



EMPLOYMENT TRIBUNALS

Claimant: Jihad Shahin

Respondent: Russell Finex Limited

Heard at: London Central (by CVP)

On: 18 December 2023

Before: Tribunal Judge Andrew Jack, acting as an Employment Judge

Representation

Claimant: In person.

Respondent: Ms A Foley, solicitor (SAS Daniels LLP)

PRELIMINARY HEARING IN PUBLIC RESERVED JUDGMENT

The judgment of the Tribunal is as follows:

1. The discrimination claims were not presented within the applicable time limit. It is not just and equitable to extend the time limit. The discrimination claims are therefore dismissed.
2. The unlawful deduction from wages claim was not presented within the applicable time limit. It was reasonably practicable to do so. The unlawful deduction from wages claim is therefore dismissed.

REASONS

Procedure

1. This was a public preliminary hearing. It was to determine the following:
 - a. Would it be just and equitable to extend the time limit for presenting the discrimination claims?

- b. Was it reasonably practicable to present the unlawful deduction from wages claim (in respect of unpaid pay and bonus) within the time limit?
 - c. If not, was it presented within a reasonable period?
2. The claimant emailed the Tribunal at 08:35 on the morning of the hearing saying that he had been unwell and had been hospitalised, and that he was concerned that he would not be able to speak easily as he had lost his voice. Following a query from the tribunal, at 09:24 he provided medical evidence that he had visited a hospital the day before and that he had been advised to arrange a chest X-ray on the day of the hearing. However the claimant told me at the start of the hearing that he was happy to continue with the hearing as he was feeling better and his voice was fine. He said that he could go to the hospital the day after the hearing. He did not wish the hearing to be postponed. In the light of the need to avoid delay so far as compatible with proper consideration of the issues, I decided to proceed with the hearing.
3. The claimant adopted his witness statement (bundle, p. 86) and was cross examined by the respondent. Both parties made submissions and I reserved judgment, so that the claimant would be able to go to hospital for an X-ray if he wished.

Findings of Fact

1. The claimant was employed by the respondent as an Export Sales Coordinator from 4 April 2022. He was dismissed on 6 December 2022 with immediate effect, and was paid in lieu of one-week's notice. The claimant's final wage slip was dated Friday 16 December 2022.
2. The claimant submitted a grievance to the respondent on 19 January 2023. He contacted ACAS on 4 April 2023, who issued a certificate on 6 April 2023. His claim was presented on 3 May 2023.
3. The claimant has been diagnosed with General Anxiety Disorder. He was unwell throughout the entire period of December 2022 to May 2023. Indeed he was unwell throughout 2022 and remains unwell now. He is still prescribed Sertraline for anxiety.
4. After his dismissal, the claimant worked at a pub over Christmas and New Year. He got a new job on 3 January 2023 as a technical sales engineer. He is still in that job. He also worked in a club from February to June 2023 on a Thursday and Sunday, as he was supporting his partner.
5. The claimant first became aware that he could present a claim to the ET in January 2023. He was not aware of the time limits at that point, and he did not know about the time limits when he submitted a grievance to the respondent on 19 January 2023. He only knew in March 2023 that there was a time limit for bringing a claim. He took outline legal advice in March 2023. He had instructed a lawyer by 13 March 2023 (see bundle, p. 83). He was told by his lawyer that his claim could be out of time.
6. He did not seek advice specifically about time limits.

7. The claimant emailed the respondent on 14 April 2023, saying that he was running out of time and that he would be filing a tribunal claim (bundle, p. 85). He did a quick Google search at some point, which said there was a three months' time limit. However he did not understand when the three months ran from.
8. The reason that he "did not have time to look at this", he told me, was that he was working to support his new partner in his new job as a technical sales engineer, and was also still working in the pub, and working on Thursday and Sunday in the club. I find that the reason he did not investigate time limits thoroughly enough to understand them was that he was busy with work. The reason that he was late, he told me and I find, was that although he knew that there was a 3 months' time limit, he believed that it ran from 19 January 2023 when he had made a grievance and he thought that he had until 19 April 2023 to contact ACAS. As a result of the Google search that he undertook he thought that he had 3 months from (in his words) "the problem", and he believed that time ran from the date that he submitted a grievance.
9. The claimant gave detailed reasons for his presenting his claims late. In doing so, he did not rely on his illness. He was working in more than one role from 6 January 2023 until June 2023, after presenting his claims. I am satisfied that the reason he did not present his claims earlier was *not* that he was too unwell due to his General Anxiety Disorder.

