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EMPLOYMENT TRIBUNALS

Claimant: Mr S Serla
Respondent: S&T (UK) Limited
Heard at: East London Hearing Centre
On: 18 December 2019
Before: Employment Judge Moor

Representation

Claimant: in person
Respondent: Mr A Singh, solicitor

JUDGMENT

1. The complaints in respect of unpaid pension contributions and unpaid expenses are dismissed following a withdrawal by the Claimant.
2. The whole of the Claimant's claim for holiday pay on termination of employment was brought in time and will be heard at a full hearing.
3. The Claimant's claim for unpaid commission was brought outside the time limit under section 23(2) of the Employment Rights Act 1996 and the Tribunal does not have jurisdiction to hear it.
4. The Claimant's contractual claim for unpaid commission was brought outside the time limits under the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 and the Tribunal does not have jurisdiction to hear it.

REASONS

1. The Claimant has withdrawn his claims for unpaid pension contributions and unpaid expenses now that they have been resolved by the Respondent.

2. The Respondent has withdrawn its counterclaims for alleged unauthorised credit card expenses and alleged poor performance/negligence.

Time Limits for Claimant's Claims

3. The Claimant's remaining claims are for unpaid holiday pay and unpaid commission. I have heard evidence from the Claimant and submissions from both parties as to whether these claims have been brought out of the relevant time limit and, if so, whether I can extend time.

4. The holiday pay claims are brought partly under Regulation 14 of the Working Time Regulations 1998 ('WTR') and partly, in respect of the carried over leave and leave in excess of the statutory maximum, as deduction of wages claims under the Employment Rights Act 1996 ('ERA'). The definition of Wages at section 27 ERA includes holiday pay.

5. The unpaid commission payment claim is brought as a claim under section 23 of the Employment Rights Act 1996 ('ERA'). The section 27 definition of wages includes commission. Alternatively this is brought as a breach of contract claim by virtue of the Employment Tribunals Extension of Jurisdiction (England and Wales) 1994 Order.

6. The claim was presented on 17 July 2019, following a period of early conciliation from 20 May 2019 to 20 June 2019. The parties agree the effective date of termination was 20 February 2019.

Findings of Fact

7. Having heard the evidence of the Claimant I make the following findings of fact.

8. After the termination of his employment the Claimant expected any outstanding payments to be paid in his final payslip on the last working day of February 2019, i.e. 28 February 2019. The Respondent agrees this is when he would have received his final payment.

9. The Claimant took advice after the termination of his employment. He was advised that the time limit for starting EC was within three months of the date he expected to receive the payments he was claiming. He did not retain advisers to write his claim for him. He took one-off advice about the time limit but could not afford to have representation.

10. The Claimant expected the payments he claimed on 28 February 2019 so that he thought he had started EC in time. He had spent the interim trying to negotiate with the Respondents.

Factual Allegations in the Claims

11. The Claimant contends that he took no holiday in the calendar year 2019 and had a large number of carried-over holidays owing to him by agreement.

12. It is agreed that the holiday year is a calendar year.

13. The contract of employment provides the Claimant was to be paid 20 days' plus bank holidays. He will argue that he had a verbal agreement that this was increased by 5 days. Clause 10.3 of the contract allowed for no more than 5 days of the unused holiday to be carried over. He will argue he had a verbal agreement that he could carry over more accrued but untaken holiday.

14. Clause 10.4 of the contract of employment provides that a payment in lieu of accrued but untaken holiday will be made where the employment ceases for any reason.

15. The commission he claims is based upon a verbal contract he alleges he reached with his employer in 2016. His claim is that it was common practice for commission agreements to be reached verbally and they were paid at 1% of project value. He claims that he had worked to secure a particular project and agreed a commission upon it to be paid upon the signing of contracts. This occurred in late 2016 but he was not paid. He knew that his employer was having some financial difficulties. The Board asked him to wait for the project to be complete and he continued to be patient. He states in his claim form and I accept that he did not agree to payment on completion of the project. What he did was wait for payment because he was asked by his employer to do so, bearing in mind their financial difficulties. By January 2019 he knew he was leaving so spoke to Mr Parthan, a director, about payment of the commission when he left. Mr Parthan said they would see what they could do. The project was still not yet complete.

Statutory Time Limits

16. The issue in this claim is whether the Claimant started Early Conciliation (EC) on time. There is no issue that he brought the claims within good time once EC had ended. Before presenting a claim to a Tribunal, the Claimant must use ACAS EC, therefore when I refer to starting the claim, below, I mean starting EC.

