



EMPLOYMENT TRIBUNALS

Claimant: Mr. K. Owsiany

Respondent: Lidl Great Britain Ltd.

Heard by: Video (CVP)

On: 14 February 2023

Before: Employment Judge S Evans (sitting alone)

Representation

Claimant: In person

Respondent: Mr. J. Boyd, Counsel

RESERVED JUDGMENT

1. The claimant's claim in respect of pay for accrued but untaken holiday is not well- founded and is dismissed.
2. The tribunal has no jurisdiction to hear the claimant's claim of unlawful deduction from wages. It is out of time and is struck out.
3. The claimant's claim of disability discrimination under the Equality Act 2010 is out of time and is struck out.

REASONS

Background

1. The claimant was employed by the respondent as a customer assistant from 5th November 2018. He resigned from his employment on or about 22nd December 2022.
2. Prior to the commencement of this claim, the claim brought two earlier claims against the respondent, the first on 27th August 2021 and the second on 22nd November 2021. The first claim was withdrawn by the claimant and the second claim was dismissed by a judgment of 25th April 2022.

3. Early conciliation of this claim began on 27th May 2022 and ended on 30th May 2022. The claimant's claim was issued on 2nd June 2022.
4. At a Preliminary Hearing on 5th October 2022, it was ordered that a one day hearing, in public, by video was to be listed for 14th February 2023 before a judge sitting alone. It was further ordered that the first part of this hearing would be a final merits hearing to determine the Working Time Regulations 1998 (holiday) claim. The second part of the hearing was to be a preliminary hearing to consider:
 - whether the disability discrimination claim and/or the unlawful deduction from wages claim were presented outside the time limits in sections 123 (1)(a) of the Equality Act 2010 and section 23 Employment Rights Act 1996; and
 - if so, should it be dismissed on the basis that the tribunal has no jurisdiction to hear it?
 - further, or alternatively, because of those time limits (and not for any other reason), should any complaint be struck out under Rule 37 Employment Tribunal Rules of Procedure 2013 on the basis that it has no reasonable prospects of success; and/or
 - should one or more deposit orders be made under Rule 39 on the basis of little reasonable prospects of success.

The Hearing

5. The hearing took place by Cloud Video Platform (CVP). The technology worked satisfactorily throughout the hearing and both parties confirmed they had been able to take a full part in the hearing.
6. A bundle of 270 pages was before the Tribunal. At the outset of the hearing, the claimant indicated that documents sent by him to the employment tribunal were not included in the bundle. The claimant was given an opportunity to identify which documents needed to be added to the bundle and this resulted in an additional 6 pages being added to the bundle at pages 271 – 276. The parties were directed to refer specifically to any pages to which the Tribunal should have regard in reaching its decision. All page references below are to pages in the bundle.
7. At the Preliminary Hearing on 5th October 2022, directions made included one for the preparation of witness statements. The claimant did not supply a formal witness statement but confirmed in advance of, and at the hearing, that he relied on the contents of his email dated 19th December 2022 to the Employment Tribunal as his evidence. The respondent produced a witness statement from Ms. Hilary Draper, Regional Engagement Consultant for the respondent. The Tribunal heard oral evidence from the claimant and Ms. Draper.
8. The Tribunal took account of all the evidence to which it was directed in reaching its decision. The Tribunal also carefully considered the oral submissions made by the claimant and the respondent's representative.

Issues

9. The issues for determination at this hearing were identified in the Order of 5th October 2022, namely:

9.1 Holiday Pay

- 9.1.1 What was Mr. Owsainy's holiday entitlement in the holiday year 2020 – 2021?
- 9.1.2 How many days holiday did Mr. Owsainy take in the holiday year 2020 to 2021
- 9.1.3 How many days holiday was Mr. Owsainy unable or unwilling to take because he was on sick leave in the holiday year 2020 to 2021?
- 9.1.4 How many days holiday was he permitted to roll forward into the holiday year 2021 to 2022?
- 9.1.5 Are there days that he was not permitted to roll forward that ought to have been rolled forward?
- 9.1.6 Has Mr. Owsainy been denied his rights to exercise paid annual leave?
- 9.1.7 What amount of compensation would be just and equitable?

