



EMPLOYMENT TRIBUNALS

Claimant: Mr N Pattalwar

Respondent: Advanced Oncotherapy Limited

HELD AT: Manchester (by CVP)

ON: 1 March 2024

BEFORE: Employment Judge Johnson

REPRESENTATION:

Claimant: Did not attend.

Respondent: Did not attend.

JUDGMENT

The judgment of the Tribunal is that:

- (1) The claim was presented out of time on 1 November 2023 contrary to section 23(2) Employment Rights Act 1996.
- (2) The claimant has failed to persuade the Tribunal that it was not reasonably practicable for him to present the claim in time in accordance with section 23(4) Employment Rights Act 1996.
- (3) Accordingly, the Tribunal has no jurisdiction to hear the claim and it is therefore dismissed.

REASONS

Introduction

1. The claimant presented a claim form to the Tribunal on 1 November 2023 bringing a complaint of unlawful deduction from wages by the respondent in relation to their failure to pay him his wages. He claimed that he had not been

paid for May 2023 in the sum of £3952 and for 1 to 23 June 2023 (when his employment ended), in the sum of £2382.

2. The claimant says in his claim form that he began his employment with the respondent on 1 December 2021 as a vacuum engineer and he ended his employment on 23 June 2023, which was presumably connected with the failure by the respondent to pay him.
3. He quickly notified ACAS on 21 July 2023 and an early conciliation certificate was issued on 27 July 2023.
4. The claim was initially accepted by the Tribunal and a Notice of Claim was sent to the respondent on 28 November 2023. The respondent presented a response on 30 November 2023. They resisted the claim, but acknowledged that the claimant had not been paid the sum of £3952 gross for May 2023 and £2998.80 for 1 to 23 June, (reduced to £2381.40 because he had taken more of his pro rata annual leave at his date of termination).
5. Regional Employment Judge Franey then noted that the claim had been presented out of time and the Tribunal provided his comments in an email sent to the claimant on 14 December 2023. The relevant part of the email says the following:

‘The time limit for bringing a claim is three months from the date employment ends, although the period spent in early conciliation with ACAS “stops the clock”. Your claim form indicates that your employment ended on 23 June 2023, which would make the last date for presenting the claim 22 September 2023. However, the period you spent in early conciliation between 21 and 27 July 2023 (six days) must be ignored, and therefore the time for presenting a claim expired at the end of September 2023. Your claim was not presented until 1 November 2023. It is about one month late. The Tribunal can only extend time if you can establish that it was not reasonably practicable (in the sense of being reasonably feasible) for you to have presented the claim any earlier, and that you presented it within a further reasonable period. You should therefore write to the Tribunal within 28 days providing details of why the claim was not presented by the end of September 2023 so that a Judge can take a decision on how to proceed.’

6. The claimant sent a letter in reply which was undated but received by the Tribunal on 25 January 2024 and which sought to explain his reasons for not presenting his claim by the end of September 2023. The relevant sections said the following:

‘The reason for the delay in submitting my claim is rooted in the hope and expectation that the underlying matter would be resolved, resulting in the timely payment that I am entitled to receive. My expectation was based on the information provided, indicating the resolution process would conclude by June 23.

Unfortunately, the resolution process took longer than anticipated, and despite my best efforts to expedite matters, the conclusion was not reached within the

expected timeframe. Consequently, I find myself in the position of having to submit my claim after the initial due date.

Compounding the situation is the considerable stress I am experiencing due to the financial instability caused by the delay in receiving my salary. As of now, my financial situation is precarious, and I am facing challenges in making ends meet.'

He said '*...I have attached supporting documentation and relevant details to provide a comprehensive understanding of my circumstances.*' However, the only documentation provided was the previous email correspondence from the Tribunal and the respondent.

