

JJE



EMPLOYMENT TRIBUNALS

Claimant: Mrs H Tsocheva
Respondent: Clean Green Cleaning Services Ltd
Heard at: East London Hearing Centre
On: 2 July 2018
Before: Employment Judge J Jones

Representation

Claimant: Mr Ley (FRU rep) and assisted by
Ms Markova, Bulgarian interpreter
Respondent: Ms Anderson of Counsel

JUDGMENT

1. It was reasonably practicable for the Claimant to have issued her claim before the expiry of the time limit in section 23 of the Employment Rights Act 1996. The Claimant issued her claim outside of that time limit.
2. The Tribunal has no jurisdiction to hear this claim and it is dismissed.

REASONS

1. As there was an issue as to whether or not the claimant's complaint has been issued in time, we addressed that matter at the start of the Hearing.

Law

2. The Claimant brought a complaint of unlawful deduction of wages under section 23 of the Employment Rights Act 1996 (ERA) which states that a worker may present a complaint to the Employment Tribunal that his employer has made a deduction from wages in contravention of section 13 of the same Act.
3. Section 13 ERA states that an employer shall not make deductions from wages of a worker employed by him unless the deduction is required or authorised to be made by

virtue of the statutory provision or the workers contract; or the worker has previously signified in writing his agreement or consent to making the deduction.

4. Section 23(2) ERA stated that 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 the date of payment of the wages from which the deduction was made. Where the claimant complains about a series of deductions or payments then the reference to a deduction or payment would be to the last deduction or payment in the series of the last of the payments received.

5. In the case of *Walls Meat Co Ltd v Khan [1979] IR LR 52*, Lord Denning stated that the test was

'.... Had the man just because or excuse for not presenting his complaint within the prescribed time? Ignorance of his rights- or ignorance of the time limit- is not just cause or excuse unless it appears that he or his advisers could not reasonably be expected to have been aware of them. If he or his advisers could reasonably have been so expected, it was his or their fault, and he must take the consequences'.

6. Also, in the case of *Palmer v Southend-on-Sea Borough Council [1984] IR LR 119*, May LJ stated that the work *practicable* could be read as the equivalent of *feasible*. He proposed a test of *'reasonable foreseeability'*. The Court of Appeal rejected possible constructions of the term as being either reasonableness or physical possibility. Some of the considerations that the court might investigate included the manner of, and reason for, the dismissal (or in this case - the alleged deductions), whether the employer's conciliatory appeals machinery had been used; substantial because of the Claimant's failure to comply with the time limit; whether there was any physical impediment to preventing compliance, such as illness, or postal strike; whether, and if so when, the Claimant knew of his rights; whether the employer had misrepresented any relevant matter to the employee; whether the Claimant had been advised by anyone, and the nature of any advice given; and whether there was any substantial fault on the part of the Claimant or his adviser which led to the failure to present the complaint in time. These considerations all relate to the background of the surrounding circumstances which a tribunal should be aware of as stated by the Court of Appeal in the case of *Schultz v Esso Petroleum Ltd [1999] IR LR 488*.

7. In dealing in particular, with the Claimant's claim to have been ignorant of her rights, the Tribunal found assistance from the judgment in the case of *Dedman v British Building & Engineering Appliances Ltd 1974 AER 524* it was said that in such a case, the questions to be asked would be: what were the Claimant's opportunities for finding out that she had rights, whether she took those opportunities and if not, why not and whether she had been misled or deceived. The court held that if there was an acceptable explanation of her continuing ignorance of the existence of her rights, then it would be unjust to ignore it and that may make it impracticable for her to have issued her claim in time. If the Claimant did not know of her right to claim was it reasonable for her not to have known of that right?

8. The Claimant referred to the case of *Taylorplan Services Ltd v Jackson [1996] IR LR 184* in which the court stated that in relation to a complaint relating to issues of deductions, the tribunal should ask itself what was the date of the last deduction and whether the Claimant issued her claim within the period of three months prior to the presentation of the complaint. If the answer to that question is in the negative, the tribunal

should consider whether it was reasonably practicable for the complaint to have been presented within the relevant three-month period and if not, was it nevertheless presented within a reasonable period of time thereafter?

9. In the case of *Northamptonshire County Council v Entwistle* [2010] IR LR 740, also referred to by the Claimant, Mr Justice Underhill held that in principle these provisions should be given “a liberal construction in favour of the employee” and that it has “consistently been held to be not reasonably practicable for an employee to present a claim within the primary time limit if he was, reasonably, in ignorance of that time limit.”

10. The Claimant referred to the case of *Cambridge and Peterborough Foundation NHS Trust v Crouchman* [2009] AER (D) 96 (May) where a tribunal’s judgment that it had not been reasonably practicable for a claim to have been presented in time where the discovery of a new fact after the expiration of the primary time limit had been the reason for the delay in issuing proceedings; was upheld. The new fact that the claimant in that case discovered changed entirely his view of the strength of his claim.

11. It was agreed between the parties that the time began to run from 15 September which would have been the last in the series of alleged deductions. In accordance with Section 23 of the ERA, the Claimant should have been issued by 14 December 2017.

Evidence

12. The Claimant gave evidence at the today’s hearing. The Tribunal heard the bundle of documents and considered them to the extent that they related to the time point.

13. The Claimant complains that her wages were unlawfully deducted between 25 July and 15 September. Most of her complaints relate to overtime that she did at places of work that were not her usual place of work. Her case is that that she had been instructed to work there by the Respondent. The amount in dispute is £1072.50.

