



EMPLOYMENT TRIBUNALS

Claimant: Ms Cretu

Respondent: DHL Services Limited

Heard at: London South via CVP **On:** 7 July 2023

Before: Employment Judge Khalil (sitting alone)

Appearances

For the claimant: in person

For the respondent: Ms B Clayton, Counsel

JUDGMENT ON A PRELIMINARY ISSUE WITH REASONS

Decision:

Pursuant to S. 111 (2) and S. 23 (2) Employment Rights Act 1996, the Tribunal does not have jurisdiction to hear the claimant's complaints of Unfair Dismissal and Unauthorised Deductions, as it was reasonably practicable for these claims to have been presented in time.

This Judgment does not affect the claimant's claim for holiday pay in respect of which the parties are to write to the Tribunal within 14 days of the sending of this Judgment, if a Hearing in respect of that remaining claim is still required.

Reasons

Claims, appearances and documents

1. This was a public Preliminary Hearing to consider if the claimant's claims for Unfair Dismissal and Unauthorised Deductions from wages can proceed because the respondent submitted, they had been presented out of time.

2. The claims were clarified at the outset as being Unfair Dismissal based on an effective date of termination ('EDT') of 27 May 2022 when the claimant resigned with immediate effect.

3. The claimant had submitted a witness statement and appeared in person; the respondent appeared by Counsel, Ms B Clayton.

4. The Unauthorised Deductions claims arise from alleged deductions made in October 2021 and December 2021. The Tribunal directed that it would be focusing on time jurisdiction and not the respondent's alternative application that the claimant's claims had no reasonable prospects of success. The Tribunal also remarked that it would not consider today the holiday pay claim as the respondent was unable to indicate when the final payments were due to be paid to the claimant or whether it was the case that claimant had not received any paid holiday.

Relevant findings of fact

5. The following findings of fact were reached by the Tribunal, on a balance of probabilities, having considered all of the evidence during the hearing, including the documents referred to, and taking into account the Tribunal's assessment of the witness evidence.

6. Only findings of fact relevant to the preliminary issue, and those necessary for the Tribunal to determine, have been referred to in this judgment. It has not been necessary, and neither would it be proportionate, to determine each and every fact in dispute. The Tribunal has not referred to every document it read and/or was taken to in the findings below but that does not mean it was not considered if it was referred to in evidence or submissions and considered relevant to the preliminary issue.

7. The relevant chronology was agreed that following the claimant's resignation on 27 May 2022, she commenced Early Conciliation ('EC') with ACAS on 26 August 2022 which lasted until 7 October 2022 when the EC certificate was issued. The deadline under S. 207 B (4) Employment Rights Act 1996 ('ERA') was 7 November 2022.

8. The claim for unfair dismissal and unauthorised deductions was presented on 8 November 2022. Time for the unauthorised deductions claims, at the latest, runs from 30 November 2021 and 31 January 2022 respectively as those claims related to alleged unauthorised deductions relating to non-payment of training in October 2021 and under-payment/non-payment of sick pay in December 2021 respectively. There was no early conciliation within 3 months of either date.

9. The claimant had said in her witness statement that she had started to complete her ET1 on 14 October 2022 but as she had been looking for other work she prioritised that before completing her ET1 form. The claimant got another job on 27 October 2022. She said in evidence she believes she accepted it on the same day.

10. Also, in evidence the claimant said that her ADHD affects her ability to priorities tasks. In paragraph 2 of her witness statement, she said her ability to make decisions quickly are also affected.

11. On 7 November 2022, the claimant received a counter terrorism form to complete in relation to a new job. She had until 12 November 2022 to do so. She was required to register (only) within 24 hours of receipt.

12. The claimant said she had technical difficulties in submitting her claim from 9.30pm onwards on 7 November 2022. She was completing her form using her mobile phone. She said she had already had similar difficulties on the same day with the counter terrorism form which she had known about throughout the day (paragraph 5 of her witness statement).

13. In her witness statement, the claimant said she believed there were connection difficulties with the HMCTS website. The Tribunal announced its enquiries undertaken of the HMCTS that there were no technical difficulties with its website and a usual number of claims were received on 7 and 8 November 2022. The Tribunal was not taken to any specific evidence of the claimant's difficulties.

14. The claimant accepted in cross examination she knew of the 7 November 2022 deadline.

15. The claim was not presented until 8 November 2022, in the early hours.

16. The claimant also explained the delay as she has a 7-year-old child to care for on her own.

Applicable law

17. S.111 (2) S. 23 (2) ERA 1996 say in comparable terms:

S.111 (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.

S.23 (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.

18. The Tribunal also had regard to the following authorities: *Palmer and Saunders v Southend on Sea 1984 ICR 372 CA*; *Schultz v Esso Petroleum 1999 ICR 1202*; *Initial Electronic Security Systems v Avdic 2005 ICR 1598*; *Consignia PLC v Sealy 2002 IRLR 624*; *Beasley v National Grid 2008 EWCA Civ 742*; *Fishley v Working Mens College, 28 October 2004*.

