



EMPLOYMENT TRIBUNALS

Claimant: Ms E Cafer

Respondent: Lornar Ltd

Heard at: London South Employment Tribunal
On: 21 June 2022

Before: Tribunal Judge Milivojevic acting as an Employment Judge

Representation

Claimant: In person

Respondent: Mr Fuller, Chartered Legal Executive

RESERVED JUDGMENT ON PRELIMINARY ISSUE

1. The Tribunal does not have jurisdiction to consider the Claimant's claim of unfair dismissal having regard to the appropriate statutory time limits.
2. The Tribunal does not have jurisdiction to consider the Claimant's claim of wrongful dismissal having regard to the appropriate statutory time limits.
3. The Claimant's claim that she has been subjected to unauthorised deductions from wages, in respect of work performed on or before 31 August 2020 is out of time, and the Tribunal does not have jurisdiction to hear that part of the Claimant's claim having regard to the appropriate statutory time limits.

Reasons

The Claims

1. The Claimant was employed by the Respondent as a waitress. She commenced working for the Respondent in 1998.
2. By way of an ET1 submitted on 19 January 2021 the claimant brought claims for :
 - unfair dismissal;
 - notice pay (also known as wrongful dismissal);
 - a redundancy payment;
 - holiday pay; and
 - that she had been subject to unauthorised deductions from her wages.

3. The Respondent asserts that some or all of those claims have been brought outside the relevant limitation period, and therefore that the Tribunal does not have jurisdiction to hear those claims.
4. In particular, the Respondent asserted that the Claimant's effective date of termination of her employment was 22 August 2020. In response, the Claimant said that her dismissal took effect some time around 13 October 2020.

Issues, procedure and evidence heard

5. The Notice of Preliminary Hearing confirmed the issues to be considered by the Tribunal:

Was the unfair and/or wrongful dismissal complaint presented outside the time limits in (as applicable) sections 111(2)(a) & (b) of the Employment Rights Act 1996 and article 7 of The Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 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 either or both complaints be struck out under rule 37 on the basis that they have 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? Dealing with these issues may involve consideration of subsidiary issues including whether it was "not reasonably practicable" for a complaint to be presented within the primary time limit.

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 on the basis of 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 reasonably practicable" for a complaint to be presented within the primary time limit.

6. It was agreed at the outset of the hearing that the Claimant's claim for a redundancy payment was submitted within the applicable time limits and therefore did not fall to be considered within this preliminary hearing.
7. The Tribunal received an agreed bundle of documents totalling 93 pages, a witness statement of the claimant, four witness statements from the Respondent, and a skeleton argument from the Respondent. The Respondent confirmed that the statements had been served in accordance with the directions for the final hearing, but that only Ms Bouzid (one of the Respondent's Directors) would be giving oral evidence and that the other three statements could be disregarded by the Tribunal for the purposes of the preliminary hearing.
8. A number of days before the hearing, the Claimant requested a Turkish

interpreter which was provided. All parts of the Tribunal hearing were interpreted for the Claimant. The Tribunal was particularly grateful to the interpreter for agreeing to continue the hearing slightly longer than originally listed in order to complete the evidence and oral submissions.

Facts

9. The Claimant worked as a waitress for the Respondent from 1998. It was an agreed fact that the Claimant worked around 16 hours per week. In March 2020 as a result of the coronavirus pandemic and ensuing “lockdown” the Claimant was placed on furlough leave.
10. During this period the Claimant travelled to Turkey to visit her brother who was unwell. On 18 July 2020 Ms Bouzid sent a whatsapp message to the Claimant asking her when she would return to the UK. The Claimant replied on the same day to state that her return ticket was 28 August, but that she would return sooner if required.
11. Ms Bouzid’s next message was on 4 August 2020. This informed the Claimant that she was needed back at work and asked when she would be available. The Tribunal did not have the Claimant’s reply in the whatsapp conversation in the bundle. The Claimant had provided a screenshot of what she said was the deleted message itself. In that message the Claimant said that she was explaining that the building she was living in was subject to “carantina” (which was essentially understood to be the Turkish word for quarantine) and that once she had returned a negative test, she would be able to let the Respondent know when she was coming back.
12. The Claimant’s account was that she had then had a telephone discussion with Ms Bouzid. The Claimant said that discussion meant that the “carantina” message had been superseded and that she deleted it from her whatsapp conversation on that basis. The Claimant said that a further telephone conversation had taken place on or around 22 August 2020 during which Ms Bouzid had said that she would provide the Claimant with a P45, but that she could be re-employed at a later stage and that they would “sort out” her continuity of employment. The Claimant’s version of events was that Ms Bouzid had informed her that furlough was coming to an end and that the Claimant could not be on annual leave and furlough at the same time.
13. Ms Bouzid denied that a telephone conversation had taken place. She said that furlough was coming to an end on 22 August 2020 and that she had received advice that an individual could not be in receipt of furlough payments whilst being out of the country and not available for work. Ms Bouzid had written to the Claimant on 17 August 2020 [page 48]. The letter stated that the Respondent had re-opened for dining in, and that the Claimant was required to work her normal contractual hours. The letter asked the Claimant to confirm her intentions as to whether she was resigning if she was unavailable for work, or if she intended to return. In the latter case she was also asked to confirm her current position in terms of being absent from work.
14. Ms Bouzid was clear that a discussion had taken place in person where the

