

# THE INDUSTRIAL TRIBUNALS

CASE REF: 17952/18

**CLAIMANT:** Alistair Drury

**RESPONDENT:** Department for Communities

## DECISION

1. The tribunal is satisfied that the claimant's complaint to the tribunal was lodged out of time.
2. The claimant has failed to satisfy the tribunal that it was not reasonably practicable for him to lodge his complaint in time.
3. The tribunal therefore has no jurisdiction to deal with it, and the complaint is dismissed.

## CONSTITUTION OF TRIBUNAL

**Employment Judge (sitting alone):** Employment Judge Browne

## APPEARANCES:

**The claimant attended and represented himself.**

**The respondent was represented by Ms L Gillen, Barrister-at-Law, instructed by The Departmental Solicitor's Office.**

## ISSUES

1. The claimant lodged his sole complaint for unlawful deduction of wages with the tribunal on 31 October 2018.
2. That complaint arose as a result of his salary payments made between 2012 and 2017, after the claimant's return from a career break, from 09 October 2008 until 09 June 2012.
3. The pay structure of his civil service post as Administrative Officer had been altered during his absence, as a result of the implementation of the Equal Pay Settlement, arising from the result of a court case.
4. The respondent raised a question of the jurisdiction of the tribunal to deal with the claimant's case, asserting that it had been lodged out of time. The relevant

legislation is contained in Article 55 of the Employment Rights (Northern Ireland) Order 1996, which states:

“55.—(1) A worker may present a complaint to an industrial tribunal —

- (a) that his employer has made a deduction from his wages in contravention of Article 45 (including a deduction made in contravention of that Article as it applies by virtue of Article 50( 2)),
- (b) that his employer has received from him a payment in contravention of Article 47 (including a payment received in contravention of that Article as it applies by virtue of Article 52(1)),
- (c) that his employer has recovered from his wages by means of one or more deductions falling within Article 50(1) an amount or aggregate amount exceeding the limit applying to the deduction or deductions under that provision, or
- (d) that his employer has received from him in pursuance of one or more demands for payment made (in accordance with Article 52) on a particular pay day, a payment or payments of an amount or aggregate amount exceeding the limit applying to the demand or demands under Article 53(1).

(2) Subject to paragraph (4), an industrial tribunal shall not consider a complaint under this Article 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 Article in respect of — —

- (a) a series of deductions or payments, or
- (b) a number of payments falling within paragraph (1)(d) and made in pursuance of demands for payment subject to the same limit under Article 53(1) but received by the employer on different dates, the references in paragraph (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.

- (4) Where the industrial tribunal is satisfied that it was not reasonably practicable for a complaint under this Article 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.
5. The claimant had raised a grievance with the respondent, which was dealt with on 25 October 2017, and his grievance was not upheld. He appealed from that decision; the appeal was held on 18 April 2018, and the claimant was notified on 14 May 2018 that it had not been upheld.
6. The letter informing him of the appeal outcome made it clear that the decision was final, and that the internal appeal process was then exhausted.
7. It is a question of fact in each case whether it was reasonably practicable to present a claim in time. The Court of Appeal in ***Palmer v Southend-on-Sea Borough Council [1984] 1 All ER 945, [1984] 1 WLR 1129, [1984] ICR 372*** was able to offer no more specific test than that the tribunal should ask whether it was 'reasonably feasible' to present the claim in time – a test which May LJ acknowledged was easier to state than to apply.
8. The general approach to be adopted was stated by the Court of Appeal in ***Marks & Spencer plc v Williams-Ryan [2005] EWCA Civ 470, [2005] IRLR 562*** to be that the statute should be given a liberal interpretation in favour of the employee.
9. Whilst in ***Theobald v The Royal Bank of Scotland plc [2007] All ER (D) 04 (Jan)***, the EAT suggested that such a conclusion is against the weight of other authority, the emerging view seems to me to be that the wider approach is appropriate, depending of course upon the individual facts of each case.
10. It appears to me that, even adopting a more flexible interpretation of the legislation, the claimant did not make the case that it was not reasonably practicable for him to present a complaint because of any ignorance of his right to claim. The issue in question in this case appears to me to be somewhat different from the more common scenario of, for example, an employee being told to leave his employment.
11. The claimant was twice accompanied by union representatives, in his grievance and in his appeal. I consider it to be unlikely that the union would have been unaware of the claimant's complaint as being an actionable breach of the legislation.
12. His grievance, and the related appeal, were based upon the same issue as that before the tribunal. I therefore consider that the claimant was not under any misapprehension as to the focus or nature of his complaint. The claimant did not advance legal uncertainty or lack of knowledge as a ground for delay in submission of his tribunal complaint.
13. The only substantive ground advanced by him was that he did not have all the information he needed, which, on his version, was only supplied during the run-up to the hearing.

14. I have concluded that this was not a bar to lodging a complaint to the tribunal. Additional information is often supplied in pre-hearing discovery; it is not in my view a practical impediment to delay launching proceedings. The claimant in his witness statement was able to cite and comment upon a very large amount of material, which in my view contained ample knowledge and documentation in support of his case.
15. His argument included reference to the fact that, in his view, the unlawful deductions continued until July 2018. Whilst the legislation refers to the date of the last unlawful deduction, my interpretation of that is to include where the fact of the alleged deduction only comes to the notice of the claimant at a stage past the first such deduction. That situation did not in my view apply in this case, as evidenced by the grievance on this exact point, raised by the claimant in 2012.
16. If the deductions were unlawful, I conclude that the claimant's knowledge of and objection to their continuing would most plausibly have been addressed by bringing legal proceedings, in order to halt them.
17. If the claimant can properly be deemed reasonably to have known of his right to such a claim, even in a general sense, then it will probably be held that it was reasonably practicable to present a complaint within the time limit, whether or not he in fact knew of the right (***Porter v Bandridge Ltd [1978] 1 WLR 1145, [1978] ICR 943***). However it is always necessary for the tribunal to consider what the claimant knew, and whether his lack of relevant knowledge was reasonable.
18. If the claimant had knowledge of his rights, there arises an obligation upon him to seek information or advice about the enforcement of those rights (***Trevelyan (Birmingham) Ltd v Norton [1991] ICR 488***), and accordingly ignorance of time limits may well be held not to be reasonable if the claimant was aware of the right to claim but made no further enquiries about how or when to do so.
19. I am satisfied from the claimant's persistence from 2017, and from the voluminous documents produced by him throughout his grievance process, that he might reasonably be deemed to be well aware of the specifics of his complaints.
20. I am further satisfied that it is likely that he was fully aware of its actionable nature. At no stage during the opportunity given to him at the tribunal hearing to establish why it was not reasonably practicable for him to lodge his claim did he assert that he was unaware of his right to bring tribunal proceedings.
21. He raised an argument as part of his reasons for not lodging a complaint that he was hoping to negotiate resolution with the respondent. It was made clear however in the appeal outcome letter of 14 May 2018 that the respondent then regarded the matter as closed.
22. The claimant's ET1 complaint to the tribunal confines his case to the period from 2012 to 2017, with no subsequent application by him to expand the dates.
23. Even taking the most flexible view, I have concluded that the latest date he became aware that there would be no further negotiation was 14 May 2018.
24. I am therefore satisfied that the complaint was lodged out of time.

25. The claimant has not satisfied me that there was any practical impediment to prevent him from presenting his complaint. The tribunal therefore has no jurisdiction to deal with his complaint, and it is dismissed in its entirety.

**Employment Judge:**

**Date and place of hearing: 3 July 2019, Belfast.**

**Date decision recorded in register and issued to parties:**