



5

EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4109326/2021

10

Held remotely by Cloud Video Platform on 13 June 2022

Employment Judge J Shepherd

Karen Parker

**Claimant
In person (by
telephone)**

15

**Personal representative
of Neil James (deceased)**

**Respondent
Did not attend**

20

25

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

30

The judgment of the Tribunal is that the Tribunal does not have jurisdiction to consider the claims under s.23 Employment Rights Act 1996. The claims are therefore dismissed.

REASONS

35

1. The claimant submitted a claim form to the Tribunal on 3 May 2021. The claimant had notified ACAS on 14 March 2021 and ACAS issued the certificate on 19 April 2021. The claimant raised claims of unlawful deductions from wages.

2. The respondent filed a response to the claim on 1 June 2021. The claim was originally due to be heard on 16 September 2021. On 6 September 2021 the claimant's personal representative requested a postponement due to the respondent being too unwell to attend a hearing and unfortunately the respondent died on 7 September 2021. The hearing was postponed to 13 June 2022.
3. By email dated 25 October 2021 the respondent's personal representative stated that they did not wish to defend the claim and by a judgment dated 7 December 2021 the response was struck out under rule 37 of the Rules contained in Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 on the grounds that the response had not been actively pursued.
4. The claimant contacted the Tribunal late on Friday 10 June 2022 to request a postponement of the final hearing due to being unwell recovering from Covid.
5. The Tribunal refused that request for a postponement of the final hearing that was due to take place by Cloud Video Platform (CVP). The claimant did not provide any medical evidence to demonstrate that she was too unwell to participate in a CVP hearing. As the claim was now over a year old it was important that the hearing proceed without further delay.
6. The claimant did attend the hearing by telephone as she did not have a device that enabled her to attend by video. She was able to fully participate in the hearing. The claimant gave evidence on her own behalf. She did not provide any documents to the Tribunal.
7. The respondent's personal representatives did not attend the hearing.

The claims

8. The claimant confirmed that she wished to pursue a claim for unlawful deductions:

- a. In respect of a three month period from 1 September 2008 to 1 December 2008 when she says that the respondent deducted £1.56 per hour from her pay during her probationary period.
- b. In respect of the period from April 2020 to October 2020 when she says the respondent should have paid her a backdated wage increase of 3.1% that was awarded by the Council after she had left her employment with the respondent.
9. The claimant confirmed that she was not pursuing any claim relating to the government bonus for working as a key worker as she had since applied for this directly and received it.

Findings of Fact

10. The claimant was employed by the respondent as a carer from 1 September 2008 to 1 October 2020 when the claimant's employment terminated by reason of her resignation.
11. When the claimant commenced her employment she was informed that, during her training and the 3 month probationary period, she would be paid £8 per hour and that this would increase to £9.56 per hour at the end of her probationary period. The claimant believed that other staff had only been paid £8 per hour during their training, but not for the entirety of their probationary period. The claimant queried this with the respondent who told her that he paid £8 during the probationary period as an incentive for people to stay on beyond the initial period of training because he was fed up of people leaving.
12. The claimant tried to raise the issue after her probationary period had ended but the respondent did not want to talk to her about it. The claimant did not bring a tribunal claim at that time because she said the nature of the job, working with the respondent one on one, meant that she did not feel able to do so.

13. At some point in October 2020, after the claimant had left her employment with the respondent on 1 October 2020, the Council implemented a wage increase of 3.1% for care workers. This meant that the respondent would pass on that wage increase to the people employed directly by him to provide his care. The wage increase would be backdated to April 2020. The claimant did not receive this wage increase, or any backdated payment, because she had already left the respondent's employment when the increase was implemented.

14. The claimant could not recall the hourly rate she was in receipt of between April and October 2020, nor could she recall how many hours she had worked each week as they varied, particularly during the pandemic. The claimant had not provided any documentation to the Tribunal setting out the amount of pay she received or hours she worked during this period.

15. The claimant could not recall why there was a delay of just over 5 months from the end of her employment on 1 October 2020 to notifying ACAS of her claim on 14 March 2021. The claimant was not aware of the time limits for bringing a tribunal claim. She thinks she became aware of them when the Tribunal told her about them. She could not remember how she had become aware of how to commence tribunal proceedings or to contact ACAS, she thinks someone must have told her about it. It is possible that she telephoned the Citizens Advice Bureau.

