



# EMPLOYMENT TRIBUNALS

## *Claimants*

(1) Ms K Olesinka  
(2) Ms S Kostecka  
(3) Ms K Nazaruk

## *Respondent*

Urszula Dabek  
t/a Polish Beer Warehouse

## **PUBLIC PRELIMINARY HEARING**

Heard at North Shields  
Before Employment Judge Garnon

On 5<sup>th</sup> February 2018

## *Appearances*

For the Claimants: In person  
For the Respondent: Mr M Cameron, Consultant  
Interpreter: Ms P Wieczorek

## **JUDGMENT**

**The Tribunal will consider all the claims advanced by all claimants**

## **REASONS**

1. This public preliminary hearing was ordered on 16 November 2017 by Employment Judge Buchanan. The claimants put their claims on a single claim form presented on 11 April 2017. The claims are:-

1.1 unlawful deduction from wages pursuant to section 23 of the Employment Rights Act 1996 ("the Act"). The claimants assert that over the respective periods of their employment they were not paid at the rate of the national minimum/living wage and as a result there has been an unlawful deduction from their wages. As Employment Judge Buchanan pointed out to the respondent the obligation to establish the claimants were paid the rate of the national minimum/living falls on the respondent pursuant to the provisions of the National Minimum Wage Act 1998. He also noted if the claimants are prevented from advancing claims in respect of their contractual pay to this Tribunal then an alternative avenue is open to them through the County Court.

1.2 A claim of unpaid holiday pay. The claimants assert they were not paid for any holidays during the course of their employment. This claim is advanced pursuant to Regulation 30 of the Working Time Regulations 1998 ("the WTR").

1.3 A reference to the Tribunal pursuant to section 11 of the Act relating to an itemised pay statement to be provided pursuant to section 8 which is said not to have contained details of deductions. It was confirmed there was no reference under section 11 in respect of the particulars to be provided under sections 1 and 4. However, the claimants ask the Tribunal to exercise its powers under section 38 of the Employment Act 2002 to make an additional award as they assert that at the time of institution of these proceedings the respondent was in breach of her duty under section 1 and/or section 4 of the Act.

2 Employment Judge Buchanan noted the claims appeared to be out of time. This was not raised in the response but I entirely agree it is a matter which cannot be ignored. It is now clear he was working from a document on the tribunal file which calculated the start of all limits from the earliest termination date of 13<sup>th</sup> December 2016. The issues for today are (bold is my emphasis)

2.1. Whether the claim of unlawful deduction from wages has been presented to the Tribunal before the end of the period of three months plus the extension of time permitted by section 207B of the Act, **beginning with the date of payment of wages from which the unlawful deductions were made.** If not whether it was reasonably practicable for a complaint to have been presented before the end of such period and if not whether the claim has been presented within such further period as the Tribunal considers reasonable.

2.2. Whether the claim of unpaid holiday pay pursuant to regulation 30 of the WTR was presented before the end of the period of three months (extended by the provisions of regulation 30B of the 1998 Regulations) **from the date that payment should have been made** and if not whether it was reasonably practicable for the complaint to have been presented within such time limit and if not whether it has been presented within such further time as is reasonable.

2.3. Whether the reference under section 11 of the Act was made before the end of the period of three months (as extended by section 207B) beginning with **the date on which the employment ceased** or within such further period as the Tribunal considers reasonable where it is satisfied it was not reasonably practicable for the application to have been made before the end of the said period and if not whether it has been presented within such further time as is reasonable.

3. With effect from 6<sup>th</sup> April 2014 s 207B provides for extension of time limits to facilitate Early Conciliation (EC) before institution of proceedings, thus:

*(2) In this section—*

*(a) Day A is the day on which the complainant or applicant concerned complies with the requirement in subsection (1) of section 18A of the Employment Tribunals Act 1996 (requirement to contact ACAS before instituting proceedings) in relation to the matter in respect of which the proceedings are brought, and*

*(b) Day B is the day on which the complainant or applicant concerned receives or, if earlier, is treated as receiving (by virtue of regulations made under subsection (11) of that section) the certificate issued under subsection (4) of that section.*

*(3) In working out when a time limit set by a relevant provision expires, the period beginning with the day after Day A and ending with Day B is not to be counted.*

*(4) If a time limit set by a relevant provision would (if not extended by this subsection) expire during the period beginning with Day A and ending one month after Day B, the time limit expires instead at the end of that period.*

*(5) Where an employment tribunal has power under this Act to extend a time limit set by a relevant provision, the power is exercisable in relation to the time limit as extended by this section.”*

4. It is now well established a claimant may avail herself of the more favourable of ss (3) , commonly described as the “ stop the clock” provision and ss(4) .Employment Judge Buchanan recorded some facts as agreed

(a) Ms Olesinka worked for the respondent from 7 September 2016 until 13 December 2016;

(b) Ms Nazaruk worked for the respondent from 6 December 2015 until 1 January 2017.

