



EMPLOYMENT TRIBUNALS

Claimant: Mr M Paciorek

Respondent: Royal Free London NHS Foundation Trust

RESERVED JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD REMOTELY AT LONDON CENTRAL

On: 6, 7 JULY & 31 AUGUST 2022

Employment Judge: Employment Judge Henderson (sitting alone)

Appearances

For the claimant: In Person

For the respondent: Ms H Patterson (Counsel)

Interpreter: Ms Iwona Budzynska

JUDGMENT

The claimant's claims for unlawful deductions of wages (under section 13 Employment Rights Act) do not succeed and are dismissed.

REASONS

Background

1. This was a claim for unlawful deduction of wages under section 13 Employment Rights Act 1996 (ERA) brought in an ET1 dated 8 September 2021, following Early Conciliation with ACAS from 3 July-10 August 2021. The claimant continues in employment with the respondent as an apprentice electrician. There were two Case Management preliminary hearings: one (by telephone) with Employment Judge Elliott on 5 January 2022 and another (on CVP) with Employment Judge Norris on 9 February 2022.

The Issues

2. At the commencement of the hearing I clarified with the parties, the outstanding issues to be decided in this case. It was agreed that these were as set out in the Case Management Order (CMO) of EJ Elliott on 5 January 2022: the paragraph numbers in brackets are as per that CMO. I have also indicated below which issues are alleged as being outside the statutory time limit for lodging Employment Tribunal claims under section 23 ERA. As the claimant contacted ACAS on 3 July 2021 any complaint should have arisen on 4 April 2021 or later.

Allegation A (Paragraph 16) was the claimant entitled to be paid at Band 3 from July 2017-April 2019 while he was on the Bank contract? **Out of Time.**

Allegation B (Paragraph 17) was the claimant entitled to sick pay when he had 'flu from 4-8 February 2019, while he was on the Bank contract? **Out of Time**

Allegation C (Paragraph 18) was the claimant entitled to holiday pay when he was on the Bank contract? **Out of Time.** The claimant accepted during the course of the hearing on 6 and 7 July that this claim was withdrawn as the Bank Contract provided for a percentage of 12.07% representing an allowance for holiday pay (referred to as WTD) to be added to salary. **This complaint was therefore withdrawn.**

Allegation D (Paragraph 19) is the claimant entitled to payment for one day per week for study carried out online from September 2020-May 2021? **In Time**

Allegation E (Paragraph 20) has the claimant been paid £643 less than he was due per annum in the tax years 2018/2019 and 2019/2020? **Out of Time**

Allegation F (Paragraph 21) is the claimant entitled to be paid for 37 days from 23 March 2020-28 April 2020 when he was isolating due to Covid? **Out of Time.** The claimant confirmed that **this complaint was also withdrawn** as the respondent had been paid in full for Covid-related sickness absence in January 2022.

Allegation G (Paragraph 22) is the claimant entitled to occupational sick pay at 11 days of full pay and 61 days of half pay for the period 24 August 2020-4 May 2021? The respondent contended that this issue was also out of time as the sick pay entitlement was calculated on a rolling 12 month basis and the relevant payments were due in October and November 2020. The claimant did not raise any challenge to this. **Out of Time.**

Allegation H (Paragraph 23) was the claimant contractually entitled to be paid at the top of Band 3 of Action for Change (AFC) and to the incremental pay increases within the Band for his apprenticeship contract? **In Time**

Allegation I (Paragraph 24) were the claims brought within the requisite time limit? If not, does the tribunal exercise its discretion to extend time on the basis that it was not reasonably practicable for the claimant to bring his claims within the 3-month time limit and, if so, that the claims were brought within such further period as the tribunal considers reasonable in the circumstances? (section 23 (3) and (4) ERA).

Conduct of the Hearing

3. The hearing was conducted remotely on CVP. The hearing was originally listed for 2 days on 6 and 7 July 2022. There was an agreed electronic bundle of documents (605 pages); there was also an additional bundle containing the written witness statements of the claimant; and on behalf of the respondents of Ms Sharon O'Byrne (HR Business Partner) and Mr Liam Commins (Head of Estates). The witnesses adopted their written statements as their evidence to the tribunal. There was also a written Skeleton Argument from the respondent's counsel, which was updated for the final day of the hearing on 31 August 2022.

