

Case Number: 2301792/2022



EMPLOYMENT TRIBUNALS

Claimant: Ms. Catalina Mosquera Alvarez

Respondent: Amazing Services Group Limited

Heard at: London South Employment Tribunal (by CVP) **On:** 2 November 2022

Before: Employment Judge Chapman KC (sitting alone)

Representation

Claimant: Mr. Karim Pal, Trade Union representative

Respondent: Not attending and not represented

Interpreter (Spanish): Ajub Janbaz (present at Court to assist the Claimant)

Clerk to the Tribunal: Mr. Nimalan Pathanchaly

JUDGMENT

JUDGMENT

1. It is the judgment of the Tribunal that, having regard to the applicable statutory time limit, it does not have jurisdiction to consider the Claimant's claim for arrears of pay/unauthorised deduction from wages.

REASONS

Issues

2. Prior to the commencement of this Hearing on 2 November 2022, I had the benefit of reading both the Tribunal file and a helpful (43 pp) Bundle of documents prepared on the Claimant's behalf by her Union representative.
3. This claim is for arrears of pay/unauthorised deductions from wages with respect to an alleged wrongful tax deduction in December 2021 and then a failure to pay the Claimant for the month of January 2022.
4. There is no ET3 in this case and the Respondent has taken no active role in these proceedings. Indeed, the document at p. 25 of the Bundle (an email dated 21 April 2022 from Ms Rose Evans, the HR Administrator for the Respondent) indicates that the Respondent does not dispute the sums which the Claimant claims in these proceedings. I shall return to this document and its significance in due course.
5. In the circumstances (that is, without participation by the Respondent), it is not surprising that there is no list of issues, but the Tribunal has identified a preliminary issue relating to time limits and jurisdiction and has identified this preliminary issue in correspondence, dated 30 June 2022 and 13 September 2022. In the Tribunal's letter dated 30 June 2022 the Claimant was asked to prepare for a preliminary hearing at which the time limit issue would be considered.
6. For her part, in a letter, dated 17 August 2022, which was sent to the Tribunal by the Claimant's trade union representative there was a request by the Claimant for a summary determination of this claim pursuant to rule 21(2) of the Employment Tribunals Rules of Procedure. This request followed the absence of an ET3 and the absence of any active participation by the Respondent, together with the correspondence to which I have referred in which the Respondent did not appear to question the validity of the Claimant's claim for deductions from wages. Following consideration by EJ Gordon, the Tribunal responded to this request by letter dated 13 September 2022 in which it informed the Claimant's Union representative that, *"In the light of the issue of limitation and extension of time that falls to be determined, the case will remain listed for hearing on 2nd November 2022 at 2 pm, at which the question of issuing judgment can be considered. It would not be appropriate to proceed under Rule 21(2) prior to then."*

7. As this introduction has indicated, there are preliminary issues which are relevant to the jurisdiction of this Tribunal and which therefore require consideration first. These issues arise out of this chronology:
 - a. The Claimant's employment is stated by her on the ET1 Claim Form to have come to an end on 12 January 2022 and her claim relates to arrears of pay due on 5 January 2022 (for work in December 2021) and on 5 February 2022 (for work done prior to the effective date of termination on 12 January 2022: see, pay slip for 5 February 2022 at p. 28 in the Claimant's Bundle);
 - b. It would therefore seem to follow that the latest "*trigger*" date for time limit purposes was 5 February 2022 which would indicate that, absent ACAS early conciliation, the ET1 Claim Form ought to have been presented by 4 May 2022 (that is, three months less one day);
 - c. In the event, the ACAS early conciliation certificate indicates a notification on 17 May 2022 (after time had already expired) and the issue of a certificate by email on 24 May 2022;
 - d. The ET1 Claim Form itself was presented on 24 May 2022.
8. The Claimant's ET1 rightly accepts that the ET1 Claim Form is "*technically*" out of time. This has been confirmed by Mr Pal, Union Representative, who ably appears for the Claimant at this hearing today. Mr Pal has also assisted me in confirming the chronology that I have set out.
9. In the circumstances, the following time limit/jurisdictional issues arise: (i) was it reasonably practicable for the claim to be made to the Tribunal within the time limit? (ii) if it was not reasonably practicable for the claim to be made to the Tribunal within the time limit, was it made within a reasonable period?
10. Subject to the Tribunal's decisions on these preliminary issues, there do not appear to be any or any substantial further issues with respect to the claim of unauthorised deductions from wages and as I have indicated the Respondent has neither submitted an ET3 nor any evidence.
11. I have heard submissions which deal with these preliminary issues. I am grateful to the Claimant and to Mr Pal, the union representative for the Claimant (who also provided a Bundle of documents for use today). I am also grateful to Ajub Banjaz, Spanish interpreter,

for his considerable assistance in providing translation to the Claimant during the course of this Hearing.

