



EMPLOYMENT TRIBUNALS

Claimant: Mr A Fraser-MacKenzie

Respondent: Cordant Security Limited

Heard at: North Shields

On: 13 June 2018

Before: Employment Judge S A Shore

REPRESENTATION:

Claimant: In person

Respondent: Ms J Letts, Legal Assistant

JUDGMENT

The judgment of the Tribunal is that:

1. The claimant's claims of unfair dismissal, failure to pay holiday pay and unauthorised deduction of wages are struck out because they were not presented within the period of three months from the effective date of termination, or the date upon which payment of the holiday pay or wages claimed were due and it was reasonably practicable for the claims to have been submitted in time.
2. The correct name of the respondent is Cordant Security Limited.

REASONS

Background

1. The claimant was employed as a security officer by the respondent at the Tesco Express Store, North Road, Durham, from 20 May 2015 until he was summarily dismissed on 8 August 2017.
2. On 20 February 2018, the claimant submitted claims of unfair dismissal and failure to pay holiday pay. He also ticked the box in paragraph 8.1 of the ET1

indicating that other payments were due but gave no details of these. There was mention of a claim for 21 days' suspension pay in box 9.2 of the ET1 and a Schedule of Loss dated 20 March 2018 that was lodged by the claimant makes a claim for unpaid wages for the period of suspension.

Hearing and Evidence

3. At the outset of the case, I explained the overriding objective of the Employment Tribunals Rules of Procedure 2013, which is to deal with a case fairly and justly. I read rule 2 to the parties in its entirety. I explained to the claimant, who had not attended an Employment Tribunal previously, that he should raise any questions about matters of law or procedure with me, and I would do my best to answer them for him.

4. I explained that the purpose of the public preliminary hearing was only to determine whether the claimant's claims had been made on time and, if they had not, whether I was satisfied that it was not reasonably practicable for the complaints to be presented before the end of the three-month period and that, if it was not reasonably practicable to have submitted the claims in time, whether they had been submitted within such further period as I considered reasonable.

5. I read section 111(2) Employment Rights Act 1996 to the parties. The same test applies to holiday pay claims under regulation 30(2) of the Working Time Regulations 1998, with the three-month period beginning with the date on which it is alleged that the payment should have been made. The same provisions apply with regard to claims of unauthorised deduction of wages in section 23(2) Employment Rights Act 1996, the three-month period beginning with the date of payment of wages from which the deduction was made.

6. Ms Letts had prepared a bundle of documents for the hearing that consisted of the claimant's ET1, early conciliation certificate dated 20 February 2018, response guidance, ACAS correspondence, notice of a claim and hearing, claimant's Schedule of Loss, respondent's response, respondent's request for a preliminary hearing and notice of preliminary hearing. She also submitted two authorities: **Ashcroft v Haberdashers Aske's Boys School UKEAT/0151/07/CEA** and **Fishley v Working Men's College UKEAT/0485/04/DZM and UKEAT/0486/04/DZM**.

7. Neither party had prepared witness statements.

8. The claimant said that he had the original of the "claim" that he submitted on 11 September 2017, a week after his appeal hearing. He handed over a copy of an ACAS single request form for early conciliation that was dated 11 September 2017. The claimant said he completed the application online. I asked if he had obtained an ACAS certificate and he said that he had not. He said he had no knowledge that he needed to obtain an ACAS certificate. He took a copy of the single request form that he had handed up and gave it to his representative the following morning, which would have been 12 September 2017.

9. I observed that the document was an ACAS single request form for early conciliation, rather than an Employment Tribunal application. I immediately noticed

the issue with the document. Under section A, there were two lines in red script that said:

“You need to complete the following fields: please enter matching email and confirmation email addresses.”

10. On the second page of the form the claimant had completed the email address of his representative, Natalie Wright, but had only completed details of her email once. Underneath that box was a box entitled “confirm email address” which was blank, and which was ringed in red. It was therefore obvious to me due to my experience as a practicing solicitor that the form had not been accepted online, and my experience is that if the form has a red warning message on it, it will never be accepted. The claimant confirmed that he had not received an email confirmation that the form had been accepted. He said that he dropped copies of the form with his representative the day after he had completed it. He was not aware of whether his representative has any legal training or knowledge.