Use of the Interpreter

4. The tribunal had the assistance of the court-appointed interpreter, Ms Iwona Budzynska, who confirmed that she and the claimant understood each other and the relevant language was Polish. Initially, the claimant said that he was happy to proceed in English with assistance from Ms Budzynska, as necessary. However, on the second day of the hearing the claimant asked for Ms Budzynska to translate everything that was said into and out of Polish. On Day 3 the claimant said he was happy to proceed in English with assistance from Ms Budzynska as needed, other than for his closing submissions which were translated in full.
5. As the claimant was not legally represented, I explained the process which the tribunal would follow at each stage. I also explained the significance of clarifying the issues/allegations. I told the claimant that I understood that he had many procedural/practical matters he wished to raise with the respondent (especially as he is still employed). However, I explained that the claim he had brought, for unlawful deductions of wages was based on his contractual entitlement and not on procedural matters or tests of reasonableness or fairness. When explaining the process of cross-examination, I asked him to focus on questions which were relevant to the issue of his contractual entitlement in each allegation.
6. On Day 1 the tribunal clarified the issues with the parties; took time to read the witness statements and relevant documents in the agreed bundle and heard evidence from the claimant. On Day 2 the claimant concluded his evidence, including oral evidence explaining why he had been unable to bring the claims within the requisite time limits. The claimant had not included such evidence in his written witness statement. The tribunal also heard Miss O'Byrne's evidence.
7. As the case could not be concluded within the scheduled time frame, the tribunal agreed a further hearing date of 31 August 2022 with the parties.

8. On Day3, the tribunal dealt with some preliminary issues including (i) the respondent adding pages to the agreed bundle and (ii) refusing the claimant's attempt to amend Allegation C. I reminded the claimant that he had in fact, withdrawn that claim on Day 1. The tribunal then heard Mr Commins' evidence and closing submissions from both parties. The claimant gave his submissions orally (translated by Ms Budzynska). The tribunal reserved its decision.

Findings of Fact on Time Limitation

9. The tribunal heard lengthy evidence over the course of three days on all the allegations but will only make such findings of fact as are necessary to determine the issues set out above. As several of the claimant's complaints were out of time (A, B, E and G) I shall deal with that issue first.

Claimant's evidence as to why claims were not brought in time

10. For this part of his evidence, the claimant asked that Ms Budzynska translate all of his evidence, which he gave in Polish. The claimant had not covered any of this evidence in his written witness statement, although it had been identified as an outstanding issue at the CMO in January 2022.
11. The claimant initially said that he was not aware of the law or of any time limits applicable in Court or Tribunal claims. He had started work on the Bank Contract in 2017 and did not want to bring tribunal claims or raise legal issues in the early days of his employment. He had always wanted to reach an agreement and resolve his issues with the respondent. However, he had four different line managers in quick succession and although some of them tried to help him, there was no continuity and so nothing was resolved.
12. In response to tribunal questions, the claimant said he had first become aware that he could bring a tribunal claim in July 2021, when he did some research online, following which he had contacted ACAS to commence early conciliation. The ET1 was lodged on 8 September 2021.
13. The claimant had referred in his witness statement to the accident he had at work on 13 August 2018. He accepted that this accident was not part of his current claims and that the tribunal did not need to hear the details of this. However, the claimant went on in his oral evidence to say that his manager at the time, Mr Groom, had intimidated him and told him that if he brought a tribunal claim he would lose his job. This allegation was not contained in his written witness statement. The claimant said this is why he had not brought his claims earlier. He did not accept (as put to him in cross examination) that he had prioritised other personal matters over bringing a tribunal claim.
14. The claimant's oral evidence of the alleged intimidation by Mr Groom in 2018 was inconsistent with his earlier evidence that he had not been aware that he could bring tribunal claims until July 2021. Given this inconsistency, I did not accept the claimant's evidence on this point as credible. I find on a balance of probabilities that the claimant was aware of his ability to bring tribunal claims against his employer before July 2021 and possibly, as far back as 2018.

