



EMPLOYMENT TRIBUNAL

Claimant: Ms. KA Smith

Respondent: Reed Staffing Services Ltd.

Hearing: Final Hearing

Heard at: London Central ET (via CVP)

On: 2-3 July 2024 (4 July 2023 reserved for deliberations)

Before: EJ Tinnion

Appearances: For Claimant: Mr. M. Smith, Counsel
For Respondent: Mr. J. Allsop, Counsel

JUDGMENT

1. The Tribunal has no jurisdiction over the Claimant's holiday pay claim because it was not presented in time.
2. The claim is struck out under Rule 37(1)(a) (no prospect of success given lack of jurisdiction).

REASONS

Introduction

3. Following ACAS Early Conciliation between 20-23 October 2023, by an ET1 presented on 2 November 2023 Claimant Ms. KA Smith presented a holiday pay claim under s.13 of the Employment Rights Act 1996 and Reg 30(1) of the Working Time Regulations 1998 against the Respondent, Reed Staffing Services Ltd (**RSS**), a labour supply agency.
4. Ms. Smith's claim is one of several against RSS, all of which raise common issues regarding the correct calculation of 'rolled up' holiday pay for temporary workers working for employment agencies under the Working Time Regulations 1998 in light of the Supreme Court judgment in Harper Trust v Brazel [2022] UKSC 21. Because Ms. Smith's claim raised a potentially dispositive issue regarding jurisdiction which did not arise in those other claims, it is the subject of this separate judgment addressing only that issue.

5. By its ET3, RSS disputed the Tribunal's jurisdiction over Ms. Smith's holiday pay claim and denied the claim on its merits. Summarising RSS' case regarding jurisdiction/time limits: (i) the last payment of pay/holiday pay to Ms. Smith was 14 July 2023 (ii) applying the ordinary 3 month time limit for presenting an ET1 containing wages/holiday pay claims, Ms. Smith therefore had until 13 October 2023 to present a timely ET1 or contact ACAS (the effect of which, had she done so, would have been to extend time for presenting her ET1) (iii) during the period 14 July – 13 October 2023, Ms. Smith neither contacted ACAS nor presented an ET1 (iv) Ms. Smith contacted ACAS on 20 October 2023, by which time the 3 month window had expired (v) Ms. Smith accepted if her ET1 claim was not presented in time, it was reasonably practicable for her to have presented it in time (vi) given the above, the Tribunal lacks jurisdiction over her holiday pay claim.
6. Summarising Ms. Smith's case in response: (i) the last payment of pay/holiday pay to Ms. Smith was on 14 July 2023, however this was not the last unauthorised deduction in the series of deductions of holiday pay due to her (ii) on 20 October 2023 RSS issued a P45 to Ms. Smith stating her leaving date was 20 October 2023, thereby terminating her contract and giving her notice of termination on 20 October 2023 (iii) relying on clause 25 of her contract ("*Since this Contract remains in force between Assignments, no payment in lieu of any accrued annual leave will be made on termination of an Assignment. A payment in lieu of any accrued annual leave will only be made when this Contract is ended*"), a payment of all outstanding rolled-up holiday pay was owed to Ms. Smith following this termination of her contract (iv) no such payment was made (v) her claim in respect of this last deduction was timely made, therefore (vi) her claim in respect of that deduction and all deductions which preceded it as part of a series was also timely made.

Final hearing

7. The final hearing was on 2-3 July 2024 (**Final Hearing**). A 136-page bundle relating to Ms. Smith's claim was produced. A bundle was also relied upon containing an agreed chronology and statement of facts. The Tribunal heard evidence from Ms. Smith and Mr. Beart (Managing Director, Reed Education). The Tribunal was satisfied both sought to assist by giving honest answers to questions asked. The parties' counsel made written and oral closing submissions, the Tribunal thanks them for their assistance. Judgment was reserved.

List of Issues

8. During the hearing, a list of issues for all Claimants' claims was produced which went through five iterations before it was finally agreed. This judgment addresses only one of the issues on that list - Issue #10: "*Is Ms. Smith's entire claim for holiday pay, issued on 2 November 2023, submitted outside the limitation period of 3 months?*". Issue #11 recorded that "*If out of time, Ms. Smith accepts the Tribunal has no jurisdiction over her claim*", so it is common ground that if her claim was not presented within the ordinary 3 month time limit, the Tribunal has no jurisdiction to consider it.

Findings of fact

9. The Tribunal makes its findings of fact on the balance of probabilities. In the event, nearly all material facts were not in dispute.
10. As noted, an agreed chronology and statement of facts were provided. The Tribunal adopts those agreed matters, save that it does not accept the date typed on the chronology on which RSS paid Ms. Smith her last wages/holiday pay. That chronology states that on 21 July 2023 Ms. Smith received pay for work undertaken over one pay period including £15.08 in rolled-up holiday pay from RSS. That date is a typographical error (one not pointed out to the Tribunal at the final hearing) as the relevant entry appears after an entry for 7 July 2023 but before two entries for 14 July 2023. At the hearing, it was common ground that 14 July 2023 was the date on which RSS made its last wages/holiday pay payment to Ms. Smith, and the chronology records the agreed fact that this was the last period Ms. Smith worked for RSS. Most importantly, the relevant RSS payslip stated a BACS payment of £140 including £15.08 holiday pay was made to Ms. Smith on 14 July 2023 for work done on 7 July 2023 for a pay period ending 14 July 2023. On that basis, the Tribunal finds as a fact that RSS made its last payment of wages and holiday pay to Ms. Smith on 14 July 2023.

