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EMPLOYMENT TRIBUNALS

Claimant: Mr H Sam
Respondent: Mitie Security (London) Limited
Heard at: East London Hearing Centre
On: Tuesday 23 July 2019
Before: Employment Judge Jones (sitting alone)

Representation

Claimant: In Person
Respondent: Mr Bidnell-Edwards (Counsel)

JUDGMENT

The judgment of the Employment Tribunal is that: -

- 1 The claim was not presented in time despite it being reasonably practicable to do so and is dismissed.
- 2 There are no reasonable prospects of this claim succeeding.
- 3 The Claim is dismissed.

REASONS

1 The Claimant issued a claim at the Employment Tribunal on the 18 July 2018 for unlawful deduction of wages and failure to pay holiday pay.

2 It was the Claimant's case that he tried to book annual leave between the 21 July and 31 August 2017 but his manager refused him permission to take that much leave. He was told that he had to take less time. The Claimant was granted 15 days leave. He agreed to take 15 days leave. In today's hearing he was not clear when that period of time was due to start. The Claimant fell ill around the start of the leave on 25 July 2017 and was sick for 6 weeks. It is likely that he returned to work on or around 5 September 2017.

3 The Claimant's complaint was that he did not get paid properly for that period of time. It is also his complaint that he was not paid properly for a day in November and a day in December 2017.

4 The Claimant had initially issued his complaint together with his colleague, Mr Mazueto who also brought proceedings in the employment tribunal. Mr Mazueto's complaint was dismissed by way of withdrawal. The Claimant initially brought the claim against Kingdom Services Group Limited, who at the time, were his employers. The Claimant was initially employed by Epping Forest College and then transferred to Kingdom Services Group Limited and then back to the college and then lastly, to Mitie Security (London) Limited.

5 At a previous hearing in this matter, on 24 June 2019, Employment Judge Russell ordered that the Mitie Security Ltd, the 3rd Respondent, should be added as a party to these proceedings. EJ Russell also released the other two Respondents from the case as there were no issues between them and the Claimant. It was agreed by all who attended that hearing that if there were any omissions or deductions from the Claimant's wages responsibility for those would have transferred to the 3rd Respondent.

6 The claim was served on Mitie and it filed a Response to these proceedings and Grounds of Resistance on 14 February 2019. Mitie is the only Respondent in this matter. In its Response Mitie did not refer to the fact that the claim had been issued outside the statutory time limits.

7 Today, Respondent's Counsel, raised the issue of the Tribunals jurisdiction to consider this claim given that the claim had been issued late. I was told today that this issue had been raised at the last hearing but there are no notes of that discussion in the minutes of the case management hearing.

8 The Claimant has a claim for two shifts he believes that he worked but which remain unpaid. Those were shifts were on 12 September 2017 and 10 November 2017.

9 The Tribunal had sworn evidence from the Claimant today. He gave evidence both on the issue of the apparent late filing of his ET1 complaint and on the claims for holiday pay and the two outstanding shifts.

Holiday and other pay claim

10 After the Claimant gave evidence, the Tribunal made the following findings in respect of the holiday pay in 2017: -

11 The Claimant attempted to book 4 weeks leave i.e. between 21 July and 31 August 2017. He did not remember when he submitted the request for the leave. His manager refused him that leave but gave him 15 days which began on 25 July.

12 Unfortunately, at the start of that holiday period, the Claimant was unable to go on holiday as he fell ill and was ill for a period of 6 weeks. On his return to work he submitted medical certificates and supporting evidence to confirm that he had been ill. However, his manager refused to allow him to take annual leave subsequently. The Claimant's case

was that he should be able to take the leave that he lost due to ill-health, at another time. The Respondent refused to allow him to do so. His claim therefore was for the annual leave he was unable to take during that leave year. It is the Claimant's case that his leave year began on 1 September and continued to 31 August on the following year. It was the Claimant's case that he was not allowed to carry forward the leave he had been unable to take in 2017 and he lost it.

