Neutral Citation Number: [2024] EAT 127

Case No: EA-2022-000701-RS

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 25 June 2024

Before:

THE HONOURABLE MRS JUSTICE HEATHER WILLIAMS, DBE

- -

Between:

MR J WHARTON **Appellant**

- and –

SHEEHAN HAULAGE AND PLANT HIRE LTD **Respondent**

- -
- -

The parties were not present or represented

Hearing date: 25 June 2024

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JUDGMENT

SUMMARY

Jurisdictional / time points

The Employment Tribunal ("ET") dismissed the claimant's claims for notice pay and holiday pay on the basis that it did not have jurisdiction as the claim form was presented out of time.

The claimant's appeal was allowed as the ET had erred in treating the three month time limit as running from the date of termination of his employment. As the claim was for unlawful deduction of wages, pursuant to section 23(2) of the **Employment Rights Act 1996** the three month time limit ran from the date when the alleged deductions were made. In this instance, the claimant had contacted ACAS within three months of this later date and had presented his claim to the ET within one month of receiving the EC Certificate.

The ET's finding that the claim was presented out of time was set aside and substituted for a finding that the claim was presented in time and the claim was remitted to the ET for hearing.

THE HONOURABLE MRS JUSTICE HEATHER WILLIAMS, DBE:

1. This is an appeal against the decision of Employment Judge Forde sitting in the Reading Employment Tribunal ("ET"), to dismiss the claims for notice pay and holiday pay on the basis that the Tribunal did not have jurisdiction to hear them as they were presented out of time. I will refer to the parties as they were known below.

2. The appeal was set down for a full hearing at the paper sift stage by Mr Clive Sheldon KC (as he then was), sitting as a Deputy Judge of the High Court, by an order sealed on 11 June 2023.

3. The claimant has represented himself throughout the litigation; the respondent was represented by Ms H Sheehan, its HR manager, at the hearing before the ET. Neither party has attended the hearing today. I will explain the circumstances shortly.

4. In terms of the substance of the appeal, the ET found that the claims were presented out of time as the claimant's employment had terminated on 9 September 2020 and the applicable three-month time period ran from this date. In his notice of appeal, the claimant contends that his claim was for unlawful deduction of wages, that the deductions occurred on 18 September 2020 and on this basis his claims had been presented to the ET within the prescribed time limits.

<u>Procedural history in relation to the appeal hearing</u>

5. It is necessary to mention some of the procedural history leading up to the appeal hearing. On 24 January 2024, a notice of hearing was sent to the parties

indicating that the appeal had been listed for hearing on 25 June 2024. On 12 June 2024, the respondent applied for an adjournment of the hearing. By an order sealed on 14 June 2024, Eady J, President, refused the application. In her accompanying reasons, she indicated that whilst she accepted the explanation provided by Ms Sheehan, that she would be in Ireland until some point in July 2024, supporting and caring for her elderly mother (who is currently undergoing treatment for cancer), there would be nothing to stop the respondent from instructing others, whether a lawyer or some form of legal or HR consultant, or one of its directors or other employees, to appear on its behalf at the appeal hearing. As she explained in detail, Eady J was concerned about the likely lengthy delay that would result if the hearing was adjourned, in circumstances where the hearing before the ET had taken place as long ago as 3 March 2022, and the underlying events occurred in 2020.

6. By subsequent order sealed on 21 June 2024, I refused the respondent's subsequent application for Ms Sheehan to attend the appeal hearing remotely from Eire where she is currently with her mother. The application was made on the basis that it was still intended that Ms Sheehan would represent the respondent at the appeal and that she was unable to travel back to the UK for the hearing, given her caring responsibilities. In the reasons accompanying my order, I emphasised that Eady J had refused the adjournment application on the basis that there was nothing to prevent the respondent from obtaining alternative representation for the hearing, and the current application did not assert that this had not proved possible, nor explain what steps had been taken to obtain alternative representation, whether internal or external to the respondent. Paragraph 8.14.6 of the 2023 Practice Direction of the Employment Appeal

Tribunal indicates that applications for remote attendance at a hearing by a person who is outside of the jurisdiction will only be granted in: “exceptional circumstances”, a criterion that was not met in these circumstances. I subsequently refused the respondent’s application for permission to appeal this order as no arguable error of law had been identified, as opposed to an expression of disagreement with my conclusion.

