EMPLOYMENT TRIBUNALS

Claimant: **Mr C Tang**

Respondent: **Intertek Testing Management Limited**

Heard at: **East London Hearing Centre**

On: **Monday 2 December 2019**

Before: **Employment Judge C Lewis**

Representation

Claimant: In person

Respondent: Mr K Charles (Counsel)

RESERVED JUDGMENT

The judgment of the Employment Tribunal is that the Claimant's claims of breach of contract and unlawful deduction from wages are dismissed for lack of jurisdiction.

REASONS

The claim

1 By a claim form issued on 12 August 2019, following a period of early conciliation between 13 May and 28 May 2019, the Claimant brought a claim against the Respondent alleging that he was owed arrears of pay. The Claimant claim form states that he was employed by the Respondent from 14 December 2015 until 31 March 2019 and contained a claim in respect of his bonus and his last month's pay. He stated that he was

> "entitled to a bonus payable together with [his] last month's pay on 25 March 2019. However, the company breached its contract and failed to pay this as advised" and that he was "finally told that he was entitled to a bonus of £12,376.53 but this will be paid in April. The company did not provide any explanation, apology nor make any attempt to pay this at an earlier time,

causing [him] significant distress and inconvenience."

2 By its response, the Respondent contended that the Claimant was employed by the Respondent from 7 December 2015 to 31 March 2019 as a transfer pricing specialist within its group tax department. The Claimant's claim for breach of contract and unlawful deduction of wages were denied. The Respondent accepted that pursuant to the Claimant's contract of employment, he was entitled to participate in a discretionary bonus scheme and set out the following provisions of the scheme:

> *"*You *will be eligible to participate in an annual bonus scheme. The bonus is discretionary and subject to the rules of the global bonus structure.*
>
> *The bonus scheme runs from January to December and will be pro-rated to the date of joining. Payment will be calculated in accordance with the achievement of set criteria and in any year which a bonus is payable. Such payment will be made on or before 30 April of the following year."*

3 The Respondent asserts that the Claimant brought his employment to an end on 31 March 2019. A payment was made to the Claimant on 26 April 2019 pursuant to the Claimant's contract and the bonus scheme in the sum of £12,376.53 was paid. The Respondent denied that the Claimant was entitled to the bonus payment on 25 March 2019 as alleged and denied that it was in breach of contract, having paid the payment before 30 April 2019 as provided in the clause quoted above. The Respondent acknowledged that it would normally strive to make a bonus payment earlier, although it had no contractual duty to do so, and apologised to the Claimant at the time for not making the payment in his March salary and provided him with an explanation.

Time limits

Respondent's submissions

4 The Respondent contended that the Claimant was out of time to pursue either a claim of breach of contract or unlawful deduction of wages. The effective date of termination being 31 March 2019, allowing for the extension provided by the ACAS early conciliation period, the Claimant should have presented his claim to the Tribunal by 30 July 2019 and did not present his claim until 12 August 2019. The Claimant's allegation was that the bonus was due on 25 March when his wages were due to be paid and therefore the deduction was made on this date as such the deadline for commencing the Tribunal claim, taking account of the ACAS conciliation was 24 July 2019. On either calculation the Claimant was out of time.

5 The Respondent went further and contended that the Claimant's claim had no prospect of success and should be dismissed or struck out. His claim that the payment had been made late was misconceived.

Evidence before the Tribunal

6 The Tribunal was provided with a bundle of documents and heard evidence

from Sarah Pitt of the Respondent and the Claimant. Ms Pitt confirmed the position set out by the Respondent in its response to the claim, namely that the Claimant was paid his bonus on 26 April 2019 directly into his bank account and this was shown on his payslip. The contract containing the relevant clause in respect of the bonus payment was in the bundle at page 26. Ms Pitt explained she had corresponded with the Claimant in respect of his bonus and had apologised for not paying him on 25 March. She had written to him confirming that he would be paid in April as she was waiting for the final calculation of the bonus figure, due to him being a leaver, and she apologised for any inconvenience. She confirmed in response to his email of 4 April, that others were in the same position and that they would be receiving their bonus payments in April. Ms Pitt told the Tribunal that this was not unusual and historically sometimes bonuses have been paid in April and sometimes in March.

