



EMPLOYMENT TRIBUNALS

Claimant: Mr S Aliyu

Respondent: De Montfort University

Heard at: Leicester Employment Tribunal

On: 29 June 2023

Before: Employment Judge K Welch (sitting alone)

Representation

Claimant: In person, supported by Miss E Edwin, his friend

Respondent: Mrs K Hurst, Solicitor

JUDGMENT having been handed down in an oral judgment on 29 June 2023 and written reasons having been requested on 31 July 2023 in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013 the following reasons are provided.

REASONS

Background

1. This open preliminary hearing came before me on 29 June 2023. The hearing had been case managed by Employment Judge Heap on 28 June 2022. She had listed the case for a public preliminary hearing to consider a number of matters. Employment Judge Heap told the claimant in the Case Management Summary:

“The Tribunal does not have jurisdiction to hear claims that have been presented outside of the relevant statutory time limits unless a Claimant is able to persuade the Tribunal that it was “not reasonably practicable” (or not reasonably feasible)

for the Claim Form to have been presented in time. This will generally require something either physically or mentally impeding a Claimant from being able to present the claim on time. Even if that is the case, however, then the Tribunal will also need to be satisfied that the Claim Form was then issued within a reasonable period after the time limit expired. Unless the Claimant is also to persuade the Tribunal about both of those things (and the burden is on him to do so) then the Tribunal will not have jurisdiction to hear his claim and it will be struck out. The Claimant will therefore need to explain at the hearing what good reason(s) that he has for not having presented the claim in time. So that things can proceed smoothly, I have set some steps for the parties to take to prepare for the hearing and they are set out below under the heading "Orders". I have attached a copy of the Presidential Guidance on Case Management which will assist the Claimant in respect of those preparatory steps that he needs to take."

2. The Employment Judge went on to order that the claimant provide a witness statement for use at the preliminary hearing. The claimant sent a witness statement on 16 December 2022, and this was used for today's hearing.
3. The hearing was originally listed for a preliminary hearing on 12 January 2023 before Employment Judge Ahmed. The claimant contacted the Tribunal the day before the hearing to say that he was unable to attend as he was unable to pay for a flight back to the UK from Nigeria. The hearing went ahead without the claimant, although the decision was to postpone the case and it was therefore relisted for today.
4. The respondent had confirmed that it wished to pursue its application for strike out under rule 37 on the basis of that the claims were vexatious and/or unreasonable and/or there was no prospect of them succeeding in addition to the strike out for lacking jurisdiction having been presented out of time.

5. The respondent wrote in on 24 May 2023 requesting that a further application be considered should the applications for strike out fail, namely that deposit orders be made under rule 39 of the Employment Tribunal Rules of Procedure 2013 ('the ET Rules') in order for him to continue with either of his claims.
6. The hearing was therefore listed to determine the following issues:
 - a. To determine what the effective date of termination of the Claimant's employment was;
 - b. To consider whether all or any of the claims should be struck out under Rule 37 of the ET Rules if the Tribunal has no jurisdiction to entertain the claim if the Claimant has issued proceedings outside the relevant statutory time limit. It will be for the Claimant to persuade the Tribunal that it was not reasonably practicable to present the claim in time and that it was issued within a reasonable period thereafter;
 - c. The respondent's application to strike out the whole of the claim on the basis that it is "scandalous and vexatious" and/or it has "no reasonable prospects of success" under Rule 37 of the ET Rules;
 - d. Whether a Deposit should be made in order for the claimant to pursue his claims for unfair dismissal and/or unlawful deductions from wages under rule 39 of the ET rules; and
 - e. If the claim or any part of it proceeds to further consider to the issues in the claim and to make any further Orders necessary to deal with it, including whether any further information is required and to list the matter for a full hearing.
7. It was agreed at the start of the hearing, that the Tribunal would firstly consider jurisdiction, strike out and/or whether deposit orders should be made for the unfair dismissal and/or unlawful deductions from wages claims.