7. Subsequent to the parties being sent the order on 21 June 2024 refusing the respondent’s application for Ms Sheehan to attend the appeal hearing remotely, the claimant emailed the Employment Appeal Tribunal (“EAT”), indicating that he was now unable to attend the 25 June 2024 appeal hearing in person, although he could attend remotely. However, he indicated that in any event he was willing for the hearing to proceed in his absence.

Attendance at the appeal hearing

8. I have determined that it is in the interests of justice for the appeal hearing to proceed in the absence of the claimant. As I have indicated, he recently confirmed that he had no objection to this course; and in the same email he said that he relied upon his grounds of appeal and upon the comments made by the Deputy High Court Judge when the case was sifted to a full appeal.

9. As I have indicated, no-one from the respondent has attended the hearing today. I delayed the start of the hearing until 10.40 a.m. in case a representative from the respondents had been delayed en route. However, no message was received by the EAT suggesting that this was the case.

10. There has been no further communication from the respondent since I refused permission to appeal last Friday. In the circumstances, I infer that the respondent has decided not to attend. As the respondent has been given a fair opportunity to do so, I determined it was also appropriate and in the interests of justice for me to proceed in the respondent's absence.

11. In respect of both parties, I will take into account the written documentation already provided, in so far as it is relevant.

The material circumstances and the Employment Judge's decision

12. The claimant presented his claim form to the ET on 5 February 2021. In the "Employment details" section, he said that he had been employed by the respondent from 3 August to 9 September 2020 as a plant operator. In section 6 of the form he indicated his gross weekly pay was £595. The details of his claim that he provided were that he was owed one week's notice pay of £595 and outstanding holiday entitlement in the sum of £43.92. He said that he had been told by the respondent that his services were no longer required but had not received one week's statutory notice pay or his full accrued holiday entitlement. The claim form did not refer in terms to whether the claim was brought as a breach of contract, an unlawful deduction from wages and/or under the **Working Time Regulations 1998**, hereafter "**WTR 1998**", although the latter was referred to explicitly in the context of alleging that the claimant had not been paid his correct entitlement to holiday pay.

13. The response form referred to the claimant's employment ending on 8 September 2020 (which Ms Sheehan corrected at the hearing before the ET to 9 September 2020). The respondent said that the claimant had resigned on the

evening of 8 September 2020 by throwing his keys at Michael Sheehan, saying: "Stick your job" and had not returned to work on the following day. The implication was that the respondent had accepted the resignation on 9 September 2020.

14. The respondent contended the claimant was not owed any notice pay as he had not given any notice and that he had been paid in full for the weeks that he had worked. Sums paid and payment dates were listed. The form said:

> "His last pay day the 18th September included his last two days' work, 7th and 8th September, along with accrued holiday pay. Employees are paid weekly in arrears."

The list that was then set out referred to the last payment having been made to the claimant on 18 September 2020 in respect of the two days worked on 7 and 8 September 2020.

15. I have limited documentation from the ET proceedings, but it appears from para 5 of the ET's decision that the hearing on 3 March 2022 was listed specifically to consider whether the claim was presented in time and thus whether the ET had jurisdiction to hear it. As I have indicated, Ms Sheehan attended that hearing on behalf of the respondent. The claimant did not attend. He had contacted the ET in advance of the hearing, indicating he was unable to attend on the hearing date. Para 3 of the ET's decision records that the claimant sent an email at 9.52 hours on 3 March 2020, which asked for some facts and details to be taken into account. I have not seen a copy of that email. The Employment Judge determined it was appropriate to proceed in the claimant's absence and there is no appeal against that conclusion.