(c) Ms Kostecka worked for the respondent from 22 September 2015 until 13 December 2016

5. The claim form refers to three early conciliation certificates. The certificate for Ms Olesinka shows Day A as 30 January 2017 and Day B as 1 February 2017, which would add 2 days under the “ stop the clock” provision. The certificate for Ms Kostecka shows Day A as 30 January 2017 and Day B as 14 February 2017 adding 15 days t under the “ stop the clock” provision. The certificate for Ms Nazaruk shows Day A as 7 February 2017 and Day B as 7 March 2017 adding 28 days under the “stop the clock” provision.

6. The point which was not apparent to Employment Judge Buchanan, or to myself until I read the respondent’s statement today, was that the start dates for the wages claim and holiday pay claim were the dates of final payment of wages which were 11<sup>th</sup> January 2018 for Ms Olesinska, and Ms Kostecka and 4<sup>th</sup> January for Ms Nazaruk . But for s 207 Ms Nazaruk would have had to present her claim under s 11 by 31<sup>st</sup> March 2017 and her other two claims by 3<sup>rd</sup> April. Adding the 28 days using ss (3) the time for presentation would expire on 28<sup>th</sup> April for the first claim and 1<sup>st</sup> May for the others Her claims are all in time .

7 . Ms Olesinska should have presented her s11 claim by 14<sup>th</sup> March and her other claims by 12<sup>th</sup> April. Ms Kostecka should have presented her s11 claim by 27<sup>th</sup> March and her other claims by 25<sup>th</sup> April. The only claims out of time are the s11 claims.

8. Whilst there are three certificates on the Tribunal file the claimants produced further certificates in the names of Ms Olesinska and Ms Kostecka showing Day A as 1<sup>st</sup> February and Day B as 28<sup>th</sup> February . The question of whether or not there can be more than one ACAS certificate in respect of each claimant is has been considered by the Employment Appeal Tribunal in HMRC –v- Garau UKEAT/0348/16 Where a claimant goes through the EC process twice in respect of the same complaint only the first process counts for time limit extension.

9. When a Tribunal has to determine whether it was reasonably practicable for a claim to have been filed in time Palmer v Southend on Sea Borough Council 1984 ICR 372 set out the relevant considerations. Reasonably practicable means reasonably “do-able”. The burden of proving it was not rests on the claimant..

10. Wall's Meat Company v Khan , Riley –v-Tesco Stores and Dedman-v-British Building held it to be enough to warrant exercise of the discretion where the claimant was **reasonably** ignorant of the time limit . If she was speaking to advisors it is important to know who they were. Incorrect advice from Tribunal staff or ACAS is usually a valid reason for not issuing in time . But time limits are just that—limits and I cannot relax them for no sound reason.

11. Employment Judge Buchanan told the claimants of section 18(7) of the Employment Tribunals Act 1996 which provides anything communicated to a conciliation officer in performance with his functions is not admissible in evidence except with the consent of the person who communicated it to that officer. It is important to explain the claimants understood much of what I said today without the assistance of Ms Wieczorek, but the more technical our discussions became the more they needed it . The claimants told me what I had suspected anyway. They understood from their conversations with ACAS that in order to issue their claims together, as what they called a “ multi “ claim , Ms Olesinska and Ms Kostecka had to start EC again. This is a misunderstanding of a rule which provides for an exemption from the requirement for EC where another person has already done it .

12. So complex are these provisions that many people for whom English is their first language struggle to understand them . Whether ACAS gave the wrong advice or the claimant's misunderstood the advice given, I am satisfied the reason for the s11 claims being late, is a genuine and reasonable misunderstanding of the time limit. I also decide it was presented within such further period as is reasonable. Mr Cameron helpfully did not argue against this. On that basis, I have no hesitation in finding all the claims can be considered.

**Employment Judge Garnon**

**Signed on 5<sup>th</sup> February 2018**