



EMPLOYMENT TRIBUNALS

Claimant
Mrs C Gillie

Respondent
Blue Angel Promotions Ltd

PRELIMINARY HEARING BY SKYPE

Heard at: By Skype

On: 5 June 2020

Before: Employment Judge Davies

Appearances

For the Claimant:

In person

For the Respondent:

Mr Davies (solicitor)

RESERVED JUDGMENT

1. The claim of unauthorised deduction from wages was not brought within the time limit in s 23(2) Employment Rights Act 1996. It was reasonably practicable to do so. The Tribunal therefore does not have jurisdiction to consider the claim and it is dismissed.

REASONS

INTRODUCTION

- 1.1 This is a claim of unauthorised deduction from wages by failure to pay National Minimum Wage, brought by Mrs C Gillie against Blue Angel Promotions Ltd. The Claimant represented herself. The Respondent was represented by Mr Davies (solicitor).
- 1.2 This hearing was conducted by Skype (V- video). The parties did not object. A face to face hearing was not held because it was not practicable and all the issues could be dealt with by Skype. I had a copy of the agreed hearing file, including witness statements. The parties had a copy of the same documents.
- 1.3 I heard evidence from the Claimant and from Mr Matthews (Director) for the Respondent.

THE ISSUES

- 2.1 The hearing had been listed to decide whether time should be extended for bringing the claim and, if so, to determine the claim. However, technical issues with Skype caused delays and the question of reasonable practicability was not straightforward, so it soon became clear that there would only be time to deal with

the time limit issue. I explained that if I decided to extend time for bringing the claim I would list a further hearing to decide if the Claimant had been paid National Minimum Wage or not. The issues to be determined were therefore:

- 2.1.1 Was it reasonably practicable for the Claimant to present the claim within three months of the date of payment of her last wages?
- 2.1.2 If not, did she bring it in a reasonable period after that?

THE FACTS

- 3.1 I make the following findings of fact. The Claimant and Mr Matthews went into business together in 2015 to run the Lord Roberts pub. They both invested £10,000 and both agreed they would be responsible for the business 50:50. The Claimant was going to run the catering for the pub and Mr Matthews was going to run the bar.
- 3.2 Mr Matthews had already incorporated Blue Angel Promotions Ltd on 28 April 2015 and was a Director of it. The Claimant was made a Director on 6 May 2015. At that stage they were the only two Directors. The Claimant and Mr Matthews went to a meeting at Lloyds Bank to open a company bank account but they were unable to do so. The Claimant says that this was because she had a poor credit score but that the bank manager told them Mr Matthews could open the account and she could be added at a later stage. Mr Matthews says that the difficulty was because the Claimant was an undischarged bankrupt and could not be a company Director for that reason. The Claimant said that she had never been bankrupt and I was not provided with any evidence to suggest that she had. Mr Matthews may have thought this was the issue, but I accept it was not. However, other issues to do with the Claimant's credit led to difficulties in opening a bank account and I find that the solution discussed was to remove the Claimant as a Director at Companies House. In reaching that finding, I place weight on the fact that when the Claimant was removed as a Director on 21 May 2015, the Respondent's accountant, Mr Smith, forwarded confirmation to Mr Middleton at Lloyds Bank. That suggests that this was discussed at the meeting.
- 3.3 The Claimant said that she was not aware she had been removed as a Director and I accept her evidence. Although Mr Smith forwarded confirmation of her removal as a Director to Mr Middleton, to the brewery and to Mrs Matthews, he did not forward it to the Claimant. There was no reason for her to check the Companies House website to discover she had been removed. Mr Matthews may have understood after the meeting at the bank that the Claimant needed to be removed as a Director, and given instructions for that to happen, but I accept the Claimant's evidence that this was not what she understood was to happen following the meeting with the bank. She is not a sophisticated business person and she did not appear to me to have a clear understanding of the technical or legal niceties. Although it may seem surprising, I accept her evidence that she did not realise she had been removed as a Director. In any event, she continued to be co-owner of the business. In due course, she had access to the bank account.
- 3.4 To begin with, the Claimant and Mr Matthews used their investment to get the pub up and running. They did not receive any pay or dividends. After about a year they started being paid. The Claimant's evidence was that Mr Matthews told her that they should be paid the maximum they could earn before having to pay tax. Both

