



## EMPLOYMENT TRIBUNALS

**Claimant:** Mr K Moss

**Respondent:** KJ Services Ltd

**Heard at:** Cardiff by video                      **On:** 17 April 2023

**Before:** Employment Judge Harfield (sitting alone)

**Representation:**

Claimant: In person with the assistance of his wife, Mrs Moss

Respondent: Mr Stanley (consultant)

## RESERVED JUDGMENT

It is the decision of the Employment Judge sitting alone that the claimant's complaint of failure to pay holiday pay/unauthorised deduction from wages relating to holiday pay was presented outside of the primary time limit and it was reasonably practicable for the complaint to have been presented in time. The tribunal therefore has no jurisdiction to consider the complaint and it is dismissed.

## REASONS

### Introduction and issues to be decided

1. The claimant undertook Acas early conciliation between 30 November 2022 and 13 December 2022. The claim form in this case was presented on 15 December 2022. It is a claim for holiday pay. The claimant says in box 8.2 that when he took holiday during his employment he was only paid holiday pay based on his basic wage and not including elements such as overtime and bonuses. The claimant finished employment with the respondent on 4 February 2022 when he retired.

2. The respondent presented a response form denying the claims and asserting that the claim was presented some 7 months out of time. The case was therefore listed for a 2 hour public preliminary hearing to determine:

*“Was any complaint presented outside the time limits in sections 23(2) to (4)/ 48(3)(a)& (b) of the 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 on the basis that it has no reasonable prospects of success and/or should one or more deposit orders be made under rule 39 based on little reasonable prospects of success? Dealing with these issues may involve consideration of subsidiary issues including whether there was a relevant “series”; whether it was not “reasonable practicable” for a complaint to be presented within the primary time limit.”*

3. A direction was made for the filing of a joint hearing bundle that was not complied with. The respondent emailed in a copy of the Acas certificate and a copy of the claimant’s letter of 12 July 2022. The claimant emailed in some royal mail postage records. I also had access to the tribunal file that contains the correspondence sent on the case and the ET1 and ET3. There had been no direction for the provision of written witness statements. I took oral witness evidence from the claimant. The claimant’s wife also gave oral evidence because she had conducted the telephone calls with Acas. Mr Stanley was given the opportunity to cross examine both witnesses. Both parties gave short closing comments. We were nearly at the end of the 2 hour listing and I therefore reserved my Judgment to be delivered in writing.

### **The legal principles**

4. Under section 13 of the Employment Rights Act 1996 a worker has the right not to suffer a deduction from wages. Where the total amount of wages paid on any occasion by an employer to a worker is less than the amount properly payable on that occasion, the amount of the deficiency is treated as a deduction from wages on that occasion. Therefore where, for example, an employer fails to pay the full amount of holiday pay that is properly due on an occasion, that will amount to a deduction from wages.
5. Section 23 gives a worker the right to present a complaint to an employment tribunal where an employer has made a deduction of wages that contravenes section 13.

6. Section 23(2) says: *“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 3 months beginning with –*
  - (a) *In the case of a complaint relating to a deduction by the employer, the date of the payment of wages from which the deduction was made...”*
7. Section 23(3) says that where the complaint is about a series of deductions the reference in 23(2) to a deduction refers to the last deduction in the series. I.e. where there is a series of deductions the time limit starts to run from the last deduction.
8. Section 23(3A) confirms that section 207B applies (extension of time limits to facilitate conciliation before the institution of proceedings). This allows the 3 month time limit to be extended in certain circumstances to accommodate a period of Acas early conciliation. To gain any form of extension on that basis Acas early conciliation must have started before the expiry of the primary 3 month time limit.
9. Section 23(4) says: *“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.”*
10. Two issues may therefore arise: firstly whether it was not reasonably practicable for the claimant to present the complaint within time, and, if not, secondly whether it was presented within such further period as is reasonable. The burden is on the claimant to establish to the tribunal’s satisfaction that it was not reasonably practicable to present the claim within time and it was presented within such further period as is reasonable. This is why I heard oral evidence, tested under cross examination, from the claimant and from his wife.
11. Ultimately, each case is to be assessed by the tribunal on its own facts. There are, however, some guiding principles that can be taken from case law in the field.
12. The test is a strict one compared, for example, with the more generous test of “just and equitable” that applies in discrimination cases. It was said in London Underground Ltd v Nowel [1999] IRLR 621:

*“The power to disapply the statutory period is therefore very restricted. In particular it is not available to be exercised, for example, “in all the circumstances”, nor when it is “just and reasonable”, or even where the tribunal, “considers there is good reason” for doing so.”*

13. In Palmer and anor v Southend-on-Sea Borough Council 1984 ICR 372, CA, the Court of Appeal conducted a general review of case law authorities and concluded that 'reasonably practicable' does not mean reasonable, which would be too favourable to employees, and does not mean physically possible, which would be too favourable to employers, but means something like 'reasonably feasible'. Lady Smith in Asda Stores Ltd v Kauser EAT 0165/07 explained it in the following words: '*the relevant test is not simply a matter of looking at what was possible but to ask whether, on the facts of the case as found, it was reasonable to expect that which was possible to have been done*'.
14. Complete ignorance of one's rights at all may make it not reasonably practicable to present a claim within time as long as that ignorance is itself reasonable. Lord Scarman commented in Dedman v British Building and Engineering Appliances Ltd 1974 ICR 53, CA, where a claimant pleads ignorance as to his or her rights, the tribunal must ask further questions: 'What were his opportunities for finding out that he had rights? Did he take them? If not, why not? Was he misled or deceived?' In Porter v Bandridge Ltd 1978 ICR 943, CA, the majority of the Court of Appeal said the correct test is not whether the claimant knew of his or her rights but whether he ought to have known of them.
15. Where a claimant is generally aware of his rights he will generally be taken to have been put on inquiry as to the time limit. For example in Trevelyan's (Birmingham) Ltd v Norton 1991 ICR 488, EAT, Mr Justice Wood said that, when a claimant knows of his right to complain of unfair dismissal he is under an obligation to seek information and advice about how to enforce that right. Similarly in Cygnnet Behavioural Health Ltd v Britton [2022] EAT 108 Mr Justice Cavanagh said: "*A person who is considering bringing a claim for unfair dismissal is expected to appraise themselves of the time limits that apply: it is their responsibility to do so.*" The EAT said that on the facts of that particular case: "*it makes no sense, in my judgment, that the claimant would not have been able to type a short sentence into a search engine and to seek information about unfair dismissal time limits, or to ask an acquaintance by email to search for that information*" and "*it would be the work of a moment to ask somebody about time limits or to ask a search engine.*" (Such observations apply equally to complaints about deduction from wages which have the same time limit tests as an unfair dismissal complaint.) Ultimately the question in an individual case is whether the claimant was reasonably ignorant of the time limits: John Lewis Partnership v Charman EAT 0079/11. A relevant factor in that case was also that the claimant was waiting the outcome of an appeal process against his dismissal before investigating his other options.

16. It can also be relevant if a claimant has been given incorrect advice by tribunal or Acas staff: Rybak v Jean Sorelle Ltd 1991 ICR 127, EAT.
17. Complaints about back payments of holiday pay are normally brought under the Employment Rights Act because of the ability to bring a complaint about a series of deductions (albeit there is a 2 year backstop under section 23(4A)). It is also possible to bring a complaint about failure to pay holiday pay under the Working Time Regulations 1998. Such an alternative complaint would not improve the claimant's position. Under the Working Time Regulations a worker can bring a complaint about the failure to pay the whole or any part of any amount due for holiday pay at the time of taking the holiday, or for accrued but untaken holiday at the termination of employment, but the worker again has to present the claim to the tribunal before 3 months beginning with the date on which each individual payment should have been made (subject to any extension for Acas early conciliation). There is no provision for bringing a claim for a series of failures to pay. There is the same power to extend time where the tribunal is satisfied that it was not reasonably practicable for the complaint to have been present in time and the complaint has been presented within such further period the tribunal considers reasonable.

