



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4111596/2021

5 **Held via Cloud Video Platform (CVP) on 10 January 2020**

Employment Judge: M Sutherland

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Olivia Ballantyne

**Claimant
Represented by:
Mr Ballantyne**

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**Hazel Hiram t/a
Hazel Hiram Dental Care**

**Respondent
In person**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Tribunal is that the claim for unlawful deduction from wages is
25 dismissed because it was not lodged within the time limit in circumstances where it
was reasonably practicable to do so.

REASONS

1. On 2 October 2021 the Claimant made a complaint of unlawful deduction from
wages which were due to be paid on 27 April and 27 May 2021 in respect of
30 work undertaken in the period 1 to 19 April and in respect of sick pay for the
period 20 April to 10 May. A preliminary hearing was arranged for today to
determine whether it was not reasonably practicable for the complaint to be
presented within the primary time limit of three months plus an extension for
early conciliation and if so whether the complaint was brought within such
35 further period as the tribunal considers reasonable.

2. The Claimant was represented by her father. The Respondent appeared on her own behalf.
3. The Claimant gave evidence on her own behalf. The Respondent did not give evidence and did not call any witnesses.
- 5 4. No documents were lodged in process and no submissions were made.

Findings of Fact

5. The Claimant was employed by the Respondent from November 2020 until 17 May 2021. On 19 April 2021 the Claimant resigned with 4 weeks notice effective on 17 May 2021. The Claimant did not undertake any work for the Respondent in the period from 20 April to 17 May 2021. On 22 April 2021 the Claimant advised the Respondent that she was not fit to work on account of her anxiety. She provided a sick note to this effect on 30 April 2021. There was no contractual entitlement to sick pay beyond statutory sick pay. The Claimant secured alternative employment which she started on 10 May 2021 (and she is not therefore seeking sick pay for the period 11 to 17 May).
6. The Claimant was diagnosed with anxiety in mid April 2021 and has been in receipt of medication since then. She has been fit to work in her new role since starting on 10 May 2021 and has not been absent from work.
7. The Claimant was paid in arrears on the 27th of each month. On 27 April she was not paid any wages for the period 1 to 19 April or any sick pay. On 27 May she was not paid any sick pay in respect of the period 20 April to 17 May.
8. On or about 23 April 2021 the Claimant advised her father of the failure to pay wages and arranged for him to represent her. Her father has access to employment law specialists through his own business. He sought their advice towards the end of April which was provided as a favour. The Claimant (through her father as her representative) was aware of the right to bring a complaint for unlawful deduction from wages to an employment tribunal towards the end of April.

9. Around the end of April the Claimant tried to enter into negotiations with the Respondent but the Respondent confirmed in writing that she was unwilling to pay the wages and sick pay sought.
10. On 9 June 2021 the Claimant commenced ACAS early conciliation. On 22 June 2021 the Claimant received the ACAS Early Conciliation Certificate. The certificate advised that the process of early conciliation had concluded and that she may institute employment tribunal proceedings.
11. The Claimant asserted that employment tribunal proceedings were not instituted until 2 October 2021 because she could not face talking about her employment with the Respondent which had led to her anxiety and because her father had been busy with his own business.

The Law

12. Section 23 of the Employment Rights Act 1996 ('ERA 1996') provides that a complaint of unlawful deduction from wages must be presented before the end of the period of three months beginning with the date of the deduction, or where the Tribunal is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period, within such further period as the tribunal considers reasonable. Where a complaint is brought in respect of a series of deductions the time limit runs from the last deduction.
13. Section 207B(3) of ERA 1996 provides that if ACAS early conciliation is commenced within the three month time period, "in working out when a time limit...expires the period beginning with the day after Day A and ending with Day B is not to be counted". Day A is the date of receipt by ACAS of the EC notification and Day B is the date of issue of the ACAS EC certificate. Section 207B(4) provides that "If a time limit...would (if not extended by this section) 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".
14. The onus is on the Claimant to prove that it was not reasonably practicable to comply with the time limit and to convince the tribunal it was lodged within such further reasonable period (*Porter v Bandridge Ltd* 25 [1978] IRLR 271, CA).