The Law

10. Section 123(1) of the Equality Act 2010 (EA) provides that discrimination claims may not be brought after the end of —
 - (a) the period of 3 months starting with the date of the act to which the complaint relates, or
 - (b) such other period as the employment tribunal thinks just and equitable.
11. Section 140B EA applies where a time limit is set by section 123(1)(a), to extend the time limit to facilitate early conciliation before the institution of proceedings.
12. Day A and Day B are defined in section 140B(2) EA. Day A is the day on which the prospective claimant initiates the early conciliation process, and Day B is the date of the early conciliation certificate issued when the process is concluded.
13. The extension under section 140B(3) EA applies in every case. It operates to "stop the clock" during the period in which the parties participate in early conciliation as it provides that in working out when a time limit expires, the period beginning with the day after Day A and ending with Day B is not to be counted.
14. The additional extension under section 140B(4) EA only applies in certain circumstances, where the limitation date, as calculated by section 123(1)(a), falls in the period between Day A and one month after Day B.
15. In *Robertson v Bexley Community Centre t/a Leisure Link* 2003 IRLR 434, Court of Appeal, Lord Justice Auld said at paragraph 25 that:

When tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse. A tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time. So, the exercise of discretion is the exception rather than the rule.

16. The onus is therefore on the claimant to convince the tribunal that it is just and equitable to extend the time limit.
17. When a claimant relies on his ignorance e.g. his ignorance of a right to make a tribunal claim to explain the late presentation of a discrimination claim, the tribunal should not only consider whether the ignorance was genuine but also whether it was and remained reasonable: *Perth and Kinross Council v Townsley*, Employment Appeal Tribunal (Scotland), 0010/10.
18. The normal time limit for presenting a claim for unlawful deduction from wages is set out in s. 23(2)(a) and (4) of the Employment Rights Act 1996 (ERA). A tribunal shall not consider a claim for unlawful deduction from wages unless it is 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. However a tribunal may consider a claim presented outside the normal time limit, if it is satisfied both that:
 - it was not reasonably practicable for the claim to be presented within the normal time limit; and
 - the claimant has presented it within such further period as the tribunal considers reasonable.
19. The normal three month time limit is extended by s. 23(3A) and s. 207B ERA to take account of the obligation to enter into early conciliation facilitated by ACAS.
20. In order to determine how the normal time limit will be extended by early conciliation, it is necessary to identify Day A and Day B and then apply the extensions in section 207B(3) and 207B(4) ERA. Day A and Day B are defined in section 270B(2) ERA. Day A is the day on which the prospective claimant initiates the early conciliation process and Day B is the date of the early conciliation certificate issued when the process is concluded.
21. The extension under section 207B(3) ERA applies in every case. It operates to "stop the clock" during the period in which the parties participate in EC as it provides that in working out when a time limit expires, the period beginning with the day after Day A and ending with Day B is not to be counted.
22. The additional extension under section 207B(4) ERA only applies in certain circumstances, where the limitation date, as calculated by subsection 207B(3), falls in the period between Day A and one month after Day B.

23. The correct approach for a tribunal on time limits in respect of protection of wage claims is set out in *Taylorplan Services Ltd v Jackson and ors* 1996 IRLR 184, EAT. The tribunal should consider the following questions:

- (1) Is this a complaint relating to one deduction or a series of deductions by the employer?
- (2) If a single deduction, what was the date of the payment of wages from which the deduction was made?
- (3) If a series of deductions, what was the date of the last deduction?
- (4) Was the relevant deduction under (2) or (3) above within the period of three months prior to the presentation of the complaint?
- (5) If the answer to question (4) is in the negative, was it reasonably practicable for the complaint to be presented within the relevant three-month period?
- (6) If the answer to question (5) is in the negative, was the complaint nevertheless presented within a reasonable time?

24. The burden of proof for establishing that it was not reasonably practicable to present the claim in time is on the claimant. Case law relating to the reasonably practicable in the context of unfair dismissal (*Marks & Spencer plc v Williams-Ryan* [2005] EWCA Civ 470) confirms that the tribunal can take into account various factors such as:

- the substantial cause of the claimant's failure to comply with the time limit;
- whether and when the claimant knew of their rights, including whether the claimant was ignorant of any key information;
- whether the claimant had been advised by anyone and the nature of the advice given;
- whether there was any substantial fault on the part of the claimant or their adviser which led to the failure to present the complaint in time.

25. A claimant's ignorance of (a) the right to bring a claim, or (b) how to make it or (c) the time limit for making it, will not automatically lead to a finding that it was not reasonably practicable for the claimant to present the claim in time. Where ignorance is a factor, the tribunal needs to be satisfied that the claimant's ignorance was reasonable in all the circumstances: *Marks & Spencer plc v Williams-Ryan*, paragraph 21.

26. Where an applicant has knowledge of his rights to make a claim before an industrial tribunal, then there is an obligation upon him to seek information or advice about the enforcement of those rights: *Trevelyan's (Birmingham) Ltd v Norton*, [1991] I.C.R. 488.

Conclusions

27. The claimant's claims, as clarified following earlier hearings, are set out in the Case Management Order of Employment Judge Howden-Evans

(bundle, p. 61-72). The claims are for direct race and/or religious discrimination, harassment on the grounds of race and/or religion, direct disability discrimination, discrimination arising from disability, failure to make reasonable adjustments, and unlawful deductions from wages in respect of unpaid wages and unpaid bonus. The events complained of include refusing the claimant permission to work from home in May 2022 (p. 67). The latest event complained of in the discrimination claims is the claimant's dismissal on 6 December 2022. However he says that he only learnt of some of some of the events which occurred while he was employed after his dismissal: he says that one week after he was dismissed, Keval told the claimant that Sean and Sue had repeatedly used the nickname "Jihadi John" for the claimant (p. 70). However the delay in learning of this was only one week, and he was aware of most of the events complained of as they occurred.