8. The application for wasted costs, as outlined in Employment Judge Ahmed's Case Management Summary and further Case Management Orders, was left until these matters had been decided.
9. I was provided with an agreed bundle of documents of approximately 200 pages and an agreed chronology, which proved helpful. The bundle was the same as the previous one provided for the January hearing although it had a few additional pages added to it. As the physical bundles had been sent to Nottingham, I used the electronic version of the agreed bundle, and had the additional pages printed out. References to page numbers within this judgment refer to page numbers from the agreed bundle.
10. The hearing was an in person, public preliminary hearing with all parties attending Leicester Tribunal. I heard evidence only from the claimant, who had provided a witness statement in readiness for the hearing in January 2023.
11. I was also provided with an agreed chronology and skeleton argument for the respondent, together with a statement from the claimant.

FINDINGS OF FACT FOR THE PURPOSES OF THE PRELIMINARY HEARING

12. The claimant was employed as a part time lecturer by the respondent from 1 April 2017 until the termination of his employment. He was working on obtaining his Ph.D. with the respondent during this period.
13. Initially, there was a difference between the dates provided by the parties as to the date of the claimant's termination of employment. The claimant said that his employment ended on 28 March 2020, but, in evidence, he confirmed that this was in fact 28 February 2020. The respondent initially said that his termination date was 1 February 2020, but, having heard evidence from the claimant that he worked during a grace period between 1 to 28 February 2020, the respondent agreed that the claimant's termination date was 28 February 2020.

14. I am therefore satisfied that the claimant's employment ended on 28 February 2020.
15. When the claimant was initially employed, he submitted his application for wages in written form. However, this became electronic at some point during his employment with the respondent, so that he logged his claims for payment of wages electronically.
16. The respondent has a 'Procedure for Part Time (Hourly Paid) Lecturers' [P70-83]. Page 84 provides details of when claims should be submitted in order to obtain payment. This provides:
- "For work done up to 25th of the month, the part-time lecturer must complete their claim form and obtain HOD's authorisation by 30th day of the month or the next working day."*
17. The claimant had previously claimed payments for work done in this way.
18. Therefore, for the hours the claimant worked in February 2020, he should have presented his claim for payment at the end of February 2020 for payment on 25 March 2020.
19. The claimant's visa was due to expire on 1 February 2020 and the respondent contacted him on 13 January 2020 by email [P121] about this. The respondent chased the claimant on 29 January 2020 as no reply had been received [P120]. The claimant emailed the respondent on 31 January 2020 [P120] to inform them that he had been advised to put in an application for a visa extension by the Student Union advice centre, and sent a client care letter showing what he had been advised to do [P123].
20. The claimant was informed by the respondent that this was not sufficient to allow them to carry out a verification check to confirm his right to work, as it was not from the Home Office. This was done by email sent to the claimant on 5 February 2020

[P119]. The claimant was informed that as he was “*clearly in the process* of [his] application”, he would enter a 28 day grace period. He was asked to send any Home Office communication as a matter of utmost urgency so that the check can be performed and was told, “*If I have not received any confirmation by the end of the grace period, i/e 28 Feb 2020, you will be made a leaver.*”

21. The claimant continued to work for the respondent during this grace period.
22. On 19 February 2020 the respondent chased the claimant for an update. The claimant advised on 25 February 2020 that he was booking an appointment for a biometric check on 27 February 2020 [P116-118]. He was informed the same day that this would be too late for the respondent to conduct a check that he had the right to work, and therefore provided no statutory excuse for the respondent and so his employment would need to be terminated.
23. The claimant stopped working for the respondent on 28 February 2020 and his P45 was issued in March 2020 which stated his termination date as 1 February 2020 [p180].
24. The claimant gave evidence that he was unable to log his claim for pay as his access to the portal had been blocked when his employment ended. However, he did not contact the respondent about this.
25. In fact, the claimant did not contact the respondent from the end of February 2020 until 20 November 2020, when he asked about his biometric residence permit ('BRP'). This had arrived during lockdown, and he wanted to know how to collect it. [P124-7] This was provided to him on 25 November 2020.
26. The claimant said that he was busy working on his Ph.D. which involved working in his words, “*day and night*” between the period March 2020 and April 2021. It should be noted that the Covid-19 pandemic had resulted in the first National lockdown from March 2020. The claimant’s evidence was that the university

department was closed for the first 3 months of this period until May/June 2020, which coincided with the first lockdown.

