



EMPLOYMENT TRIBUNALS

Claimant:

Mr M Fodorcan

v

Respondent:

Mr Massimo Ponzellini

Heard at:

Reading

On: 11 April 2017

Before:

Employment Judge R Lewis

Appearances

For the Claimant:

Mr D Marshall (Accountant)

For the Respondent:

Ms M Polinac (Counsel)

JUDGMENT

1. The claim is struck out. The tribunal has no jurisdiction to consider it because it was presented out of time in circumstances in which it was reasonably practicable for it to have been presented within time.

REASONS

1. The claimant presented a claim for unlawful deductions.
2. In response, the respondent raised defences of time, employment status, and on the merits.
3. The claimant's representative applied for amendments, and in consequence the listed hearing was extended to two hours.
4. When I read papers before the start of the hearing, an immediate difficulty arose. The claimant wrote in his witness statement that his English was limited. (He is Romanian.) The respondent wrote that his normal language of communication with the claimant had been Italian.
5. I therefore opened the hearing by asking Mr Fodorcan directly about his understanding. He immediately answered that he needed a translator.
6. Mr Marshall had understood that translation in the tribunal could be undertaken by Mr Fodorcan's son (who was present). The respondent's solicitors apparently had been told that this course would be adopted. Neither side had asked the tribunal to arrange for an interpreter to attend.

7. I explained to the parties that the tribunal provides the services of an independent accredited interpreter. I said that I could not take evidence from Mr Fodorcan through his son, although his son was perfectly free to explain matters to Mr Fodorcan as we went along. That placed an immediate limitation on this hearing, which could not deal with any point on which the claimant's oral evidence was needed.
8. Ms Polinac asked me nevertheless to deal with two matters, which were the claimant's application to amend, and the respondent's application to strike out on grounds of limitation.
9. There was a lengthy discussion of the pleadings and the application to amend, at the end of which I was able to formulate the potential claim advanced by Mr Marshall. The formulation, with which the parties agreed, was that the parties entered into a working arrangement which the respondent did not put in writing. The claimant submitted that he was an employee or worker for the respondent, whereas the respondent countered that the claimant was self employed; that the claimant submitted that his agreed, and / or fair, rate of pay was £12.00 per hour, to which the respondent answered that there was a monthly package for remuneration of about £1,000.00 per month plus accommodation and benefits. There was (thirdly) agreement for the purposes of this hearing that the claimant had worked the hours set out in a schedule (92); and the claimant claimed the shortfall between the hours worked, calculated at £12.00 per hour, less sums actually received; to which the respondent replied that as there was no agreed figure of £12.00 per hour, the claimant was entitled to be paid at the national minimum wage, which in fact he had been. A final point was that if the claimant were indeed found to be a worker or employee, he was entitled to holiday pay.
10. After I had established the above, Ms Polinac asked me to deal with limitation. The claimant had in two documents, the claim form (64) and a statement (125-126) set out that he accepted that the claim was late and given his explanation, saying why he had been unable to present the claim in time.
11. Ms Polinac's application gave rise to a difficulty, which I resolved in the following manner. I explained to the parties that if the claimant wished to give evidence in addition to what was written at the quoted pages, I could not receive his oral evidence without a tribunal interpreter and the matter would have to be adjourned to a full hearing later in the year.
12. If however the claimant were content for these purposes to rely purely on the above documents, as setting out the totality of his case on extension of time, the matter could proceed.
13. I adjourned for 15 minutes to enable Mr Marshall, the claimant and his son to discuss the point, after which Mr Marshall on the claimant's behalf

stated that the claimant had nothing to add to what was written at pages 125-126. He therefore gave consent to my deciding the point.

14. I then heard submissions as to time.
15. The relationship between the parties was agreed to have ended on 5 September 2016. On that day, the claimant submitted a final invoice to the respondent (12). It was common ground that that was paid on 29 September 2016.
16. Ms Polinac's primary submission had been that time for bringing the present claim ran from 5 September, the date of last working or last invoice. I disagree. Applying section 23(2(a) ERA, it seemed to me that time ran from last payment, 29 September, and that therefore primary limitation expired on 28 December 2016.
17. Day A was 22 November and Day B was 25 November. Day B therefore was several weeks before the expiry of primary limitation. I find that the only effect of the early conciliation procedure on limitation was that 'the clock stopped' for the number of days between 22 and 25 November.
18. Applying section 207B(3) ERA, I find that the extension of time ran to at the latest 1 January 2017. The claim was presented on 9 January 2017.
19. Accordingly, I find that the claim was presented out of time.
20. At page 125 of the statement, the claimant had written the following:

“As regards the lateness of my claim, following my discussion with ACAS last November, I did not realise that I would need to follow up within such a short space of time. I was without work, and facing eviction from the room where I had lived for the past year, and was quite unable to afford the assistance of a professional adviser. It was therefore very fortunate that shortly after the Christmas holiday, Mr Marshall learned of this situation through his friend, Dr Donovan, who assisted me at the eviction hearing on 11 January 2017. In the meanwhile, Mr Marshall had prepared the application for this hearing, which he submitted on 9 January 2017, in a very short period of time. ...”
21. In the claim form (64), the claimant had written: “I formally request that you agree to look at my claim, though it is late, as the ECS was issued on 25 November 16. I did not know the time limit, and also face possible eviction on 10 January 2017 from the respondent's property”.
22. In reaching my judgment, I attach weight to a document submitted by the claimant to the respondent on 26 November 2016 entitled “Letter of grievance” (31) in which the claimant, obviously with assistance, set out the claim which was in essence before me. It was dated the day after Day B.
23. The document shows that by 26 November 2016 at the latest, the claimant understood that the conciliation process had come to an end; and

formulated a number of the claims which he wished to present, which all in short led to a claim that he had been underpaid from the sum which he claimed was an agreed sum.

- 24. While I have no evidence on the matter, I regard it as unlikely that ACAS failed to mention the existence of limitation.
- 25. I accept that this was a difficult and troubling time for the claimant, but I had no evidence of any medical matter which prevented him from dealing with his everyday affairs. While I accept that official documentation may appear daunting, experience indicates that accessing the claim form online, completing it and annexing a document (such as the grievance letter of 26 November 2016) is a task well within the capability of many, without professional help. The claimant had available to him his son's English language skills.
- 26. It has not been shown to me that it was not reasonably practicable for the claim to have been presented within time and it is accordingly dismissed.
- 27. I add that my scepticism about the merits of many aspects of the claim formed no part of this decision, which is based on procedural matters only.

Employment Judge R Lewis

Date: 25/04/2017

Judgment and Reasons

Sent to the parties on:

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For the Tribunal Office