Claimant had resigned from her employment. Ms Bouzid initially said that this took place on or around the 22 August 2020. The Claimant stated that she had not changed her flight and that she did not return to London until 28 August 2020. The Claimant had provided a document to this effect [page 47] although Ms Bouzid was unclear about what this document was, particularly whether it showed the original booking or was a retrospective confirmation of the ultimate dates of travel.

15. Ms Bouzid accepted that the discussion may have taken place after 22 August, but that the p45 was backdated to this date because this was the date when the furlough payments had ended. Ms Bouzid was clear that the discussion had taken place on or before 31 August, as she had emailed her accountants on this date. The attachment to that email confirmed that the Claimant had left employment [page 90].
16. The Claimant did not work for the Respondent following her return to the UK, until 13 October. The Claimant worked from this date for a week until 18 October 2020. The Claimant asserted that her continuous employment had continued until this date when the Respondent's attitude towards her had changed.
17. The Tribunal experienced difficulties with both parties' evidence. Ms Bouzid could not remember when the discussion had taken place with the Claimant during which Ms Bouzid said that the Claimant had resigned. The Respondent did not provide any letters confirming to the Claimant the circumstances in which her resignation had been accepted, particularly as it was a verbal resignation. There were no diary notes or other records of this conversation provided to the Tribunal. The only document provided was the P45 which had been emailed to the Claimant, although neither party provided a copy of the email to which the document was attached.
18. The Claimant's evidence was extremely contradictory in a number of areas. Her position had changed since her original pleadings and changed a number of times throughout cross examination. The Claimant stated that she had difficulties with English and had not fully understood the form. The Claimant then said that she had entered the date of 17 August 2020 as her date of termination on her ET1 form because that is what the Respondent had required. When it was pointed out that this was the Claimant's claim form and no response had been received from the Respondent before the claim was submitted, the Claimant asserted that the Respondent had not given her any paperwork at all, even her P45. This was despite the Claimant having accepted earlier in cross examination that she had received her P45 by email and that she understood that these were usually only sent when someone's employment was ending.
19. The Claimant explained in her witness statement that the "whole thing" had affected her physically and psychologically. In particular the Claimant believed that worrying about matters had contributed to her having a car accident. When asked about this, the Claimant said that it was the uncertainty of not knowing whether or not she had a job. The documents demonstrated that this accident had taken place in September 2020 [page 55] which was before October 2020.