9.2 Time limits

- 9.2.1 Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before 28th February 2022 may not have been brought in time.
- 9.2.2 Was the discrimination complaint made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:
- 9.2.3 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?
- 9.2.4 If not, was there conduct extending over a period?
- 9.2.5 If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?
- 9.2.6 If not, was the claim made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:
 - 9.2.6.1 Why were the complaints not made to the Tribunal in time?
 - 9.2.6.2 In any event, is it just and equitable in all the circumstances to extend time?

- 9.2.7 Was the unauthorised deductions complaint made within the time limit in section 23 of the Employment Rights Act 1996? The Tribunal will decide:
- 9.2.8 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the date of payment of the wages from which the deduction was made?
- 9.2.9 If not, was there a series of similar acts or failures and was the claim made to the Tribunal within three months (plus early conciliation extension) of the last one?
- 9.2.10 If not, was there a series of deductions and was the claim made to the Tribunal within three months (plus early conciliation extension) of the last one?
- 9.2.11 If not, was it reasonably practicable for the claim to be made to the Tribunal within the time limit?
- 9.2.12 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?

The Law

10. Taken together, regulations 13 and 13A of the Working Time Regulations 1998 give a worker an entitlement to 5.6 weeks holiday each year. Regulation 30 gives a worker a right to bring a claim to an Employment Tribunal in respect of any shortfall.
11. Under s.23(2) of the Employment Rights Act 1996 (“ERA”):
“an Employment Tribunal shall not consider a complaint...unless it is presented to the Tribunal before the end of the period of three months beginning with the effective date of termination.”
This time limit can only be extended if the Tribunal is satisfied under s.23(4) ERA firstly, that it was not reasonably practicable for the complaint to be presented in time and secondly, that the claim was presented “within such further period as the Tribunal considers reasonable”.
12. Section 123(1)(b) of the Equality Act 2010 permits the Tribunal to grant an extension of time for such other period as the employment tribunal thinks just and equitable.
13. The Tribunal was directed by Counsel for the respondent to the following principles established at common law and relevant to s.123, namely that the Tribunal’s discretion is wide, that time limits are to be adhered to, that the exercise of the discretion should be the exception and not the rule, that the relevant factors to take into consideration are a matter for the tribunal and that the “s.33 checklist” might be helpful but should not be followed slavishly. This latter reference is to s.33 Limitation Act 1980 which requires courts to consider factors relevant to the prejudice that each party would suffer if an extension was refused, including: the length and reasons for

the delay; the extent to which the cogency of the evidence is likely to be affected by the delay; the extent to which the party sued had co-operated with any requests for information; the promptness with which the claimant acted once he knew of the possibility of taking action; and the steps taken by the claimant to obtain appropriate professional advice once they knew of the possibility of taking action.

14. The Tribunal reminds itself that the onus is on the claimant to convince the Tribunal that it is just and equitable to extend time. The Tribunal will need to determine why the time limit was not met and why, after the expiry of the primary time limit, the claim was not brought sooner than it was. In determining whether or not to grant an extension of time, all the relevant factors in the case should be considered.