### **Relevant Findings of Fact**

18. Based on the witness evidence and documents I found the relevant facts, for the purposes of the issues before me at the preliminary hearing, to be as follows.
19. The claimant was employed by the respondent as a plant operator between October 2004 and his retirement on 4 February 2022. Sometime in or around December 2021 the claimant became aware from colleagues that he may be being underpaid holiday because it was only based on basic pay. Colleagues told him that when they had raised the issue, they felt that their employment was being threatened. The claimant therefore decided to look into it once he had retired. After his retirement on 4 February 2022 the claimant received his final pay on the following Friday: 11 February 2022.
20. The claimant took no action until some time in early to mid April 2022. Mrs Moss said that was because for the first few weeks the claimant was enjoying his retirement. Mrs Moss knew about the existence of Acas and she telephoned Acas on the claimant's behalf to get some advice.
21. Mrs Moss's evidence was that she told the Acas advisor that the claimant had retired. She says that the Acas advisor did not mention employment tribunal time limits or the need to start Acas early conciliation within 3 months. She says that the Acas advisor said that the claimant needed to

lodge a grievance with the respondent and that the grievance letter needed to be sent to the respondent within 3 months and they had got that done. She says they were advised that the respondent then needed to be given time in which to reply. I return to my findings about what Mrs Moss and the claimant were told by Acas further below as my ultimate conclusions are linked with wider evidence I heard from the claimant and Mrs Moss.

22. Both the claimant and Mrs Moss say that they were unaware at the time of the need to commence Acas early conciliation within 3 months or that there were time limits for employment tribunal claims, and that they were just doing what they were advised to do by Acas. Mr Moss was not a member of a trade union. Mr Moss said he did not do his own research in to employment tribunal time limits. He said Mrs Moss had done some reading and said there were time limits but he could not remember when that was. Mrs Moss when asked if she had done some reading said, “not really, no” and she knew there was 3 months to put the grievance in so knew they were well within time and that this information had come from Acas and not from her own independent research. They did not contact a Citizens Advice Bureau for advice as they relied on what Acas told them. Mr Moss said that he did not contact a solicitor for advice because he considered the cost would be too prohibitive and the last solicitor he had instructed (on unrelated matters) charged £100 an hour. Mr Stanley asked the claimant if he was aware of “no win no fee” arrangements. The claimant said that he was but said that he thought the solicitor would take the lion’s share of any award leaving him with very little.
23. The claimant says that he sent the respondent a grievance letter dated 22 April 2022. There is no copy available. The respondent says they did not receive it. The claimant did not keep a copy. He says his daughter typed the letter out for him on her computer. He has not asked his daughter if she still has a copy on her computer. The respondent disputes that the letter existed. The claimant does have a post office receipt dated 22 April 2022 for an item to be sent to the respondent. He also has a delivery receipt dated 25 April 2022 signed by “James.” On the balance of probabilities, I consider it likely that the claimant did send some form of grievance letter to the respondent that date. What happened when the letter reached the respondent’s premises I do not know, as it does not appear likely that it reached the payroll department. The detail of what it said I also do not know.
24. The claimant did not initially chase up the lack of a response. Mrs Moss said it was because Acas had said in the initial call that the respondent needed to be given reasonable time to respond.

25. Some time in or around early July 2022 Mrs Moss phoned Acas for a second time. She spoke to a different advisor each time. There is a dispute between the claimant and Mrs Moss's evidence as to what was said in that second phone call. Mr Moss said in his evidence that they had found out about time limits in the second phone call with Acas or it may possibly have been before that. He said Acas mentioned the 3 month time limit and he had said then that the first letter had gone in before the 3 month time limit. He says Acas' advice at the time of the second call was to send a second chaser letter. He accepted that it must have been known and mentioned at that point in time that the 3 month time limit to start early conciliation had already passed. He said he did not know why Acas had not advised them at the time to start early conciliation or to act quickly because of time limit problems that had by then arisen. He said they were simply advised to write again and wait and so that is what they did.
26. Mrs Moss said in her evidence that Acas did not tell her about employment tribunal time limits in that second phone call. She says that their advice was simply to send another letter and give the respondent 14 days to respond. She said that the first time she knew there was a problem with time limits was after the tribunal claim had been lodged when she received the respondent's ET3 response form. Mr Stanley put the discrepancy in Mrs Moss's evidence compared to that of the claimant's to Mrs Moss in cross examination. She said the claimant had been guessing in his responses and that she had taken the call with Acas and not him. She said that when the claimant had said he was aware of the time limits in July the claimant had known it was a 3 month time limit for submitting the grievance and that she knew they had put it in within 3 months and had evidence it was signed for and so she did not see what the problem was.
27. There was a short delay in sending another letter as Mr Moss waited for his daughter to return from holiday. On 12 July 2022 the claimant's daughter typed a second letter. This said: *"To whom it may concern, I wrote to you previously, letter dated 22.04.22, but have yet to receive a response. I am therefore requesting a response from you within 14 days of the date of this letter, otherwise I will have no other option than to pass my case over to Acas."*
28. Tracey in payroll received that second letter and contacted the claimant by telephone to ask him what it was about. The claimant says (which the respondent disputes) that she offered him the sum of £600 which he refused. He says that Tracey said she would look into it but after a while she stopped picking up his whats app messages and would not respond to his phone calls. The claimant said that he eventually got fed up at the lack of response and so they went back to Acas again who said the next step was to go to the tribunal. Mrs Moss spoke to a third Acas advisor. She

