EMPLOYMENT TRIBUNALS

Claimant: Mr A Gvozd

Respondent: PJSC 'AEROFLOT'

Heard at: Watford Employment Tribunal (In public; By video)

On: **28 July 2023**

Before: Employment Judge Quill (sitting alone)

Appearances

For the claimant: In person
For the respondent: No appearance or representation

JUDGMENT

(1) The complaint of unauthorised deduction from wages was not presented within the time limit set out in the Employment Rights Act 1996. There is no jurisdiction for the Tribunal to hear it and it is therefore dismissed.

(2) The complaint of failure to make a payment required by the Working Time Regulations was not presented within the time limit set out in those regulation and is therefore dismissed. There is no jurisdiction for the Tribunal to hear it and it is therefore dismissed.

(3) The complaint (if any) of breach of the contract of employment was not presented within the time limit set out in the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 and is therefore dismissed.

(4) Any complaint based on a contract allegedly entered into on or around 29 November 2022 is not within the scope of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 and the Tribunal does not have jurisdiction to hear it.

REASONS

Introduction

1. Judgment, with reasons, was given orally during the hearing. Written reasons were requested. These are those reasons.

2. The Respondent has not taken action to respond to the claims. A judgment under Rule 21 was sent to the parties on 22 May 2023 about redundancy payment. That judgment stated that the Claimant's other claims appeared to have been brought outside the standard time limit for such claims and a hearing would be required. As per the notice of hearing dated 16 June 2023, this was that hearing.

The Claims and The Issues

3. The Claimant's claim form was presented on 12 December 2022. The ACAS Early Conciliation Certificate ("ECC") showed that early conciliation had started and finished on 12 December 2022. The claim form said that employment had ended on 21 June 2022 and that the claim related to failure to pay wages for May and June 2022 or pay holiday pay. (It also included the redundancy pay claim).

4. It included the passage:

> While Aeroflot representative tried to obtain a licence to pay the employees (including myself) arrears and redundancy, OFSI failed to issue reasonable licence to facilitated bank transfers. As a result Aeroflot representative left the UK and returned to Russia in October 2022 without paying me owed moneys.

5. The first issue for me to consider today, therefore was time limits. Subject to that, I would then go on to consider the merits of the claims.

The Hearing and The Evidence

6. The hearing took place by video and there were no technical difficulties.

7. As well having access to the claim form and other information on the Tribunal file, I had documents which the Claimant emailed during the course of the hearing being:

   7.1. Payslips for May and June 2022 respectively

   7.2. P45

   7.3. Letter to the Claimant from the Respondent dated 28 March 2022

   7.4. Document signed by the Claimant dated 29.11.2022 and headed "Addendum 2 to Employment Contract dated 01.12.2015"

8. I had no written statement from the Claimant (and he had not been ordered to produce one) but I took his evidence on oath orally.

The Findings of Fact

9. The Claimant was employed from around September 2003 by the Respondent. He worked in the UK and UK law governed his contract of employment. Since around 2015 his job title had been Sales Director and he played a role in the arrangements the Respondent had with other businesses.

10. The Claimant was not involved in commercial litigation/disputes between the Respondent and other entities. He does have some experience of courts and tribunals including the immigration tribunal. He has never been involved in an employment dispute either in the UK or elsewhere. The Claimant speaks good English. He has good comprehension skills for written and spoken communications.

11. The Respondent supplied the Claimant with a letter dated 28 March 2022, which he received and read on, or shortly after, that date. The relevant passages included:

> Unfortunately, we have not been able to identify any suitable alternative work for you, because due to current circumstances with Aeroflot being banned by the UK Government to operate passenger flights, we are making arrangements to close our Representation and freeze our operations in the UK for undefined period.
>
> You are entitled to 12 weeks' notice to end your employment with PJSC Aeroflot – Russian Airlines, based on your contract of employment and length of service.
>
> …. Your last day of employment will be 21/06/2022.
>
> Any annual leave you have accrued but have not taken at the end of your employment will be added to your final pay.
>
> …If you have any further questions, please contact me. I know this may be an upsetting and worrying time for you but sanctions imposed against our Company leave us with no other choice.