19. The Tribunal noted the so called '**Consignia** exception' whereby if a claimant does an act within the prescribed period, which in the ordinary event would result in the complaint being made within the specified period, and that is prevented from having its normal and expected result by some unforeseen circumstance, the escape clause is available and if that condition is satisfied, it does not matter why the applicant has waited until the last moment. In *Initial*, unforeseen circumstances was interpreted as the reasonable expectation of the sender or poster of a claim form (in that case by electronic mail) where Judicial notice and/or general experience can be used in the absence of expert evidence.

Conclusions and analysis

20. The Tribunal concludes that this was not a case involving ignorance of time limits. On the contrary, the claimant had expressly accepted she was aware of the time limit.

21. The Tribunal thus considered the claimant's explanations about why the claim was not submitted in time and whether it could be said it was reasonably feasible for the claimant to have presented the claim in time (Palmer applied).

22. The thrust of the claimant's arguments were about the difficulties the claimant says she encountered on 7 November 2022. The only explanation for resuming completion of the claim form until 9.00pm on that day was because the claimant said she would struggle, because of her ADHD, to prioritise matters because she had also been sent a counter terrorism form to complete too. That had a 24-hour period to register only but the claimant had until 12 November 2022 to complete the form.

23. The Tribunal rejects that the claimant had a reasonable expectation her claim would be submitted in time 2.5 hours before midnight on the day of expiry of the time limit (**Consignia** exception considered). The claimant was submitting her claim using her mobile phone (not a desktop or laptop), on a day when she had already been encountering other technological/ internet or connection issues too in relation to her counter terrorism form throughout the day. It had become a known, rather than unforeseen issue, during the day. The claimant did not have a competing deadline of midnight with the counter-terrorism form. The 24-hour period was only in respect of registration not the form completion deadline. Objectively assessed, it is not uncommon for a person using a website to submit documents to encounter unstable internet connection issues, website maintenance/repair or outage, website unresponsiveness, website delay, uploading issues, unsaved work etc. This can be either at the 'sender' end or 'recipient' end. There is a lot more risk in that than the sending of an email in time. In contrast, the reasonable expectation of a putative claimant would not be to encounter a power cut or hardware failure which were the examples given by the respondent's counsel. They are much more exceptional and rare occurrences which would not be in the reasonable contemplation of a putative

claimant and thus would not impact on the question of reasonable expectation. The Tribunal concluded that was a legitimate factor to the question of reasonable expectation rather than to the question of whether there was any other way of getting the claim submitted within the available remaining time in those circumstances (as that latter question brings into consideration why the claimant had left it so late).

24. This was not a case of a delay of 8 hours; it was more than the 30-60 minutes both of which were referred to in respect of email receipt in *Initial*, however the imponderables for that were far less, in the Tribunal's conclusion. The *Initial* case was heard 18 years ago since when, whilst the online forum has grown rapidly, so have the occasions of problems and uncertainty.

25. Whilst that might have explained the position on 7 November 2022, it did not explain why the claimant had left it until then to resume completion of the form.

26. This is because between 27 October and 7 November the claimant gave no information or evidence why it was not reasonably feasible to have presented her claim. There was no conflicting task required. She had been offered and accepted her new job and did not get her counter terrorism form until 7 November 2022.

27. Looking at the whole period with the Consignia 'exception' being rejected, it was reasonably practicable to submit her claim in time.

28. In *Beasley v National Grid 2008*, the Court of Appeal endorsed the EAT in *Fishley v Working Mens College 2004*, a case in which a claim form was 11 minutes late. It was said:

"On this point I would endorse what the EAT said in Fishley v Working Mens College 28 October 2004, Bean J presiding. That was a case in which the complaint was 11 minutes late because the appellant's printer had broken down. At paragraph 13 Bean J said:

"We must say it is the common experience of anyone who has tried to operate a computer, a printer, or a fax machine, that they are temperamental creatures and one cannot rely on success first time within a few minutes. We think that if the presentation of an Originating Application is left to the very last moment, then a temporary impediment, such as the breakdown of a piece of office equipment or something of that kind is one of the risks of life which has to be taken."

The EAT upheld the Tribunal's decision that the complaint had been made out of time."

29. On that basis, the Tribunal declines jurisdiction. The claims for unauthorised deductions in October 2021 and December 2021 are significantly out of time in respect of which no positive case was advanced regarding why it was not reasonably practicable (feasible) for the claims to have been submitted sooner.

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Reasons were given at the time and written reasons will not be provided unless they are asked for by a written request presented by any party within 14 days of the sending of this written record of the decision.

Employment Judge Khalil

8 August 2023

Sent to the parties on:

8 August 2023

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For the Tribunal:

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