EMPLOYMENT TRIBUNALS

Claimant: **Mr M Tuazon**

Respondent: **Barts Health NHS Trust**

Heard at: **East London Hearing Centre (by CVP)**

On: **19 June 2022**

Before: **Employment Judge Feeny**

Representation

Claimant: In person
Respondent: Ms H Cudbill, solicitor

JUDGMENT having been sent to the parties on 23 June 20223 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013.

REASONS

1. The Claimant presented an ET1 on 10 December 2022 claiming compensation for unpaid wages. This hearing was listed on 30 January 2023 to determine the following issues:

> "was the complaint(s) presented outside the prescribed three month time limit (as extended by any relevant ACAS Early Conciliation period) and if so:
>
> (a) should the complaint(s) be dismissed on the basis that the Tribunal has no jurisdiction to hear it?
>
> (b) because of those time limits (and not for any other reason) should the complaint(s) be struck out under rule 37 on the basis that they have no reasonable prospects of success and/or should one or more deposit orders be made under rule 39 on the basis of little reasonable prospect of success?"

2. The Respondent subsequently presented its response to the Tribunal several months late, on 5 June 2023. At the same time, the Respondent applied for a retrospective extension of time for the Tribunal to accept the response. That application was also listed to be dealt with at this hearing.

3. This hearing took place fully remotely by Cloud Video Platform. There were no technical issues and I was satisfied in that respect that both parties were able to participate fully in the hearing. There was, however, an issue with the Claimant's location.

4. The Claimant when presenting his ET1 gave an Australian address for correspondence. At the start of this hearing, therefore, I queried with the Claimant whether he was in Australia or the UK. The Claimant confirmed that he was not in either country and was on holiday in Greece. I then paused the hearing to check the list held by the Taking of Evidence Unit in the Foreign, Commonwealth & Development Office ("FCDO") and, from this, I was able to ascertain that Greece has not yet confirmed its position to the UK Government as to whether or not it will permit evidence to be given abroad in English courts. The Claimant was not therefore able to give evidence at this hearing.

5. I canvassed this issue with the parties and, with their agreement, I have dealt only with the second aspect of the jurisdiction issue listed to be dealt with today, that being the strike out or deposit order application. This is on the basis that I have not had to hear evidence under oath from the Claimant to determine the application. I have been able to limit my consideration to submissions made by both him and Ms Cudbill, solicitor, representing the Respondent.

6. Given that I cannot determine the jurisdiction issue finally today, again as canvassed with the parties at the outset of the hearing, I have not dealt with the Respondent's application to retrospectively extend time to accept the response. As a matter of logic, the Tribunal first needs to determine whether it has jurisdiction to hear the claim before the Respondent is required to provide a substantive response. For the avoidance of doubt, I have permitted Ms Cudbill to represent the Respondent and take part in this hearing under my general discretion in Rule 21.

7. As indicated earlier, this is a claim for unpaid wages and the relevant period is from October 2020 to November 2021. The Claimant's case is that he was promoted to a Band 6 role in October 2020. He was expecting to be paid a full Band 6 salary but it transpired that the salary paid to him by the Respondent was discounted by 25% as a trainee rate for a Band 6 role.

8. As formulated, the claim could be either brought as an unlawful deduction of wages under the Employment Rights Act 1996 ("ERA") or as a breach of contract claim under the Employment Tribunals (Extension of Jurisdiction) Order 1994 ("the 1994 Order"). Either way, the time limit and the test for an extension of time are the same.

9. Section 23(2)-(4) of ERA is as follows:

> (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.

10. I have had in mind the summary of the relevant principles by the Court of Appeal in the case of **Lowry Beck Services v Brophy** 2019 EWCA Civ. 2490:

"12. There has been a good deal of case law about the correct approach to the test of reasonable practicability. The essential points for our purposes can be summarised as follows:

(1) The test should be given "a liberal interpretation in favour of the employee (*Marks and Spencer plc v Williams-Ryan* [2005] EWCA Civ. 470, [2005] ICR 1293 , which reaffirms the older case law going back to *Dedman v British Building & Engineering Appliances Ltd* [1974] ICR 53).