11. The claimant said that he had knowledge about ACAS because he and colleagues had had a problem with a former employer in 2012. They had been to ACAS to try and resolve their problem. The claimant said that he had no knowledge of the three-month time limit that applies to Employment Tribunal claims because, as far as he was concerned, justice is justice and there is no time limit. I had to disabuse him of this notion.

12. The claimant said that his representative did not tell him about a time limit. In answer to my question as to what had prompted him to contact ACAS in February 2018, he said that he had contacted his representative in September and October about the claim but she had heard nothing. He then rang ACAS in February 2018 to ask what had happened with his claim. Initially ACAS told him that his name was not on their system but they did tell him about the time limits. He then took advice from solicitors who told him to submit a claim and the Tribunal would decide whether to accept it or not. He therefore contacted ACAS again, went through the early conciliation process on the telephone and obtained a certificate dated 20 February 2018. He submitted his Employment Tribunal application the same day.

13. The claimant accepted that his claim had not been made within the period of three months from the date of the end of this employment or within three months of the date that payment of wages and holiday pay was due. He said that he had tried to submit the claim in time but mistakes were made. He was not familiar with the process and was waiting to hear from ACAS. He had put through the paperwork and then it had been a waiting game.

14. Ms Letts submitted that it was reasonably practicable for the claimant to have submitted the claim in time. The ACAS early conciliation application was not accepted in September but the claimant had tried to submit it in time so it must have been reasonably practicable for him to have submitted the actual claim in time. The claimant had given no reason to explain why he had failed to follow the attempted ACAS application up until February 2018. There was no evidence to say that he had tried to follow it up before February 2018. If he had followed up the application within the three-month time limit, he could still have made a claim in time. She referred me

to the two cases that she had submitted and submitted that the claims were out of time.

Decision

15. The claimant was dismissed on 8 August 2017. He should therefore have submitted an unfair dismissal claim by midnight on 7 November 2017, subject to any extension that he had obtained by engaging in early conciliation through ACAS. His holiday pay and wages should have been paid by 31 August 2017 at the latest. He should, therefore have started ACAS early conciliation by 30 November 2017 at the very latest. It is clear that the claimant himself is entirely to blame for the failure to start the ACAS early conciliation process. He is clearly an intelligent individual and I cannot understand why he thought that he had submitted an ACAS early conciliation claim when the copy single request form that he submitted to this hearing clearly indicated that he needed to complete confirmation of his representative's email. The ACAS system simply would not have accepted his application and I can see no reason why he would reasonably have thought that it had. Further, the claimant did not chase ACAS up until February 2018, more than three months after primary limitation had expired.

16. As Lord Scarman commented in **Dedman v British Building & Engineering Appliances Limited [1974] ICR 53**:

“Where a claimant pleads ignorance as to his or her rights, the Tribunal must ask further questions:

- What were his opportunities for finding out that he had rights?
- Did he take them?
- If not, why not?
- Was he misled or deceived?”

17. In this case, the claimant had an adviser and also had access to the internet. He had been on the ACAS website which is full of advice about making an Employment Tribunal claim. He did not take any of the opportunities to seek advice and did not present a reasonable excuse as to why he had not. He was not misled or deceived.

18. In the case of **Porter v Bandridge Limited [1978] ICR 943** the Court of Appeal ruled that the correct test is not whether the claimant knew of his or her rights, but whether he or she ought to have known of them. I find that the claimant ought to have known about his rights to bring a claim and the time limits in which those claims should have been brought. He clearly thought he had a claim, because he had attempted to start ACAS conciliation in September 2017. I note the words of the Employment Appeal Tribunal in the case of **Avon County Council v Haywood-Hicks [1978] ICR 646**, which rejected the idea that ignorance, however abysmal and however unreasonable, is a universal excuse. It said that this offended the notion of common sense and that an intelligent and well-educated man ought to have investigated his rights within the time limit and claimed in time. Given that the unfair

dismissal legislation has been in force since 1972, Tribunals will rarely be sympathetic to the notion that claimants were wholly ignorant of their rights.

19. Therefore, having considered the submissions of the claimant and the respondent and considered the document submitted, I have absolutely no hesitation in finding that the claimant failed to lodge his claims of unfair dismissal, failure to pay holiday pay and unauthorised deduction of wages within the period of three months from the effective date of termination (for the unfair dismissal claim) and from the date that payment was due (for the other two claims) and that it was reasonably practicable for him to have done so. I therefore strike out all the claimant's claims.

Employment Judge S A Shore

Date 6 July 2018

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.