12. The Claimant was aware (including from news media) of the general situation and he knew about the sanctions referred to in the letter. He understood the letter and knew that it meant that last day of employment was 21 June 2022.

13. The Claimant received his March and April payments.

14. The pay date was the last Friday in each month. So he should have received the May payment no later than 27 May 2022 and the June payment no later than 24 June 2022. He received neither. This is despite the fact that he received payslips for each: the one for May showing the usual amounts; the one for June including a redundancy payment, and payment in lieu of holiday, as well as the usual amounts.

15. The Claimant knew promptly after 27 May and 24 June that the payments had not been made.

16. The Claimant was informed of several things by his employer. The suggestions that they made about alternative methods by which they might be able to arrange

payments are not relevant to my decisions about time limits and I need say no more about them than that they were not acceptable to the Claimant.

17. The Claimant was told that the usual method of payment (in sterling, to his UK bank account) was not immediately possible. Firstly, (according to what the Claimant was told), the Respondent needed a licence from the UK government to do so; secondly, (according to what the Claimant was told) when the licence was issued, the Respondent and/or the UK banks did not believe that the terms of the licence allowed the payments to be made to the Claimant.

18. The Claimant was told – and he genuinely believed – that the Respondent was willing to make the payments provided this licence issue was resolved. In June 2022, he believed that it would be resolved. He was aware of (and was copied in on some of) correspondence sent by the Respondent to Office of Financial Sanctions Implementation. The most recent item he saw from the Respondent chasing was around 25 October 2022. The Claimant had also made numerous attempts to contact OFSI.

19. The Claimant's evidence was that he was unsure about specifically when he first contacted ACAS. I believe him that he is unsure. He accepts that they probably warned him about time limits when he did contact them. He says that he followed their advice when he did contact them. In the absence of evidence to the contrary, my finding is that he first contacted ACAS on, or very shortly before, 12 December 2022.

The Law

20. Insofar as it is relevant, section 23 of the Employment Rights Act 1996 ("ERA") states:

> (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 …
>
> … 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) apply 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.

21. Article 7 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 ("the Order") states:

> Subject to articles 8A and 8B, an employment tribunal shall not entertain a complaint in respect of an employee's contract claim unless it is presented-

(a) within the period of three months beginning with the effective date of termination of the contract giving rise to the claim, or

(b) where there is no effective date of termination, within the period of three months beginning with the last day upon which the employee worked in the employment which has terminated, or …

(c) where the tribunal is satisfied that it was not reasonably practicable for the complaint to be presented within whichever of those periods is applicable, within such further period as the tribunal considers reasonable.

22. Regulation 30 of the Working Time Regulations 1998 ("WTR") says, in part:

30.— Remedies

(1) A worker may present a complaint to an employment tribunal that his employer– …

(b) has failed to pay him the whole or any part of any amount due to him under regulation 14(2) ...

(2) Subject to regulations … 30B, an employment tribunal shall not consider a complaint under this regulation unless it is presented–

(a) before the end of the period of three months … beginning with the date on which it is alleged that the exercise of the right should have been permitted (or in the case of a rest period or leave extending over more than one day, the date on which it should have been permitted to begin) or, as the case may be, the payment should have been made;

(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 or, as the case may be, six months.

23. Section 207B of ERA and Article 8B of the Order and Regulation 30B of WTR are worded similarly, and each describes how time limits are affected by early conciliation. In summary:

23.1. Where early conciliation commences after the time limit has expired, then the time limit is not extended.

23.2. Where early conciliation commences before the time limit expires, then the Claimant will have at least a calendar month from then end of the conciliation ("Day B") to present the claim.

23.3. In some cases, they might have longer than one month from Day B (the period from the day after conciliation starts until Day B is ignored when calculating the time limit).

24. When a claimant argues that it was not reasonably practicable to present the claim within the time limit, there are questions of fact for the tribunal to decide. In other words, whether it was, in fact, reasonably practicable or not. The onus of proving it was not is on the claimant. When doing so, the phrase "not reasonably practicable" should be given a liberal interpretation in favour of the Claimant.

