

RESERVED JUDGMENT



EMPLOYMENT TRIBUNALS

Claimant: Miss T McGauley

Respondent: Dwr Cymru Cefyngedig

Heard By Video at: Swansea Civil Justice Centre **On:** 24 May 2023

Before: Employment Judge S Povey

Appearances

For the Claimant: In Person

For the Respondent: Miss Ahmad (Counsel)

JUDGMENT

1. By reason of section 23(4A) of the Employment Rights Act 1996, the Tribunal cannot consider the claim of unauthorised deductions from wages.
2. In the alternative:
 - 2.1. The claim of unauthorised deductions from wages was not presented to the Tribunal before the end of the period of three months beginning with the date of payment of the wages from which the last deduction was made.
 - 2.2. It was reasonably practicable for the claim of unauthorised deductions from wages to be presented before the end of the period of three months beginning with the date of payment of the wages from which the last deduction was made.
 - 2.3. The claim of unauthorised deductions from wages was not presented to the Tribunal within such further period as the Tribunal considers reasonable.
 - 2.4. By reason of sections 23(2) & (4) of the Employment Rights Act 1996 the Tribunal cannot consider the claim of unauthorised deductions from wages.
3. As such, the claim of unauthorised deductions from wages has no reasonable prospect of success and is struck out.

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REASONS

1. At the culmination of the hearing on 24 May 2023, I reserved my judgment due to lack of time. This is my decision and reasons.

Background

2. This is a claim brought by Tracey McGauley (hereafter referred to as the Claimant) against her current employer, Dwr Cymru Cefyngedig (hereafter referred to as the Respondent). Following a period of ACAS Early Conciliation (from 16 May 2022 to 26 June 2022), the claim was presented to the Employment Tribunal ('the ET') on 24 July 2022.
3. The Claimant has been employed by the Respondent since August 2017. She is currently employed as a Catchment Administrator (and has been since June 2022). Her claim relates to her employment with the Respondent in an earlier post of Waste Network Technician.
4. The claim relates to alleged unpaid wages for the period from April 2019 to March 2020. From the outset, the Respondent has taken issue with whether the Tribunal had jurisdiction to consider the claim, as it had been brought out of time. At a Preliminary Hearing on 16 March 2023, Employment Judge Sutton KC issued case management directions for the preparation and hearing of that application.
5. On 24 March 2023, the Respondent sent to the Claimant and the Tribunal its application to strike out the claim. By an email dated 11 April 2023, the Claimant responded to that application. The hearing of the application was listed for a Public Preliminary Hearing on 24 May 2023, the parties being notified of the same by a letter dated 12 April 2023.
6. At the hearing on 24 May 2023, I heard oral evidence from the Claimant. In addition, I received oral submissions from Miss Ahmad for the Respondent and from the Claimant. The parties also provided a paginated, indexed file of documents.
7. I have taken all the evidence I have seen and heard and the parties respective submissions into account in reaching my decision.

The Relevant Law & Procedure

8. Section 13 of the Employment Rights Act 1996 ('ERA 1996') affords the right to workers not to suffer unauthorised deductions from wages.
9. Section 23 of the ERA 1996 gives those who claim to have suffered unauthorised deductions from their wages the right to present a complaint to the ET. So far as relevant to the issues in this case, section 23 includes the following:

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(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, ...

...

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.

(4A) An employment tribunal is not (despite subsections (3) and (4)) to consider so much of a complaint brought under this section as relates to a deduction where the date of payment of the wages from which the deduction was made was before the period of two years ending with the date of presentation of the complaint.

...

10. Section 207B of the ERA 1996 (referred to above) relates to the effects of ACAS Early Conciliation on time limits.

11. Rule 37 of the Schedule 1 to the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013, so far as relevant, includes the following:

(1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim...on the following grounds:

a. that it...has no reasonable prospect of success;

...

(2) A claim...may not be struck out unless the party in question has been given a reasonable opportunity to make representations, wither in writing or, if requested by the party, at a hearing.

...

Relevant Findings of Fact

12. The Claimant confirmed at the outset of the hearing that the alleged deductions she is claiming arose between April 2019 and March 2020. On further enquiry, she was able to helpfully clarify the following relevant information:

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- 12.1. She was paid by the Respondent on the 20th of every month.
 - 12.2. She had suffered alleged unauthorised deductions every month that she had been paid from at least 20 May 2019 until 20 April 2020.
 - 12.3. The deductions related, predominantly, to overtime.
 - 12.4. The last alleged unauthorised deduction appeared in the wage which was paid on 20 April 2020 (but related to the previous month's work).
 - 12.5. The Claimant was of the view that the deductions were unauthorised soon after each occurred. Indeed, by April 2020, she was expecting the deduction.
13. The Claimant explained that she tried to resolve the issue with the Respondent. It was not in dispute that the Claimant pursued a grievance in February 2021, which progressed to both a hearing and an appeal, resulting in some payments being made.
 14. In addition, the Claimant explained that she had been on long term sick leave from December 2020 until March 2022 (by reason of her mental health). The grievance process had taken place whilst the Claimant was on sick leave. The Claimant had the assistance of her trade union during the grievance process.
 15. The Claimant returned to work in March 2022 but not to the same role. She initially was on secondment before taking up her current role from June 2022.
 16. The Claimant said that she had been unaware of the ET until about a year before she presented her claim in July 2022. She further clarified that her mental health counsellor had told her about ACAS in or around July 2021. Although the Claimant undertook some internet research thereafter, she did not contact ACAS until she began Early Conciliation on 16 May 2022.