17. Under Regulation 30(2) of the WTR the claim is to be brought within 3 months from *when the payment should have been made* or, if it was not reasonably practicable to bring the claim by that time, then the Tribunal can extend time by a period it considers reasonable.

18. Under section 23 of the ERA 1996 a claim for a deduction of wages must be brought within 3 months beginning with the date from with the *deduction is made or when it was due*, see section 23(2). Or, if it was not reasonably practicable to bring the claim by that time, then the Tribunal can extend time by such further period it considers reasonable.

19. Under Reg 3 of the 1994 Order the employee can bring a contract claim '*arising or outstanding on termination*'. That claim is capped at £25,000. Reg 7 provides that the time limit for bringing the claim is within 3 months of the date of the termination of the contract giving rise to the claim or from the effective date of termination. Where The Tribunal is satisfied that it was not reasonably practicable for the complaint to be presented in time, within such further period as it considers reasonable.

20. Thus, for a contract claim brought by virtue of this order, the primary time limit expired on 19 May 2019.

21. The Respondent did not make submissions to me that where the primary time limit was not satisfied I should not extend time and therefore I was first minded to allow the claims. But I indicated that I wished to review the law on the effect of receiving incorrect advice before I did so. I have now reviewed the case law.

22. First, ignorance of time limits is not a matter that it makes it no reasonably practicable to bring a claim in time. A potential claimant is expected reasonable to research the matter and take advice on his rights. If, having taken advice, that advice is wrong and leads him into error, what then? The principle established in Dedman v British Building and Engineering Appliances [1974] ICR 53 CA still applies: generally the claimant is fixed with the error of his adviser unless something in those circumstances make an exception to the rule.

Application of Law and Facts to Issues

Holiday Pay Claim

23. The part of the holiday pay claim relating to statutory holiday pay (i.e that required under the WTR) in the 2019 leave year is in time. The date any outstanding payment of accrued but untaken holiday should have been made, if it was due, was 28 February 2019. The last date to start EC would have therefore been 27 May 2019.

24. Likewise the part of the holiday pay claim relating to contractual holiday pay brought under section 23 of the ERA is in time. The last date this payment should have been made, if it was due, was 28 February 2019.

25. I note that the contractual part of his holiday pay claim will require the Claimant to establish that his contract was varied by verbal agreement so that he could carry over all of his untaken but accrued holiday from previous years. I have not made any decision upon that and it will be a matter for the Tribunal hearing the case. The Claimant will have to give evidence about when this verbal agreement was reached and with whom.

Commission Claim as Deduction of Wages Claim

26. On the Claimant's case, the commission payment was due to be paid upon contracts being signed at the end of 2016. Thus he is out of the primary time limit for a section 23 claim because that claim would have to have been brought within 3 months of when the payment was due.

27. While the Claimant waited for payment, patiently, as he says the Board had asked him to do. By this wait he did not agree to vary the agreement to payment upon completion, which would mean the commission was not yet due at all.

28. In my judgment, the Claimant had a choice to make: wait or bring a claim. He chose to wait. His choice was understandable: he was still employed and his employer had financial difficulties. But, while he may have made a sensible choice, it was still reasonably practicable for him to bring an earlier claim. There was no practical difficulty or obstacle in him doing so.

29. Thus the commission claim as an ERA claim is brought out of time and the Tribunal has no jurisdiction to hear it.

Commission as a Contract Claim

30. In the alternative, has the commission payment claim as a contract claim been brought in time?

31. The primary time limit of 3 months is exceeded by 1 day. Was it not reasonably practicable for the Claimant to meet this time limit? The difficulty for him here is the principle established in Dedman that a Claimant is fixed with the fault of his advisers. There was nothing in the Claimant's circumstances that I can find that creates an exception to this principle. The time limits in this area are certainly confusing, but to equate confusion with practicability would mean many litigants in person would be allowed to circumvent the primary time limit and that cannot have been the intention of Parliament.

32. While, again, Mr Singh did not make submissions to me that I should not extend time, unfortunately for the Claimant the matter is one of jurisdiction and the parties cannot 'agree' to waive the time limits. I therefore find that the commission payment as a contract claim has been brought out of the Tribunal's time limits and I do not have jurisdiction to hear it.

33. Perhaps this is as well for the Claimant because his claim is higher than the statutory cap and therefore is better litigated, if he wishes to do so, in the County Court.

Employment Judge **Moor**

Dated: 20 December 2019