(2) The statutory language is not to be taken as referring only to physical impracticability and for that reason might be paraphrased as whether it was "reasonably feasible" for the claimant to present his or her claim in time: see *Palmer and Saunders v Southend-on-Sea Borough Council* [1984] IRLR 119. […]

(3) If an employee misses the time limit because he or she is ignorant about the existence of a time limit, or mistaken about when it expires in their case, the question is whether that ignorance or mistake is reasonable. If it is, then it will have been reasonably practicable for them to bring the claim in time (see

> *Wall's Meat Co Ltd v Khan* [1979] ICR 52); but it is important to note that in assessing whether ignorance or mistake are reasonable it is necessary to take into account any enquiries which the claimant or their adviser should have made."

11. The relevant dates for the purpose of this application are as follows. The Claimant's employment with the Respondent commenced on 23 September 2019. On 26 October 2020 he was promoted into the Band 6 role. On 11 November 2021 he left the Respondent to join another Trust and (self-evidently) stopped receiving pay for that role. This means that the last day that the Claimant could have presented a claim that would have been in time is 10 February 2022.

12. On 4 August 2022 the Claimant received a notification of overpayment from the Respondent in relation to the number of days which it claimed it had overpaid him for in his final month (November 2021). This set in train further enquiries on the Claimant's part, which I will come back to. The next relevant date is 29 September 2022, which was Day A of the ACAS Early Conciliation period. Day B of ACAS Early Conciliation was 10 November 2022 and the ET1 was presented on 10 December 2022.

13. As indicated at the start of this judgment, I have not heard any evidence from the Claimant, given that he is in Greece. I have heard submissions from him on what evidence he would give at any future hearing, when back in the UK. For the purposes of today's hearing, I have taken his factual case at its highest. This means, for instance, that I have assumed that he was not well served by his Trade Union when seeking legal support and that he was - as he complains – essentially "strung along" by the Respondent in the autumn of 2022 when he raised the issue of the alleged underpayment with it.

14. The Claimant's factual case in outline is as follows. He was offered promotion to the Band 6 role in the autumn of 2020, this was to prevent him leaving to join a different Trust in a Band 6 role. The Claimant will say that he was led to believe that his pay in the new role would be a full Band 6 salary, albeit that was not stated explicitly in the conversations prior to the promotion.

15. The Claimant was not given a new contract when the promotion started but he was copied into a notification of change from HR. On the last page of this form it was documented that his salary would be discounted by 25% as it was a trainee role. There was no further discussion about this reduction, it was not raised by the Claimant at the time nor was it raised by the Respondent, save in the documents already referred to. The Claimant's evidence will be that, as a matter of practical reality, the role that he was carrying out in the period from October 2020 to November 2021 was a senior role, it was not a trainee role.

16. It follows that from October 2020 onwards, the Claimant was receiving his salary at a lesser amount than he expected to be paid. However, he did not query this with anyone at the Respondent prior to August 2022. He left the Respondent in November 2021 as a result of securing a Band 7 role at another Trust.

17. As already indicated, the Claimant's evidence will be that he did not realise until August 2022 that he had been underpaid during the period working in a Band 6 role from October 2020 to November 2021. He says that his enquiries were triggered by a belated

request from the Respondent's Human Resources department for re-payment of salary due to being overpaid for a number of days in his last month. This led the Claimant to check his earlier Band 6 payslips against the Band 7 payslips he had subsequently received with his new employer. Upon doing so, he realised that the difference between them was too great to be explained by the difference in band alone. He also checked the original payslips against the Agenda for Change document, which is publicly available online and which sets out the spinal pay points for various bands within the NHS. These two enquiries led him to realise that he had been under-paid during that initial period.