27. The claimant submitted his final thesis on 4 February 2021, although in evidence said that there were some minor amendments required, such that it was finally completed in or around April 2021.
28. On 22 April 2021, the claimant for the first time raised issues about his unpaid wages for hours of work he had performed prior to 28 February 2020 [P129-130]. There was correspondence between the claimant and his former line manager and HR within the bundle showing that he attempted to get copies of his timetable to particularise his claim for unpaid wages, and I am satisfied that he had sought to resolve this issue amicably.
29. On 30 August 2021 the claimant wrote to the respondent by email and post [P171] asking for payment of his hours worked prior to February 2020. He did not raise any issues concerning the termination of his employment.
30. The claimant gave evidence that he had spoken with a friend, who was a legal practitioner, in July/August 2021. This friend advised him to seek an amicable resolution to the issue and then go to Employment Tribunal if this was not possible.
31. The claimant contacted ACAS on 18. November 2021 and the Early Conciliation Certificate was issued on 19 November 2021. The claimant presented his claim on 3 December 2021.
32. The claimant was suffering financially during this period, and states that this had a substantial financial effect on him which continues to date.
33. The claimant also stated that he wished to resolve matters amicably and brought his claim as a last resort.
34. The claimant gave evidence that he knew of the possibility of going to Tribunal to bring claims, but did not know of the exact time limits until around the time he

presented his claim, but it was clear that he was an intelligent man who had subsequently done some research into bringing Tribunal claims on the internet. He said in evidence that he had “read extensively” about time limits, but had not done this prior to November 2021, at the time of presenting his claim.

RELEVANT LAW

35. Time limits for bringing claims for unfair dismissal and unlawful deductions appear in sections 111 ERA and section 23 ERA, which provide:

“111 Complaints to employment tribunal

(1) A complaint may be presented to an employment tribunal against an employer by any person that he was unfairly dismissed by the employer.

(2) Subject to the following provisions of this section, an employment tribunal shall not consider a complaint under this section unless it is presented to the tribunal—

(a) before the end of the period of three months beginning with the effective date of termination, or

(b) 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 three months.

(2A) Section 207B (extension of time limits to facilitate conciliation before institution of proceedings) applies for the purposes of subsection (2)(a).”

“23 Complaints to employment tribunals

(1) A worker may present a complaint to an employment tribunal—

(a) that his employer has made a deduction from his wages in contravention of section 13 (including a deduction made in contravention of that section as it applies by virtue of section 18(2)),..

(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, ...*

(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."*

36. ACAS Early Conciliation therefore extends time to bring claims where, during the primary time limit, the claimant contacts ACAS and begins early conciliation.

This in effect stops the clock for time limits, and the time limits are extended by virtue of the time spent in ACAS early conciliation. However, this is only where the contact to ACAS is made within the primary time limit.

37. The Tribunal has a discretion to extend time in both unfair dismissal and unlawful deductions from wages claims where it considers that it was not reasonably

practicable to present the claims within the primary time limit, provided that they were presented within such further period of time as was reasonable.

38. I note that time limits should be strictly applied, and the exercise of the discretion is the exception rather than the rule. There is no presumption that the Tribunal should exercise its discretion.

39. The phrase '*reasonably practicable*' does not mean either reasonable or physically possible, rather it means something like '*reasonably feasible*'. It is not simply a matter of looking at what was possible but to ask whether, on the facts of the case as found, it was reasonable to expect that which was possible to have been done,

40. Where a litigant is aware of the right to make a claim, that puts them on enquiry. Therefore, the question is not whether the claimant was aware of the date for presenting his claim, but whether he ought to have been aware taking into account all the surrounding circumstances. This may appear harsh but it is a well-established principle.

41. The EAT stated in para 53 of Cygnets Behavioural Health Ltd v Britton [2022] EAT 108 that:

42. "*A person who is considering bringing a claim for unfair dismissal is expected to appraise themselves of the time limits that apply; it is their responsibility to do so.*"

43. The Tribunal may strike out a claim or allegation where it considers that the claim is scandalous or vexatious or has 'no reasonable prospect of success' under Rule 37(1)(a) which says:

"Striking out

(1) *At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds—*

(a) *that it is scandalous or vexatious or has no reasonable prospect of success;*

.....