7 When the Claimant gave evidence he was first asked to explain the reason for not having brought his complaint within three-months as extended by the early conciliation period. The Claimant explained that he had been on a back-packing holiday and had had no access to the internet. He stated that he was under the impression that during the arbitration period the clock stopped and thought the three-month period therefore started in April. He assumed that the clock stopped for one month but it took longer. The Employment Judge explained the effect of the early conciliation period but that after allowing for the conciliation period his claim had been brought out of time and that the test was whether it was reasonably practicable for him to have brought his complaint within time.

8 The claimant explained that he was away from 20 to 21 March for two months with no contact with modern communications and had not expected the issue to arise; he had expected his payment to be made in March. He had to carry out research whilst he was away travelling in some pretty remote places. When asked to explain where he went, he explained he flew to Hong Kong initially and was there for probably one week at the end of March/ beginning of April. He then travelled to China and took some trains along the southern coast of China and down to Vietnam and Cambodia. He left China and arrived in Vietnam in mid-April. He was travelling by train and those were not as good in Vietnam so it was not a straight forward journey. He reached Ho Chi Minh City about one week later and spent maybe three or four days there before heading to Cambodia. He reached Cambodia in late April and from there went to Chiang Mai Thailand. He took a train to Bangkok and then flew back to Hong Kong from Bangkok, arriving in late April or early May. When in Hong Kong, he visited with friends and relatives and stayed there until the end of May and then flew back to the United Kingdom. In Hong Kong, he had access to the internet at the places where he was staying. He returned to the United Kingdom in the middle of June. When he got back to the UK he also had access to the internet.

9 The Claimant found out that his bonus had not been paid in late March, he was travelling by that point and found out in a telephone call from his wife, he checked his bank and realised that the bonus had not been paid with his final salary. He called a few people to find out whether they had been paid their bonus and then contacted Sarah Pitt. He thinks he was in Hong Kong when he contacted her. Sarah Pitt took a few days to respond. By the time she had confirmed he was entitled to a bonus but it would not be paid until April, he was in China. He accepted that they had internet

café's in China but not on the trains that he was using; he accepted that they also had internet café's in Vietnam but told the tribunal that in Cambodia they were really hard to find. He accepted that in Thailand things were better and that internet access was available in Chiang Mai and in Hong Kong. He was in South China when he contacted ACAS but he could not pinpoint the exact location.

10 The Claimant explained that when he got back to the United Kingdom in June, most of his efforts were spent in looking for a new job, meeting head-hunters and attending interviews, he did not do much in terms of putting in this claim but put it to one side and concentrated his efforts on his job search. It was only when he had more or less sorted out his job situation, that he came back to the question of his bonus. He did not want to spend his resources on this and be distracted from preparing for interviews. At first the Claimant seemed reluctant to answer when he was asked when he found a new job but told the Tribunal that it was before he submitted the claim, perhaps late July early August, around that time. He thought it was the third job interview that he attended and that he received the email most likely mid to late July but that his new employer was a bank and therefore there was a complex process involved in vetting and he had to fill out forms for around 20 background checks.

11 When asked if he had anything else to add to his explanation, he told the tribunal that he had not expected to have to bring a claim and that it was more or less forced on him, and that he was more interested in getting the background research done rather than hastily submitting the claim. He accepted that he was in email correspondence with Sarah Pitt up to mid-April and that he had internet access at that time and that he in contact with ACAS from 13 May so he also had access to the internet at that time.

The claim

12 The Claimant did not dispute that his contract stated that the bonus payment may be made up to 30 April. He said that there was a practice that the payment would be made in March and that there had been an announcement that it would be expected to be paid in March. He therefore had a reasonable expectation, which he described as a contractual obligation, that he would be paid in March. The bonus had only ever historically been paid later than March on one occasion, to take account of a change in an income tax rate, when the rate was due to go down and therefore the staff affected would receive a more favourable tax rate if it was paid in April as opposed to in March. When pressed he accepted that the contract states payment by 30 April and that he was paid before 30 April.

