EMPLOYMENT TRIBUNALS

Heard at: London South (by CVP) **On:** 4 January 2024

Claimant: Mr J Efeotor

Respondent: Network Rail Infrastructure Limited

Before: Employment Judge Ramsden

Representation:

Claimant In person

Respondent Mr Zovidavi, Counsel

JUDGMENT

1. By consent, the Respondent's name is amended to Network Rail Infrastructure Limited.
2. The Respondent's application to strike-out the Claimant's claim is granted, and the Claimant's claim struck-out accordingly.

REASONS

3. These written reasons are provided at the request of the Claimant following oral reasons given on 4 January 2024.

Background

4. The Claimant worked for the Respondent as a Customer Service Assistant from either May 2017 or October 2018 (the parties disagree about the correct date) until his employment terminated by reason of his resignation on 26 May 2021.
5. The Claimant has brought a complaint that the Respondent owes him £1,250 by way of back pay for Sunday working in the period 1 January to 1 July 2020. The basis for this claim is pleaded in the alternative, either that the Respondent is in

breach of contract, or that it unlawfully deducted that sum from his wages. The Claimant seeks an award of compensation in that amount, i.e., £1,250.

6. The claim relates to a dispute between the Claimant and the Respondent about the rate of pay for Sunday working in the period 1 January to 1 July 2020. The Claimant was not alone in disputing the appropriate rate of pay for this work with the Respondent, and the matter was became part of pay negotiations between the Respondent and three trades unions recognised by it for relevant purposes. The Claimant was a member of one of those trades unions, the RMT, and so he "*left it to the union to resolve the matter*".

7. An agreement was eventually reached between the Respondent and those three trades unions on 20 March 2023 in respect of classes of employees of the Respondent that included Customer Service Assistants. The resultant pay award included a sum by way of back-pay for Customer Service Assistants in respect of Sunday working in respect of the period 1 January to 1 July 2020 (the **Pay Award**).

8. The relevant Collective Bargaining Agreement applicable at the time the Pay Award (and applicable at the date the Claimant's employment ended on 26 May 2021), dated 30 November 2005 (the **CBA**), applies to "*employees*" of the Respondent meeting the requisite description set out in that agreement.

9. On a date after 20 March 2023 (the relevant date is redacted from the document in the Bundle), Lisa Belsham, the Respondent's Director of Industrial Relations, wrote an email (to whom we cannot see, as that has also been redacted) which included the following:

   "*I know many of you have been contacted by ex-employees and / or union representatives on the matter of back pay. We have now met with representatives of the three trades unions and confirmed the following position:*

   - ** Back Pay will be processed for any person covered by the General Grades uplift who was **employed in the organisation on / after 01 January 2023**. It will be normal arrears from 1 January 2022 to date of leaving.*
   - ** Leavers during 2022 will not get back pay, as the dispute was still in play by all three unions.*
   - ** Back Pay will only be paid to 'good leavers' – so we will **exclude** any employee who was dismissed or those who resigned prior to a disciplinary.*"

10. The Claimant was told about the Pay Award by a former colleague around April 2023. He contacted the Respondent seeking £1,250 back pay, but this was not paid by the Respondent.

11. ACAS early conciliation began on 6 June and ended on 18 July, each of 2023, and the Claimant presented his Claim Form on 10 August 2023.

12. The Respondent applied to strike-out the Claimant's claim pursuant to Rule 37(1)(c) of the Employment Tribunals Rules of Procedure 2013 (the **ET Rules**), on the basis that the Claimant's claim "*has no reasonable prospect of success*". That preliminary issue falls to be determined today.