16. The crux of the ET's reasoning was as follows:

> "6. The first thing for me to determine was the effect of date of termination or alternatively, when the claimant's employment ended. Ms Sheehan confirmed to me the respondent had in error stated the claimant's termination date…to have been 8 September 2020, when in fact it was 9 September 2020…
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> 7. The claim pursues claims of breach of contract, notice pay and holiday pay. Both claims have time limits of three months, i.e. that those claims must be presented to an Employment Tribunal within three months of the termination date. In this case the time limits for both claims to be presented to a Tribunal expired on 9 December 2020.
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> 8. From the Tribunal file I could see that there is an ACAS early conciliation certificate by way of reference number R230706/2/25 that identifies that the date of receipt by ACAS of the EC Early Conciliation Certificate notification was 16 December 2020, that the certificate itself was issued on 6 January 2021. Therefore, it would appear that the claimant obtained the certificate beyond the three-month time limit that I have already described.
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> 9. Lastly, the claim was received by the Tribunal on 5 February 2021 ostensibly almost two months beyond the statutory time limit.
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> 10. Having received the evidence before the Tribunal, I found that there was not evidence before the Tribunal which could explain the claimant's failure to present his claim in time. Accordingly, I find the claim has been presented out of time and therefore the Tribunal has no jurisdiction to hear the claim."

17. I do not know whether there was any further documentation before the ET. I have not seen, for example, the claimant's contract of employment and no reference is made to it in the judgment. By application dated 17 June 2024, the respondent applied to the EAT to rely on additional documentation that was not before the ET. This was a schedule of payments made to the claimant and supporting payslips. I refused the application as the documentation was not relevant to what was the only issue before the EAT on this appeal, namely whether the ET erred in law in finding that the claim was presented to the ET outside of the prescribed time limits. The application appeared to have been made on the misconceived basis that the EAT could and would be deciding upon

the merits of the underlying claim. As I explained in the order that I made, if the appeal succeeded, the claim would be remitted to the ET for determination. The EAT simply hears appeals on points of law.

The grounds of appeal

18. The claimant's grounds of appeal are succinctly stated in his notice of appeal as follows:

> "My claim is for Unlawful Deduction of Wages, which happened on the 18th September 2020. I then applied to ACAS for early conciliation on the 16th December 2020, within three months of the problem happening, as per the UK Gov Website.
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> After an unsuccessful Early Conciliation Period I received my Early Conciliation Certificate on the 6th January 2021 and presented my claim to the Employment Tribunal on the 5th February 2021. Well within the period of at least one month, as per the UK Gov Website."

19. The respondent's answer relies upon the ET's reasoning, emphasising that the claim was only received by the ET on 5 February 2021. The respondent then seeks to rely upon the following by way of further support in resisting the appeal:

> "We stand by the original defence that there is no valid claim to be heard. Mr Wharton walked out of his post on the 8th September, verbally abusing his manager, Mr Sheehan, as he left, and advising he would not be returning with immediate effect, serving no notice period. Therefore, his last day of work was Tuesday, 8th September 2020; his final pay day was 18th September for the two days, 7th and 8th September plus 14.37 hours accrued holiday pay. It is standard practice payments are made one week in arrears. His employment lasted five weeks and 1 day. Therefore he was paid his full entitlement, including accrued holiday pay due to him on Friday, 18 September 2020."

20. The majority of that paragraph relates to the merits of the underlying claim, which as I have explained, is not before the EAT at this preliminary stage of the

litigation. However, for present purposes the text is notable in confirming that salary payments were made a week in arrears, that the claimant's final pay day was 18 September 2020 and that he was also paid a sum for accrued holiday entitlement on that date.

21. Despite the requirement at para 6 of the EAT's order sealed on 11 June 2023 to file skeleton arguments not less than 14 days before the hearing date, neither party did so, nor has either party made any detailed submissions on the law. In his email sent to the EAT on 21 July 2020, the claimant indicated he did not intend to file a skeleton argument as he was content to rely upon the grounds of appeal and the comments made by the Judge at the sift stage. Whilst the respondent has not filed a skeleton argument, I infer that reliance continues to be placed on the contents of the answer.