15. The claimant also went on to say that he had no time to bring any claims as he was working on two different shift systems and was studying in his own time. He had been waiting for the respondent to reach agreement with him on his disputes, but the procedure was delayed and then the pandemic began (which would have been February /March 2020) and, as a key-worker, he worked 5 days a week and spent the weekends studying. The claimant also referred to the fact that he had two surgical procedures and had an extended sickness absence when he was in Poland. This evidence was inconsistent with the claimant's denial (in cross examination) that he prioritised other activities over bringing a tribunal claim.
16. The claimant said that the pandemic made it difficult for him to access any legal advice. The claimant accepted that he had received assistance from his Union representative, Mr Cage since the end of 2019. Mr Cage had accompanied the claimant to various meetings with the respondent. However, the claimant said that he and Mr Cage had never discussed the possibility of tribunal claims or any relevant time limits until July 2021, when he approached ACAS prior to bringing the claim in tribunal. He said that Mr Cage had never told him he could bring a tribunal claim. I did not find the claimant's evidence on this matter to be plausible. I find it unlikely that a Union representative involved in a series of disputes would not mention the possibility of bringing tribunal claims (even if they did not advocate such action).
17. I find that the claimant had been aware that he could bring tribunal claims possibly as far back as 2018, but for his own personal (and largely understandable) reasons he had chosen not to do so. This, however, is not the same as demonstrating that it was not reasonably practicable for him to bring tribunal claims earlier or within a reasonable time frame. I also note that he was in contact with and received assistance from his Union representative from 2019, who could have helped him in preparing a tribunal claim from that time onwards.

Relevant Law on time limits/extension of time

18. The time limit (of 3 months) may be extended if it was not reasonably practicable for the claim to be presented in time and if it was presented within a reasonable time thereafter (section 23 (4) ERA). The burden of proving this is on the claimant; the relevant standard of proof is the usual test of "on a balance of probabilities".
19. "Reasonably practicable" means something closer to "reasonably feasible" rather than not physically possible or not having a reasonable explanation. (**Palmer v Southend on Sea Borough Council [1984] ICR 372 CA**).

Conclusions on Time Limitation

20. On the basis of the findings of fact set out above, the claimant has not shown (on a balance of probabilities) that it was not reasonably practicable for him to

bring his out to time claims earlier. His evidence was inconsistent as to when he first knew he could bring tribunal claims. His evidence that he had never discussed the possibility of tribunal claims with his Union representative was not plausible. He said he had learnt of his right to bring tribunal claims by searching online in July 2021; he did not explain why he could not do this earlier. The pandemic may have impacted on his ability to obtain legal advice but it would not have prevented him from researching online.

21. Claims for unlawful deductions of wages cannot be considered by the tribunal where the deductions complained of was made more than two years prior to the claim being presented, (section 23 (4A) ERA). The claim was presented on 8 September 2021 – so any deductions before 9 September 2019 cannot be considered. On this basis allegations A and B cannot be considered at all.
22. The following claims are also out of time and the tribunal has no jurisdiction to hear them: allegations E and G.

Findings of Fact on the remaining (in-time) claims.

23. The following findings of fact only relate to allegations D and H.

Allegation D - is the claimant entitled to payment for one day per week for study carried out online from September 2020-May 2021?

24. There was no dispute that the claimant was absent from work from September 2020 to May 2021 and was in Poland during his sickness absence. The claimant said that he nevertheless continued to study one day a week online during this period. He told his line manager Conor O'Brien (email of 27 October 2020 at page 207) that he would try to continue his online learning and keep in touch with his teacher but he also said that his health condition required further treatment and that he was signed off work until 17 November 2020. This is an ambiguous statement; the claimant does not clearly say that he is studying one day a week online.
25. Mr Commins said that Mr O'Brien had notified JTL (the governing body for the Apprenticeship) that the claimant was on long-term sick leave and so he had been suspended from the study course over this period. Mr Commins was not able to produce any documentary evidence to support this statement. He referred to email correspondence from Mr O'Brien (in June/July 2021 at pages 225-6) which explained that he had told the claimant not to resume college attendance until he had returned to work and that he would not be paid for any college work (online or otherwise) while he was off work on sickness absence. There was no correspondence produced from Mr O'Brien which was contemporaneous to the period October/November 2020.
26. As with so many of the issues in this case, there is a lack of clear communication between the parties which led to misunderstanding and some acrimony. Ms Patterson acknowledged in her submissions that communication could have been better on both sides.