Factual background & submissions

12. It does appear from the pay slips which are in the Bundle at pp. 27 and 28 that the Claimant was paid on a monthly basis by means of BACS. These pay slips are for 5 January 2022 and 5 February 2022. The Claimant ceased working for the Respondent and had an effective date of termination on 12 January 2022.
13. In the period after she ceased employment with the Respondent, the Claimant corresponded by email with the Respondent's HR Administrator (see, pp. 14 to 22 of the Bundle which contain emails between 8 February 2022 and 8 March 2022). I am told that the Claimant then put matters in the hands of her Trade Union representative, Ms Eva Dalmau of the Cleaners and Allied Independent Workers Union who in turn corresponded with the Respondent between 19 April 2022 (email from Ms Dalmau at p. 25) and 12 May 2022 (see, p. 24). On 21 April 2022 Ms Evans, HR Administrator of the Respondent, informed Ms Dalmau by email (p. 25 in Bundle) that the sums identified as owing were "*correct*" and confirming that payment would be made on 7 May 2022 (just after the three-month deadline for submitting an ET1). I note that, in her email dated 19 April 2022 (p. 25) Ms Dalmau states that, if she did not receive a response from the Respondent within 3 business days then she would be "*escalating this further*". In fact, as I have indicated, she did hear from Ms Evans of the Respondent on 21 April 2022 and the matter was not escalated until after the 4 May deadline had passed.
14. I am told and I accept that the sums owing (and accepted by the Respondent as "*correct*") were not paid (whether on 7 May 2022 or at all).
15. On 17 May 2022, ACAS received an Early Conciliation Notification and issued a certificate in this regard by email on 24 May 2022 (ACAS EC reference R161125/22/16). The ET1 was presented on 24 May 2022.
16. Mr Pal's helpful and succinct submissions centre on two matters. First, the assurance (or, as he puts it, "*promise*" by Ms Evans by email dated 21 April 2022 that the missing payments would be made on 7 May 2022). Second, on internal staffing problems within

the Union in which there was staff holiday and long-term sickness absence which might have inhibited timely attention to deadlines by union officials (I am told in this regard by Mr Pal that Ms Dalmau was on annual leave from 6 May 2022 to 10 May 2022. In addition, on 10 May 2022 the Union's then head of legal left suddenly on unexpected sick leave and, accordingly, when Ms Dalmau returned to work she encountered a lot of work that she had not anticipated). Mr Pal has emphasised, however, that the principal issue on which he relies is the Respondent's promise or assurance of a payment on 7 May 2022.

Legal framework as necessary to the preliminary issues for determination

Time limits

17. In most cases, Employment Tribunal proceedings must be started within the time limits that are set out in the statutory provisions conferring the right to bring the proceedings. Time limits are relevant to the question whether the Employment Tribunal has jurisdiction to entertain the claim at all.
18. The time limit (for the presentation of a claim) that is of relevance to the present case (and the claim set out in the ET1) is as follows: 3 months from the date of the last (unauthorised) deduction (from wages) pursuant to section 23(2) - (3) of the ERA 1996 which is (by section 23(3A)), subject to section 207B of the ERA 1996.
19. In this case ACAS early conciliation, commencing 17 May 2022, was *outside* the relevant three-month time-limit and a later ACAS conciliation process does not have the effect of extending a time limit which has already expired.
20. This three-month time limit is subject (where, as here, it has not been met) to a provision that the relevant claim may be presented "*within such further period 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 the period*" of three months. The burden as to reasonable practicability in this regard falls on the Claimant. I bear in mind that the statutory provision as to extension on reasonable practicability grounds is to be given a liberal interpretation in favour of the Claimant (see, ***Dedman v British Buildings*** [1974] ICR 53 (CA)) and that reasonable practicability involves practical considerations of fact to be considered by the Tribunal. There is a helpful summary of the legal framework in ***Lowri***

Beck Services Ltd v Brophy [2019] EWCA Civ 2490. I bear in mind that ignorance of legal rights may provide a ground for the reasonable practicability extension provided that the ignorance of such rights was itself reasonable (see, for example, *Walls Meat v Khan* [1979] IRLR 52 (CA)) and that illness or psychological distress – when sufficiently evidenced – may also provide a basis for an extension of time as long as such illness etc. provides a basis on which it may be concluded that it was not reasonably practicable to present the claim in time.

