



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 8000440/2024

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Held in Aberdeen (by CVP) on 24 June 2024

Employment Judge B Beyzade

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Mr. Okechukwu Nwobodo

**Claimant
In person**

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Fairburn House Limited

**Respondent
Represented by:
Mrs Angela Wright,
Tribunal Advocate**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

1. The Judgment of the Tribunal is that:

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1.1 the complaint of unlawful deduction of wages was presented outwith the time limit set down in s23(2) of the Employment Rights Act 1996. Further, that it was reasonably practicable for the claimant to have presented the claim within the relevant time limit. In these circumstances, the Tribunal does not have jurisdiction to hear the claimant's claim.

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REASONS

Introduction

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1. The claimant presented a complaint of unauthorised deductions from wages (arrears of pay) which the respondent denied.

2. The respondent resists this claim primarily on the basis that the claim was lodged outwith the relevant statutory time limit.

3. This hearing was listed to determine the issue of time bar and depending on the outcome of the Tribunal's determination of the same, an application made by the respondent dated 21 June 2024 for strike out and matters any further procedure. This was a hearing held by CVP video hearing pursuant to Rule 46 of Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 ("ET Rules"). I was satisfied that the parties were content to proceed with a CVP hearing, that it was just and equitable in all the circumstances, and that the participants in the hearing were able to see and hear the proceedings.

4. I had before me a copy of the Tribunal file which contained a copy of the Claim Form, Response, ACAS Certificate, and Notice of Hearing. I was also provided with a joint File of Productions, to which reference was made by parties during the hearing.

5. The respondent was represented by Mrs Angela Wright, Tribunal Representative, whereas the claimant represented himself.

6. At the outset of the hearing the claimant and the respondent's representative were advised that the Tribunal would investigate and record the following issues as falling to be determined, the parties being in agreement with these:

(1) Was the claimant's claim for unlawful deduction of wages (arrears of pay) presented in time? It was agreed that in order for the claimant's claim to be presented within the time limit set out at section 23(2) of the Employment Rights Act 1996, the claim should have been presented by 31 March 2024.

(2) If not, whether it was not reasonably practicable for the claimant's complaint under section 23 of the Employment Rights Act 1996 to be presented before the end of the relevant period of three months?

(3) If not, was the complaint presented within such further period as the Tribunal considers reasonable?

7. The claimant gave oral evidence at the hearing on his own behalf.

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8. The claimant and the respondent's representative made closing submissions.

Findings in fact

10 9. On the documents and oral evidence presented the Tribunal makes the following essential findings of fact restricted to those necessary to determine the list of issues -

15 10. The claimant commenced employment with the respondent as a Care Assistant on 07 April 2022. The claimant worked 48 hours per week on average (consisting of four 12-hour night shifts per week), although his working hours varied. His hourly rate was approximately £10.00 gross per hour.

20 11. At all material times the respondent operated a care home.

25 12. The claimant was due to be paid the amount of £1737.84 in respect of his December 2023 pay. This would normally be payable on 29 December 2023. However, due to the holiday period, the claimant was due to receive his December 2023 pay on 01 January 2024. When he received his December 2023 salary, he was paid £400.00 less (than what he expected to be paid). The sum of £400.00 that had not been paid to the claimant had been described by the respondent as "Rent". The claimant engaged in correspondence with the respondent expressing his dissatisfaction with the
30 shortfall in his pay.

13. The claimant had a meeting with the respondent in January 2024 during which he was advised that he would be receiving a refund. As he had not received a refund, he sent an email on 29 February 2024 at 10.19am to Susan

Davidson of the respondent in order to follow up the matter in the following terms:

5 "I am writing to remind you of the subject matter, that I have not received the sum of four hundred pounds (£400) being the rent deduction on my account on 29th December 2023 as we discussed and agreed on a full refund.

Please consider this email a reminder to refund the amount to my bank account details..."