25. If the tribunal is satisfied that it was not reasonably practicable to present the claim within the time limit, then it is necessary to consider whether the period between the expiry of the time limit and the eventual presentation of the claim was reasonable in the circumstances. This does not necessarily mean that the Claimant has to act as fast as would be reasonably practicable.

26. The fact that an employee pursued an internal procedure is a relevant circumstance which can, and should, be considered by the tribunal. However, generally speaking, it is not usually enough by itself to make it "not reasonably practicable" for the complaint to be presented within the prescribed period, even if the employer (or any third party) is slow to announce the outcome. See the Court of Appeal's review in Palmer and anor v Southend-on-Sea Borough Council 1984 ICR 372, CA.

27. In Porter v Bandridge Ltd 1978 ICR 943, CA, the Court of Appeal held that the correct test is not whether the claimant knew of his rights but whether he ought to have known of them.

28. Similarly, when a claimant is ignorant about (or makes a mistake about) a fact which is relevant to the calculation of time limit, the question is whether that ignorance (or that mistake) is reasonable. The assessment of reasonableness has to take into account that a potential claimant ought to be aware of the importance of not missing a time limit. Put another way, even if it is true that the claimant did not know the true facts at the time of the events which started the time limit clock running, then that does not necessarily mean that it was not reasonably practicable to issue the claim in time. The claimant must also show that the ignorance was reasonable and that he could not reasonably have been expected to have discovered the true situation during the limitation period.

Analysis and Conclusions

29. I was shown a document which the Claimant has signed 29 November 2022. It is not necessary for me to make any decisions about whether the Respondent entered into an agreement on those terms, or about whether I would amend the claim to add a complaint alleging a breach of this (alleged) contract. Even assuming those things in the Claimant's favour, this was not a claim which "arises or is outstanding on the termination of the employee's employment" and therefore is not within the jurisdiction granted to employment tribunals by the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994. It is a matter for the Claimant, and not me, to decide whether or not any other court or tribunal might have jurisdiction to consider an alleged breach of that agreement.

30. The 29 November 2022 document, even if it is otherwise a valid and binding contract (about which I make no decision), does not comply with the statutory formalities to be a "settlement agreement" and does not, therefore, prevent the Tribunal determining the Claimant's statutory rights.

31. In this case, the Claimant was made aware in March about the last day of employment. Therefore he was aware from then onwards that any payments due to him should either be made by that last day of employment (21 June 2022) or else by the normal pay date for June (24 June 2022).

32. He was aware around 27 May 2022 that he had not been paid for that month, and aware in June that no payment for June (or May) was made in June. He remained aware that no payment had been made.

33. I do not proceed on the assumption that the final payments became due on 21 June. I proceed on the basis that they became due no earlier than 24 June. I also accept that, if there was an unauthorised deduction at all, then the failure to make the May and June payments were a series of deductions. Thus, for all elements of the unauthorised deduction of wages claim, the time limit clock began running on 24 June 2022.

34. To the extent that that there is any reliance on the Tribunal's jurisdiction under of the Working Time Regulations 1998 or the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994, the time limit clock would not start running any later than 24 June 2022 in relation to the claims for unpaid salary and holiday entitlement.

35. The time limit (ignoring early conciliation) would therefore expire on 23 September 2022 (at the latest) for all of the complaints in the claim form (barring the redundancy pay claim which has already been dealt with). In fact, no early conciliation started by then, and so the time limit did expire on 23 September 2022 (at the latest).

36. Early conciliation and presentation of the claim was all done on 12 December 2022. The claim was therefore more than two months out of time.

37. Furthermore, it was presented around 7 weeks after the most recent correspondence from the Respondent to OFSI, and after the Claimant had become aware that the employee of the Respondent's who had been pursuing that correspondence had left the UK.

38. The Claimant's argument is that he believed that the matter would be resolved and there would be no need for him to make a claim. He combines that with his argument that he was not aware of the time limits for bringing a claim (and says he was not aware that there were such time limits).