13 At the end of his evidence the Claimant was asked to clarify how much he was claiming. He did not dispute that he had been paid the outstanding bonus in April. The Claimant stated that it was a point of principle and that he had not put a figure on the compensation that he was seeking despite the Tribunal's order dated 19 September 2019 requiring him to do so within 4 weeks. When pressed on this the Claimant stated that he was seeking one month's lost interest, between £50 and £100, and the costs involved in following up with Ms Pitt.

14 In summary, Mr Charles submitted that it was clear the Claimant had no

reasonable prospect of succeeding in his claim, the bonus had been paid in accordance with the contractual term, and that it had been reasonably practical for him to submit his claim in time.

The relevant law

Time limits

15 The time limit for bringing a complaint of unlawful deduction from wages is contained in section 23 of the *Employment Rights Act 1996*. Section 23 (2) provides that, subject to sub section (4), an Employment Tribunal shall not consider a complaint under the section unless it is presented before the end 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, or

b. In the case of a complaint relating to a payment received by the employer, the date when the payment was received.

Sub section (4) provides where the Employment Tribunal is satisfied that it was not reasonably practical 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.

15 The time limit for bringing a complaint of breach of contract following the termination of employment under the *Employment Tribunal's Extension of Jurisdiction Order 1994* is contained in article 7 of that Order, which provides (so far as is relevant to this claim) that an Employment Tribunal should not entertain a complaint in respect of an employee's contract claim unless it is presented –

(a) Within the period of three-months beginning with the effective date of termination of the contract giving rise to the claim, …

(c) where the tribunal is satisfied that it was not reasonably practical for the complaint to be presented within which ever of those periods is applicable, within such further period as a Tribunal considers reasonable.

16 The statutory limitation periods for instituting tribunal claims are subject to extension to allow for early conciliation. In respect of claims arising under primary legislation (the claim for unlawful deductions from wages under s 13 of the Employment Rights Act 1996), the relevant provisions are to be found in ERRA 2013 Sch 2, and in respect of claims arising under secondary legislation (the claim for breach of contract under the Employment Tribunals (Extension of Jurisdiction) Order 1994, they are contained in the ERRA 2013 (Consequential Amendments) Order 2014 SI 2014/386 and the ETA 1996 (Application of Conciliation Provisions) Order 2014 SI 2014/431. The effect of the respective provisions is identical and I refer to the relevant sections under the Employment Rights Act 1996 (ERA) below.

Reasonably practicable

17 First, the employee must show that it was not reasonably practicable to present his claim in time. The burden of proving this rests firmly on the applicant (*Porter v Bandridge Ltd [1978] IRLR 271*, *[1978] ICR 943, CA*). Second, if he succeeds in doing so, the tribunal must be satisfied that the time within which the claim was in fact presented was reasonable. The leading authority on the subject is the decision of the Court of Appeal in *Palmer and Saunders v Southend-on-Sea Borough Council [1984] 1 All ER 945*, *[1984] IRLR 119*, *[1984] ICR 372, CA*. May LJ, who gave the judgment of the court, undertook a comprehensive review of the authorities, and proposed a test of '*reasonable feasibility*'. He explained his reasoning as follows (*[1984] ICR at 384, 385*):

> "[W]e think that one can say that to construe the words “reasonably practicable” as the equivalent of “reasonable” is to take a view that is too favourable to the employee. On the other hand, “reasonably practicable” means more than merely what is reasonably capable physically of being done—different, for instance, from its construction in the context of the legislation relating to factories: compare *Marshall v Gotham Co Ltd [1954] AC 360, HL*. In the context in which the words are used in the 1978 Consolidation Act, however ineptly as we think, they mean something between these two. Perhaps to read the word “practicable” as the equivalent of “feasible” as Sir John Brightman did in [*Singh v Post Office [1973] ICR 437, NIRC*] and to ask colloquially and untrammelled by too much legal logic—“was it reasonably feasible to present the complaint to the [employment] tribunal within the relevant three months?”—is the best approach to the correct application of the relevant subsection."

