EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Miss A A Onyenagbaru	**AND**	**Mr B Mashumba**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT **Bristol (by video)** **ON** **19 May 2023**

EMPLOYMENT JUDGE **J Bax**

Representation

For the Claimant: **Did not attend**
For the Respondent: **Mr B Mashumba (in person)**

JUDGMENT

The claim of unlawful deductions from wages was presented out of time and it was reasonably practicable for the Claimant to have presented it in time. The Tribunal did not have jurisdiction to hear the claim and it is dismissed.

REASONS

1. In this claim, the Claimant, Miss Onyenagbaru, brought a claim for unpaid wages.

Procedural background and issues

2. The Claimant notified ACAS of the dispute on 22 August 2022 and the certificate was issued on 30 August 2022. The claim was presented on 14 September 2022.

3. The Claimant claimed she undertook work for the Respondent between 11 and 29 November 2021. It therefore appeared that the claim had been presented, after allowing for the early conciliation period, more than 3

months after the deduction to her pay and that the Tribunal might not have jurisdiction to hear the claim. The Claimant was informed about this in the Tribunal's letter dated 30 September 2022, when acknowledging the claim.

4. By letter dated 30 September 2022, the parties were sent the notice of hearing with associated case management orders for witness statements and documentary evidence. These were not complied with by either party.

5. The response was accepted. The response suggested that the Respondent's name was Sycamore Care Service. In the Tribunal's letter dated 21 November 2022, informing the parties accepting that the response had been accepted, it was noted that it was not disputed that the Claimant was owed money and that the Respondent required bank details so it could be paid. The parties were required to inform the Tribunal by 19 December 2022 whether any sum was owed and if so how much. On 28 December Mr Mashumba wrote to the Tribunal and said the bank details were still awaited.

6. The Claimant was sent the joining instructions for the hearing on 18 May 2023. The parties were also sent an e-mail by the Tribunal the same day asking for them to provide information by return, to which neither party responded.

7. At 09:35 on 19 May 2023, a member of Employment Tribunal staff tried to contact the Claimant by telephone, using the numbers provided on the claim form. One of the telephone numbers was unobtainable. The other number rang, however it did not connect to a voicemail facility. This number was tried twice. The Video Hearings Officer also tried to contact the Claimant before the hearing started and left a voicemail for her.

8. The hearing started at 10:03. The Claimant did not join. Both the video Hearings officer and a member of Employment Tribunal staff tried to contact the Claimant by telephone and she did not answer the calls. An email was sent to the Claimant informing her that she was due to attend the hearing and that she should do so and the hearing would proceed in her absence if she had not joined or contacted the Tribunal by 10:20.

9. All correspondence to the Claimant was sent to the e-mail address she provided on the claim form.

10. The Claimant did not join the hearing and did not contact the Tribunal by 1020. The Judge was satisfied that she had been notified of the hearing and that all reasonable attempts had been made to contact her to see if she would join the hearing. The hearing proceeded in her absence.

11. It was explained by the Judge that it appeared the claim had been presented out of time and if it had been presented out of time the Tribunal did not have jurisdiction to hear it, unless the Claimant satisfied the Tribunal that time should be extended.

12. The Respondent said that the correct Respondent's name was Sycamore Care Services Limited. The correct name of the Respondent was not dealt with at the hearing on the basis that the jurisdictional issue should be determined first.

The evidence

13. I heard from Mr Mashumba for the Respondent.

The facts

14. I found the following facts proven on the balance of probabilities after considering the whole of the evidence.

15. The Respondent operates a care agency. The Claimant was asked to undertake the live in care work in Gloucestershire, when she lived in Kent, in November 2021, the claim form suggested this was between 11 and 29 November 2021. After 29 November 2021, the client paid the Claimant directly, rather than the Claimant working via the agency. The claim form said that the Claimant continued to work away from home.

16. The Claimant was paid £1,000 on 3 December 2021 and she contacted Mr Mashumba that day saying there had been a shortfall. The Claimant had engaged with the agency by a services company and Mr Mashumba had asked for its bank details which the Claimant had not provided. The £1,000 was paid as an advance, pending the provision of the bank details.

17. The claim form said that because she was working away from home, she could not complete the claim form earlier. No other information was provided as to why the claim was presented when it was.

The law

18. The claimant claims in respect of deductions from wages which she alleges were not authorised and were therefore unlawful deductions from his wages contrary to section 13 of the Employment Rights Act 1996 ("the Act"), which provides:

    13 Right not to suffer unauthorised deductions

(1) An employer shall not make a deduction from wages of a worker employed by him unless—
(a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or
(b) the worker has previously signified in writing his agreement or consent to the making of the deduction.
(2) In this section "relevant provision", in relation to a worker's contract, means a provision of the contract comprised—
(a) in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or
(b) in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.
…

19. S. 23 (Complaints to [employment tribunals]) of the Act provides
(1) A worker may present a complaint to an [employment tribunal]—
(a) that his employer has made a deduction from his wages in contravention of section 13 (including a deduction made in contravention of that section as it applies by virtue of section 18(2)),
(b) ….
(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—
(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, or
(b) in the case of a complaint relating to a payment received by the employer, the date when the payment was received.
(3) Where a complaint is brought under this section in respect of—
(a) a series of deductions or payments, or
(b) a number of payments falling within subsection (1)(d) and made in pursuance of demands for payment subject to the same limit under section 21(1) but received by the employer on different dates,
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.
[(3A) Section 207B (extension of time limits to facilitate conciliation before institution of proceedings) applies for the purposes of subsection (2).]
(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 reasonable.
…

20. Put simplistically, with effect from 6 May 2014 a prospective claimant must obtain an early conciliation certificate from ACAS, or have a valid exemption, before issuing employment tribunal proceedings. Section 207B of the Act sets out how the time spent in early conciliation is taken into account when calculating whether a claim was presented in time. Account was taken of the guidance in Luton Borough Council v Haque [2018] ICR 1388, EAT.