13 Perusal of the Claimant's payslips which were in the bundle of documents today on pages 84, 85 and 86 showed that the money that the Claimant was paid during the period of July to end of August 2017 included SSP and holiday pay. The SSP was sometimes described as '*Unlinked*' and on the 15 August payslip and on the 15 September payslips SSP was described as '*linked*'. The Claimant was therefore paid for the time that he had off as a combination of holiday pay and sick pay. Also, the Respondent paid the Claimant at a higher rate for holiday pay than for sick pay as the sick pay is paid as SSP which is paid at a low flat rate.

14 Also, the Claimant's contract contained the following clauses:

- 14.1 *"The timing of all holidays is subject to the agreement of your line manager.*
- 14.2 *Outline schedules of significant holidays for individual staff are required to be planned before December 31 in any holiday year.*
- 14.3 *9.4 In the holiday year in which your employment commences or terminates, your holiday entitlement will accrue on a pro-rata basis for each complete month of service. If on the termination of your employment, you have exceeded your accrued holiday entitlement, the college will be entitled to deduct the excess from any sums due to you, including payment of salary. If on the other hand, you have any unused holiday entitlement, the college may require you to take it during your notice period or may alternatively pay you the appropriate sum in lieu.*
- 14.4 *9.5 Holiday entitlement for one holiday year cannot be taken in subsequent holiday years unless otherwise agreed by the college. Failure to take holiday entitlement in the appropriate holiday year will lead to forfeiture of any accrued holiday not taken without any right to payment in lieu thereof."*

15 The Claimant's case today was that the Respondent's payslips were unclear and that although he worked a block of time in one month he would sometimes be paid for that block of time over a period of weeks so that he was unable to calculate or keep track of his pay and be certain that he was being paid the right amount.

16 The Claimant was unable to categorically state today that he was owed any wages for the dates in November and December that he referred to as being outstanding.

The process of issuing this claim in the employment tribunal

17 In relation to the issue of proceedings, the Claimant's evidence today was that he was unclear about what he should do about his manager's decision not to allow him to take the annual leave that he lost due to illness in the summer of 2017. He spoke to one of his colleagues who encouraged him to seek advice from the Unison the union. He joined Unison the union and put the matter in their hands. The Claimant blames part of the delay in issuing proceedings on Unison. The Claimant was unable to tell the Tribunal today when he went to see Unison or when he was told that Unison would not be able to help him or assist him in this matter. There was subsequently a dispute between the Claimant and Unison about membership fees which from searches on his phone today the Tribunal believes occurred sometime in October 2018. The Claimant did not know how long after he had spoken to his manager and been refused permission to take his holiday, that he sought advice from Unison.

18 The Claimant had assistance from his colleague, Mr Mazueto in drafting his ET1 claim form and assistance from another colleague in dealing with IT issues that came up in completing and submitting his ET1 claim form as he does not feel fully confident in completing forms online. The Claimant confirmed that he submitted the claim form with the assistance of his friends. The Claimant did not seek any legal or other advice when deciding what to do about his concerns about employment or in issuing proceedings against the Respondent. The initial claim was issued against Kingdom Security Limited and the Claimant obtained an ACAS certificate in respect of that complaint on 16 July 2018 with the date of receipt by ACAS of the Early Conciliation Notification being 13 July 2018. As already stated the 3rd Respondent was added by the Judge at the last preliminary hearing although they were in attendance at that hearing.

Law

19 Under Section 13 of the Employment Rights Act 1996 the Claimant is entitled to wages earned. An employer shall not make a deduction from wages of a worker employed by him unless the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the workers contract, or the worker has previously signified in writing his agreement or consent to the making of the deduction. Employers are also allowed to deduct a reimbursement in respect of overpayment of wages or overpayment of expenses.

20 Regulation 13 of the Working Time Regulations 1998 (WTR) establishes the right to 4 weeks annual leave in each leave year. Regulation 14 WTR states that it applies where a worker's employment terminates during the course of the leave year, and on the date when that termination takes effect the proportion he has taken of his entitlement that year is different from the proportion of the leave year which has expired. In the circumstances, where the proportion of leave taken by the worker is less than the proportion of the leave that has expired, the employer shall make a payment to the worker in lieu of leave accrued but untaken.