The strike-out application

13. Specifically, the Respondent asserts that the Tribunal does not have jurisdiction to hear the Claimant's claim as:

    a) (this is the Respondent's primary argument) the claim should rightly be regarded as a breach of contract claim, and the condition for the Tribunal's jurisdiction to determine that claim set out in Article 3(c) of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 (the **1994 Order**) was not met, because the claim did not "*[arise] or [was] outstanding on the termination of the employee's employment*";

    b) (this is the Respondent's second alternative argument) if the Claimant's claim should properly be regarded as a breach of contract claim and the Tribunal considers that the condition for its jurisdiction in Article 3(c) of the 1994 Order is met, the Claimant did not present the claim within the time limit prescribed by Article 7(a) of the 1994 Order, because it was not "*presented within the period of three months beginning with the effective date of termination of the contract giving rise to the claim*", and the Claimant has articulated no argument "*that it was not reasonably practicable for the complaint to be presented within [that period]*", or that it was presented "*within such further period as the tribunal considers reasonable*"; or

    c) (this is the Respondent's third alternative argument) if the Claimant's claim should properly be regarded as an unauthorised deduction from wages claim, the Claimant's claim was not brought within the time limit prescribed by section 23(2)(a) of the Employment Rights Act 1996 (the **1996 Act**), because it was not "*presented before the end of the period of three months beginning with… the date of payment of the wages from which the deduction was made*" or, as per section 23(3), presented before the end of the period of three months beginning with "*the last deduction or payment in the series*" in the case of a series of deductions, and it was reasonably practicable for his claim to be brought within that time.

14. The Claimant resists the Respondent's application. The Claimant says that:

    a) There was a dispute about the premium applicable to Sunday working outstanding when he left the Respondent's employment, and the resolution of that dispute by the Pay Award means that he is owed the back pay amount agreed to apply to Customer Service Assistants who

worked for the Respondent in the period 1 January to 1 July 2020, as he did work for the Respondent during that period;

b) The reason he did not bring his claim sooner is that he was part of the group of affected employees who brought the matter to the attention of their trade union, the RMT, which took the matter up on their behalf, and he "*left it to the union to resolve the matter*"; and

c) After he left the Respondent's employment he was no longer informed about the status of the dispute, save through former colleagues with whom he has maintained contact. One such former colleague informed him of the Pay Award around April of 2023. The Claimant then proceeded to contact the Respondent on a number of occasions seeking payment of the back pay of £1,250 but without success, following which he contacted ACAS and attempted early conciliation, again without success, so he filed his claim. The Claimant says that he acted appropriately and should not be penalised for when he filed his claim given that he did not know about the agreement of the Pay Award until April 2023.

The hearing

15. The Respondent was represented in the hearing by Mr Zovidavi, Counsel. The Claimant presented his own case.

16. The Respondent served hearing bundle of 76 pages, which had not been commented on by the Claimant in advance, but which the Claimant confirmed in the hearing was agreed by him.

17. Each party made submissions, which were considered by the Tribunal.

The law

The Tribunal's power to strike-out claims

18. Rule 37(1) of the ET Rules provides that:

"*At any stage of the proceedings, either of 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…".

19. The Court of Appeal has found that a "*more than fanciful*" chance of success was sufficient to resist strike-out on the basis of "*no reasonable prospect of success*" (*A v B* [2011] ICR D9).

20. Particular caution should be taking in striking-out a claim on the basis of "*no reasonable prospect of success*" if the claimant is a litigant-in-person and the key issues turn on disputed facts (*Cox v Adecco* [2021] ICR 1307).

The scope of the Employment Tribunal's jurisdiction relating to breach of contract

21. The 1994 Order extends the jurisdiction of the Employment Tribunal to deal with breach of contract claims in respect of contracts of employment or other contracts connected with employment if certain conditions are met. In the case of an allegation of a breach of contract by the employer, Article 3 of the 1994 Order applies. That Article provides that:

"*Proceedings may be brought before an employment tribunal in respect of a claim of an employee for the recovery of damages or any other sum (other than a claim for damages, or for a sum due, in respect of personal injuries) if-*

(a) the claim is one to which section 131(2) of the 1978 Act applies and which a court in England and Wales would under the law for the time being in force have jurisdiction to hear and determine;

(b) the claim is not one to which article 5 applies; and

(c) the claim arises or is outstanding on the termination of the employee's employment."