18 The factors to be taken into account will vary depending on the circumstances of the individual case. Various potentially relevant factors were identified by May LJ, these included the manner of, and reason for, the dismissal; whether the employer's conciliatory appeals machinery had been used; the substantial cause of the claimant's failure to comply with the time limit; whether there was any physical impediment preventing compliance, such as illness, or a postal strike; whether, and if so when, the claimant knew of his rights; whether the employer had misrepresented any relevant matter to the employee; whether the claimant had been advised by anyone, and the nature of any advice given; and whether there was any substantial fault on the part of the claimant or his adviser which led to the failure to present the complaint in time.

Conclusions

Time limit

19 In this case the Claimant’s employment terminated on 31 March 2019, he complains that he ought to have received his bonus with his final salary on 25 March (and not in April when it was paid). He issued his claim on 12 August 2019. The Claimant commenced early conciliation on 13 May (Day A) and the early conciliation certificate was issued on 28 May 2019 (Day B). ERA s 207B(3) adds on to the ordinary three-month limitation period the specific amount of time that has been devoted to early conciliation in a particular case. The amount of time spent on early conciliation in this case is 14 days; those 14 days will not count in calculating the date of expiry of the

time limit: the clock will simply stop during the EC period, which means instead of expiring on 24 June the time limit expired on 8 July 2019. In respect of the contract claim the time limit would have been due to expire on 30 June but is extended by the period of early conciliation (14 days) which resulted in the time limit expiring on 14 July 2019.

20 The provisions of s207B(3) and those of s 207B(4) do not assist the Claimant in this case in calculating the expiry of the time limit. Under ERA 1996 s 207B(4) where the (extended) time limit would otherwise expire during the period beginning with Day A and ending one month after Day B, time is extended to the end of that period i.e one month after the already extended three-month time limit (see *Luton Borough Council v Haque UKEAT/0180/17*, *[2018] ICR 1388*). However in this case one month after Day B is 28 June, the stop the clock provisions in s207B(3) mean that the additional 1 month extension is not triggered. In any event even on the Respondent's calculation the Claimant brought his claims outside the applicable time limits. I find that the 3 month time limit for bringing the claim in respect of the deduction from wages (under s13 of the Employment Rights Act 1996) started to run on 25 March 2019 and expired on 8 July 2019; the time limit for bringing the claim for breach of contract (under the Extension of Jurisdiction Order 1994) started to run on 31 March 2019, the date of the termination of the contract and expired on 14 July 2019. I find that claims were brought out of time.

Reasonably practicable

21 The Claimant did not rely on ignorance of his rights nor of the existence of applicable time limits. He told the tribunal that he had conducted internet research before contacting ACAS and then again before issuing his claim. He was in contact with ACAS in May. The Claimant did not give a satisfactory explanation as to why he had not presented his claim in time. Initially he referred to being out of the country and away from the internet communication for a period of some two-months. However, when asked to provide more information he accepted that he had access to internet communication in April and May when he was in contact with Ms Pitt and then ACAS respectively. He accepted that he had access to the internet in Hong Kong at the end of his travels and was back in the United Kingdom in June. Even though he had been through the early conciliation process in May he did not take any further steps to pursue his complaints until August. I do not find that his erroneous assumption as to the effect of early conciliation or the fact that he was pursuing his job searches and attending 3 interviews meant that it was not reasonably practicable for him to issue his claim in the tribunal. He has failed to adequately explain his failure to present his claim in June or July or why he delayed until August. The Claimant has failed to establish that it was not reasonably practicable for him to have brought his complaint in time.

Breach of Contract Claim

22 In any event, having heard from the Claimant and the Respondent and having seen the documents in the bundle, I am satisfied that there was no breach of contract. The contractual clause states that the bonus payment is payable on or before 30 April. The Claimant was paid on 26 April, which is before 30 April and there was no breach of that term.

