Case No: 3300324/2023

EMPLOYMENT TRIBUNALS

Claimant: Mr D Collins

Respondent: Hanley Ltd

JUDGMENT

Employment Tribunals Rules of Procedure 2013 – Rule 21

1. The claimant was dismissed by reason of redundancy and is entitled to a redundancy payment of £**11,991.**

2. No decision has been made on the merits of his other claims because they were presented outside the time limit, and it would have been reasonably practicable to present them in time. As such, the employment tribunal does not have jurisdiction. This judgment does not necessarily prevent the Claimant pursuing those claims in a different court or tribunal.

REASONS

1. The Claimant's employment ended on 30 April 2022. He commenced early conciliation on 24 November 2022, and received the conciliation certificate on 9 December 2022. He presented his claim to the Tribunal on 11 January 2023.

2. No response was presented, by the deadline of 16 February 2023, or at all. However, a letter, dated 6 February 2023, from Clare Usher-Wilson, director, was received on 14 February 2023. This included "Hanley does not dispute Mr Collins' claim".

3. The letter also contained a detailed account of the (alleged) reasons for non-payment. Regardless of whether the explanation is true or not (and I have no reason to doubt it, but it is not necessary for me to decide that point for present purposes), it provides corroboration for what the Claimant said in his claim form: "My claim is late because I have a letter from Hanley dated 17th June 2022 saying they were going to pay me once they received a licence to operate from the government". What the Claimant was told in June 2022, and what the Tribunal was told in February 2023, is that the Respondent (i) admits liability and (ii) wants to make payment and (iii) theoretically has the funds to make

payment, but (iv) cannot access those funds because the banks holding them (claim to) believe that authorising the payments would breach legal obligations (to comply with sanctions imposed by the relevant national governments).

4. 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.

5. 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.

6. 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.

7. 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:
    a. Where early conciliation commences after the time limit has expired, then the time limit is not extended.
    b. 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.
    c. 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).

8. 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.

9. 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.

10. 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.

11. 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.

12. 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.

13. In this case, the Claimant was aware in June 2022 that he had not (on his case) been paid the last two months of salary before the 30 April 2022 termination date, had not received

payment in lieu of notice, had not received payment in lieu of holiday entitlement and had not received redundancy pay.

14. He was aware since the end of March 2022 that he had not been paid for that month, and correspondingly for April. He received payslips but no money. He also received a payslip dated 31 May 2022, purporting to show his termination payments, but, again, no payment was made.

15. I proceed on the basis that the holiday pay did not become due until 31 May 2022, and that that is when the clock started to run for his unauthorised deduction from wages claims. For the notice pay argument, and the redundancy pay argument, the clock started to run from the end of employment, being 30 April 2022.

16. To the extent that that there is any reliance on the Tribunal's jurisdiction under of the Working Time Regulations 1998, the time limit clock would not start running any later than 31 May 2022, and would probably also commence on 30 April 2022.

17. The time limit (ignoring early conciliation) would therefore expire on 29 July 2022 for some complaints and, at the latest, 30 August 2022 for all of the other complaints in the claim form (barring the redundancy pay claim which is in time, for the reasons mentioned below).

18. In fact, no early conciliation started by then, and so the time limit did expire on 30 August 2022 (at the latest).

19. Early conciliation commenced 24 November. Since the time limits had expired already, this did not extend time.

20. The claim was therefore more than four months out of time for any complaint (other than redundancy payments) and more than five months out of time for some.

21. 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. No argument is raised that the Claimant was unaware of the existence of courts and tribunals (and similar bodies) or that they exist to resolve disputes between parties who have not otherwise been able to resolve the matter between themselves or that there are time limits for such applications.

22. I make the decision on the assumption that he was not specifically aware of the existence of employment tribunals, or which types of dispute they deal with, or the time limits for presenting such claims. However, there was no 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.

23. 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 June and

July, 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 29 July and/or 30 August 2022.

24. It is not argued by the Claimant that the Respondent's position has ever changed. It is not argued that he was misled by the Respondent, save for the fact that he has been told that the Respondent acknowledges liability (a fact repeated in writing in the 6 February 2023 letter).

25. I do not need to decide whether what the Respondent told the Claimant (and the Tribunal) is true or not. Regardless of whether it was/is true or not, the situation did not change.

26. In my judgment, 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.

27. In this case, it was not reasonable for the Claimant to fail to investigate time limits during the period that he believed that the Respondent was still chasing its banks (and/or the relevant national authorities) for the payment to be authorised. 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.

28. By 29 July 2022, he had known of the problem for almost 4 months (because his March payment was not made on time, or at all). 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 29 July 2022, or 30 August 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.

29. 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 within the initial 3 month time limit, and to bring a claim by whatever amended time limit would have been the result of the commencement of such early conciliation.

30. For that reason, the claims for arrears of pay, notice pay and holiday pay (or payment in lieu of holiday) are not within the jurisdiction of the employment tribunal.

31. In the alternative, even if I am wrong, and it was not reasonably practicable for the Claimant to bring the claim in time, then, by 24 November 2022 he must have been aware

that the situation was not (necessarily) going to be resolved to his satisfaction. That is when he contacted ACAS to commence early conciliation. Even after the end of the conciliation (9 December 2022), he did not present the claim for a further month. Therefore, even had it not been reasonably practicable to bring the claim before 24 November 2022, it was not brought within a reasonable time period thereafter.

32. Section 164 of the Employment Rights Act 1996 describes the time limits for asserting redundancy pay entitlement. I am satisfied that the Claimant made written requests in time, and, in any event, received confirmation of entitlement from the employer within the initial 6 month period following the termination of employment. In any event, were it necessary for me to do so, I would extend time, because it is just and equitable to do so.

Employment Judge Quill

Date: 17 August 2023

JUDGMENT SENT TO THE PARTIES ON

25 September 2023

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AND ENTERED IN THE REGISTER

J Moossavi

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FOR THE TRIBUNAL OFFICE