The conditions set out in (a) and (b) are met in this case, and those are not the subject of consideration in this application.

The time limits within which breach of contract claims must be brought in order for the Employment Tribunal to have jurisdiction

22. Article 7 of the 1994 Order requires that:

"*Subject to [any adjustment effected by reason of compliance with Early Conciliation requirements], 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…

(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."

23. No adjustment for Early Conciliation applies where the primary time limit for bringing the claim has expired before the start of Early Conciliation (Article 8B of the 1994 Order).

24. Whether it was reasonably practicable for a would-be litigant to bring their claim within the time limit is a question of fact.

25. The starting assumption is that, in passing the 1994 Order in those terms, Parliament has set an expectation that this is the period within which, in the ordinary course of events, it *is* reasonably practicable for would-be litigants to meet. There is also a strong public interest in claims being brought promptly. The burden of proof is on the claimant to show the reason or reasons which rendered it not reasonably practicable to meet the limitation period (*Porter v Bandridge Ltd* [1978] IRLR 271).

26. There has been considerable case law on whether waiting for the completion of an internal appeal procedure (typically against the employer's decision to dismiss) renders it "*not reasonably practicable*" to bring a claim before that process is complete. The theme of those cases is that waiting to exhaust the employer's internal appeal process on its own is not enough (*Palmer and anor v Southend-on-Sea Borough Council* [1984] ICR 372).

27. The test of whether it was "*not reasonably practicable*" is an objective test, examining not what the Claimant in fact knew of the applicable time limit, but whether the claimant *should reasonably have known* about it (*Porter*).

28. Lord Justice Scarman in *Dedman v British Building and Engineering Appliances Ltd [1974] 1 All ER 520* explained that where a claimant says that they did not know of their rights, the relevant questions would be:

    "*What were his opportunities for finding out that he had rights? Did he take them? If not, why not? Was he misled or deceived? Should there prove to be an acceptable explanation of his continuing ignorance of the existence of his rights, it would be inappropriate to disregard it, relying on the maxim "ignorance of the law is no excuse". The word "practicable" is there to moderate the severity of the maxim and to require an examination of the circumstances of his ignorance*".

29. As Lord Justice Brandon in *Wall's Meat Co Ltd v Khan* [1978] IRLR 499, [1979] ICR 52:

    "*Thus, where a person is reasonably ignorant of the existence of the right at all, he can hardly be found to have been acting unreasonably in not making inquiries as to how, and within what period, he should exercise it. By contrast, if he does know of the existence of the right, it may in many cases at least, though not necessarily all, be difficult for him to satisfy an [employment] tribunal that he behaved reasonably in not making such inquiries.*"

The time limits within which unauthorised deduction from wages claims must be brought in order for the Employment Tribunal to have jurisdiction

30. Section 23 of the 1996 Act sets out the time limit within which unauthorised deduction from wages claims must be brought:

"*(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) 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.

(4A) An employment tribunal is not (despite subsections (3) and (4)) to consider so much of a complaint brought under this section as relates to a deduction where the date of payment of the wages from which the deduction was made was before the period of two years ending with the date of presentation of the complaint…".

31. No adjustment for Early Conciliation applies where the primary time limit for bringing the claim has expired before the start of Early Conciliation (section 207B of the 1996 Act).

The effect of termination of employment on the employment contract

32. As a general principle, all contractual obligations in a contract of employment end on the termination of that contract, save where:

a) The employment contract expressly provides otherwise;

b) The law otherwise operates to provide for continuity of obligations (for example, in relation to confidential information); or

c) The employee is also a fiduciary, in which case fiduciary duties (which may be described in the contract of employment) continue to apply.

Application of the law to the facts here

The Respondent's primary argument

33. The Respondent's primary argument is that the claim should rightly be regarded as a breach of contract claim, and the condition for the Tribunal's jurisdiction to determine that claim set out in Article 3(c) of the 1994 Order was not met, because the claim did not "*[arise] or [was] outstanding on the termination of the employee's employment*".