The preliminary hearing

7. I considered this claim following the allocation of the entire multiple of claims brought against the respondent, which is known as the *Jimenez Multiple (case number: 2407815/2023)*. As Mr Pattalwar's claim had clear jurisdictional issues to resolve, I decided to list it for a separate preliminary hearing (PH) to determine the question of jurisdiction due to time limits from the preliminary hearing case management (PHCM) of the *Jimenez Multiple* which was heard on 22 February 2024.
8. The claimant asked that the PH be heard remotely by CVP and as it would only involve a single claimant, it would be proportionate and in the interests of justice to do so. The Tribunal provided relevant joining details to the claimant for the CVP hearing today and I was ready to hear the PH at 10am.
9. Unfortunately, the claimant had not joined the PH at 10:00 and I waited until 10:15 in case he was having technical or other difficulties. As the claimant did not appear, I decided that I would deal with the PH on the papers. However, I was then informed that the claimant had been trying to join the PH by CVP and I agreed to attempt to resume the PH at 10:45. Despite him briefly appearing in the '*virtual waiting room*' for the allocated CVP hearing room, the claimant could not be joined and at 11:00, I decided to proceed on the papers alone.
10. I had considered whether it would be appropriate to simply postpone the PH and relist on the next available date. I was aware that the claimant was now based in the south of England and it would be more difficult for him to travel to Manchester for a future relisted PH. I was not sure whether the claimant had experienced technical difficulties, but my concern was that these difficulties might well be repeated at a relisted PH.
11. I considered the background to these proceedings and noted Judge Franey's comments made in the email to the claimant dated 14 December 2023. It was clear that the claimant's employment had been terminated on 23 June 2023 and he quickly notified ACAS of early conciliation within a month on 21 July 2023. The early conciliation certificate was issued a few days later on 27 July 2023. Allowing for the '*stopping of the clock*' for the purposes of calculating time during the early conciliation period, the claim form must have been

presented by 30 September 2023 in accordance with section 23 Employment Rights Act 1996. The claim was presented on 1 November 2023 and the claimant appeared to acknowledge that it presented out of time when he replied to the Tribunal's letter as described above.

12. Accordingly, the purpose of the PH would be to consider whether it was not reasonably practicable for the claimant to present his claim within the time provided by section 23 and if not, was the further time that it took him to present his claim reasonable. The burden of proof is with the claimant, but I noted that he had provided a written explanation which was sufficiently detailed for me to understand his reasons behind the delay in presenting his claim.
13. I decided to apply the principles contained within the overriding objective in Rule 2 of the Tribunals Rules of Procedure. I was conscious that the reasonable practicable argument was a difficult one for a claimant to succeed with and while the claimant may have additional oral submissions that he wished to make, his written arguments provided so far, did not identify significant issues which might persuade the Tribunal to extend time.
14. I was also concerned that as the claimant was seeking to recover unpaid wages which he was contractually entitled to and which was acknowledged by the respondent in their grounds of resistance, his circumstances might mean that he would be better served by bringing a civil claim in the County Court to recover these losses. This jurisdiction has a much longer time limit and at present, he would appear to have time available to file a claim form should the Tribunal proceedings be dismissed on jurisdictional grounds relating to time.
15. This was particularly important given the concerns raised by Dr Megahey at the PHCM on 22 February 2024 about the recovery of the respondent business following the financial issues that they appear to have encountered during 2023 and to date in 2024.
16. It therefore decided it would be in the interests of justice under Rule 2 to proceed with the PH today taking account of the need to deal with the case in a way which was proportionate to the complexity and importance of the issues before me, avoiding unnecessary formality and seeking flexibility in the proceedings, avoiding delay so far as compatible with proper consideration of the issues and of course, saving expense.
17. In balancing the issues in reaching this decision, I felt it was important to reach a decision quickly as this would assist the claimant and my approach was flexible but would still allow me the opportunity to properly consider the case. Additionally, I noted that the claimant was protected further by being able to apply for reconsideration should he be unhappy with my decision today.

The Law

18. The claimant presented a complaint of unlawful deduction from wages which can be accepted by the Tribunal in accordance with section 13 Employment

Rights Act 1996, (ERA). Section 23 ERA deals with complaints to the Employment Tribunal. Section 23(2) provides that:

'...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, [...]

