



EMPLOYMENT TRIBUNALS

Claimant: Mr M Gardner

Respondent: Abellio London Limited

Heard at: London South (remotely by CVP)
On: 19 September 2023

Before: Employment Judge Heath

Representation

Claimant: In person

Respondent: Mrs T Patala (Solicitor)

JUDGMENT

The claims of unfair dismissal and unauthorised deductions from wages were presented outside the relevant time limits, time is not extended for their presentation, the tribunal has no jurisdiction to consider them and they are dismissed.

REASONS

Introduction

1. The claimant brings claims of race discrimination, disability discrimination, unfair dismissal and unauthorised deductions from wages. There was a case management hearing before EJ Siddall on 18 May 2023 at which the issues were clarified and this matter was set down for hearing to determine “*whether the claims for unfair dismissal and for unlawful deductions from wages were brought in time; and if not, whether they should proceed*”. A previous Notice of Hearing for today’s hearing had suggested it was to determine other issues, including whether the claimant was a disabled person, but at the start of the hearing, both parties confirmed their understanding that this hearing would determine the issue identified by EJ Siddall. Mrs Patala confirmed that the respondent had conceded that the claimant was a disabled person on review of his medical records. There was some discussion about whether the claimant depression and anxiety as well as long Covid were impairments for the purposes of the Equality Act 2010, but it remains the case that the latter is the disability he relies on.

Procedure

2. At the start of the hearing I asked the claimant whether he needed any adjustments to the hearing in the light of his medical issues. He confirmed that he did not, but I indicated we would be taking a break mid-morning and that he should raise it with me if he felt himself in any difficulty during the hearing.
3. I was provided with a 282 page bundle. The case management hearing had ordered the production of witness statements for this hearing, but none had been produced. By agreement with the parties, the claimant gave evidence on the issue of time limits and was questioned by myself and Mrs Patala. Both parties gave closing submissions, I deliberated in the absence of the parties and gave oral decision. The claimant asked for written reasons.

The facts

4. The claimant was employed by the respondent from 13 April 2002, latterly as a Central Duty Manager. He has been a trade union representative, and told me that he was experienced in dealing with employment issues and aware of tribunal time limits.
5. In 2018, the claimant says he was not paid in full for some overtime he did. He said the respondent failed to pay him what was due to him in the following months. In November 2019 claimant says he did a shift for which he should have been paid in the following months payroll, that is December 2019 or January 2020. The claimant says that he put in grievances in relation to these deductions. The claimant said that he exhausted internal procedures, but when he was dismissed he was told that he could bring up these deductions again when he was re-employed.
6. In November 2019 the claimant went on long-term sickness absence. He had been experiencing mental health difficulties following the death of his father, and was later hospitalised a couple of times during 2020 with Covid.
7. Absence management formal procedures were initiated which led to his dismissal on 2 July 2021. His dismissal was confirmed by letter dated 2 July 2021 from Mr Passfield, Operations Manager, and which contained the following paragraph:

“We discussed that if you make a full recovery within the next 12 months, we would be delighted for you to return to work. I would suggest at the end of this period that we meet as to ascertain your fitness level, obviously before we meet, I would like you to attend an appointment with the Companies Occupational Health provider. I would be more than happy to hold this meeting myself”.

8. The claimant did not appeal his dismissal. I accept his explanation that he believed that the respondent would re-employ him if and when his health improved. The claimant's evidence was that this belief was the reason why he did appeal his dismissal and did not present a claim to the tribunal. He advanced no other reason for not putting in a claim (including ill-health) and Mrs Patala did not challenge this explanation.
9. If the deductions from wages are taken as a series of deductions the latest time limit for presentation of a deduction from wages claim would have been around May 2020. The time limit for the presentation of an unfair dismissal claim would

have been 1 October 2021.

The law

10. The time limit for bringing an unfair dismissal complaint is set out in section 111 of the Employment Rights Act (“ERA”), the relevant provisions of which are as follows:

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.

11. The time limit for bringing claims of unauthorised deductions from wages set out in section 23 ERA and is in similar terms, save that the three months time limit begins with “*the date of payment of the wages from which the deduction was made*”.
12. The provisions relating to extensions of time because of ACAS early conciliation are not applicable here.
13. The test of practicability means what could have been done not what would have been reasonable. Reasonably practicable does not mean “reasonable” or “physically possible” but is analagous to “reasonably feasible” (see *Palmer and Or v Southend-on-Sea BC* 1984 ICR 372, CA). The burden of proof is on the claimant to show that it was not reasonably practicable to present the claim in time *Consignia v Sealy* [2002] IRLR 624.
14. I have not fair and in any case law on all fours with the scenario here, but in *London Underground Ltd v Noel* [1999] IRLR 621 the Court of Appeal held that the offer of alternative employment made by the employer before the expiry of the time limit, which was then withdrawn, did not constitute a “special fact” rendering it not reasonably practicable to present an unfair dismissal in time since the claimant knew all the facts necessary to make a complaint in time, and the fact of the offer and its subsequent withdrawal did not alter that position.

Conclusions

15. With respect to unauthorised deductions from wages, the claims are almost 2 ½ years out of time. The claimant knew of the circumstances giving rise to the claim in 2019, and while it was prudent of him to seek redress internally, this does not make it unfeasible to bring a claim. In circumstances where an offer of re-employment was clearly conditional, it does not seem likely that the respondent or claimant would have agreed to deal with these payment matters when he was re-employed. It was reasonably practicable for the claimant to bring his claim on time.
16. In respect of unfair dismissal, the dismissal letter clearly gave the claimant cause to understand that he would be welcomed back to employment by the respondent if he made a full recovery within 12 months and the respondent had ascertained

his fitness. However, at the point of dismissal it could have been the case that the claimant may not have been able in the future to satisfy these conditions.

17. It is also the case that he was unequivocally dismissed. EJ Siddall set out the issues relating to unfair dismissal at paragraph 2.6 of “The Issues” section of the case management summary. These are the issues one would expect in an ill-health capability dismissal and are issues which had crystallised at the point of dismissal. The claimant has not pointed to any fact that he did not know about which would have affected the fairness of the dismissal. What the claimant later learnt was that the respondent would not “re-employ” him (which he relies on as acts of direct race and disability discrimination, unfavourable treatment and a PCP giving rise to a duty to adjust).
18. While I can understand why the claimant would not have appealed his dismissal or put in a claim when he had a very well grounded belief that he might be reemployed, the conditional offer fresh employment, which was not in fact followed through, is not a special fact rendering it not reasonably practicable to present his complaint. The claimant knew all he needed to know to bring a complaint of unfair dismissal at the point of dismissal. Although it is entirely understandable why he did not bring a claim (as he had the hope of re-employment) he has not shown that it was not reasonably feasible for him to bring a claim. It probably comes as cold comfort to the claimant to hear my sympathy for his predicament and my acknowledgement that the outcome must seem harsh.
19. However, I find that it was reasonably practicable for the claimant to bring a claim in time.
20. As the complaints of unauthorised deduction from wages and unfair dismissal have been brought out of time, the tribunal does not have jurisdiction to consider them and they are dismissed.

Employment Judge **Heath**

19 September 2023_____