18. The Claimant had asked his Trade Union for legal support in pursuing his claim, but, despite chasing, he was not put in touch with solicitors or given any real assistance in recovering the debt. He did not consider it economic to pay a solicitor himself to recover the money. In early September 2022, therefore, the Claimant researched employment law online, he read up on the Employment Tribunal and ACAS Early Conciliation processes, and was aware of time limits. However, he continued at this stage to negotiate with the Respondent behind the scenes, including agreeing an extension to the ACAS Early Conciliation period. He claims it was only in early December, once he had provided a breakdown of the sums he was claiming to the Respondent, that the Respondent appeared to change its position about agreeing a settlement. This prompted the Claimant to present his ET1 on 10 December 2022.

19. That is the factual case in outline. The issue that I have to consider is whether the Claimant has no reasonable prospect of successfully meeting the test for jurisdiction in s. 23 ERA (or the 1994 Order). In doing so I must consider, based on the evidence the Claimant would give, whether he could show that it was not reasonably practicable for him to have brought his claim by 10 February 2022. Only if it was not reasonably practicable to have brought the claim within that period would a Tribunal then go on to consider, when determining jurisdiction, whether the claim was brought within a further period of time that was reasonable.

20. Starting with the first question, the reason why the claim was not presented in time, simply put, is because the Claimant did not check his payslips during the relevant period against the Agenda for Change document (which, as I have said, is publicly available). Had he done so, he would have seen immediately that he was not being paid the correct amount. In essence he relies on ignorance of his right to claim during this period, i.e. up to February 2022. The question for the Tribunal will be whether such ignorance on the part of the Claimant was reasonable.

21. For the purposes of this application, as already indicated, I have accepted the Claimant's factual case at its highest. I accept that there may have been some "sleight of hand" on the part of the Respondent when discussing the promotion with the Claimant in autumn 2020. The Claimant's case appears to be that he was led to believe that he would get the full Band 6 salary to retain him within the Trust but his salary was then put through at a lower rate once that had been agreed. However, even that being so, the Claimant was not completely in the dark: the notification of change document that he was copied into clearly indicated that there was a discount being applied to his salary to reflect a trainee rate. In my judgment, that alone should have prompted the Claimant to check his payslip against the Agenda for Change document once his first payslip was received.

22. Ultimately, I cannot envisage a Tribunal determining this matter substantively in the future finding that someone as clearly intelligent as the Claimant would be reasonably confused by the information on his payslip and fail to realise that his pay was not being processed for the correct amount. The information was there for him to discover his right to claim within the relevant time limit, he was just not at that point sufficiently curious to make those checks. In my judgment, the Claimant does not have a reasonable prospect of successfully persuading the Tribunal at a future hearing that it was not reasonably practicable for him to have made those checks and for him to have presented his claim in time. The claim must therefore be struck out.

23. If I am wrong on that, I have gone on to consider what view the Tribunal at a future hearing would take on the second element of the test, which is whether the claim was brought within a reasonable period of time thereafter. As I have said, for today's purposes, I accept that the Claimant would be able to show that he was not assisted by his Trade Union in providing legal support and also that he was led by the Respondent to believe that the matter could be settled without recourse to litigation. However, on the other hand, the Claimant was on notice of the time limit, he knew about it from his own research, and he still did not act promptly. So, even were the Respondent leading him on to believe that the case could be resolved without presenting the claim to the Tribunal, it was still an deliberate choice of his to delay presenting the claim.

24. Ultimately, on this secondary issue, I am not satisfied that the Claimant would have no realistic prospect of satisfying the test, albeit I may have made a deposit order instead. But, in any event, as it is my judgment that the Claimant has no realistic prospect of succeeding on the first limb of the test, his claim is struck out pursuant to Rule 37(1)(a).

Employment Judge Feeny
Date: 28 June 2023