34. The Tribunal observes that the Claimant is neither a party to or identified as a third party beneficiary with enforcement rights of the CBA, or therefore of the Pay Award. The contract that the Claimant appears to be relying on in respect of this allegation is therefore his contract of employment.

35. The copy of the Claimant's contract of employment included in the Bundle does not provide for any of its terms (including those concerning pay) to continue after termination. This contract and all its obligations therefore came to an end on 26 May 2021.

36. The Claimant has said that when he resigned, he was part of a group of employees in dispute with the Respondent about their pay for working on Sundays in the period 1 January to 1 June 2020. The Claimant has said that when he (and others) referred the matter to the RMT, he "*left it to the union to resolve the matter*", and that is why he did not bring a claim at the time the dispute initially arose or shortly after his employment ended. The fact that he did not bring such a claim is not disputed by him – his argument is that he should have been able to do so when he filed his Claim Form on 10 August 2023.

37. In terms of Article 3(c) of the 1994 Order, it is clear that the claim did not arise on the termination of the Claimant's employment (his evidence is that it pre-dated it), and therefore the relevant question is whether the claim was outstanding on the termination of his employment. This depends on the meaning of "*claim*" in that Article: if "*claim*" means a claim that has been brought, there was no claim outstanding at that time, but if "*claim*" can include a contingent claim, the Claimant may be able to refer to the dispute outstanding with the Respondent which was being pursued on his behalf by RMT. The Tribunal finds that "*claim*" does not have the latter wider meaning – it means a claim that has in fact been brought. The legislative language clearly refers to a "*claim*" in the context of setting a time-based parameter around claims for breach of contract which are within the tribunal's jurisdiction – this must mean a claim that has *been brought* by that time. Alternatively, if the legislative language is ambiguous, the intention of Parliament in setting a clear definition around what is and what is not within the jurisdiction of the employment tribunal would give the term "*claim*" the meaning of a claim that has *been brought*.

38. No claim for breach of the Claimant's employment contract had been brought by the date his employment terminated on 26 May 2021, and neither did the

termination of his employment give rise to such a claim. The Pay Award was only agreed on 20 March 2023, and it only applied to "*employees*" of the Respondent (as only current employees are covered by the carefully crafted scope of the CBA), and the ambit of the Pay Award was only extended to cover former employees subsequently (as described in Ms Belsham's email), and the former employees covered were required to have been employed by the Respondent on 1 January 2023, which was not the case for the Claimant.

39. The Tribunal consequently finds that the Claimant has no reasonable prospect of succeeding in his argument that the Tribunal has jurisdiction to consider the Claimant's claim as a breach of contract claim by reason of Article 3 of the 1994 Order.

The Respondent's secondary argument

40. The Respondent's secondary argument is that, even if the Claimant's claim satisfies Article 3(c) of the 1994 Order, it was not brought within the time limit specified in Article 7 of the 1994 Order.

41. It is unnecessary to consider this in light of the Tribunal's finding that the Claimant's claim does not satisfy Article 3(c), but for completeness the Tribunal expresses findings on this argument.

42. The Tribunal concludes that, in relation to the first question of whether it was reasonably practicable for the Claimant to bring the claim within three months of the date his employment terminated, the Claimant has not discharged the burden (as per *Porter*) of demonstrating that it was not.

    a) It was open to the Claimant to bring a claim in relation to the disputed rate of pay for Sunday working at any point from when that dispute arose.

    b) While it is understandable that, in the context of an ongoing employment relationship where the Claimant was hopeful of the RMT resolving the issue for him, he did not do so before he knew he was going to resign, Article 7(a) sets a primary time limit for him doing so at three months <u>after</u> the effective date of the termination of his employment, i.e., 25 August 2021, and he did not bring a claim in that time. That time period was considered by Parliament to be a reasonable one and there are strong public policy reasons for requiring claims to be brought within this time (*Porter*). Besides the fact that he had handed the matter over to the RMT to resolve, there is no argument offered by the Claimant for why he did not bring a claim in that time frame. He did not need to wait for the Pay Award to be agreed – he was well-aware of the dispute he had with the Respondent about the appropriate rate of pay.