Conclusions

The Effects of Section 23(4A) of the ERA 1996

17. Although I was not addressed on it by the Respondent, section 23(4A) of the ERA 1996 is determinative of the issue in this case. As set out above, the ET is not permitted to consider a complaint that relates to any alleged unauthorised deduction which arose more than two years before the claim was presented.
18. In this case, anything that arose before 24 July 2020 would fall outside of the ET's jurisdiction. Taking the Claimant's case at it's highest, all of the payments of wages from which she says unauthorised deductions were made occurred before 24 July 2020. The ET, by reason of section 24(4A) of the ERA 1996, has no power to decide them.

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19. Importantly, section 23(4) of the ERA 1996 expressly excludes the ET's power to consider a claim where it was not reasonably practicable to present the claim within three months and it was presented within such period as was otherwise reasonable. In effect, section 23(4A) of the ERA 1996 imposes a two-year limit on the backdating of unlawful deduction from wages claims.
20. For that reason, the ET has no power to consider or determine the claim. It follows that it has no reasonable prospects of success and the Respondent's application to strike it out succeeds.
21. The effects of section 23(4) of the ERA 1996 allied with the dates of the alleged unauthorised deductions is conclusive of this matter. However, as I was addressed by the parties on the provisions of section 23(4) of the ERA 1996, I have, for the sake of completeness, gone on to consider those submissions and make findings in the alternative.

Sections 23(4) of the ERA 1996

22. Section 23(4) of the ERA 1996 gives the ET the power to consider a claim brought out of time where:
- 22.1. It was not reasonably practicable for the Claimant to present the claim to the ET within the three month time limit; and
- 22.2. The Claimant thereafter presented the claim within a further reasonable period of time after the expiry of the three month time limit.

Reasonably practicable

23. In my judgment it was reasonably practicable for the Claimant to bring the claim within the three month time limit. She was well aware that what she considered to be unauthorised deductions were being made regularly between June 2019 and April 2020, so much so that in her own evidence she was expecting the last of the deductions even before she received her monthly wage.
24. I am acutely aware that the Claimant was off work because of her mental health for an extended period of time but that was not until December 2020. She was still able to attend work until then and there was little to suggest that she was incapable or unable to reasonably start her claim in the ET within three months of the last of the alleged deductions.
25. However commendable the Claimant's actions may have been in preferring to try and resolve matters amicably or by negotiation with the Respondent, that was in reality a choice that she made. It did not support a finding that it not reasonably practicable for the Claimant to have started ET proceedings within the specified time limit.
26. By law, reasonable practicability is the test that I must apply. For those reasons, it was reasonably practical for the Claimant to bring her claim before the expiry of three months from the date of the last alleged deduction.

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Further Reasonable Period

27. In the alternative, even if it was not reasonably practicable to bring the claim within the three month time limit, the claim was not been brought within a further reasonable period.
28. It was not in dispute that the claim was finally presented to ET in July 22, two years after the expiry of the three month time limit. Without more, that period is unreasonable.
29. From July 2020 until December 2020, the Claimant continued in work. Whilst the Claimant was hopeful of resolving the issue without recourse to legal action, it was reasonable for her to present her claim to the ET during that period. Whilst the Claimant referred to the challenges of her mental health, she was considered well enough to attend work and has not provided any medical evidence to support her inability to at least begin the ET process.
30. Whilst I acknowledge that the Claimant was unfit for work because of her mental health from Dec 2020 to March 2022, she was able to continue her attempts to resolve the issue with Respondent, by lodging, pursuing and engaging in a grievance process from February to September 2021. In my judgment, if the Claimant was able to engage in that process, it was reasonable for her to have also presented her claim to the ET. In the alternative, it was reasonably open to the Claimant to chose the pursue her ET claim instead of an internal grievance, if she would have found pursuing both processes overwhelming.
31. It is also noteworthy that the Claimant was receiving advice from her trade union during this time, who could have made her aware of the time limits in operation regarding any proposed claim to the ET. In addition, the Claimant was told by her counsellor in July 2021 about ACAS and it was reasonably open to the Claimant to follow up that information and make enquiries about the options open to her in her on-going dispute with the Respondent.
32. From March 2022, the Claimant was fit enough to return to work. Again, save for a desire to resolve matters by negotiation, there was no reason advanced for why the claim could not have been presented to the ET either then or at any time in the following four months before the claim was finally presented in July 2022.
33. The deadline for presenting this claim to the ET was July 2020. It was not presented until July 2022, two years out of time. It was reasonably practicable for the Claimant to present it to the ET by July 2020. In the alternative, it was not presented within a further reasonable period after the end of the three month time limit.
34. For those reasons, the ET does not have the power under section 23(4) of the ERA 1996 to consider this claim, it has no reasonable prospects of success and is struck out.

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Employment Judge Povey
Date - 25 May 2023

Sent to the parties on 26 May 2023

For the Tribunal Office Mr N Roche