Section 23(3) goes on to say:

'Where a complaint is brought under this section in respect of –

(a) a series of deductions or payments, [...]

...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.'

Finally, section 23(4) deals with claims presented out of time and says the following:

'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.'

19. In *London International College v Sen* the EAT ([1992] IRLR 292, Knox J) and the Court of Appeal ([1993] IRLR 333) agreed that the determination of the effective cause of a claimant's failure to present a claim in time is a classic question of fact for the first instance tribunal. Sir Thomas Bingham MR endorsed the approach of the Court of Appeal in *Palmer and Saunders v Southend-on-Sea Borough Council* [1984] IRLR 119, [1984] ICR 372, CA (at [35]) that the correct enquiry is into 'what was the substantial cause of the employee's failure to comply'. The focus will then be on whether, in light of the substantial cause, it was not reasonably practicable to meet the time limit.
20. Where the mistake or ignorance on the part of the litigant was not the result of any faulty professional advice then the question for the tribunal is whether the litigant's mistake or ignorance was reasonable. This was articulated in the leading case of *Wall's Meat Co Ltd v Khan* [1978] IRLR 499, [1979] ICR 52, CA in which Brandon LJ stated (at [60]–[61]):

"the impediment [to a timeous claim] may be mental, namely, the state of mind of the complainant in the form of ignorance of, or mistaken belief with regard to, essential matters. Such states of mind can, however, only be regarded as impediments making it not reasonably practicable to present a complaint within the period of three months, if the ignorance on the one hand, or the mistaken belief on the other, is itself reasonable."
21. Claims that illness or disability led to a reasonable ignorance must be scrutinised carefully by a tribunal. In *Cyqnet Behavioural Health Ltd v Britton* [2022] IRLR 906 the EAT, Cavanagh J, overturned the decision of an

employment tribunal that it had not been reasonably practicable for an employee to lodge their unfair dismissal claim within time. The claim had been lodged 62 days late, but the tribunal had concluded that it had jurisdiction pursuant to the not reasonably practicable escape clause. The tribunal had given weight to severe dyslexia and mental health problems on the claimant's part (during the relevant period he had suicidal ideation and at times struggled to get out of bed), the distraction and stress of the claimant (a physiotherapist) having to deal with an investigation by his regulatory body at the time the limitation period for a tribunal claim was elapsing, along with ignorance of the time limit.

22. On the latter point the claimant had been aware 'in a general sense' that there was a limitation period and that he needed to act as soon as possible, but he did not know, and took no steps to identify, a specific timescale for lodging a claim. In *Cygnnet* it appeared that the claimant had devoted his time and energy to dealing with the regulatory process and once that was concluded, immediately turned his attention to a tribunal claim by contacting ACAS. The tribunal held that the claimant's lack of urgency derived from his ignorance of the time limit and that his dyslexia was a primary cause of that ignorance.
23. The EAT held (at [53]) that it had been perverse to extend time. Cavanagh J dealt bluntly with the claimant's ignorance of the time limit stating that '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' and pointed out that the tribunal judge had failed to identify why the only thing the claimant was unable to do in the relevant period was identify the time limit – the claimant *had* been able to deal with ACAS (contacting ACAS and completing early conciliation formalities), the respondent (including submitting an appeal against dismissal), had worked as a locum, had moved house and had engaged at great length in writing with the statutory regulator, during that same period. The EAT held (at [56]) that 'Even if the pandemic meant that it was not easy to speak to somebody, 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'.

Discussion

24. There is no doubt that the claim was presented out of time taking into account the dates of employment and the failure to pay provided by the claimant in his claim form. His employment ended on 23 June 2023 and his claim was for unpaid wages for May and the balance of the time worked in June. Under section 23(3) ERA, the last failure to pay in the series claimed was in respect of the June 2023 wages and they became due on 23 June 2023. This is when the 'clock' starts to run in respect of the three month period provided by section 23(2) ERA.
25. As Judge Franey explained in the Tribunal's email dated 14 December 2023, the claim should therefore have been presented by no later than 22 September 2023. However, allowing for the period of early conciliation from 21 July to 27 July 2023, the 'clock was stopped' and the time accrued during that period did not count to the calculation of whether the claim was in time.