43. The case law on the question of awaiting for resolution of an internal appeal is analogous to a situation where an employee is awaiting conclusion of trade union

negotiations with their employer, but waiting to exhaust such a procedure is not, without more, enough (*Palmer*), and the Claimant continued to wait for the RMT to resolve the situation after his employment terminated when there was no reason why he could not benefit from the outcome of the RMT negotiations whilst also preserving his position by bringing a claim.

44. The Claimant's ignorance of any time limit applicable to claim does not make it "*not reasonably practicable*" not to bring a claim on these facts – his evidence is that he was very clear that he was in dispute with the Respondent at the time he left the Respondent's employment, and he could have taken steps at that time to find out the effect of his resignation on that dispute, but he did not do so. Moreover, he said that when he left the Respondent's employment he stopped receiving any updates from the Respondent or the RMT about the pay dispute, which was a weighty indicator that they no longer considered that dispute to include him. That should also have prompted him to clarify his position.

45. The second question, of the duration of the further period within which it was reasonable for the Claimant to bring the claim, does not arise, because the Tribunal finds it *was* reasonably practicable for the Claimant to bring any breach of contract claim in connection with the pay dispute within the period of three months beginning on the date his employment terminated.

46. All this means that the Tribunal finds that the Claimant has no reasonable prospect of succeeding in his argument that the Tribunal has jurisdiction to consider the Claimant's claim as a breach of contract claim by reason of Article 7 of the 1994 Order.

The Respondent's third argument

47. As described above, this argument is that, if the Claimant's claim should properly be regarded as an unauthorised deduction from wages claim, the Claimant's claim was not brought within the time limit prescribed by section 23(2)(a) of the 1996 Act because it was not "*presented before the end of the period of three months beginning with… the date of payment of the wages from which the deduction was made*" or, as per section 23(3), presented before the end of the period of three months beginning with "*the last deduction or payment in the series*" in the case of a series of deductions.

48. Similar language to that considered in relation to the Respondent's second argument, of that time limit being extended where it was "*not reasonably practicable*" for the complaint to be presented within the three month time period running from the termination of the employee's employment, appears in section 23(4) of the 1996 Act. For the same reasons as set out above, the Tribunal finds it *was* reasonably practicable for the Claimant's claim to be brought within that time frame, and so no question arises as to a reasonable extension.

49. Moreover, section 23(4A) makes it plain that the Tribunal has no jurisdiction for an unauthorised deduction from wages claim brought more than two years after the last unauthorised deduction, and that two year period expired, at the latest, on 26 May 2023, so before the Claimant field his Claim Form on 10 August 2023.

50. For these reasons, the Claimant has no reasonable prospect of succeeding in his argument that the Tribunal has jurisdiction in respect of his unauthorised deduction from wages claim.

51. In summary, the Tribunal finds that the Claimant's claim, whether characterised as a breach of contract claim or an unauthorised deduction from wages claim, has no reasonable prospects of success. The Tribunal is conscious of caution expressed in *Cox* concerning striking-out claims brought by litigants-in-person, but:

    a) the facts here are not disputed; and

    b) it seems plain to the Tribunal that the prospects of success of the Claimant's claim are less than fanciful.

    It is therefore an appropriate use of the Tribunal's power in Rule 37 of the ET Rules to strike-out this claim.

Conclusions

52. For all of the above reasons, the Respondent's application succeeds and the Claimant's claim is struck-out.

Employment Judge Ramsden

Date **4 January 2024**

JUDGMENT AND REASONS SENT TO THE PARTIES ON

18 January 2024

FOR THE TRIBUNAL OFFICE.