FINDINGS OF FACT

15. The claimant was employed by the respondent to work 25 hours a week. He had a written contract of employment (pages 81 – 91). Clause 7 (page 84) set out holiday entitlement and provides under Clause 7.1 that a full-time employee's entitlement is to 30 days paid holiday each holiday year, inclusive of statutory and bank holidays. Clause 7.1 also provides that part time employees' holiday entitlement is reduced pro rata according to the number of days worked.
16. Clause 8 of the claimant's contract (pages 84-85) set out the contractual provisions as to sickness. Clause 8.10 (page 85) states:
"During any continuous period of absence due to illness of one month or more you shall not accrue holiday under this Agreement and entitlement to paid holiday in the Holiday Year shall be in accordance with Working Time Regulations 1998."
17. The respondent's Holiday Year ran from 1st April to 31st March.
18. It is common ground between the parties that the claimant was away from work on sick leave from December 2019 to May 2022. This meant he was continuously absent for the Holiday Years 2020-2021 and 2021-2022.
19. The claimant's entitlement was to 28 days leave in each of the Holiday Years, 2020-2021 and 2021-2022.
20. In addition to the annual leave entitlement under the Working Time Regulations 1988, the claimant was also permitted to carry forward annual leave entitlement from the previous leave year under Clause 8 of the V10 2020 Sickness Policy (page 65). Clause 9 of the V 05.2021 Sickness Policy (page 74) provides that an employee on long term sickness absence should be allowed to take annual leave either on or following their return to work or while still absent. The Tribunal was not directed to any specific provision in the 2021 Policy with regard to carry forward but the point was not disputed by the respondent.

21. Although, in the Holiday Year 2020 – 2021, the claimant was entitled to 28 days paid leave, he was actually credited with 28.5 days leave. No explanation could be given for the additional 0.5 days which is assumed to be an error by the respondent. This was to the claimant's advantage. There was a further 7 days carried forward from 2019/2020. The total annual leave entitlement of the claimant in the Holiday Year 2020 – 2021 was therefore 35.5 days. The claimant took 23 days leave between 1st and 31st December 2020 (page 124) and 1 days' leave on 1st January 2021 (page 127) Page 98 shows a request for 30 days leave taken 23rd November 2020 – 1st January 2021 inclusive. Instruction to pay for those 30 days was given on 8th February 2021 (page 97). The Claimant states that he should have had 37 days leave but that takes no account of clause 8.10 so, as it was common ground between the parties that 30 days leave was taken in the Holiday Year 2020/2021, 5.5 days should be carried forward to 2021/22.
22. In the Holiday Year 2021 – 2022, the claimant should have been given 28 days paid leave. In fact, he was credited with 30 days paid leave as the respondent failed to adjust the leave entitlement in accordance with clause 8.10 of the claimant's contract. An instruction (page 99) was made on 7th October 2021 to pay the claimant for annual leave of 4 days September 2021 and 17 days October 2021. An instruction (page 101) dated 15 March 2022 to pay 10 days annual leave 7th February – 18th February 2022 means the claimant was paid for 31 days annual leave in the Holiday Year 2021-2022. The claimant accepts he was paid for 31 days but says it should have been 33.5. The claimant was entitled to 28 days under clause 8.10 plus 5.5 days carried forward – a total of 33.5 days. He was paid for 31 days. He should therefore have carried forward 2.5 days to the Holiday Year 2022-2023. In fact because of the respondent's error in crediting him with 30 days annual leave in the Holiday Year 2021-2022, he carried forward 4.5 days.
23. The claimant expressed concern ahead of, and during, the hearing that his payslips (showing his holiday entitlement) had been tampered with. He stated that this happened after his first claim was brought before the Tribunal. Ms Draper's evidence, which is accepted, was that payslips during a leave year are not updated to show a drop in annual leave entitlement as set out in Clause 8.10. Any adjustment is only made at the end of the leave year. When that adjustment is made and the payslip is re-run. It will show amended figure. This explains the disparity between for example, the payslip of March 2021 at pages 197 and 198. There was no reason to tamper with the payslips. The contract, at clause 8.10, stated that the Working Time Regulations 1998 applied in the Holiday Years 2020-21 and 2021-22 due to the claimant's absence and the Working Time Regulations 1998 specify a maximum leave entitlement of 28 days.
24. During his evidence, the claimant also stated that he should have received an extra day's holiday in the Holiday Year 2022-23 in respect of an

additional bank holiday for the Platinum Jubilee. That is not relevant to this claim and no finding of fact is made in relation to it.