21. The question of whether or not it was reasonably practicable for the claimant to have presented his claim in time is to be considered having regard to the following authorities. In Wall's Meat Co v Khan [1978] IRLR 499, Lord Denning, (quoting himself in Dedman v British Building and Engineering Appliances [1974] 1 All ER 520) stated "it is simply to ask this question: has the man just cause or excuse for not presenting his complaint within the prescribed time?" The burden of proof is on the claimant, see Porter v Bandridge Ltd [1978] IRLR 271 CA. In addition, the Tribunal must have regard to the entire period of the time limit (Wolverhampton University v Elbeltagi [2007] All E R (D) 303 EAT).

22. In Palmer and Saunders v Southend-on-Sea BC [1984] IRLR 119the headnote suggests: "As the authorities also make clear, the answer to that question is pre-eminently an issue of fact for the Industrial Tribunal taking all the circumstances of the given case into account, and it is seldom that an appeal from its decision will lie. Dependent upon the circumstances of the particular case, in determining whether or not it was reasonably practicable to present the complaint in time, an Industrial Tribunal may wish to consider the substantial cause of the employee's failure to comply with the statutory time limit; whether he had been physically prevented from complying with the limitation period, for instance by illness or a postal strike, or something similar. It may be relevant for the Tribunal to investigate whether, at the time of dismissal, and if not when thereafter, the employee knew that he had the right to complain of unfair dismissal; in some cases the Tribunal may have to consider whether there was any misrepresentation about any relevant matter by the employer to the employee. It will frequently be necessary for the Tribunal to know whether the employee was being advised at any material time and, if so, by whom; the extent of the advisor's knowledge of the facts of the employee's case; and of the nature of any advice which they may have given him. It will probably be relevant in most cases for the Industrial Tribunal to ask itself whether there was any substantial failure on the part of the employee or his adviser which led to the failure to comply with the time limit. The Industrial Tribunal may also wish to consider the manner in which and the reason for which the employee was dismissed, including the extent to which, if at all, the employer's conciliatory appeals machinery had been used. Contrary to the argument advanced on behalf of the appellants in the present case and the

obiter dictum of Kilner Brown J in Crown Agents for Overseas Governments and Administrations v Lawal [1978] IRLR542, however, the mere fact that an employee was pursuing an appeal through the internal machinery does not mean that it was not reasonably practicable for the unfair dismissal application to be made in time. The views expressed by the EAT in Bodha v Hampshire Area Health Authority [1982] ICR 200 at p 204on this point were preferred to those expressed in Lawal:-

23. To this end the Tribunal should consider: (1) the substantial cause of the claimant's failure to comply with the time limit; (2) whether there was any physical impediment preventing compliance, such as illness, or a postal strike; (3) whether, and if so when, the claimant knew of his rights; (4) whether the employer had misrepresented any relevant matter to the employee; and (5) 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.

24. In addition, in Palmer and Saunders v Southend-on-Sea BC, and following its general review of the authorities, the Court of Appeal (per May LJ) concluded that "reasonably practicable" does not mean reasonable (which would be too favourable to employees), and does not mean physically possible (which would be too favourable to employers) but means something like "reasonably feasible".

25. Subsequently in London Underground Ltd v Noel [1999] IRLR 621, Judge LJ stated at paragraph 24 "The power to disapply the statutory period is therefore very restricted. In particular it is not available to be exercised, for example, "in all the circumstances", nor when it is "just and reasonable", nor even where the Tribunal "considers that there is a good reason" for doing so. As Browne Wilkinson J (as he then was) observed: "The statutory test remains one of practicability … the statutory test is not satisfied just because it was reasonable not to do what could be done" (Bodha v Hampshire Area Health Authority [1982] ICR 200 at p 204).

26. Underhill P as he then was considered the period after the expiry of the primary time limit in Cullinane v Balfour Beattie Engineering Services Ltd UKEAT/0537/10 (in the context of the time limit under section 139 of the Trade Union & Labour Relations (Consolidation) Act 1992, which is the same test as in section 111 of the Act) at paragraph 16: “The question at “stage 2” is what period - that is, between the expiry of the primary time limit and the eventual presentation of the claim - is reasonable. That is not the same as asking whether the claimant acted reasonably; still less is it equivalent to the question whether it would be just and equitable to extend time. It requires an objective consideration of the factors causing the delay and what period should reasonably be allowed in those circumstances for

proceedings to be instituted - having regard, certainly, to the strong public interest in claims in this field being brought promptly, and against a background where the primary time limit is three months."

Conclusions

27. The Claimant should have been her wages by 3 December 2021 and therefore the unlawful deductions from wages claims should have been presented by 2 March 2022 subject to pausing by reason of early conciliation via ACAS. The Claimant notified ACAS on 22 August 2022, which post-dated the primary limitation date and she did not get the benefit of any extension of time for the early conciliation period. The claim was therefore presented 6 months out of time.

28. The only reason put forward by the Claimant was that she was working away from home. She had an e-mail address and had telephone numbers as demonstrated by the claim form. The Claimant could have undertaken research online or contacted ACAS on-line or by telephone. The Claimant could have sought advice and by contacting the Respondent on 3 December 2021 she was aware that there might be outstanding pay. The Claimant adduced no evidence that it was not reasonably practicable to present the claim. The Claimant was not availed of the extension within s. 23. The Tribunal did not have jurisdiction to hear the claim and it was dismissed.

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Employment Judge J Bax
Dated 19 May 2023

Judgment sent to Parties on 02 June 2023

For the Tribunal Office