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THE EMPLOYMENT TRIBUNALS

Claimant: **Mr Shah Khair**

Respondent: **Guardian Selection Limited**

Heard at: **East London Hearing Centre** **On: 25 March 2019**

Before: **Employment Judge Burgher**

Representation

Claimant: Mr D Velloor (Solicitor)

Respondent: Dr G Burke (Counsel)

JUDGMENT ON PRELIMINARY HEARING

Issues

1 The matter was listed before me to determine whether the claim has been issued within time and if so whether the Claimant was employed by the Respondent or another entity and whether another Respondent should be added.

2 Both parties provided helpful written submissions in respect of the issues before me. Seeing that I can not properly consider the time issue without hearing evidence of when the contract came to an end, if at all. The Claimant has not produced a witness statement. The respondent had produced three witness statements from Taryn Hoeben, Stevan Ambage and Brittany Allan. However, none of these witnesses were in attendance at the Tribunal to give sworn evidence before me. I indicated to the parties that I would give limited weight to such witness statements given that the witnesses were not in attendance to be questioned on their statements.

3 The Claimant gave evidence under oath and stated that he was working at Swanlea School as an agency maths teacher until an allegation was made against him on 12 March 2018 by a pupil. The Respondent supplied the Claimant to the Swanlea School for this work.

4 On 13 March 2018 the Claimant was told by the headteacher of the Swanlea School that the allegation was now a police matter, that he would be suspended and that he would need to make a statement. The Claimant was concerned by this and contacted Ms Hoeben, of the Respondent, numerous times to try and find out what was happening.

5 The written statements of both Ms Hoeben and Ms Allan indicate that the Claimant was informed that his assignment to the Swanlea school was terminated. There was no date provided as to when such conversation(s) with the Claimant were alleged to have taken place and there was no documentation to confirm that this had taken place. The Claimant, who gave evidence before me, denied that he had been told that the assignment had been terminated, he stated that he had been informed that there would be an investigation by the LADO and police.

6 On the evidence before me, I find that there was uncertainty and confusion about the Claimant's status in respect of the assignment Swanlea School from his removal from the school on 13 March 2018. The Claimant expected a suspension to last between 2 to 4 weeks which, he would have thought was a normal period, however there was a lack of information provided to him and a delay in progressing the complaint against him. This heightened his concern.

7 On 15 March 2018, Swanlea School made it clear to the Respondent that the Claimant is "no longer allowed to work at Swanlea" and the Respondent did not invoice Swanlea School in respect of the Claimant for any dates following 12 March 2018.

8 The Claimant had communication with Ms Hoeburn. He stated that he called her 2 to 3 times each week but this is not supported by the contents of the limited emails that were before me.

9 On 19 April 2018 the Claimant stated in an email to Ms Hoeburn that he would be interested in getting back to a long-term maths role. By this time the Claimant had not been working and was suffering financial worries given that he was not working and his wife was pregnant. Ms Hoeburn responded to the Claimant's email by stating that the enquiry was still open and that the LADO was a difficult lady to get hold off. She stated that hopefully they would be able to get the matter sorted and then they would be sure to place the Claimant long-term elsewhere. The Claimant was asked what he understood elsewhere to mean, specifically in reference to an understanding that he could return to the Swanlea school. The Claimant responded that he believed he may return to work at Swanlea once the investigation was completed.

10 On 3 May 2018 the Claimant wrote to Ms Hoeben again under an email entitled 'closure'. He asked if they had heard from Swanlea school regarding the investigation as he wanted to move on and put close one this. He stated that this was totally unfair treatment by the school. Ms Hoeburn responded by email on 3 May 2018 stating that she had a meeting with the school following week and she would let the Claimant know as soon as possible the outcome. She stated once they have had confirmation that we can proceed then she will be able to start using him for work again and I will be sure to place him elsewhere. She apologised that the Claimant had to go through this.

11 Whilst I find that there was an element of confusion about the Claimant's understanding of his position regarding the assignment with the Swanley School in

March 2018, I conclude that from the evidence the Claimant was fully aware that he was not going to be returned to assignment at the Swanlea School from 3 May 2018. This was the date of the second email regarding placing the Claimant elsewhere was in the context of the Claimant wishing closure. There was no email or correspondence suggesting that the Claimant could be returned to Swanlea School at all.

12 Whilst investigations ongoing pain was unable to work at Swanlea or any other school. The investigation concluded on 10 July 2018 and the Claimant was informed that the file would now be closed. There was no return to Swanlea school and the Claimant asserted that the closure of the investigation amounted to the termination of his assignment at Swanlea school for consideration of the time limit.

Law

13 Section 23 of the Employment Rights Act 1996 states:

> "*(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)that his employer has received from him a payment in contravention of section 15 (including a payment received in contravention of that section as it applies by virtue of section 20(1)),*
>
> *(c)that his employer has recovered from his wages by means of one or more deductions falling within section 18(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 section 20) 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 section 21(1).*
>
> *(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 207A(3) (extension because of mediation in certain European cross-border disputes) and section 207B (extension of time limits to facilitate conciliation before institution of proceedings) apply 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."

14 My findings on the evidence mean that I conclude that the Claimant understood that he would not be returning to Swanlea school by 3 May 2018 at the latest. This was the date of the second email sent by Ms Hoeburn indicating that the Claimant would be placed elsewhere. This was consistent with Respondent's instruction from the school given on 15 March 2018 that the Claimant would not return to work there.

15 In these circumstances the Claimant ought to have contacted ACAS by 2 August 2018 to benefit from the time extension provisions provided by section 207B of the Employment Rights Act 1996. The Claimant did not contact ACAS until 15 October 2018 and did not present his complaint until 28 November 2018. His claim has therefore been presented out of time.

16 I then considered and evaluated the reasons put forward by the Claimant in relation to the presentation of the complaint. I had regard to the case of Palmer and Saunders v Southend-on- Sea Borough Council [1984] IRLR 119, CA per May LJ at paragraph 35 in respect of the test of reasonable practicability. This is also construed as assessing what is reasonably feasible or what is reasonably capable of being done. I am aware that there are numerous factors that a Tribunal can properly consider when determining whether it is reasonably practicable.

17 The Claimant stated that he sought advice from the Citizen's Advice Bureau and then employment solicitors in March 2018 regarding his position. The Claimant also had difficulties regarding the pregnancy was wife between 24th August 2018 and 6 September 2018.

18 Save for the Claimant's erroneous focus on the outcome of the investigation as the reason for the delay in presenting his complaint he has not satisfied me that it was not reasonably practicable to present his complaint in time. Ignorance of the law or mistaken understanding are not, in themselves, sufficient. In these circumstances the Claimant claims have been presented out of time and it is not reasonably practicable to extend time.

19 The Claimant's claims are therefore dismissed.

Employment Judge Burgher

27 March 2019