said that Acas told her they needed to go through early conciliation and she filled out the paperwork for that. She said that even at that stage Acas did not tell her that there was a potential problem with time limits.

29. Early conciliation was then commenced on 30 November 2022 and ended on 13 December 2022 when the certificate was issued. The ET1 claim form was presented on 15 December 2022. Mrs Moss helped the claimant with completing and lodging his claim form. Mrs Moss said this happened in the space of two days because Acas said to do it as soon as possible to get things moving and because she tends to get paperwork done straight away. She denied that Acas had said it was urgent and should be done straight away, for example, because of time limit difficulties.
30. I return to the question of what Mrs Moss, and in turn, the claimant, were told in the calls they had with Acas. I have of course not had any evidence from the Acas officers concerned or, for example, their written call logs summarising the discussions. There are some things that particularly trouble me with the account given by Mrs Moss. The first is the conflict in the evidence between her and the claimant. The second is the assertion that 3 different Acas officers all failed to mention that there were employment tribunal time limits or time limits for starting early conciliation and only said there was a 3 month time limit for lodging a grievance with the respondent. It is part of Acas' role to guide litigants through the early conciliation process. Whilst I accept they may be unlikely to give a specific limitation date to litigants, I find it inherently implausible that on 3 separate occasions the Acas staff failed to mention at all a need to commence early conciliation within 3 months or that they would say there is 3 months in which to lodge a grievance but make no mention of early conciliation requirements. I also find it odd that if Mrs Moss (and in turn the claimant) were completely blind to time limit issues that they filed the ET1 claim form so promptly once Acas early conciliation came to an end. That step is in stark contrast to the periods of time taken to progress matters prior to that point.
31. On the balance of probabilities, I consider it more likely that Acas did tell Mrs Moss in the first phone call of a need to commence early conciliation within 3 months as well as encouraging the claimant to bring a grievance. It would explain the reference to a 3 month time period. On the balance of probabilities I consider it likely that Mrs Moss (and in turn the claimant) were confused by this and muddled up giving notice to the respondent of a grievance with the need to commence early conciliation (which also generally involves the respondent being notified of the potential complaint, albeit via Acas) within 3 months. The claimant and Mrs Moss at the start of the hearing before me and in the course of their witness evidence displayed a lack of understanding of the difference between early conciliation and the pursuit of a grievance and their fall back position

generally was that everything was ok because the grievance had been lodged within 3 months. This, in my judgement, is further evidence of the likely confusion they held at the original time. It also fits with Mr Moss's evidence that the time limits were mentioned either in the second call with Acas or earlier and both his and Mrs Moss's evidence that in the second call with Acas they had said to Acas they considered everything to be ok as they had lodged the first grievance letter within 3 months.

32. I consider it likely that in the second phone call with Acas the potential difficulty with time limits probably was also raised. Again, this explains the claimant's evidence that his reply at the time had been that everything should be ok as the grievance had been lodged within 3 months. It seems likely to me that the claimant and Mrs Moss, despite the second interaction with Acas, remained mistaken about the difference between early conciliation and pursuing a grievance. I also consider it likely that by the time of the third phone call with Acas Mrs Moss, and in turn the claimant, definitely knew about the potential time limit problems and this is why the claim was then promptly lodged.