Relevant law

16. s.13(3) Employment Rights Act 1996 (ERA) provides:

(3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.

17. S.23(2) ERA provides:

(2) Subject to subsection (4), 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-

5 (a) in the case of a complaint relating to a deduction by the employer, the date of payment of the wages from which the deduction was made...

(3) Where a complaint is brought under this section in respect of –

10 (a) a series of deductions or payments...

the references in subsection (2) to the deduction or payment are to the last deduction or payment in the series or to the last of the payments so received.

15 (4) Where the [employment tribunal] is satisfied that it was not reasonably practicable for a complaint under this section to be presented before the end of the relevant period of three months, the tribunal may consider the complaint if it is presented within such further period as the tribunal considers
20 reasonable.

18. What is reasonably practicable is a question of fact. The test is empirical and involves no legal concept. Practical common sense is the keynote (**Wall's Mat Co Ltd v Khan [1979] ICR 52, CA**).

25 19. The onus of proving that presentation in time was not reasonably practicable rests on the claimant (**Porter v Bandridge Ltd 1978 ICR 943, CA**). If the claimant satisfies the tribunal that the presentation of the complaint within time was not reasonably practicable then the tribunal must then go on to
30 decide whether the claim was presented “within such further period as the tribunal considers reasonable.”

20. In **Palmer v Southend-on-Sea BC [1984] ICR 372, CA**, the Court of Appeal emphasised that the phrase “reasonably practicable” does not mean simply reasonable. That would be too favourable to employee. However, nor did it mean physically possible, which would be too favourable to employers. It meant something like ‘reasonably feasible’. In **Asda Stores v Kauser UKEAT/0165/07** Lady Smith explained the test as follows: “the relevant test is not simply a matter of looking at what was possible but to ask whether, on the facts of the case as found, it was reasonable to expect that which was possible to have been done.”

Conclusion

21. In respect of the first claim of unlawful deduction from wages, the date of the last alleged deduction in the series of deductions was on or around 1 December 2008, at the end of the claimant’s probationary period. That claim is therefore brought over 12 years outside the relevant time limit of three months.

22. It was reasonably practicable for that claim to have been brought within the relevant time limit. The only reason the claimant gave for not bringing a claim at the time of the deductions being made is because she thought it would be difficult to do so given the nature of the work she did working one on one with the respondent.

23. It was reasonably feasible for the claimant to have brought the claim within the relevant time limit. Discomfort at the idea of bringing a claim whilst still employed does not amount to it not being reasonably practicable to bring a claim. Even if it were not reasonably practicable to bring the claim within the relevant time limit, the claimant did not bring the claim within a further reasonable period. 12 years is not a reasonable period to wait to bring a claim for unlawful deductions and the claimant did not act in a timely fashion to bring the claim once her employment had come to an end.

24. In respect of the second claim of unlawful deduction from wages, the date of the last deduction in the series of deductions was made on 1 October 2020. The 3 month time limit for bringing a claim in respect of that claim expired on 31 December 2020. The claimant did not notify ACAS until 14 March 2021 and there was therefore no extension of the time limit to facilitate conciliation before institution of proceedings in accordance with s.207A ERA 1996. The claimant did not issue her claim form until 3 May 2021. The claim was therefore brought 4 months and 3 days outside of the relevant time limit.

25. The claimant could not explain the delay in contacting ACAS or bringing her claim. She thinks she spoke to the Citizens Advice Bureau who told her about contacting ACAS, but could not explain when that occurred or why she had delayed in doing so after her employment terminated on 1 October 2020. The Tribunal concludes that it was reasonably practicable for the claimant to bring her claim within the relevant time limit.

26. Both claims for unlawful deductions for wages were brought outside of the relevant time limits. It was reasonably practicable for them to have been brought within the time limits and the Tribunal therefore does not have jurisdiction to consider them. The claims are therefore dismissed.

Employment Judge: Jude Shepherd
Date of Judgment: 15 June 2022
Entered in register: 15 June 2022
and copied to parties