(2) *A claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing.”*

Deposit orders

“Rule 39 Deposit orders

(1) *Where at a preliminary hearing (under rule 53) the Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success, it may make an order requiring a party (“the paying party”) to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument.*

(2) *The Tribunal shall make reasonable enquiries into the paying party's ability to pay the deposit and have regard to any such information when deciding the amount of the deposit.”*

44. This is noted to be a lower threshold than for strike out.

CONCLUSION

45. This is a case where the claimant has presented his claim significantly out of time. The claimant's employment was agreed as ending on 28 February 2020, at the end of the grace period given to him to try and obtain some evidence of his application to enable a verification check to be undertaken showing he had the right to work in the UK. His wages, had he properly claimed them in accord with

the respondent's policy, were due to have been paid on 25 March 2020.

Therefore, time limit for his unfair dismissal claim expired on 27 May 2020 and for unlawful deductions from wages on 24 June 2020. The claim form was presented on 3 December 2021.

46. The claimant has the burden of proving that it was not reasonably practicable to present either of his claims within the time limits. The time for presenting the claimant's claim was not extended by ACAS early conciliation, as the approach to ACAS was made outside the primary time limits for each of the claims.

47. I therefore have to consider whether it was reasonably practicable for the claimant to have presented his claims in time.

48. I accept that the claimant was clearly working very hard on his thesis for his Ph.D. during the primary time limit, but do not accept that this prevented him from lodging a claim with the Employment Tribunal.

49. The claimant was aware that his employment was ending in advance of 28 February 2020 and was certainly aware that it was to end on 28 February 2020 from an email dated 25 February 2020, which confirmed that his employment would need to be terminated.

50. The claimant did not raise any grievance, or appeal about his dismissal at any point prior to his unfair dismissal claim being presented.

51. I have considered whether the Covid-19 pandemic could have made it not reasonably practicable to present his claims during the limitation period, however, I am aware that claims were presented by others during this time, and do not accept that this, or the National lock down, made it not reasonably practicable to do so.

52. Whilst the claimant said that he did not know all of the necessary information about bringing a claim, including his visa status, "for some time", he knew that his

employment had ended, and that it was possible to bring claims to an Employment Tribunal relating to this. Therefore, he should have been on notice to find out the time limits for doing so. He had carried out research into bringing claims at a later date, and it was clear that he could have done so sooner.

53. For the unlawful deduction from wages claim, the claimant knew that he had not been paid, he had not even made a claim for those wages until a full year after his termination.

54. Therefore, I consider it was reasonably practicable for the claimant to have presented both his unfair dismissal and his unlawful deductions from wages claims in time.

55. However, even were I to consider that it was not reasonably practicable for the claimant to have presented his claims by the expiry of the primary time limit, it was clear that he did not bring them within such further period as was reasonable. It took him over a year to bring those claims. He contacted ACAS on 18 November 2021, and by then his Ph.D. thesis had been finalised at the very latest by April 2021, some 7 months earlier. He was in discussions with the respondent, and whilst he says he wished to explore these avenues before bringing a claim, this does not mean that he was unable to do so. The respondent did not hinder his ability to make claims or suggest that he should exhaust internal procedures first. It was open to the claimant to bring claims sooner and he failed to do so.

56. The claimant did not provide in his statement, or in his oral evidence, good reason for him not being able to bring his claims for the whole of that extended period from the effective date of his termination, or the date that the wages were last due until 3 December 2021. Therefore, the claims must be struck out on the

basis that the Tribunal does not have jurisdiction to consider them as they were presented out of time.

57. As I have found that the Tribunal does not have jurisdiction to consider the claims, it is unnecessary to go on to consider whether the claims should be struck out for any other grounds relied upon by the respondent or whether deposit orders should be made.

Employment Judge Welch

Date of written reasons: 1 August 2023

JUDGMENT SENT TO THE PARTIES ON

.....

.....
FOR THE TRIBUNAL OFFICE

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.