- io 14. Although the claimant was advised by email sent on the same day at 10.30am that he will receive a partial refund in the next payroll, the claimant did not receive the same.
- 15 15. The claimant sent a further email to the respondent on 01 April 2024 to follow up his request for a refund stating, "I have not seen the refund as per subject matter, please consider this a reminder to credit my account with details below:". The claimant did not receive a reply.
- 20 16. On 01 or 02 April 2024, the claimant spoke to a Citizens' Advice Bureau. He advised that he had a dispute with his employer. The claimant was advised by the Citizens' Advice Bureau to contact ACAS for guidance in relation to his employment dispute with his employer.
- 25 17. The claimant contacted ACAS on 04 April 2024 to seek guidance. When the claimant spoke to ACAS that day, he was notified about a time bar issue. The claimant was advised that he was running the risk of not having his claim heard. ACAS explained to the claimant how he should seek to deal with this matter. He was advised that he should make a Tribunal claim in any event and rely on the Tribunal's discretion. It would thereafter be a matter for the
30 Tribunal to decide whether or not to decline the claimant's claim.
18. On 04 April 2024 the claimant started ACAS Early Conciliation. The ACAS Early Conciliation Certificate was issued to the claimant on 08 April 2024.

19. The claimant presented his claim to the Employment Tribunal on 10 April 2024. The claimant's Claim Form states:

5 "I was due to be paid a sum of one thousand seven hundred and thirty-seven pounds eighty-four pence (£1737.84) being my December 2023 pay with my employment for Fairburn House Limited Muir of Ord, however a sum of four hundred pound (£400) were deducted from my pay described as Rent. I was surprised as I did not have an existing rent agreement with Fairburn House Limited neither with her director Susan Davidson who is running the affairs of

10 the company. On 7th April 2022 when I resumed at Fairburn house limited, Susan Davidson offered me a room at Fairburn house limited to sleep over while waiting to do my next shift to ameliorate stress of shuttling Muir of Ord and Inverness where I reside. I informed her of the deduction by text and my desire to have it reversed, she called for a meeting in January 2024 where

15 she agreed to refund me the money in full. Fast forward to 29th February 2024 not still seeing the refund I wrote her email to send me the refund she responded to consider part payment by end of March 2024 however by end of March nothing was paid. I sent her mail on 1st April to have the money paid she did not respond till date. I got across to Acas for early conciliation who

20 issued me certificate to pursue the case through employment tribunal. I am pleading with the tribunal to use their good office to compel Fairburn house limited to refund my pay."

20. The claimant was paid the arrears of pay that were owed to him by the respondent in the amount of £400.00 by bank transfer on 13 May 2024 (the

25 claimant had claimed £1000.00 on his Claim Form comprising £400.00 arrears of pay and £600.00 described as "overdraft cost and cost to my credit rating"). The claim form did not provide a breakdown of the compensation claim (which the claimant clarified was made pursuant to section 24(2) of the

30 ERA 1996) of £600.00.

21. The respondent's response was presented on 17 May 2024.

22. In response to communication from the Tribunal in respect of the proposal to convert today's hearing to an Open Preliminary Hearing to consider the issue of time bar, the claimant sent an email dated 07 June 2024. He stated at paragraphs 2-4:

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"2. In line with adherence of Acas guideline on conflict resolution in work place, I sought to resolve the issue through internal conflict resolution mechanism. I sent a text message as soon as I got the payslip advice to the director Susan Davidson what has happened and my desire to have the deduction reversed.

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3. Later in the month January 2024 the Respondent called for a meeting to deliberate on the matter for a resolution, she agreed on a refund without specific date.

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4. After waiting for whole of January and end of February 29th to be precise, I sent an email to the Respondent reminding her of our initial agreement on the refund at our last meeting, she responded to consider part payment by the end of March, 2024 which coincided to the time I would be leaving the company haven tendered by resignation letter earlier on. See Attachment 2 (email correspondence with the Respondent)."

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23. On 14 June 2024 the Tribunal issued notification to the parties advising "We can confirm that the Hearing listed on 24 June 2024 at 2:30pm has been converted to an Open Preliminary Hearing on time bar by Cloud Video Platform."

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Observations

24. On the documents and oral evidence presented the Tribunal makes the following essential observations on the evidence restricted to those necessary to determine the list of issues -

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25. On the whole, I found the claimant's evidence in respect of what happened between 01 April 2024 and 08 April 2024 to be clear and consistent. The claimant also explained by reference to correspondences in the agreed File

of Productions the steps he had taken to pursue the outstanding amount of £400.00 between 01 January 2024 and 01 April 2024. He relied on the advice received from the Citizens' Advice Bureau on 01 or 02 April 2024 and the guidance received from ACAS on 04 April 2024, in terms of taking steps to bring his Tribunal claim. However, I considered that there were relatively large gaps in the chronology of events which the claimant could not adequately explain including the steps he took to progress his claim between 01 January-2024 and 08 April 2024. It was not clear why the claimant had waited a significant period of time prior to seeking advice from the Citizens' Advice Bureau or seeking guidance from ACAS.