14. The Claimant works as a cleaner for the Respondent and continues to be employed by them. This is not the first time that the Claimant has had a dispute with the Respondent about her wages. In 2016, she stated that she had an issue with her wages which was resolved after a number of phone calls with the Respondent.

15. The last of the deductions was on 15 September which means that the Claimant’s complaint needed to have been issued by 14 December 2017. The claim form was issued on 6 April 2018.

16. The Claimant is a Bulgarian national who has been living in the UK for approximately 10 years. The Claimant’s English is limited and she had the services of an interpreter to assist her in presenting her case to the Tribunal today.

17. The Claimant became concerned about her wages when she noticed that there were discrepancies between her payslip and the wages that were paid directly into her bank account from August 2017. She could not see payment for the overtime hours that she worked for the Respondent at two different locations: Paddington Green and Beldanes Lodge.

18. The Claimant was assisted in writing a letter to the Respondent in August 2017 by a member of a family for whom she babysits occasionally. She spoke to her supervisor, Ali in September and later, in October she spoke to George Garcia who was one of the Respondent managers. Mr Garcia took pictures of her payslips and promised to resolve the matter for her. The Claimant was told that the Respondent believed that there was another lady who had done the work and that there were no payments due to her. The claimant had assistance in writing to the Respondent again in January 2018. She had assistance in writing a letter to HMRC on 14 November. She had no response to her letter therefore got a friend to call HMRC for her on 8 December 2017. HMRC told her about ACAS. The Claimant did not contact ACAS until January.

19. The Claimant went to the Citizens Advice Bureau (CAB) in Brent. It was very busy and there were a number of people waiting to be seen. The Claimant decided that it would not be convenient for her to wait on that day and she left. She did not return to the CAB to seek legal advice. The Tribunal was not told when the Claimant went to the CAB. The Claimant did not seek advice from any local solicitors. The Claimant spoke to a friend who was a lawyer practising in Washington DC USA. The Claimant's evidence was that this person now practices in the UK but she could not recall when she spoke to her. The Claimant stated that she was told about the services of the Free Representation Unit by her Washington lawyer friend and of the need for an interpreter at the tribunal hearing. It is therefore possible that this conversation took place after she had issued proceedings and was thinking about how she would represent herself at the final Hearing.

20. When the Claimant contacted ACAS in January, she spoke to someone called Sharon. She was advised of her right to issue proceedings in the Employment Tribunal and of the three month time limit. However, the Claimant wrote another letter to the Respondent on the matter of her alleged deduction of wages.

21. The conciliation process began on 20 February and ended on 3 April 2018. The claim was issued on 6 April.

Decision

22. It is this Tribunal's judgment that the Claimant did not have any physical impediment that prevented her from issuing her complaint in time. It had not been her case today that she had been misled by the Respondent about the dates of the alleged deductions and it is my judgment that she had not. The Claimant was relying on her ignorance of her right to claim in the Employment Tribunal until January 2018 when she spoke to ACAS.

23. I considered the whole period of time from the Claimant's concerns about her wages in August until the time that she issued in April. I accept that there is a history of matters eventually resolving themselves between the parties, without recourse to the courts as happened in 2016. However, it was not reasonable for the Claimant to wait indefinitely for this to occur.

24. Although the Claimant would have added additional difficulties because of her language, she has been in the UK for the past ten years and has a good support network in the UK which enabled her to right letters to the Respondent. The Claimant was aware

of the location of her local CAB in Brent and that she could seek help there about her employment issues with Respondent. Nevertheless, she only visited the CAB once.

25. Did she have just cause or excuse for not presenting a complaint within the prescribed time? Was it feasible that she could have issued her claim in time?

26. The Claimant did not take advantage of the local advice that was available to her. Initially, when she noticed the discrepancy in her payslip, it would not necessarily have given her an indication that she had a right to bring a claim. However, when it became clear by October that the Respondent we were not going to resolve this matter directly with her and/or when she spoke to HMRC in December the Claimant was told that she should contact ACAS about this matter. The Claimant did not do so.

27. The Claimant did not contact ACAS until January. If the Claimant had contacted ACAS in December, then ACAS would have begun the conciliation process and if that had been unsuccessful it is likely that she would issued proceedings in the Employment Tribunal in time.

28. It was not clear from the Claimant's evidence why she did not follow up with a telephone call to ACAS in December but waited until January. I bear in mind the telephone call to HMRC during which she was given the telephone number for ACAS was on 8 December which meant that there were many working days between that day and the Christmas holidays during which she could have spoken to ACAS. I was not told that the Claimant was incapacitated or had gone away on holiday or any other event in the intervening period between then and when she called ACAS in January, after the primary time limit had expired.

29. The Claimant does not get the benefit of any extension under the ACAS conciliation scheme.

30. In this Tribunal's Judgment, it was not reasonable for the Claimant to be unaware of her right to claim in the Employment Tribunal and of the time limit for doing so, after she had spoken to HMRC on 8 December. In these particular circumstances, it is this Tribunal's judgment that the Claimant's ignorance of her right to bring a claim to the Employment Tribunal and of the time limits involved in doing so thereafter, was not reasonable

31. It is the Tribunal's Judgement that it was reasonably practicable for her to have issued her claim before 14 December 2018. As the Claimant's complaint was issued on 6 April 2018 the Tribunal has no jurisdiction to hear it.

32. The claim is dismissed

Employment Judge Jones

11 July 2018