However, this still meant that the claim must have been presented by 30 September 2023.

26. The claimant however, did not present his claim to the Tribunal until 1 November 2023 and this was clearly outside of the time limit provided by section 23(2) ERA.
27. It is therefore necessary to consider the question of whether time should be extended in accordance with section 23(4) ERA and explained above in the Law section of this judgment.
28. The question to be considered is broken into two parts which is as follows:
 - (a) Can the claimant show it was not reasonably practicable to present the claim within the normal time limit under section 23(2) ERA?
 - (b) If so, was the further time taken to present the claim reasonable? In this case we are looking at further time of just over a month.
29. The claimant effectively argued in his letter setting out the reasons for the delay, that the reasons were as follows:
 - (a) Hope and expectation that the underlying matter (i.e. his outstanding pay), would be resolved. He believed a resolution process with the respondent would conclude by June 2023.
 - (b) The resolution process took longer than initially expected and he had to present his claim outside of the normal time limit.
 - (c) Reference was made to considerable stress caused by the financial instability caused by the delay in receiving his salary.
30. In terms of the claimant's hope that the outstanding issue with pay would be resolved, I noted that he believed the resolution process would conclude by June 2023. Given that he terminated his employment on 23 June 2023, he presumably concluded that he needed to protect his position rather than remain employed by the respondent (as some claimants in the Jimenez multiple have).
31. He clearly felt at this point that he had a potential wages claim as he contacted ACAS on 21 July 2023 and quickly completed early conciliation by 27 July 2023. At this point he would have been able to present his claim form to the Tribunal and given his early completion of early conciliation, he still had more than two months to present a claim.
32. The claimant has presented in these proceedings (from the way he had communicated), as someone who had a basic understanding of the potential complaint he could bring and was able to establish that he first needed to contact ACAS before presenting a wages claim.

33. It is reasonable to assume that as a person able to use IT, he would have been able to make enquiries about the time limits for presenting a Tribunal claim using a search engine. As Cavanagh explained in Cygnnet (above), a claimant is expected to appraise themselves of the time limits.
34. No reason was provided concerning why the claimant failed to present his claim following the early conciliation period and while he relied upon a resolution process with the respondent, he appeared to lose faith in this when his employment was ended on 23 June 2023. He has not argued that he was subsequently relying upon a further resolution process when early conciliation concluded and before the end of September 2023 when the claim should have been presented.
35. Moreover, he has not advanced any argument that the respondent misled him or discouraged him from bringing a claim within the normal time limit because of ongoing assurances that he would be paid.
36. Finally, although the claimant made some reference to anxiety arising from the non payment of his wages, he has not explained how it may have prevented him from presenting a claim form before 1 November 2023 and he has not provided any medical evidence to suggest that this was the case.
37. Accordingly, I must conclude that the claimant has failed to show that it was not reasonably practicable for him to present his claim form by 30 September 2023. While it is not necessary for me to consider whether the further time taken from 1 October to 1 November 2023 to present the claim form was reasonable, for the avoidance of doubt, the claimant has failed to persuade me that this was the case based upon the written arguments provided in his email.

Conclusion

38. The claim form in these proceedings was presented out of time in accordance with section 23(2) ERA.
39. The claimant has failed to establish that it was not reasonably practicable for him to present his claim in time and that the further time taken to present this claim was reasonable.
40. Accordingly, I must dismiss the claim as it was presented out of time and the Tribunal does not have jurisdiction to hear it.

Employment Judge Johnson

Date 1 March 2024

JUDGMENT SENT TO THE PARTIES ON
13 March 2024

FOR THE TRIBUNAL OFFICE

Note

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or 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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<https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/>