26. In addition, it was also not clear why the claimant had not sought advice from ACAS until 04 April 2024 given he was advised to contact them on 01 or 02 April 2024. Furthermore the claimant waited between 04 April 2024 and 08 April 2024 for ACAS to issue an Early Conciliation certificate despite being advised by ACAS in relation to time bar issues.

27. The claimant asserted that he attempted to present his claim on 08 and 09 April 2024, and that he experienced IT issues on both days. He acknowledged that he did not present any evidence in relation to this matter and that he could have taken screenshots of the issue. Although the nature of the alleged IT issues remain unclear, the claimant did not indicate whether he was able to use a different PC and/or internet connection to make his claim. On the evidence before me, I was unable to accept that the claimant experienced IT issues that prevented him from presenting his claim on 08 and 09 April 2024.

Relevant law

28. To those facts, the Tribunal applied the law -
29. Section 13 of the Employment Rights Act 1996 ("ERA 1996") provides that an employer shall not make a deduction from a worker's wages unless this is authorised by statute, a provision in the worker's contract or by the previous written consent of the worker.

- 5 30. Section 23(2) of the ERA 1996 states that the Tribunal shall not consider a complaint of deduction of wages unless it is presented within 3 months of the date of payment of the wages. Where there are a series of deductions then s23(3) of the ERA 1996 states that the time limit runs from the last deduction in that series.
- 10 31. The Tribunal has discretion under s23(4) of the ERA 1996 to hear a claim outwith the time limit set in ss23(2) and (3) of the ERA 1996 where they consider that it was not reasonably practicable for the claim to be presented within the 3-month time limit and it was presented within a further period that the Tribunal considers to be reasonable.
- 15 32. The burden rests on the claimant to persuade a Tribunal that it was "not reasonably practicable" to bring a claim in time (*Porter v Bandridge Ltd [1978] ICR 943. CA* at 948).
- 20 33. The Tribunal will often focus on the 'practical' hurdles faced by the claimant, rather than any subjective difficulties such as a lack of knowledge of the law or an ongoing relationship with the employer. In the case of *Dedman v British Building and Engineering Appliances [1973] IRLR 379*, per Scarman LJ who held that practicability does not always mean "knowledge". Where a claimant states a lack of knowledge as to the time limits, Scarman LJ found that the Tribunal should ask (*[1974] ICR at 64*): "*What were his opportunities for finding out that he had rights? Did he take them? If not, why not? Was he misled or deceived? Should there prove to be an acceptable explanation of his continuing ignorance of the existence of his rights, it would be inappropriate to disregard it, relying on the maxim "ignorance of the law is no excuse". The word "practicable" is there to moderate the severity of the maxim and to require an examination of the circumstances of his ignorance*".

Claimant's submissions

34. The claimant accepted that his claim had not been lodged within the relevant time limit per section 23(2) of the ERA 1996 (which expired on 31 March 5 2024).

35. He was asking the Tribunal to hear his claim outside the statutory time limit because it was not reasonably practicable for him to lodge his claim in time; he did not know that the respondent had no intention of paying him the arrears of pay until the end of March 2024; he was not aware of ACAS until 01 April 10 2024 and he was ignorant of the law; he had not contacted the Citizens' Advice Bureau until 01 or 02 April 2024 and he was advised by them to contact ACAS thereafter; ACAS had advised him on 04 April 2024 that there were time bar issues, he was running the risk of not getting his claim heard and 15 further that he was able to present a Tribunal claim and rely on the Tribunal's discretion; the ACAS Certificate was issued to the claimant on 08 April 2024; the claimant said he had IT issues between 08 and 09 April 2024 and he could not present his claim on those dates; and he advised that he was able to present his claim on 10 April 2024.

20 36. The claimant submitted that the Tribunal should consider Rule 2 of the ET Rules and that it is the prerogative of the Tribunal whether there is a time bar issue or not to look at the substance of the claim. He advised that he made his claim according to advice he received from ACAS.

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Respondent's submissions

37. The respondent's representative agreed that the primary time limit for the claimant to make his claim expired on 31 March 2024, and that the alleged 30 deduction of wages was made on 01 January 2024. It was submitted that the claimant's claim was approximately nine days out of time.