28. So the acts of discrimination complained of occurred as early of May 2022, and the latest was his dismissal with immediate effect on 6 December 2022. The latest he should have contacted ACAS was therefore 5 March 2023. When he contacted ACAS on 4 April 2023 he was therefore a month late. Time did not run in the period starting on the day after he contacted ACAS (i.e. starting on 5 April 2023) and ending on the day the ACAS certificate was issued (i.e. ending on 6 April 2023): section 140B(3) EA. But it did run thereafter until he presented his claim on 3 May 2023, as section 140B(4) EA did not apply, since over three months had already passed from his dismissal by the time he contracted ACAS. His discrimination claims were therefore presented almost two months late.
29. The claimant first became aware that he could present a claim to the ET in January 2023. He should at that point have sought information about how to enforce that right.
30. The claimant was advised in March 2023 that his claim could be out of time. But he did not seek advice specifically about time limits, and his claim was not presented until 3 May 2023.
31. He did do a quick Google search and believed, incorrectly, that the three month time limit ran from 19 January 2023, when he had made a grievance, and he therefore thought that he had until 19 April 2023 to contact ACAS.
32. I must consider whether the claimant's ignorance of how time limits were calculated was and remained reasonable throughout the relevant period: *Perth and Kinross Council v Townsley*. His ignorance of how time limits were calculated was not reasonable, and became increasingly less reasonable as time progressed. He was aware that he could make a claim by January 2023 and should have sought information about how to enforce his rights. He was advised that his claims could be out of time in March 2023. However he did not seek advice specifically about time limits. He did do a quick Google search at some point, but his continued confusion about when time started to run was not reasonable in all the circumstances. He should at least have carried out more than a quick Google search, to ensure that he had understood when time ran from, especially since he had had legal advice that his claims could be out of time.

33. Turning to the balance of prejudice, if time is not extended then the claimant will not be able to pursue his discrimination claims. If time is extended, the respondent will suffer from having to defend a claim which would otherwise have been time-barred. Ms Foley did not argue that the respondent would suffer forensic prejudice if time was extended. That is, she did not argue that the delay in presenting the discrimination claims meant that e.g. relevant staff had moved on and would not be available to give evidence in the respondent's defence. Indeed, the respondent proposes to rely on three witnesses who are still available, should these claims progress (p. 56). That does not however alter the fact that if time is extended, the respondent will face claims that would otherwise be time barred.
34. Taking account of all of the circumstances as outlined above, in particular the length of the delay in presenting these claims and the unreasonableness of the claimant's ignorance of how time is calculated, I consider that it would *not* be just and equitable to extend the time limit for presenting the discrimination claims.
35. The legal tests in respect of the claim for unlawful deduction from wages are different, and I now turn to that claim.
36. This is not a claim for a series of deductions. It is a claim for what are said to be unpaid wages and for an unpaid bonus.
37. The claimant was dismissed on 6 December 2022 with immediate effect, and was paid in lieu of one-week's notice. The claimant's final wage slip was dated Friday 16 December 2022. I infer that the final payment was made to him on 16 December 2022.
38. A deduction from wages is made where the total amount of wages paid on any occasion is less than the total amount of the wages properly payable to the worker on that occasion: s. 13(3) ERA. On the claimant's case, the payment made on 16 December 2022 was less than the total amount properly payable to him, because it did not include the full amount of the wages and the bonus that he says were due to him. On the claimant's case, a deduction from his wages was made on 16 December 2023.
39. The last day for contacting ACAS in respect of the claim of unlawful deduction from wages was 15 March 2023. However the claimant did not contact ACAS until 4 April 2023, almost three weeks too late. The reason for that was not that he was unwell. The claimant was working in more than one role from 6 January 2023 until June 2023. The reason that his claim for unlawful deduction of wages was not presented within the 3 month time limit is that he was focused on his various jobs and supporting his partner. The claimant first became aware that he could present a claim to the Employment Tribunal in January 2023. There was at that point an obligation upon him to seek information or advice about the enforcement of his rights: *Trevelyan's (Birmingham) Ltd v Norton*. His ignorance of time limits until advised by his lawyer in March 2023 was not reasonable in all the circumstances. He could and should have sought advice or done research on the internet as to how to enforce his rights (as indeed he did at a later stage). In all the circumstances, I am satisfied that it was

Case No: 2207371/2023

reasonably practicable for him to bring a claim for unlawful deduction from wages prior to the expiry of the time limit for doing so on 15 March 2023.

Employment Judge Andrew Jack
Date 27 December 2023

JUDGMENT SENT TO THE PARTIES ON
10 January 2024

FOR THE TRIBUNAL OFFICE:

Notes

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