EMPLOYMENT TRIBUNALS

Claimant: Mrs A Czyz
First Respondent: Saxon Way Primary School
Second Respondent: Balfour Junior School/Beyond Schools Trust

Heard at: London South (by CVP)

On: 19/6/2024
Before: Employment Judge Mr J S Burns

Representation
Claimant: In person (on telephone as her internet inadequate)
Second Respondent: Mr B Wood (Solicitor)

JUDGMENT

The claims against both Respondents are struck out

REASONS

1. Today was an Open Preliminary Hearing to consider whether the claims were brought out of time.

2. I heard evidence on oath from Mr P Jacobs who is an independent HR consultant employed by a number of Academy Trusts with first-hand experience of the redress scheme which is the basis of the claims. I also heard evidence from the Claimant and considered her witness statement, and a bundle of 134 pages.

Findings of fact

3. The Claimant, who works as a teaching assistant, worked for Balfour Infant School ("BIS"), which is a Medway-maintained community school, from 31/10/2016 to 1/9/21. From 1/9/21 to 20/11/22 she worked for the First Respondent (SWPS) which is run by the Griffin Schools Trust. On 21/11/22 she started employment at Balfour Junior School, which is owned and run by the Beyond Schools Trust (the Second Respondent) where she remains in employment.

4. These three schools are owned and run by separate different legal entities. Hence an employee moving from employment in one of these school to another of them does not retain continuity of service, as would be the case, for example, if an employee moved from one branch to another within a single company, or if there was a TUPE transfer.

5. In April 2020 various schools in the Medway Area adopted a new formula for the payment of Term-Time Only Holiday Pay ("TTOHP") to their employees. The new formula was acceptable to the unions and settled the issue from April 2020 onwards - and the new formula remains is use to this day.

6. However this left in contention the issue of TTOHP paid or not paid up to April 2020. A number of group tribunal claims were issued about this and various unions on the one hand and Medway Council (on behalf of various schools in the area) negotiated a settlement ("the redress scheme") which was then rolled out in 2022, and made available to all eligible employees whether or not they had made a tribunal claim. The Claimant had not issued a tribunal claim but was eligible because in April 2020 she had been employed by BIS which was one of the schools included in the redress scheme.

7. Under the terms of the scheme an employee who was employed by a relevant school on 1/4/20 but who had subsequently left that employment had to submit to that school by 31/3/22 an expression of interest. If they did not, then they would be too late to take advantage of the scheme. If such an expression of interest was lodged with the school which was the employer on 1/4/20, then it would be that school which would become liable to pay the redress.

8. Mr M Simpkin at the GMB Union sent an email shortly before 31/3/22 to various union members, including the Claimant. The email includes the following:

> *"In terms of ex-employee claims, they must have submitted an expression of interest to their previous employer by the end of the 31st March 2022 to see if they can claim. If they do not it may well be deemed that any late claims will be considered out of date.*
>
> *If eligible, the offer should be applied to each TTO contract an individual held at the school.*
>
> *Change in Employer within Medway, If continuous service from any other school or academy was honoured by the current employer, then it is the current employer who pays the compensation, considering the previous service".*

9. The last paragraph of the above quote was incorrect or was at least misleading for the Claimant.

10. There is a Redundancy Modification Order in place which in some cases enables an employee made redundant by one employer to count service with a previous employer for purposes of a redundancy payment, but that did not apply to the TTOHP redress scheme.

11. When she received the GMB email she was employed by SWPS and she assumed that she had continuity of service as referred to in the email. Hence she expected her TTOHP redress would be paid by SWPS. In fact SWPS was not liable because it was not her employer on 1/4/20. The school liable to pay the redress would have been BIS as it was the employing school on 1/4/20.

12. The Claimant should have sent in an expression of interest to BIS by 31/3/22 in order to trigger its liability, but she did not do so.

13. The Claimant previously suggested that her entitlement under the redress scheme would have been two years' pay. She told me today that this figure had been suggested to her by someone at ACAS. In fact, as is clear from the scheme documents which I have seen today, there was a cap placed on the redress payable under the scheme of two weeks' pay which in the Claimant's case would have amounted to about £600 in total.

14. The Claimant started ACAS conciliation on 5/5/23 and issued her claim on 1/6/23.

15. Relevant parts of section 23 ERA 1996 read as follows:

23 (1)A worker may present a complaint to an employment tribunal—

(a)that his employer has made a deduction from his wages in contravention of section 13 (including a deduction made in contravention of that section as it applies by virtue of section 18(2)),

(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, or

…

(3)Where a complaint is brought under this section in respect of—

(a)a series of deductions or payments, or

…

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.

(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.

Conclusion

16. It is unlikely that the claim is for wages properly-so-called because the Claimant did not lodge an expression of interest with BIS, and so had no entitlement under the scheme in the first place.

17. In any event even if the claim was for wages properly-so-called, it would be a claim for a shortfall in wages up to 1/4/2020, which is outside the period of two years ending with 1/6/23, and so it is debarred by section 23(4A), whether or not it was reasonably practicable for the Claimant to claim in time.

18. Alternatively, the claim is considerably out of time in any event because I am not satisfied that it would not have been reasonably practicable for the Claimant to claim in time. She was a member of the GMB union with access to specialist advice on the subject. If she received negligent advice from the Union, that is a matter she must take up with the union, and it is not something which the Tribunal can deal with, as the Claimant has already been told.

19. In any event the Respondents are not liable and would not have been liable even if the Claimant had received proper advice, because neither of them were her employer on 1/4/20.

20. The claims are out of time and outside the Tribunal's jurisdiction.

Employment Judge J S Burns
19/06/2024
For Secretary of the Tribunals