21 Regulation 30 of the Working Time Regulations set out how a worker can enforce those rights. To do so, a worker may present a complaint to an Employment Tribunal. The complaint would be that the employer has refused to permit him to exercise the right to take annual leave and/or has failed to pay him the whole or any part of any amount due

to him under Regulations 14(2) or 16(1). An Employment Tribunal shall not consider a complaint made under this Regulation unless it is presented before the end of the period of 3 months beginning with the date on which it is alleged that the exercise of the right should have been permitted (or in the case of the rest period or leave extended over more than 1 day, the date in which it should have been permitted to begin) or, as the case may be, the payment should have been made; or (within such further periods as the Tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of time.

22 How does a tribunal decide whether it was reasonably practicable to present a claim in time? And if it was not, what is a reasonable time thereafter?

23 The law states that the question of what is or is not reasonably practicable is essentially one of fact for the employment tribunal to decide. In the case of *Walls Meat Co Ltd v Khan* [1979] ICR 52 CA Lord Denning explained the test like this:

'It is simply to ask this question: had the man just cause or excuse for not presenting his complaint within the prescribed time? Ignorance of his rights -- or ignorance of the time limit -- is not just cause or excuse unless it appears that he or his advisers could not reasonably be expected to have been aware of them. If he or his advisers could reasonably have been so expected, it was his or their fault and he must take the consequences '.

24 The issue was referred to in the case of *Palmer and Saunders v Southend-on-Sea Borough Council* [1984] 1 All ER 945. In that case May LJ reviewed the authorities and stated as follows:

“‘reasonably practicable’ means more than merely what is reasonably capable physically of being done..... Perhaps to read the word “practicable” as the equivalent of “feasible” And to ask colloquially and untrammelled by too much legal logic -- was it reasonably feasible to present the complaint to the employment tribunal within the relevant three months?”-- Is the best approach to the correct application of the relevant subsection”.

25 In the case of *Schulz v Esso Petroleum Ltd* [1999] IRLR 488 it was stated by the Court of Appeal that the tribunal must answer this question against the background of the surrounding circumstances and the aim to be achieved. This is what the “injection of the qualification of reasonableness” requires.

26 Where the claimant satisfies the tribunal that it was not reasonably practicable to present his claim in time, the tribunal must then go on to consider whether it was presented within a reasonable time thereafter. In making this assessment the tribunal must exercise its discretion reasonably and with due regard to the circumstances of the delay. The Tribunal has to look at the particular circumstances of each case and make a decision.

27 In the case of *James W Cook & Co. (Wivenhoe) Ltd v Tipper* [1990] IRLR 386 – a period of two weeks delay in issuing the after the deadline had passed was held to be reasonable and in the case of *Walls Meat* referred to above, four weeks was held to be reasonable on the particular facts of that case.

Applying law to Facts

28 The Claimant issued this claim in July 2018 for failure to pay him holiday pay or allowing him to take holiday in July/August/September 2017. The Tribunal is unable to be certain about the dates as the Claimant was unclear on when he had asked to be allowed to take the leave but it is likely that he did so on his return from his sick leave in September 2017.

29 Sometime at the end of 2017, after he was refused permission to take the leave which he believed was still there for him, the Claimant discussed the possibility of bringing a complaint against the Respondent with colleagues but took no action. He also sought advice and assistance from Unison but it was unclear to the Claimant when he did so.

30 At the time, the Claimant believed at the time that the Respondent owed him outstanding payments for holiday and unpaid wages, but he took no action on this for some time. The Claimant is literate and read in Tribunal today. It was unclear why he had delayed almost 1 year in bringing this case to Tribunal.

31 There was no impediment that would have prevented him from bringing his claim. It was feasible and practicable for him to have done so. The Claimant had access to the internet and knew that he had a right to bring a complaint here.

32 The Tribunal's judgment is that it was reasonably practicable for the Claimant to have issued these proceedings within the 3-month time limit set out in the legislation.

33 Furthermore, the clauses in the Claimant's contract referred above mean that the Respondent had precluded any payment being made to the Claimant or any other employee for accrued but unused holiday in any one holiday year. The Claimant confirmed that this was his contract and these were the terms that he signed to.

34 It is therefore this Tribunal's judgment, that the Claimant's claim has no reasonable prospect of success.

35 It is this Tribunal's judgment that the Claimant's claim should be struck out as the Tribunal has no jurisdiction to hear it and in any event, it had no reasonable prospect of success and was bound to fail.

Employment Judge Jones

30 July 2019