27. Mr Commins said in his evidence that the claimant had been signed off from work over the period September 2020 to May 2021 and had received his full sick pay entitlement. If he were now to be paid for one day a week's study he would effectively be being paid twice. The claimant did not dispute that his absence was covered by Fit Notes and that it would be reasonable for the respondent to assume that he would not be doing any work during this period. It would be logical to assume that he was not studying either. His letter of 27 October 2020 (see above) was not sufficiently clear on this point.
28. On the basis of the evidence presented to the tribunal, I find that the claimant has not shown on a balance of probabilities that he was entitled to be paid for one day's study per week over and above his entitlement to sick pay. Further the claimant did not produce any evidence of the online study carried out over the relevant period. The claim does not succeed.

Allegation H - was the claimant contractually entitled to be paid at the top of Band 3 of Action for Change (AFC) and to the incremental pay increases within the Band for his apprenticeship contract?

29. The claimant says that he should have been placed at the top of the Band 3 pay spine when he commenced his apprenticeship in April 2019. In her evidence, Ms O'Byrne explained (paragraphs 26-30 of her witness statement) that in order to ensure that the claimant did not have a reduction in his pay when he commenced his apprenticeship, it was agreed that he would be placed on the entry point to the Agenda for Change (AFC) Band 3 scale.
30. The letter confirming the claimant's appointment dated 20 March 2019 and his terms and conditions of employment (pages 58 -75) state that his pay is at Band 3 and his starting basic salary is £17,787 per annum with a High Cost Area Supplement (H CAS) of £4326 per annum. The claimant accepted these terms and conditions and signed the document on 29 March 2019.
31. Mr Commins explained that this meant the claimant was on the first point of the Band 3 scale. It may be that there was some confusion in communication in that the claimant interpreted being on the "first point" of the scale as being at the "top" of the scale (as per the way he has framed his complaint). However, the content of his letter of appointment and terms and conditions of employment, which he has countersigned, are clear.
32. Mr Commins explained in his oral evidence that soon after the claimant's appointment to his apprenticeship, there was a pay award which increased the scale payments. This meant that the claimant's basic salary increased to £18,813 (plus the HCAS) and this amount was backdated.
33. Based on the clear evidence of the terms and conditions of employment which was signed by the claimant in March 2019, the claimant has not shown that his contractual entitlement was to be paid at the top of the Band 3 scale. His claim cannot therefore succeed.

Conclusions

34. As set out above, allegations A, B, E and G were out of time and the tribunal has no jurisdiction to hear these claims. The remaining allegations D and H are not successful for the reasons set out above. None of the claimant's claims are successful.
35. The tribunal notes that three days of tribunal time (not to mention Case Management hearings and the cost of the court appointed interpreter) have been spent on this case. Whilst the way in which the claims were expressed was complex and at times confusing, this was essentially a claim for unlawful deductions of wages. As such, it is arguable that a disproportionate amount of time was spent on this case which would be contrary to the Overriding Objective (Tribunal Rules of Procedure 2013).
36. The complexity of this case was largely caused by the respondent's ambiguous, incomplete (and at times inaccurate) documentation and lack of clear communication with/explanation to the claimant. The claimant said he sought to raise complaints and to clarify the situation, but as he had a succession of managers, there was no continuity and his complaints were never properly resolved. Whilst I have some sympathy with the claimant, I note, however, that fault cannot be laid solely at the door of the respondent: the claimant often failed to make his position clear and misunderstood explanations that were being given to him. I understand that there may well have been linguistic issues, but both parties should have been able to resolve these with the assistance of translators etc. The tribunal is a forum for resolving legal complaints, not for clarifying poor communication between the parties.
37. The claimant continues in employment with the respondent and I encourage both parties going forward to be as clear and open as possible in their communications with each other, to avoid any further disputes such as those brought before the tribunal in this case.

Employment Judge Henderson

JUDGMENT SIGNED ON: 12 September 2022

JUDGMENT SENT TO THE PARTIES ON
12 09 2022

FOR THE SECRETARY OF THE TRIBUNALS