application to postpone but that the application to postpone was refused. The letter stated that Ms Woodley could attend in person if Ms Monaghan was indisposed; and that the Tribunal would take into account the Claimant's representations in the letter sent on 8 March 2023 if Ms Monaghan was too unwell to attend the hearing.

6 The Claimant and Ms Monaghan did not attend the Preliminary Hearing. The Respondent was represented by Counsel, Ms Moss. It is important to record that the Claimant did not file a witness statement or any other evidence from either herself or Ms Monaghan in support of her Claim. The Claimant did not file any other evidence in support of her case on the issue of jurisdiction either.

Facts

7 From the pleadings of the parties, the agreed facts are set out in the following chronology and are as follows.

8 From the 24 June 2021 until the 17 March 2022, the Claimant was employed as an optical consultant by the Respondent. The Claimant resigned on the 17 March 2022. The Respondent paid the Claimant's final salary on the 28 March 2022.

9 On the 28 June 2022, the Claimant applied for early conciliation, the period of early conciliation lasted until the 8 August 2022 when an early conciliation certificate was provided.

10 On the 20 August 2022, the Claimant presented her ET1 bringing the complaints of unlawful deduction from wages in respect of 4 alleged deductions and the claim for breach of contract in respect of notice pay, alleging that she had been forced to resign from her post to protect her mental health.

The issues

11 Although the broad issues are set out in the notice of hearing, I considered the issues for determination at this hearing in more detail. They were as follows:

- (1) has the Claimant presented her claim to the Tribunal before the end of the period of:
 - a) three months starting from the date alleged deduction or, in the case for series of deductions, the date of the last deduction in the series allowing for the ACAS early conciliation process.
 - b) the time limit stated within paragraph 7 of the Employment Tribunals Extension of Jurisdiction (England and Wales) order 1994;
- (2) if not, was it reasonably practicable for the Claimant to have presented the Claim to the Tribunal within those time limits;
- (3) if not, has the Claimant presented her Claim within such further time period as the Tribunal considers reasonable in the circumstances.

12 Having considered the submissions filed by Ms Monaghan, the Claimant admitted that each complaint was presented outside the primary limitation period. This meant that the issues for determination were issues (2) and (3) above. It was also admitted by counsel for the Respondent as an agreed fact that the first two sentences of paragraph 1 of the submissions filed by Ms Monaghan on behalf of the Claimant were agreed. In particular, it was accepted that “guidance was taken from employmenttribunal.gov.uk which states that claims must be submitted within 3 months.”

The law: jurisdiction; time limits

13 The relevant statutory provisions are contained within section 23(2)-(4) Employment Rights Act 1996 and paragraph 7 of the Extension of Jurisdiction Order. I will not repeat those statutory provisions, but they should be taken to be incorporated within this judgment. In respect of the unlawful deduction from wages complaints, on the basis that the alleged last in the series of deductions was made to the Claimant on the 28 March 2022, the primary limitation period runs from that date and expired on the 27 June 2022. In respect of the breach of contract claim, the primary limitation period ran from the effective date of termination being the 17 March 2022 and expired on the 16 June 2022.

14 Turning to the guidance provided by case law, the strictness of the test being considered in this case was emphasised by Peter Gibson LJ in *London Underground v Noel* [1999] IRLR 621 who said the following in respect of the similar words used in section 111(2)(b) of the Employment Rights Act 1996:

“By section 111(2)(b) this period may be extended when the tribunal is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period. The power to disapply the statutory period is therefore very restricted. In particular, it is not available to be exercised for example in all the circumstances nor when it is just and reasonable, nor even when the tribunal considers that there is good reason for doing so.”

15 In *Brodha v Hampshire AHA* [1982] ICR 200 at 204, Browne-Wilkinson J, as he then was, observed “*the statutory test remained one of practicability... the statutory test is not satisfied just because it was reasonable what to do and what could be done.*”

16 The burden is on the Claimant to show that it was not reasonably practicable to present to claim in time. Reasonably practicable does not mean ‘reasonable’ nor ‘physically possible’. It means ‘reasonably feasible’- see *Palmer v Southend-on-Sea Borough Council* [1984] ICR 372. In *Palmer*, May LJ explained that the test was an issue of fact for the Tribunal and gave examples of facts that may be relevant in certain cases: see page 385b2f. This concluded:

“Any list of possible relevant considerations, however, cannot be exhaustive and as we have stressed at the end of the day the matter is one factually industrial tribunal taking all the circumstances of the given case into account.”

17 It has consistently been held not to be reasonably practicable for an employee to present a claim within the primary time limit if he or she was reasonably in ignorance of that time limit: see *Williams Ryan* and in particular the passage from the judgment of Lord Justice Brandon at page 565.

18 In *Dedman v British Building and Engineering Appliances Limited* [1974] 1 AER 520, the Court of Appeal appeared to hold categorically that an applicant could not claim to be in reasonable ignorance of the time limit if he had consulted a skilled adviser even if that adviser had failed to advise him correctly.

19 Various authorities indicate that it is relevant if the advice comes from a third party who is advising unskilled as an ACAS officer or an employee of the employment tribunal or an employee of an employment office, see for example *London International college limited v Sen* [1993] IRLR 333.

Conclusions

20 Applying the above law and the facts to the issues outlined at the beginning of this judgment, I have concluded that the Claimant has failed to show that the Employment Tribunal has jurisdiction to hear these complaints. The Claim must be dismissed.

21 My reasons are as follows:

- 21.1. The Claim fails primarily because there is no evidence to prove either that it was not reasonably practicable to present the Claim in time, nor that if it was not reasonably practicable to present it within the time limit, it was nevertheless presented within a reasonable time thereafter.
- 21.2. Even on the information on the government website referred to by Ms Monaghan in her representations, the breach of contract complaint was presented 11 days out of time. In other words, it is clearly not presented within 3 months nor within 3 months and 1 day. The Claimant was not ignorant on the 3 months' time limit on the information received from the government.uk website.
- 21.3. In respect of the unlawful deduction from wages complaint, there is no evidence that it was not reasonably practicable for the Claimant to present this complaint in time for the following reasons:
 - a. even if the government.uk website did not explain this statutory time limit, or could be seen to explain it in a misleading way, there is no evidence that the Claimant's ignorance of the actual time limit was reasonable;
 - b. there is no evidence of what if any other enquiries were made by the Claimant about what, "within 3 months" meant if that was the wording used on the government.uk web page;
 - c. there is no evidence of the nature of the advice received from Ms Monaghan, nor whether Ms Monaghan is a skilled adviser or a trade union representative or just a friend doing her best;
 - d. from the papers, it appears Ms Monaghan is a friend; but there was no evidence as to whether she made any mistakes or incorrect assumptions.

22 For all the above reasons the claim must be dismissed

Employment Judge Ross
Date: 25 May 2023