The legal framework

22. Regulation 14(2) **WTR 1998** confers an entitlement for a worker to be paid a sum of money in respect of accrued leave on the termination of his employment. Regulation 30(1) provides that a worker may present a complaint to an Employment Tribunal that his employer has failed to pay him the whole or any part of any amount due to him under regulation 14(2). Regulation 30(2) states that:

> "(2) …an employment tribunal shall not consider a complaint under this regulation unless it is presented:
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> a) before the end of the period of three months…beginning with the date on which it is alleged that the exercise of the right should have been permitted…or, as the case may be, the payment should have been made".

23. Section 13(1) of the **Employment Rights Act 1996** (“**ERA 1996**”), provides that an employer shall not make a deduction from wages of a worker employed by him unless the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker’s contract or the worker had previously agreed in writing to the making of the deduction. Section 13(3) states that where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of wages properly payable by him to the worker on that occasion:

> “the amount of the deficiency shall be treated for the purposes of this part as a deduction made by the employer from the worker’s wages on that occasion”.

24. Section 23(1) **ERA 1996** states that a worker may present a complaint to an Employment Tribunal that, amongst other things:

> “his employer has made a deduction from his wages in contravention of section 13”.

Section 23(2) addresses the time limits for such a claim to be brought:

> “(2) Subject to sub-section (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:
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> a) in the case of a complaint relating to a deduction made by the employer, the date of payment of the wages from which the deduction was made.”

Section 23(3) addresses the position where a claim is made in respect of a series of deductions, but that does not arise in the present case.

25. Amongst other circumstances, deduction from wages claims may be brought under the **ERA 1996** provisions where the employer disputes that there is any contractual entitlement to pay the sum in question and also where the sum is

said to be due under regulation 14 **WTR 1998**. In the latter instance, the claimant is not confined to bringing a claim under regulation 30 **WTR 1998**. This has been the well-established position since the Court of Appeal's decision in **Delaney v Staples (t/a De Montfort Recruitment)** [1991] ICR 331 (although there was a subsequent appeal to the House of Lords, this aspect was not the subject of a further challenge).

26. In **Taylorplan Services Limited v Jackson and ors.** [1996] IRLR 184, the EAT confirmed that where the section 23 **ERA 1996** complaints related to one deduction by the employer rather than a series of deductions, in assessing the point from which time ran, the Tribunal should ask what was the date of the payment of wages from which the deduction was made.

27. In **Arora v Rockwell Automation Limited**, EAT 00097/06, the EAT distinguished between a situation where the claimant had received some payment, but it was alleged to be a shortfall, and a situation of complete non-payment. The EAT accepted that where the claimant had received some payment but claimed to have been underpaid, the effect of section 13(3) was that the amount of the shortfall would be treated as a deduction from the payment made on that occasion, in turn meaning that the section 23(2) three-month time limit for bringing a claim in respect of this deduction ran from the date when the allegedly deficient payment was made.

28. By contrast and consistent with the EAT's earlier decision in **Group 4 Nightspeed Limited v Gilbert** [1997] IRLR 398, where there has been a complete non-payment, the EAT considered that time began to run from when the contractual obligation to make the payment arose.

29. Where a claimant applies for an ACAS EC Certificate pursuant to section 18A of the **Employment Tribunals Act 1996**, statutory provision is made for the prescribed time limits for presenting a claim to be extended. The position is set out in section 207B, sub-sections (2) - (4) in respect of claims brought under the **ERA 1996**. Firstly, the effect of section 270B(3) is that the period beginning with the day after the EC request is received by ACAS up to and including the day when the EC certificate is received (or deemed to have been received) by the claimant, is not counted. Secondly, section 270B(4) provides that if the time limit for bringing the claim would have been due to expire in the period beginning with the day ACAS received the EC request and ending one month after the claimant received the EC certificate, the time limit expires instead at the end of that period.

30. Section 86(1) **ERA 1996** provides that where an employee has been continuously employed for one month or more but less than two years, the employer must give one week's notice to terminate the contract of employment. Section 86(2) states that the notice required to be given by an employee who has been continuously employed for one month or more to terminate the contract of employment is not less than one week.