Contractual framework

11. RSS provides labour supply services, including the placement of temporary and permanent workers in the UK education sector through its 'Reed Education' division. On 7 January 2022, Ms. Smith registered for temporary teacher supply work with RSS. When she did so, there was initially no contract in place. On 31 January 2022, the Claimant was employed by RSS under a written Contract of Service. It is not in dispute that her employment status under that contract was as an RSS employee. In September 2022, RSS notified Ms. Smith she would be moved on to a contract for services (the move was confirmed in November 2022). And on about 2 January 2023, Ms. Smith moved onto a written Contract for Services.

RSS work and pay for RSS

12. In the period 2 January 2023 – 14 July 2023, the Claimant did supply work for RSS in the following 8 periods: 23-27 January; 13-17 February; 6-10 March; 20-24 March; 3-14 April; 29 May – 9 June; 26 -30 June; and 10-14 July 2023. Ms. Smith also did supply work for RSS in 2022, the dates of which are in the agreed chronology.
13. In 2023, RSS paid Ms. Smith's wages and what she contends was incorrectly calculated 'rolled up' holiday pay on the following dates: 27 January; 17 February; 10 March; 24 March; 7 April; 14 April; 2 June; 9 June; 30 June; and finally 14 July.

Relevant law

14. The rules on time limits for unauthorised deductions from wages claims under s.13 of the Employment Rights Act 1996 are set out in s.23 of that Act. The basic rule is set out in s.23(2) to the effect that a complaint must be made within a period of 3 months beginning with, in the case of a complaint relating to a deduction by the

employer, the date of the payment of the wages from which the deduction was made. Where there has been a series of deductions or payments, it is sufficient for the purposes of s.23(3) that the complaint be made within 3 months of the date of payment of wages from which the last deduction in the series was made.

15. Similarly, under Reg 30(2) of the Working Time Regulations 1998 (WTR 1998), the Tribunal may not consider a complaint under those regulations unless it is presented (a) before the end of the 3 month period beginning with the date on which it is alleged that the exercise of the relevant right should have been permitted or the payment made except (b) where the Tribunal is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of 3 months, in which case the Tribunal shall consider the complaint if it is presented within such further period of time as the Tribunal considers reasonable.

Discussion / Conclusions

16. In order for the Tribunal to decide whether Ms. Smith's holiday pay claim was presented in time, the Tribunal has determined there is only issue it needs to decide: what is the last (alleged) deduction/underpayment pleaded in the ET1? If it is the one on 14 July 2023, Ms. Smith's claim was not presented in time as she did not present her ET1 or contact ACAS within 3 months of that date. If, however, it is the one made on or around 20 October 2023, Ms. Smith's holiday pay claim might have been presented in time (in this scenario other issues would also fall to be considered, eg whether her employment was terminated by the P45 triggering a contractual duty on RSS' part to pay her all outstanding holiday pay on or around 20 October 2023).
17. The Tribunal's conclusion is that the last deduction/underpayment pleaded in the ET1 is one made on 14 July 2023. Its reasons for that conclusion are as follows:
18. First, para. 8.2 of the ET1 pleaded that "*The Respondent has failed correctly to calculate and pay to the Claimant the paid annual leave to which the Claimant is entitled pursuant to the decision in Harper Trust v Brazel. The relevant dates and correct calculation is set out in the schedule referred to in paragraph 9.2 below ... see attached for breakdown of calculations.*"
19. Second, on examination, para. 9.2 of the ET1 does not refer to a schedule anywhere. The 'schedule' referred to was in fact a table spread over 3 pages attached to the ET1 prepared by the Claimant's solicitors containing 92 rows which identified RSS' payments of wages and holiday pay to the Claimant over a 92-week period beginning at the week ending 7 January 2022 (row 1) and ending at the week ending 6 October 2023 (row 92). The table does not record, or purport to record, the actual date of payment.
20. Third, the last payment of wages and holiday pay recorded on the table is the payment of £140 (£124.92 wages, £15.08 holiday pay) on 14 July 2023 (row 81).
21. Fourth, nothing in the ET1 or the table attached to it stated or implied the Claimant was making a claim in respect of an alleged deduction/underpayment of holiday pay either (a) on termination of her contract, or (b) on, around or after 20 October 2023.

22. Fifth, consistent with the Claimant's pleaded claim not extending to an allegation that there was a deduction/underpayment of holiday pay on, around or after 20 October 2023, para. 10 of the Claimant's witness statement summarised her case succinctly as follows: "*Between 1 January 2022 and 06 [sic] October 2023, I was paid £1,256.54 worth of holiday pay by Reed when I should have been paid £2,896.84 in holiday pay.*"
23. Sixth, also consistent with the above, Ms. Smith's updated 3-page claim calculation (a) accepted her last wages/holiday payment was on 14 July 2023 (row 81) (b) ended on the week ending 29 September 2023 (row 92), and made no claims in respect of any alleged deductions or underpayments in October 2023.

Employment Judge Tinnion

Date of signature: 5 September 2024

Date sent to parties: 13 September 2024

For the Tribunal Office: M PARRIS