20. It was agreed that the Claimant visited the Respondent on a number of occasions in September 2020. The Claimant's case is that she was asking the Respondent when she would be given work. The Claimant asserted that she was only given work on 13 to 18 October 2020 as this was three months from her dismissal (the original date she had given on the ET1 form) and that this was part of a conspiracy to make her think that she still had a job whilst the limitation period had expired. When it was pointed out to the Claimant that this was two, rather than three months from August 2020, the Claimant said that she felt that she was provided this work in order to "shut her up". It was not clear to the Tribunal why in her witness statement the Claimant had asserted that she was dismissed around 13 October, when she had continued to work further shifts beyond this. It was accepted that the Claimant did not receive a P45 or other document after these shifts were concluded.
21. The Respondent accepted that the Claimant was not paid for this work in October 2020 and that this was only paid after the ET1 was submitted. It was not part of the evidence for this preliminary hearing whether this payment included an amount for annual leave which had been accrued as a result of this work.
22. The ACAS early conciliation certificate in the bundle [page 3] stated that the Claimant contacted them on 22 December 2020 which was the same date when the certificate was issued. When asked why she had been able to contact ACAS on 22 December 2020 but did not issue her claim until 19 January 2021, the Claimant said that she did not understand English very well, and had proceeded with the claim one step at a time.
23. During cross examination, the Claimant stated that she had in fact contacted ACAS on 22 November, which she believed would have been the limitation date based on her termination date of 22 August, but that there was an administrative error at ACAS, that they had opened two files and that she had to resubmit her claim to them which she had done in December. The Claimant had not provided any documents to this effect, nor have she referred to this in her witness statement.
24. Mr Fuller highlighted that the ET1 had been clear on the date of termination as being in August 2020 and that the Claimant had only identified the October 2020 date in response to the Respondent's submission in the ET3 that the claim was out of time.
25. Both the Claimant and the Respondent made oral closing submissions which I considered but which I have not repeated in full in this judgment. The Claimant made submissions that she had been employed by the Respondent for 24 years, and that anyone in her position would have trusted her employers and believed what they had said.
26. Whilst the Tribunal considered this submission carefully, the Tribunal concluded that the Claimant's evidence was inconsistent and could not be relied upon as an accurate version of events. The Claimant had accepted that she had received a P45 which stated that her employment had ended

on 22 August 2020. The Claimant did not provide any adequate explanation for why she had entered the date of 17 August 2020 on her ET1. Nor did she provide any evidence or refer in her statement to contact with ACAS in November 2020. The Claimant did not provide any explanation as to why her difficulties with English meant that she was not able to issue her claim any sooner, or what steps had to be taken so that she could issue her claim on 19 January 2021.

27. Whilst there were some issues with Ms Bouzid's evidence about when the meeting with the Claimant took place, there was documentary evidence that by 31 August it was clear that the Claimant would no longer be employed by the Respondent. Ms Bouzid accepted that the meeting could have taken place after the Claimant had returned to the UK, but before the Respondent had sent the emails to their accountants on 31 August confirming that the Claimant was no longer employed.

28. The Tribunal concluded that the Claimant's effective date of termination was no later than 31 August 2020. The Tribunal also concluded that the work performed by the Claimant in October 2020 was a stand-alone and separate arrangement. It did not preserve or resuscitate any previous continuity of employment.

29. The Tribunal was provided with documentation which confirmed that the Claimant contacted ACAS on 22 December 2020. In the absence of corroborating documents to the contrary, the Tribunal concluded that this was the first time that the Claimant had contacted ACAS in order to commence early conciliation in relation to these proceedings.

The Law

30. The relevant time limit provisions are as follows:

Unfair dismissal

S111 Employment Rights Act 1996

(2) Subject to the following provisions of this section, an employment tribunal shall not consider a complaint under this section unless it is presented to the tribunal—

(a) before the end of the period of three months beginning with the effective date of termination, or

(b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.

(2A) Section 207B (extension of time limits to facilitate conciliation before institution of proceedings) applies for the purposes of subsection (2)(a).

Wrongful dismissal

Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994/1623

Article 7

Subject to article 8B , an employment tribunal shall 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, or
- (b) where there is no effective date of termination, within the period of three months beginning with the last day upon which the employee worked in the employment which has terminated, or
- (ba) where the period within which a complaint must be presented in accordance with paragraph (a) or (b) is extended by regulation 15 of the Employment Act 2002 (Dispute Resolution) Regulations 2004, the period within which the complaint must be presented shall be the extended period rather than the period in paragraph (a) or (b).
- (c) where the tribunal is satisfied that it was not reasonably practicable for the complaint to be presented within whichever of those periods is applicable, within such further period as the tribunal considers reasonable.

Article 8B

(1) This article applies where this Order provides for it to apply for the purposes of a provision of this Order ("a relevant provision").

