



EMPLOYMENT TRIBUNALS

Claimant: Mr Martin Akioyame
Respondent: Epsom and St Helier University Hospital NHS Trust

Heard at: London South (by CVP)

On: 18/6/2024
Before: Employment Judge Mr J S Burns

Representation

Claimant: Mr R Jones (Counsel)
Respondent: Mr S Brittenden (KC)

JUDGMENT

1. The claim for unlawful deduction from wages is struck out save for the claims described as follows in the Claimant's schedule of loss dated 28/6/23 "*Audit of 01/10/2022 - 28/12/22 shows 9 overruns at £222.00=£1998.00, 30/05/2022-18/05/2022 additional 9 overruns at 222.00= £1998.00*".
2. The Claimant's application to amend his claim to include a direct age discrimination claim is refused
3. The Claimant's application to amend his direct race discrimination claim to add the material in paragraphs 3.1-3.4 inclusive of his document entitled "*Further and Better Particulars For Hearing on 18/6/2024*" is refused.

REASONS

1. I was referred to a bundle of 199 pages, to a document entitled "*Further and Better Particulars For Hearing on 18/6/2024 and Application to Add Age Discrimination claim*" and to the Respondent's written submissions. I did not receive any witness evidence. I received oral submissions from both sides.

The wages claim

2. This is set out in the Claimants Schedule of Loss dated 28/6/23 as follows:
Unpaid Wages:
111 days at £200.00 (period 30/03/2020-20/07/2020) = £22,200.00
Extra 2 sessions per week (30/03/2020-21/06/2020 = £5,328.00
Extra 1 session per week (22/06/2020-31/03/2021 = £8214.00
30/05/2022-18/05/2022, additional 9 overruns at £222.00 period = £1998.00
Audit of 01/10/2022- 28/12/2022- show 9 overruns at £222.00= £1998.00
3. 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.

4. I reject the Claimant's submission that a claim for a wage-deduction prior to the two-year period can be claimed if it is part of a series of deductions ending within the two year period, which submission is contrary to the clear meaning of the words "*(despite subsections (3) and (4))*" in section 23(4A).
5. The Claimant presented two claims claiming unpaid wages, the first of which on 29/12/22. The two-year period ending with that date started on 30/12/20. The period of three months prior to the presentation of the claim (as extended by ACAS conciliation) started on 15/9/22.
6. The claims for £22200 and £5328 are for wages said to have been deducted earlier than the two-year period and hence they are barred by section 23(4A).
7. An unspecified part of the claim for £8214.00 is for deductions made within the two-year period but I find that any claim that that was part of a series of deductions ending on or after 15/9/22 (ie part of a series with the claim described as "*Audit of 01/10/2022-28/12/2022- show 9 overruns at £222.00= £1998.00*") has no reasonable prospect of success, because they are described differently by the Claimant and there is a gap of 18 months between 31/3/21 and 1/10/22.
8. The Claimant has not given any evidence and I am not satisfied that it was not reasonably practicable for him to bring his claim for the £8214 in time.
9. The period in respect of which the first claimed sum of £1998.00 is made is unclear as it reads "*30/05/2022-18/05/2022*". It appears to fall within the 2-year period but earlier than

15/9/22. It appears to be similar in nature to the second claimed sum of £1998.00 which relates to the period 01/10/2022- 28/12/2022 and which is in time. If this money is owed at all, it is possible that the first sum can be claimed as in-time as part of a series of deductions including the second sum. This will have to be decided on the evidence at trial and it is not appropriate to strike it out.

10. However the remainder of the wage claims are either barred or out of time and must be struck out.

The amendment applications

11. The Claimant issued two ET1s. The two cases were managed at a PH before EJ Codd on 15/6/23 at which the Claimant was represented by Counsel. Prior to that hearing the Claimant had indicated a wish to expand his claims beyond those identified in the ET1s, to which the Respondent objected. EJ Codd identified and the parties agreed the extant claims as constructive unfair dismissal, unauthorised deduction from wages, unpaid holiday pay, unpaid notice pay and direct race discrimination only.

12. The direct race claim was recorded as being about the following: *'During the pandemic, the Claimant's rota was altered without discussion; The Claimant's complaints about his rota being altered were not responded to; On some occasions, the days worked by the Claimant were retrospectively removed from the rota; The Claimant's study leave was cancelled; The Claimant was required to prove the hours that he actually worked at Ashstead Hospital in circumstances where his colleagues did not have to do so; Being subjected to threats to recover the overpayment of wages.'*

13. EJ Codd recorded the following in paragraph 44 of the case management summary *"In discussion with the advocates today, it is noted that the claimant has filed various documents which seek to expand the scope of the claim. The claimant has confirmed that the ET1 filed on 31st December 2022 is the scope of the claim and that there is no application to amend the claim. Further particulars will be provided in order to clarify the direct discrimination and wages claims."*

14. As confirmed by Mr Brittenden today, (who was also at the hearing before EJ Codd, and who took a note), the reference to *"the ET1 filed on 31/12/22"* was erroneous. EJ Codd intended to refer to the (second) claim filed on 2/3/23.

15. Hence the claims were identified and limited a year ago, and the Claimant on that occasion through Counsel expressly abandoned any application to amend or expand the claim beyond the second ET1 as understood and agreed at that hearing. All that remained to be

done was for the Claimant to particularise the wages and direct race claim within the parameters as identified.

16. The Claimant has disregarded all this and earlier this month (June 24) filed and served an application to add a direct age discrimination claim and at the same time he produced what he described as further particulars of the direct race discrimination claim but which in fact go well beyond the subject matter of the direct race claim as identified before EJ Codd. They seek to introduce entirely new allegations and issues. The first new matter would require the Tribunal to go back to the beginning of the Claimant's employment 20 years ago. In submissions Mr Johns properly conceded that in order to get the purported further particulars of the race claim before the Tribunal he would have to make a successful application to amend the direct race claim.
17. The proposed new direct age discrimination claim is proposed not simply in relation to the subject matter of the race claim as identified before EJ Codd, but in relation to the expanded subject matter of the race claim as proposed in the purported further particulars, which, as already noted, should themselves have been presented as an application to amend, if they were to be presented at all.
18. Both the applications fly in the face of the express abandonment of any application to amend, which was confirmed before EJ Codd a year ago. No good reason has been given why these new claims (the proposed expanded race claim and the new age claim) were not brought at the outset or why they were not the subject of an application to amend before EJ Codd. No explanation has been given for the long delay which has elapsed since June 23 and the recent making of these applications. Even now the proposed new allegations are vague and poorly pleaded in most part.
19. Even if the addition of a new age discrimination claim was to be restricted to the ambit of the direct race claim as agreed in June 2023, it not amount to a mere relabelling and it would introduce new issues and considerations.
20. Allowing the applications or either of them would endanger the 7-day trial in November 24 for which the parties will have been waiting for 16 months, if it takes place then. The new claims if brought afresh would be considerably out of time. I have applied the Selkent principles in refusing the applications to amend.

21. The discrimination claim will therefore be limited to direct race discrimination as identified in paragraph 12 above only, but subject to such further particulars as the Claimant has been directed to provide by 2/7/24.

Employment Judge J S Burns
18 June 2024