23 The announcement relied upon by the Claimant, to the effect that it was expected that the bonus payments would be made in March, did not vary the express contractual term. It was not a collateral agreement, nor could such an announcement override the express term of the contract. Nor do I find that the practice of paying the bonus in March where possible varied the express term. I do not find that the effect of the announcement was that the bonus payment was lawfully due in March, as opposed to in April, therefore there was no unlawful deduction from the payment due in March 2019.

24 The Claimant's claims would therefore fail and fall to be dismissed on their merits had they been brought in time.

Costs application

25 Due to lack of time the Tribunal's decision had to be reserved. The Respondent indicated that if it was successful it would seek its costs of defending the claim. The Employment Judge indicated that she would hear the costs application and make her decision on it after she had reached a decision on the claims. Although the Claimant had been put on notice of the costs application he had not produced any evidence as to his ability to pay. The Claimant was given an opportunity to make representations in respect of the costs application at the hearing and invited to send any evidence relevant to his ability to pay to the tribunal, and copied to the Respondent by 5pm on 16 December 2019.

26 The Respondent submitted that the claim had been unreasonably pursued and had no reasonable prospects of succeeding. Mr Charles referred to a 'without prejudice save as to costs' letter sent to the Claimant on 31 October 2019 in which the grounds for the assertion that the claim had no reasonable prospect of success were set out, together with a warning to the Claimant that if he continued to pursue it he would not be acting reasonably and the Respondent would seek its costs of defending the claim, which it estimated would be between £5000 to £7,500 plus VAT. The Respondent produced time sheets and invoices at the Hearing in support of its application. The costs incurred up to the hearing were £4525.00 plus VAT which does not include the costs of attending the hearing.

Relevant law

27 Rule 76(1) of the Employment Tribunals Rules of Procedure 2013 provides that a tribunal may make a costs order, and shall consider whether to do so, where it considers that

> (a) a party (or his representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted; or
> (b) any claim or response had no reasonable prospect of success.

28 The fundamental principle remains that costs are the exception rather than the

rule, and that costs do not follow the event in employment tribunals. In *AQ Ltd v Holden [2012] IRLR 648, EAT*, *Judge Richardson observed that:*

> "A tribunal cannot and should not judge a litigant in person by the standards of a professional representative. Lay people are entitled to represent themselves in tribunals; and, since legal aid is not available and they will not usually recover costs if they are successful, it is inevitable that many lay people will represent themselves. Justice requires that tribunals do not apply professional standards to lay people, who may be involved in legal proceedings for the only time in their life. As [counsel for the claimant] submitted, lay people are likely to lack the objectivity and knowledge of law and practice brought by a professional adviser. Tribunals must bear this in mind when assessing the threshold tests in [rule 76(1)(a)]. Further, even if the threshold tests for an order of costs are met, the tribunal has discretion whether to make an order. This discretion will be exercised having regard to all the circumstances. It is not irrelevant that a lay person may have brought proceedings with little or no access to specialist help and advice."

29 This was expressly endorsed by Underhill J in *Vaughan v London Borough of Lewisham [2013] IRLR 713*, EAT, at para 25. However it does not follow from this 'that lay people are immune from orders for costs.

Unreasonable conduct

30 In *Barnsley Metropolitan Borough Council v Yerrakalva [2011] EWCA Civ 1255*, *[2012] IRLR 78,* Mummery LJ stated (at para 41): 'The vital point in exercising the discretion to order costs is to look at the whole picture of what happened in the case and to ask whether there has been unreasonable conduct by the claimant in bringing and conducting the case and, in doing so, to identify the conduct, what was unreasonable about it and what effects if had'.

No reasonable prospects of success

31 In *Keskar v Governors of All Saints Church of England School [1991] ICR 493,* the EAT rebuked a tribunal for saying that it was irrelevant whether the claimant knew or ought to have known that there was virtually nothing to support his allegations of race discrimination. According to Knox J: 'The question whether a person against whom an order for costs is proposed to be made ought to have known that the claims he was making had no substance, is plainly something which is, at the lowest capable of being relevant'.