### **Discussions and Conclusions**

33. At the start of the hearing I clarified with the claimant and Mrs Moss when it was the claimant said the last deduction from wages had been (in terms of not paying his full entitlement to holiday pay). I was told it was the Friday after his retirement on 4 February 2022 which Mr Stanley confirmed would have been 11 February 2022. This means that the claimant (at least for the last payment in question) had to enter Acas early conciliation by 10 May 2022. He did not start early conciliation until 30 November 2022 with the claim form being presented on 15 December 2022. The claim was therefore presented outside the ordinary 3 month time limit. The claimant ultimately accepted this at the start of the hearing once I had explained the difference between lodging a grievance and commencing Acas early conciliation. It was confirmed that an extension was sought on the basis that it was not reasonably practicable to have presented the claim within time on the basis of having been given incorrect advice by Acas, and also the delays by the respondent in responding to the claimant's grievance.
34. I have made a finding of fact above that in the phone call in April 2022 Acas did tell Mrs Moss about the need to start early conciliation within 3 months and that it was also advisable to lodge a grievance, but that she got those things confused thinking the need was to get the grievance in within 3 months. The question is then whether that amounted to reasonable ignorance of the early conciliation time limit which meant it was not reasonably practicable to have commenced early conciliation by 10 May 2022. I do not find that it was reasonably held ignorance on the

part of Mrs Moss and, in turn, the claimant. I do accept and take into account that litigants in person can genuinely become confused and make mistakes. However, a mistaken belief that the only time limit that existed was lodging a grievance within 3 months was not, in my judgement, a reasonably held belief. It brings with it the assumption that, provided the grievance was lodged within 3 months, there would be no time limit constraints on then bringing an employment tribunal claim. I do not consider that to be a reasonably held belief/assumption. I consider that there was an onus on the claimant (and his wife in assisting him) to further check the position, whether by calling Acas again to resolve their confusion, or by seeking advice from the CAB or from a lawyer (which as a one off step would not have cost the claimant more than his claim was worth) or by doing some research on the internet. I accept that the claimant and his wife may not have been technologically proficient but they could have, for example, asked for help from the claimant's daughter, in researching the point on the internet. The claimant had known about his potential claim since December 2021, and that once he retired on 4 February 2022 he then wanted to take it forward. The exact date of the phone call with Acas in April 2022 is unknown, however, he had sufficient time prior to 10 May 2022 to undertake such enquiries and research. It is likely, in my judgement, that it would then have been quickly appreciated there was a need to commence early conciliation within 3 months. The starting of early conciliation is not, in itself, a difficult process. It is reasonable to expect those kind of steps to be undertaken in the claimant's circumstances.

35. I therefore consider it was reasonably practicable for the claimant to have commenced early conciliation by 10 May 2022 (and to in turn then lodge his tribunal claim in a timely manner thereafter). I appreciate that the claimant had an outstanding grievance. However, I consider that if he had undertaken the enquiries set out above he would also have appreciated that the lodging of the grievance did not by itself extend time such that there remained a need to commence early conciliation within 3 months even if the grievance response was outstanding. It follows that I am unable to grant an extension of time to the claimant and his claim must be dismissed as the tribunal does not have jurisdiction to hear it.
36. If I am wrong and it was not reasonably practicable for the claimant to have presented his claim within time, I would in any event have found that it was not presented within a reasonable period of time thereafter. The claimant did not between April and July 2022 chase the respondent, or seek further advice from Acas or from another source. Again the onus was on the claimant to undertake enquiries. I have found it is likely that in the July 2022 phone call with Acas the potential problem with the time limit was raised by Acas but was dismissed by Mrs Moss and the claimant in turn on the basis that it was ok as they had got the grievance in. I consider

that at that point in time there was even greater onus on Mrs Moss and the claimant to better understand the requirements of Acas early conciliation as opposed to the presentation of a grievance, and the impact on employment tribunal time limits. On my findings it was the second time it had been explained to them. The claim could then have been promptly put into early conciliation and the tribunal claim then presented, without the ensuing delay until November and December 2022. Again, I take into account the fact there was an outstanding grievance that was being chased, and also the claimant's evidence that initially he was promised a response to his grievance that then went quiet. However, again in my judgement if the claimant had undertaken reasonable enquiries he would have appreciated that waiting for a grievance response did not, of itself, extend the time limits.

37. For all these reasons the claim is dismissed. As I explained to the claimant at the hearing the "reasonably practicable" test is a stringent one that I am constrained by. I am not able to take into account, for example, what he would say about the merits of his case, or that, for example, employees who still work for the respondent are now receiving uplifted holiday pay.

---

Employment Judge R Harfield  
Dated: 18 April 2023

JUDGMENT SENT TO THE PARTIES ON 19 April 2023

FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS Mr N Roche