would be paid the same. That is what happened. The Claimant said Mr Matthews called this a Director's cut. She was then paid a weekly amount just under £200. She never received payslips. Mr Matthews asked her at the beginning if she wanted one but in the next breath told her that they did not need them and she accepted that.

- 3.5 Mr Matthews disagreed that he had ever referred to a Director's cut but he agreed that he had said they would both be paid a wage under the tax bracket so they did not pay any tax until things got going. In cross-examination he agreed he had never told the Claimant she was employed by him. He said she got paid the hours she worked but they were in business together. They were both paid the same.
- 3.6 The Respondent had produced wage slips for the Claimant that were in the file of documents. The Claimant said that they had been produced after the event to match the payments she received. That seemed to me likely to be correct. When he was asked about it, Mr Matthews repeatedly said that his wife was responsible for the wages. He could not explain why so many of the wage slips included holiday pay. The Claimant had produced a list of all her holidays, which did not match up with the pay slips. Furthermore, it was striking that until March/April 2019 the pay slips referred to an hourly rate of £8 per hour and 25 hours per week. After that date they simply referred to weekly pay or holiday pay. That coincides with the date when National Minimum Wage increased above £8 per hour. All of that gives the distinct impression that the pay slips were created to match the amounts the Claimant was paid, rather than reflecting hours worked, an hourly rate of pay and holidays taken. It also suggests that a change was made for the pay slips dated March/April 2019 onwards to avoid the impression that the hourly rate was below National Minimum Wage. Therefore, I find that the payslips do not reflect the reality of the working situation. I also accept that they were not given to the Claimant at the time and that Mr Matthews assured her at the outset that she and he did not need pay slips.
- 3.7 The Claimant was never given P45s or a P60. She seems to have filled in an HMRC starter checklist but Mr Matthews accepted in cross-examination that Mrs Matthews just asked her to do this so she had her information for the file.
- 3.8 The file of documents included notice of the Claimant's tax code from HMRC dated 22 May 2019. It was addressed to the Respondent, not the Claimant, at the Lord Robert pub. When cross-examining him, the Claimant asked Mr Matthews why it had not been given to her. Mr Matthews said if he had seen it, he would have given it to her. She pointed out that he must have seen it because he had put it in as evidence for the Tribunal, not her. Then he said he could not remember. I did not find Mr Matthews's evidence convincing. It seemed to me that Mr and Mrs Matthews simply dealt with the administration of the Claimant's pay and handled correspondence with HMRC about that without involving her. They did not give her payslips, P45s or other correspondence from HMRC. She was simply receiving a weekly payment of just under £200, consistently with her agreement with Mr Matthews that they would both be paid that sum, to keep them under the tax threshold.
- 3.9 The Claimant did not question the situation. Although she regarded herself as joint owner and a 50:50 partner and believed herself to be a Director, she did not check

the accounts or, apparently, involve herself in the Respondent's finances or wages arrangements. She trusted Mr Matthews and left those matters to him. The Claimant said that she did sometimes ask to see the accounts but there was always some excuse from Mr Matthews, such as the accounts being in Ireland or Mr Matthews being on holiday. The Claimant thought she was a company Director. If she had been, she could and perhaps should have insisted on seeing the accounts. The Claimant's evidence was that she worked long hours in the pub. She thought that when the business came good, she would receive her share of the profits because she was a joint owner. She had no idea she was an employee. I accept that evidence. The approach taken to her pay slips, P45s and so on means that there was nothing to suggest to her that she was an employee. It does not appear that the Claimant filed any tax returns or took steps to deal with her own tax affairs during this period, although she believed she was a joint owner of a business earning income, presumably on a self-employed basis.