Conclusions

31. As I have indicated, the ET's decision that the claim was out of time was based on the proposition that time ran from 9 September 2020, the date when the parties said the claimant's employment was terminated. The Employment Judge did not refer to the statutory provisions and thus it is not clear whether he overlooked the possibility of the claim being treated as an unlawful deduction

from wages claim under Part II of **ERA 1996** or whether he was alive to this, but did not recall the specific time limits provisions in section 23(2) which I have set out earlier.

32. Whilst there was arguably a degree of ambiguity in the claim form, in that it did not make explicit reference to an unlawful deduction from wages claim, such claims are routinely advanced in relation to alleged non-payment or underpayment of notice monies and in relation to regulation 14 **WTR 1998** claims for outstanding payments for accrued holiday. Furthermore, there was nothing in the claim form that precluded the claim from being advanced in that manner, or which suggested that this was not the case. As the Employment Judge was taking the potentially final step of dismissing the claim for want of jurisdiction and was proceeding in the absence of the claimant, I consider it was incumbent on him to address this in light of the implications for the time limits position. In formulating his grounds of appeal, the claimant has confirmed that his claim is brought as an unlawful deduction from wages claim under the **ERA 1996**.

33. As I have already explained when setting out the legal position, where a single shortfall in payment is alleged (as opposed to a series), the date of the underpayment is regarded as the date of the deduction and, in turn, due to section 23(2) **ERA 1996** the three-month period for presenting the claim runs from the date of payment from which the deduction was made.

34. In this instance it is agreed between the parties that the last payment was made on 18 September 2020. It is clear that *some* payment for accrued holiday was made on that occasion but the claimant contends there was a shortfall. In the

circumstances, it is clear that time ran from 18 September 2022 in respect of the Part II **ERA 1996** claim for holiday pay and that the EAT was in error to find otherwise.

35. As there was *some* payment of wages made on this occasion, the same analysis may be applied to the alleged failure to pay a further week's wages representing a notice period. In light of the terms of section 13(3), which I have referred to above, I consider this to be the correct analysis. However, in the interests of completeness, I have also considered what the position would be if the failure to pay notice monies was regarded as a freestanding claim in respect of which there was a complete failure to make any payment, so that time runs from the date when payment should have been made, by analogy with the reasoning in **Group 4 Nightspeed Limited v Gilbert** and **Arora v Rockwell Automation Limited**, discussed above. The claim form makes clear that notice monies are claimed by reference to the **ERA 1996** statutory entitlement rather than by reference to the provisions of an express contract. As the claimant's pay was payable weekly in arrears, the payment of the one week's notice monies, if due, would not have fallen due any earlier than the point when payment was in fact made on 18 September 2020. So by this route as well, time would run from 18 September 2020.

36. For the avoidance of doubt, the respondent has not in fact advanced any arguments to indicate that the above analysis is incorrect in any way or to support the Employment Tribunal Judge's selection of the termination date of 9 September as being the correct date from which time ran.

37. Accordingly, the three-month time limit for the claimant to make claims in relation to holiday pay and notice pay ran from 18 September 2020. The claimant contacted ACAS on 16 December 2020. This was still within the prescribed three-month period. Accordingly, he was able to take advantage of the provisions in section 207B **ERA 1996** that I have referred to, meaning that he had one month to present the claim from the date when he received the EC Certificate. He received the certificate on 6 January 2021 and the claim was presented to the ET on 5 February 2021. Accordingly, it was presented within time.

Outcome

38. In the circumstances, the appeal is allowed. The ET erred in law in finding that the claim was presented outside of the prescribed time limit. The only available conclusion was and is that the claim was presented in time for the reasons that I have explained. The claim will be remitted to the ET for determination of whether the sums claimed are due to the claimant or not.

39. That concludes the judgment. The terms of the order will indicate that the appeal is allowed. The finding that the claim was presented out of time will be set aside and substituted with a finding that the claim was presented in time and that the Employment Tribunal has jurisdiction to hear it. The claim will be remitted to the ET for determination and I direct that a written transcript of this judgment be produced.