25. In March 2020, the respondent announced that it was awarding a voucher of £150 to its staff in recognition of the work undertaken at the start of the pandemic (page 92). A further announcement, on 21st April 2020 (page 270) confirmed the payment of the voucher and stated:

“Please note: to receive the vouchers colleagues must have been on the company payroll from 1st March to 31st March, and physically been in work for at least one day in March. The vouchers do not apply to colleagues who haven't worked in March due to, maternity, paternity, parental leave, long- term sickness, sabbatical and unpaid leave; or to Directors, fixed term Stock Assistants and agency workers.”

The voucher was sent to staff in the week commencing 27th April 2020 (page 92). The claimant did not receive this voucher. He did not work any day in March 2020 as he was absent on sick leave from December 2019 to May 2022.

26. On 26 January 2021 (page 94) the respondent announced the payment of £200 to “all front-line colleagues ... for their hard work and ongoing dedication during the pandemic.” Page 95 shows a comment on the respondent’s website that this payment “follows a £150 voucher issued to all colleagues in March of last year.” This payment of £200 was made to the claimant in February 2021 (page 271 and 272).

27. The claimant’s evidence as to when he found out about the existence of the £150 voucher issued in March 2020 was contradictory. At various points in his evidence, he said he had not known of it when he issued his first claim in August 2021 but probably found out about it as he was searching the internet, and the respondent’s website, in relation to his second claim issued in November 2021. Later in his evidence he said he had not included it in his second claim as he may not have known about it. He also gave evidence that he was suffering from depression at the time. The claimant was unable to point to any time after November 2021 when he learned of the voucher. The second claim was dismissed during a hearing on 25 April 2022 . No application was made by the claimant to amend the second claim to include details of the voucher. On the balance of probabilities, the Tribunal finds that the claimant did know about the £150 voucher on or before 25 April 2022 when his second claim was dismissed.

CONCLUSIONS

Holiday

28. The claimant’s entitlement to 30 days annual leave as specified in clause 7 of his contract ended in January 2020 as he was absent on sick leave from December 2019. For the purpose of this decision, the precise date on

which this entitlement ended is not relevant as the claim relates to the holiday year 2020-21 which began on 1st April 2020.

29. After being on sick leave for one month, clause 8.10 of the claimant's contract specified that the claimant ceased to accrue holiday under his contract and, instead, his entitlement to paid holiday would be in accordance with Working Time Regulations 1998.
30. Under the Working Time Regulations 1998, the claimant was entitled to 5.6 weeks annual leave each Holiday Year. This amounts to 28 days' annual leave from 1st April 2020 – 31st March 2021 and 28 days' annual leave from 1st April 2021 – 31st March 2022.
31. At the beginning of the holiday year 2020-2021, the claimant carried forward 7 days annual leave from the holiday year 2019-20-20. His entitlement in the Holiday Year 2020-2021 was 28 days plus the 7 carried forward, totalling 35 days. The claimant's view that he was entitled to a total of 37 days annual leave in the holiday year 2020 to 2121 is erroneous. He based that conclusion on the fact that he had preserved his entire 30 day annual leave allowance when he was absent on sick leave for three months in 2018-2019. forward. If this was the case, it was not in line with the clear provisions of clause 8.10 of his contract and the provisions of the respondent's sickness policies in place during his absence.
32. Due to an error by the respondent, the claimant was credited with 35.5 days annual leave in the Holiday Year 2020 – 2021. During the Holiday Year 2020-2021 the claimant was paid for 30 days holiday. He should have been entitled to a carry forward of 5 days into the Holiday Year 2021-2022. Due to the respondent's error, the claimant benefited from a carry forward of 5.5 days leave rather than the 5 days to which he was entitled.
33. In the Holiday Year 2021-2022, the claimant was entitled to 28 days leave plus the days carried forward. Although this should have totalled 33 days, the respondent's error in awarding an extra half day as discussed in paragraph 33 above, meant he had a holiday balance of 33.5 days. He was paid for 31 days. He should therefore have carried forward 2.5 days to the Holiday Year 2022-2023. In fact because of the respondent's error in crediting him with 30 days annual leave in the Holiday Year 2021-2022, rather than the 28 days to which he was entitled, he carried forward 4.5 days.
34. The claimant is not owed any annual leave entitlement for either 2020 - 2021 or 2021-22. The respondent's errors highlighted above in awarding an extra 0.5 day in 2020-2021 and awarding 30 rather than 28 days in 2021-22 mean that the claimant has gained an extra 2.5 days above that to which he was entitled. The claimant has not been denied his rights to exercise paid annual leave. The claim to accrued but untaken leave is not well-founded.