21. As to the “*mistake*” (if properly so described) by the Claimant’s trade union representative, I bear in mind the guidance provided by the Court of Appeal in *Dedman v British Building and Engineering Appliances Limited* [1974] ICR 53 and *Marks and Spencer Plc v Williams-Ryan* [2005] ICR 1293. Those cases involved reliance on the representation and advice of a solicitor, although *The Times v O’Regan* [1977] IRLR 101 (EAT) suggests that similar considerations may apply where the reliance is on a trade union representative, rather than a solicitor. I bear in mind that a dogmatic approach to this issue (of reasonable practicability) is to be avoided and that each case is to be treated as turning on its own facts. It is a relevant consideration that, in this case (and as Mr Pal appeared to confirm when I asked him about it), the Claimant’s trade union representative was not ignorant of or mistaken about the deadline for presenting the claim. Instead, it may well be that they decided not to submit an ET1 (or, as Mr Pal put it, not to file an ACAS early conciliation notice which would have extended time) because of what was described as the “*promise*” (by the Respondent) that a payment would be made on 7 May 2022.
22. As to the email from Ms Evans of the Respondent on 21 April 2022 (in which it was indicated that payment would be made on 7 May 2022), it would or should have been in the mind of the Claimant and/or of Ms Dalmau, the Trade Union representative then acting for her, that this date fell after 4 May 2022 date for presentation of an ET1. I have heard Mr Pal’s submissions that the Claimant was entitled to rely on the “*certainty*” of payment by this date, but the issue before me is whether this is such that it was not reasonably practicable to submit the claim in time which seems to me a rather different question. Mr Pal has forcefully submitted that, in the circumstances, it would not be just or reasonable for the claim to be treated as time barred. However, this is not the issue in this case. Instead,

the issue is whether it was not reasonably practicable to submit the claim in time and this requires close attention to the facts that I have set out.

23. The recent EAT case of *King v Gemalto UK Ltd* [2022] EAT 29, in which *The Times v O'Regan* was mentioned, emphasises the importance of time limits and of adherence to the same.

Conclusions

24. It follows from the chronology and the discussion above that I conclude that this claim was presented out of time and, as I have also indicated, there is no issue about this as far as the Claimant is concerned.
25. As to reasonable practicability, the Claimant bears the burden with respect to this issue. I do not accept that she has discharged this burden:
- a. This is a case in which the Claimant had not been paid by the due dates (5 January and 5 February 2022 respectively). There was no uncertainty about this. Indeed, the only uncertainty was whether the Respondent would make the payments due and would make good on its “*promise*” (if that is the correct term) to make a payment;
 - b. The Claimant had attempted in February and early March 2022 to obtain the missing payments from the Respondent (far from being ignorant of her right to claim these sums, she was keenly aware of her entitlements as the emails make clear and ultimately put the matter in the hands of her trade union. While the Claimant has used an interpreter today, I am told that she has reasonable understanding of spoken English and she was clearly able to write detailed and sensible emails to her former employer before she put this matter in the hands of her union. In any event, Mr Pal has not submitted – no doubt, for good reason – that the Claimant was unable to research her rights or that her facility in English has any bearing on the issue of reasonable practicability);
 - c. The Claimant’s trade union representative then took up the baton and engaged in email correspondence with the Respondent. The trade union representative was clearly not ignorant of the Claimant’s entitlement and, as far as I am aware, was neither ignorant of nor mistaken about the deadline for presenting an ET1 Claim Form;

- d. Instead, what seems to have happened was as follows (and I say this on the basis of submissions, rather than because evidence in the form of a witness statement was provided by Ms Dalmau), the trade union relied on an assurance that a payment would be made by the Respondent on 7 May 2022 and decided – in the light of that assurance – not to issue an ET1 or to give notice for ACAS early conciliation;
 - e. That course of action was unwise for two reasons. First, because the Respondent had long failed to make payments owing to the Claimant (despite emails and chasing correspondence). Second, and perhaps more importantly, because the date on which the Respondent said the payment would be made was after 4 May 2022 deadline for presenting the ET1 Claim Form;
 - f. Against this background, and where it does not seem to me that there was ignorance of rights and entitlements by the Claimant or her trade union representative and where there was or ought to have been considerable uncertainty about whether the Respondent would make the payments (in full) on 7 May 2022, I ask myself whether it was not reasonably practicable for the Claimant to present the ET1 Claim Form in time. For the reasons that I have given, I am unable to conclude that it was not reasonably practicable; the ET1 should and could reasonably have been submitted before 4 May 2022 in order to protect the Claimant’s position pending 7 May 2022.
26. In the circumstances, and given my conclusion as to reasonable practicability, it is not necessary for me to consider whether the Claimant presented the ET1 during a further “*reasonable period*”.
27. This concludes the judgment of the Tribunal.

Employment Judge Chapman KC

Date 2 November 2022

Note

Written reasons will not be provided unless a written request is presented by either party within 14 days of the sending of this written record of the decision.

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