38. In relation to the claimant seeking advice from the Citizens' Advice Bureau on 01 or 02 April 2024, it is said that the onus is on the claimant to take steps to inform himself of information relating to ACAS and making a Tribunal claim. It is submitted that it is not an acceptable or reasonable excuse for failing to bring a claim in time.
39. The respondent's representative said the claimant was aware when he spoke to ACAS on 04 April 2024 that his claim had been presented out of time.
40. It was submitted on the respondent's behalf that the claimant alleged he had experienced IT issues on 08 April 2024 and he had not provided any documentary evidence showing any alleged IT issues.
41. The respondent's representative averred that the claimant had not established that it was not reasonably practicable for him to present his Tribunal claim within the statutory time limit, and that his claim should not proceed to a Final Hearing.

Discussion and decision

42. On the basis of the findings made the Tribunal disposes of the issues identified at the outset of the hearing as follows -
43. The Tribunal finds that the claim for unlawful deduction of wages was not presented within the relevant time limit under s23(2) of the ERA 1996. The claimant's outstanding wages were due to be paid on 01 January 2024 (this was not disputed). The primary time limit for lodging the claimant's claim expired on 31 March 2024. The claimant contacted ACAS to commence Early Conciliation outwith the primary time limit: the case was in ACAS Early Conciliation for 4 days between 04 and 08 April 2024 and so the primary time limit was not extended. The Tribunal claim was lodged on 10 April 2024, which was ten days after the expiry of the primary time limit.

44. The Tribunal considered whether it would exercise its discretion under s23(4) of the ERA 1996 to hear the claim out of time. For the reasons set out below, the Tribunal considered that it would not do so.

5 45. The Tribunal considered that it was reasonably practicable for the claim to have been presented in time. Whilst the Tribunal has the utmost sympathy with the position in which the claimant found himself with having little knowledge of his legal rights and in terms of his email correspondences with the respondent up to 01 April 2024, it was clear that the claimant was able to
10 contact the respondent, the Citizens' Advice Bureau and ACAS and engage with the Early Conciliation process (having received advice from the Citizens' Advice Bureau and thereafter guidance from ACAS) so he could equally have engaged with the process for lodging his Claim Form within the primary time limit.

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46. Further the claimant was aware that there was a short time limit for lodging the claim in the Tribunal (he became aware of this on 04 April 2024). Whilst this was not during the primary time limit, the claimant did not provide any reasonable explanation in terms of why he did not take steps to inform himself
20 about time limits during the primary time limit. The claimant's ignorance of time limits, in the circumstances, does not provide a valid excuse for lodging his claim outwith the primary time limit.

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47. The claimant took no steps to progress his claim between the 01 January 2024 and 31 March 2024. This is a rather lengthy period during which no steps appeared to have been taken, other than correspondences with the respondent, which were rather sporadic in nature. There was no evidence that the claimant sought advice and assistance or took any steps to progress his claim during the said dates, and there was no good or satisfactory reason
30 provided by the claimant in respect thereof.

48. For these reasons, the Tribunal considered that it was reasonably practicable for the claimant to have lodged his claim within the time limit set forth at section 23(2) of the ERA 1996.

5 49. Even if the Tribunal found that it was not reasonably practicable for the claimant to have lodged his claim within the primary time limit (which the Tribunal did not find), the Tribunal would have decided that the further 10 days that the claimant delayed in terms of lodging his claim was not reasonable in all the circumstances.

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50. No steps were taken by the claimant to progress his claim between 02 April 2024 and 03 April 2024 (after he had spoken to the Citizens' Advice Bureau) and 08 and 09 April 2024. I was unable to accept that on the balance of probabilities the claimant experienced IT issues between 08 and 09 April 2024 such that he was unable to lodge his claim on those dates. It was also unclear why the claimant waited between 04 and 08 April 2024 for ACAS to issue the Early Conciliation Certificate (and why the claimant did not request the same to be issued earlier in view of the time bar issues that he was put on notice of by ACAS on 04 April 2024).

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Conclusion

51. In these circumstances, the complaint for unlawful deduction of wages having been lodged out of time and the Tribunal not being willing to exercise its discretion to hear that complaint out of time, the Tribunal does not have the jurisdiction to hear the claimant's claim.

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52. In view of that conclusion, it was not necessary to investigate and determine the respondent's strike out application.

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I confirm that this is my judgment in the case of Mr. Okechukwu Nwobodo -v Fairburn House Limited 8000440/2024 and that I have signed the order by electronic signature.

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**Employment Judge: B Beyzade
Date of Judgment: 24 June 2024
Entered in register: 25 June 2024
and copied to parties**