32 The tribunal has a discretion whether or not to award costs on this ground, as it does in relation to the ground of unreasonable conduct. Even if it is of the opinion that the bringing or conducting of the proceedings has been misconceived, it does not have to award costs if it considers that, in all the circumstances, such an award is not appropriate. It is not, however, a conclusive or proper answer to a claim for costs that a misconceived claim was 'genuinely brought'; a tribunal must also consider whether it was thereafter properly pursued (NPower Yorkshire Ltd v Daly UKEAT/0842/04, [2005] All ER (D) 403 (Mar)). The test is objective and does not depend on whether the claimant genuinely believed in the claim (*Vaughan v London Borough of Lewisham [2013] IRLR 713*, EAT at para 14(6)).

The Claimant's representations

33 The Claimant submitted a 'letter of further information' on 16 December 2019 in which, rather than confining himself to addressing the costs application and his means as directed by the Employment Judge, he also sought to make further submissions in respect of the time limits and the substantive claims. In respect of the costs he describes the Respondent's application as being "unnecessary, disproportionate and vindictive". In summary he contends that the Respondent has a well-staffed legal team and it was unnecessary for the Respondent to engage external advisers to defend the claim and that the Respondent's legal costs are well in excess of the claim and that the Respondent must therefore be taken to be using its superior financial resources to intimidate future claimants.

Conclusion on costs application

34 I am satisfied that the claim had no reasonable prospect of success. The express contractual position was clear and was not disputed by the Claimant. I have taken into account that the Claimant is a litigant in person, however, I am also satisfied that the Claimant has acted unreasonably in bringing these proceedings. Ms Pitt explained the reason why his bonus would not be paid in March at the time, and apologised for any inconvenience. He had received the bonus payment 3 months before he issued his claim and had apparently brought the proceedings without giving any thought to what, if any, loss he had incurred as a result of the alleged breach. He failed to comply with the Tribunal's order requiring him to set out in writing what remedy the Tribunal was being asked to award and only came up with the estimated figure of one month's lost interest, in the region of £50-100, when pressed by the Employment Judge to quantify his claim. In his subsequent letter of information he quantified his claim for loss of interest at £102.00. I also find that the Claimant was similarly cavalier in his approach to the time limit for bringing these proceedings.

35 I find that the Respondent was put to unnecessary time and expense in defending these proceedings which the Claimant pursued 'on principle' simply to make a point. I am satisfied that the threshold tests for making a costs order are satisfied in respect of both Rule 76(1) (a) and (b). I therefore go on to consider whether to exercise my discretion to make a costs order.

36 The Respondent's solicitors' letter of 31 October 2019 set out very clearly why the Claimant's claim had no reasonable prospect of succeeding and the costs that the Respondent was likely to incur in defending the claim if the Claimant continued with the proceedings and offered not purse them if the Claimant withdrew. The Claimant was cavalier in his approach to bringing and in pursuing these proceedings, failing to comply with the Tribunal's order requiring him to set out the remedy he was seeking, and was similarly cavalier in respect of the Respondent costs, pursuing an unmeritorious claim simply to make a point.

37 It was not unreasonable for the Respondent to choose to instruct external solicitors when it was faced with litigation. Whilst the amount of costs is far in excess of the amount of the claim, it is the Claimant who had failed to quantify his claim until giving evidence at the hearing, leaving the Respondent in the dark as to the amount;

the value of the bonus itself was £12,376.53. I am satisfied that the costs were reasonably and necessarily incurred.

38 I am satisfied in all the circumstances that this is one of the exceptional cases in which I should exercise my discretion to award costs.

39 Whilst under Rule 84 of the Employment Tribunal rules of Procedure 2013 I am not obliged to have regard to the Claimant's ability to pay the costs in making the order or deciding the amount, the Claimant was given the opportunity provide evidence in respect of his ability to pay any costs; he has failed to do so. The Claimant had told the Tribunal that he had been successful in his application to work for a bank in August 2019 and I am satisfied that he is someone who is likely to have a reasonable earning capacity over the course of his career. I am also satisfied that it would be just to make an award in any event.

40 The Claimant is ordered to pay the sum of £4525.00 plus VAT towards the Respondent's costs.

Employment Judge Lewis
Date: 6 May 2020