Time Limits

35. The claimant's claim in respect of the £150 voucher issued by the respondent in April 2020 is brought under two potential causes of action : an unauthorised deduction from wages under the Employment Rights Act 1996 and a claim of discrimination arising from disability under the Equality Act 2010. The time limit in relation to each cause of action is three months (plus early conciliation) from the act complained of. The award of the voucher was the act complained of and was a one-off event. The voucher was sent out in the week commencing 27th April 2020. At the latest, the 3 month time limit would expire in July 2020.
36. The claim in relation to the voucher was issued on 2nd June 2022, so the claim was not brought within the primary time limit.
37. The Tribunal does not have jurisdiction to deal with the claim unless it is determined that the time limit should be extended.
38. The grounds for extension differ between the claim under the Employment Rights Act 1996 and that under the Equality Act 2010.
39. Turning firstly to the claim of unlawful deduction of wages under the Employment Rights Act 1996. The Tribunal has no jurisdiction to hear this claim unless it is determined that it was not reasonably practicable to bring the claim in time and, if that is the case, that it was brought within such further time as was reasonable.
40. The claimant did not know of the voucher in 2020. He was away from work and no evidence was before the Tribunal to show that he became aware before 2021. It was not therefore reasonably practicable for him to bring his claim within the primary time limit.
41. The Tribunal finds that the claimant did not bring his claim within such further time as was reasonable. He knew of the voucher before or during the second claim he brought before the Tribunal. It would have been reasonable to include details in the second claim at the outset in November 2021 or to seek to add those details once the claim was proceeding. He did not include the claim in relation to the voucher in the proceedings started in November 2021 and made no reference to the voucher or any application to amend his claim before the dismissal of the second claim on 25th April 2022. Accordingly the Tribunal has no jurisdiction to hear the claim under the Employment Rights Act 1996.
42. The disability discrimination claim, under the Equality Act 2010, also crystallised in April 2020 so it too is out of time. The test under the Equality Act 2010 as to an extension of time is much wider, namely whether it is just and equitable to do so.

43. The Tribunal has reminded itself of the legal principles identified above and taken them into account in reaching its decision, including a consideration of all the relevant factors.
44. The claimant found out about the £150 voucher in late 2021 or at the latest before 25 April 2022. He did not bring his claim until June 2022. The claimant 's evidence was that he was suffering from depression and acted when his condition improved. No evidence of the claimant's medical condition was produced to show his inability to act nor to show an improvement in or around May 2022. Before that time, the claimant was conducting his second claim before the Tribunal and liaising with the respondent in relation to his holiday claim. There is nothing to show therefore that he unable to engage with the process before May 2022 when he referred his claim to ACAS Early Conciliation.
45. The Tribunal has balanced the prejudice to both parties. The prejudice to the claimant in not being able to pursue his claim is clear but the prejudice to the respondent of having to defend a claim which is very much out of time must also be considered.
46. The onus is on the claimant to show that it is just and equitable to extend time and he has failed to do so. He gave no credible explanation of why he was unable to start the claim earlier or why things changed to enable him to commence the claim when he did. He was unable to pinpoint a date (or time frame) when he learned about the voucher and cannot show that he acted promptly once he did know of the possibility of taking action. Balancing the prejudice to both parties, it is not just and equitable to grant an extension of time to commence the claim and it is out of time.

Employment Judge S. Evans

Date 13th March 2023

JUDGMENT SENT TO THE PARTIES ON 14 March 2023

FOR THE TRIBUNAL OFFICE Mr N Roche