15. “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 akin to “reasonably feasible” (*Palmer and Saunders v Southend on Sea Borough Council* [1984] IRLR 119, CA). The tribunal should determine what was possible in the
5 circumstances and whether it was reasonable to expect that to have been done in those circumstances (*Asda Stores Ltd v Kauser* UKEAT/0165/07, EAT).
16. If the Claimant did not know of their right to claim for unlawful deductions, the
10 tribunal should determine whether they took reasonable steps to ascertain that right (*Dedman v British Building and Engineering Appliances Ltd* 1974 ICR 53, CA) Once the Claimant knows of their right, the tribunal should determine whether they took reasonable steps to ascertain how to enforce that right (*Trevelyan (Birmingham) Ltd v Norton* 1991 ICR 488, EAT)
- 15 17. The general rule is that where fault lies with a specialist advisor the remedy lies against those advisors (*Dedman*).
18. In considering whether a physical or mental illness rendered it not reasonably practicable for the claim to be submitted in time, the tribunal should focus on the closing stages of the limitation period (*Schultz v Esso Petroleum Co Ltd*
20 1999 ICR 1202, CA)
19. The claim must be brought within a reasonable period once the impediment has been removed. The assessment of what is reasonable must be made against the general background of the primary time limit and the strong public interest in claims being brought promptly (*Cullinane v Balfour Beatty Engineering Services Ltd and anor* EAT 0537/10)
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Discussion and decision

20. The date of the deductions was 27 April and 27 May both 2021. It is assumed for the purposes of this hearing that this constituted a series of deductions and accordingly the 3 month time limit expired 26 August 2021.

21. The date of receipt of the ACAS Early Conciliation Notification was 9 June 2021 (Day A) and the date of issue of the Early Conciliation Certificate was 22 June 2020 (Day B). Accordingly ACAS early conciliation commenced within the 3 month period. The 3 month time limit did not expire during the period 9 June 2021 (Day A) to 22 July 2020 (Day B plus 1 month) and accordingly the time limit is extended only by the period of early conciliation namely 13 days to 8 September 2021. The Claimant was lodged on 2 October 2021, 24 days after the primary time limit of 8 September.
22. The Claimant struggled with her mental health and suffered from anxiety from April 2021 for which she continues to receive medication but she was fit to start her new role on 10 May 2021, has not been absent from work since then, and by June 2021 she was fit to contact ACAS to commence early conciliation. Any issues with her mental health did not constitute an impediment such that it was not reasonably practicable for her to either ascertain or enforce her rights.
23. By end April 2021 the Claimant was aware of the right to bring a complaint for unlawful deduction from wages to an employment tribunal. The Claimant was or ought reasonably to have been aware that such a complaint must be presented to an employment tribunal within 3 months of the deduction either because the specialist advisers had told her (or ought to have done so) or because she ought to have asked them (which step would have been entirely reasonable and practical for her to take). There was no physical or mental impediment to the Claimant ascertaining the time limits or taking steps to meet those time limits.
24. Once the Claimant received the ACAS Early Conciliation Certificate on 22 June 2020 she was aware that she needed to institute employment tribunal proceedings but she delayed doing so because as she stated in evidence "We just left it too long".
25. In the circumstances it was reasonably practicable for the Claimant to make a complaint to an employment tribunal within the primary time limit. Having made that determination it is not necessary to consider whether the complaint

was brought within such further period as the tribunal considers reasonable
and the claim for unlawful deduction from wages falls to be dismissed.

5 Employment Judge: Michelle Sutherland
Date of Judgment: 11 January 2022
Entered in register: 12 January 2022
and copied to parties

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