39. I am satisfied that the Claimant was aware of the existence of courts (and similar bodies) and that they exist to resolve disputes between parties who have not otherwise been able to resolve the matter between themselves.

40. He was not specifically aware of the existence of UK employment tribunals, or which types of dispute they deal with, or the time limits for presenting such claims. However, he is an experienced professional person and he has worked in the UK for a long time. There was no language barrier or other impediment to stop him researching on-line about tribunals, ACAS and time limits. Had he done so, he would have found out within a few minutes about the existence of tribunals, about the need to contact ACAS before presenting a claim, and the need to present a claim within the relevant time limit. It might have taken a slightly longer period of research to work out an estimate of the specific time limit that might apply; however, the rough guide that claims need to be presented less than 3 months after the end of employment would have been sufficient.

41. Since there was no technical reason preventing the Claimant finding out everything that he needed to know about presenting a claim, and the time limits for doing so, in

July and August, and other dates prior to 23 September 2022, I have to decide whether the fact that the Claimant believed that the matter would be resolved meant that it was not reasonably practicable for him to (find out about time limits or) present a claim by 23 September.

42. It is not argued by the Claimant that (a) the Respondent could not make the payments in June but (b) by a particular later date, could have made the payment (eg because the licence issue was resolved) and that (c) therefore, it was only because the Respondent failed to make the payment promptly after the issue was resolved that he realised that he might need to bring a court/tribunal claim.

43. I do not, in fact, need to decide whether what the Respondent told the Claimant (that it could not make a payment to his UK bank account unless the UK government provided some amendment or clarification to the licence that existed as of June 2022 that was acceptable to the UK banks) is true or not. Regardless of whether it was true or not, the situation did not change. No amendment or clarification in relation to the licence was forthcoming.

44. The situation is analogous to an employee who has brought a grievance, or an appeal against dismissal. From the employee's point of view, it might seem preferable to await the employer's decision before taking the step of litigation. However, that does not necessarily mean that it was not reasonably practicable to bring a claim in time.

45. In this case, it was not reasonable for the Claimant to fail to investigate time limits during the period that he and the Respondent were still chasing OFSI. On the Claimant's case, he simply never got an answer. However, it would be reasonable for an employee in that situation to be aware of the possibilities that (i) an express answer might be given that is not the one that they want (eg no change/clarification of the decision they are challenging) or (ii) that there might be no express answer at all, and the situation might simply drift. In either case, it was not reasonable for the Claimant to simply fail to investigate what the time limits were for presenting a claim in the event the matter was not resolved to his satisfaction. By 23 September 2022, he had known of the problem for almost 4 months (because his May payment was not made on time) and had known for almost 6 months that the end of his employment was to be 21 June. In these circumstances, I do not find that it was reasonable for the Claimant to be unaware of the existence of the Tribunals, or time limits, or that time limits might start to run from (at the latest) the end of employment. The mere fact alone that he hoped the matter would be resolved does not mean that it was reasonable for him to fail to realise that he would need to contact ACAS by 23 September 2022 (and then bring a claim within the appropriate amended time limit) if he wished to bring an employment tribunal claim, in the event that – contrary to his hopes – the matter was not resolved.

46. My decision is therefore that it was reasonably practicable for the Claimant to bring a claim in time. That is, reasonably practicable to contact ACAS by 23 September 2022, and to bring a claim by whatever amended time limit would have been the result of the commencement of such early conciliation.

47. For that reason, the claims are not within the jurisdiction of the employment tribunal.

48. However, in the alternative, even if I am wrong, and it was not reasonably practicable for the Claimant to bring the claim by 23 September 2022, then, by the end of October, he must have been aware that the situation was not going to be resolved to his satisfaction. By then, the Respondent's representative had left the country. The Claimant still did not commence early conciliation promptly. It did not happen during the approximately 6 week period from 1 November to 11 December 2022. Therefore, even had it not been reasonably practicable to bring the claim before the end of October 2022, it was not brought within a reasonable time period thereafter.

Employment Judge Quill
Date: 28 July 2023.

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON
13 September 2023

.....

.....
FOR EMPLOYMENT TRIBUNALS