(2) In this article—

- (a) Day A is the day on which the worker concerned complies with the requirement in subsection (1) of section 18A of the Employment Tribunals Act 1996 (requirement to contact ACAS before instituting proceedings) in relation to the matter in respect of which the proceedings are brought, and
- (b) Day B is the day on which the worker concerned receives or, if earlier, is treated as receiving (by virtue of regulations made under subsection (11) of that section) the certificate issued under subsection (4) of that section.
- (3) In working out when the time limit set by a relevant provision expires the period beginning with the day after Day A and ending with Day B is not to be counted.
- (4) If the time limit set by a relevant provision would (if not extended by this paragraph) expire during the period beginning with Day A and ending one month after Day B, the time limit expires instead at the end of that period.
- (5) Where an employment tribunal has power under this Order to extend the time limit set by a relevant provision, the power is exercisable in relation to that time limit as extended by this regulation.

Unauthorised deductions from wages

S23 Employment Rights Act 1996

(2) 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 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.

- (3) Where a complaint is brought under this section in respect of—
- (a) a series of deductions or payments, or
 - (b) a number of payments falling within subsection (1)(d) and made in pursuance of demands for payment subject to the same limit under section 21(1) but received by the employer on different dates,
- 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.
- (3A) Section 207B (extension of time limits to facilitate conciliation before institution of proceedings) applies for the purposes of subsection (2).
- (4) 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.

Conclusions

31. The Tribunal found as a fact that the Claimant's effective date of termination was no later than 31 August 2020. The primary 3 month time limit for the claims for unfair dismissal, wrongful dismissal and unauthorised deductions from wages therefore expired three months later, on 30 November 2020.
32. The Claimant commenced early conciliation on 22 December 2020, by which point the time limits for these claims had already expired.
33. The Claimant's case at the Preliminary Hearing centred on the fact that her effective date of termination was some time around 18 October 2020 and therefore that she had complied with the primary time limits in submitting her claim. The Claimant did not advance specific grounds as to why it was not reasonably practicable for her to present her claims in time.
34. The Claimant received a P45 by the end of August 2020. The Claimant gave evidence that she was concerned that she did not have a job and that this had impacted her driving in September 2020. The Tribunal concluded that if the Claimant was concerned by September 2020 she could have taken steps to pursue her rights at that stage, for example by contacting ACAS, and submitting an Employment Tribunal claim if she remained dissatisfied. On the Claimant's evidence she was aware, of, and concerned about the fact, that she did not have a job. Therefore the Tribunal was not satisfied that it was not reasonably practicable for the Claimant to have submitted her claim in time.
35. In the alternative, the Claimant had not provided the Tribunal with sufficient explanation as to why it was not reasonably practicable to have submitted her claim sooner between 22 December 2020 and 19 January 2021.
36. The Tribunal also considered whether any deductions from the Claimant's pay before her employment terminated were part of a series of deductions pursuant to S23 (3) ERA 1996. The basis for this would be the Respondent's failure to pay the Claimant for work done in October 2020. For the reasons set out above, the Tribunal concluded that the work done by the Claimant in October 2020 was a one off cover arrangement and was

separate to the Claimant's employment with the Respondent which had terminated by 31 August 2020. The Tribunal therefore concluded that any deductions from work done in October 2020 were separate from any deductions due for work up to or by 31 August 2020 and these did not form part of a series of deductions.

37. As a result of the Tribunal's conclusions above, the claims of unfair dismissal and wrongful dismissal were submitted out of time and the tribunal does not have jurisdiction to hear those claims. The claim for unauthorised deductions from wages in relation to work done on or before 31 August 2020 was also submitted out of time and again the tribunal does not have jurisdiction to hear that part of the Claimant's claim.
38. The claim for unauthorised deductions from wages in relation to work done in October 2020 was submitted within the appropriate time limits and will be determined at the final hearing.
39. The claim for holiday pay (to the extent that it is pursued under the Working Time Regulations 1998, rather than as an unauthorised deduction from wages) was not within the scope of the list of issues set out in advance of this preliminary hearing. Therefore that claim should continue to the final hearing. However, the Tribunal highlights its findings that the Claimant's employment ended on or around 31 August 2020. The Tribunal did not hear evidence as to when the final payment for sums due from this employment, including any accrued annual leave entitlement payable on termination, should have been paid to the Claimant. It therefore remains open to the Tribunal at the final hearing of this claim to decide that some or all of the claims for holiday pay were submitted out of time.

Employment Judge Milivojevic

Date: 02 August 2022