- 3.10 The Claimant said that she began to think that Mr Matthews was spending large sums of money on himself and his wife, even though he told her the company was not making large profits and neither the Claimant nor Mr Matthews was taking a dividend. Mr Matthews gave evidence that items such as new cars or holidays were paid for from other sources, not the Respondent. I did not hear detailed evidence about this and I did not see any written records. I do not need to decide where the money came from so I have not made findings about this.
- 3.11 Although the Claimant had access to the Respondent's bank account, she told me that she never checked the bank balance, even when she started to have concerns about how much money Mr Matthews was spending on himself.
- 3.12 The Claimant said that these concerns were the reason why she decided in July 2019 to leave the business and take out her investment. She told Mr Matthews that she wanted to leave and there is no dispute that they had a friendly discussion and parted on good terms. It did not appear to me that the Claimant told Mr Matthews that she was concerned he was being dishonest or questioned where his money was coming from. Mr Matthews repaid the Claimant her £10,000 investment less £3,500 he had loaned her to buy a car the previous year. The Claimant left on 17 July 2019 and was paid up to 21 July 2019.
- 3.13 The Claimant and Mr Matthews went their separate ways until December 2019. On 11 December 2019 an Inspector from HMRC visited the Claimant's house. She attended a tax investigation meeting on 23 December 2019. She was initially told she had to file tax returns for all tax years from 2014 to 2019. The Claimant said in her witness statement that during the investigation she was told by the tax inspector that she had not been a Director of the Respondent since May 2015 and that she had been an employee of the Respondent during the tax periods 2016-2017, 2017-2018 and 2018-2019. The Claimant said that she was distressed to discover this. That is not precisely what the tax inspector said in a letter confirming what had been discussed on 23 December 2019. The tax inspector said that the Claimant showed her information printed off from Companies House showing that she had been a Director but had then been de-registered shortly afterwards. It may be that the Claimant is confused about how she first found out she had been removed as a Director – it seems to me most likely that the visit from the tax inspector prompted her to visit the Companies House website and discover that

she had been removed as a Director in May 2015. I accept that the Claimant only found out she had been treated as an employee for three tax years when the tax inspector told her that. The tax inspector advised the Claimant to contact ACAS and she did so. That led to her obtaining an early conciliation certificate. Conciliation started on 24 January 2020 and the certificate was issued on 27 January 2020. The claim was presented on 28 January 2020.

LEGAL PRINCIPLES

- 4.1 The time limit for bringing a claim of unauthorised deduction from wages and the circumstances in which that time limit can be extended are governed by s 23 of the Employment Rights Act 1996. The claim must be presented to the Tribunal within three months of the date of payment of the wages from which the deduction was made. If there was a series of deductions, the claim must be presented to the Tribunal within three months of the last payment in the series. There is no extension of the time limit for early conciliation if the individual did not start early conciliation within the three-month time limit.
- 4.2 If the claim was not presented in time, the Claimant must persuade the Tribunal that it was not reasonably practicable to do so. Reasonably practicable means something between “reasonable” and “physically possible”: see *Palmer and Saunders v Southend-on-Sea Borough Council* [1984] ICR 372, CA. It is a question of fact for the Tribunal whether it was reasonably practicable for the complaint to be brought in time. The factors to be considered may include the manner of, and reason for, the deductions; whether the employer’s conciliation machinery has 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 her rights; whether the employer misrepresented any relevant matter to the employee; whether the Claimant has 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 her adviser which led to the failure to present the complaint in time: see *Palmer and Saunders*.
- 4.3 If the Tribunal finds that it was not reasonably practicable for the claim to be brought in time, it must then consider whether it was brought within a reasonable period. The Tribunal must objectively consider the factors causing the delay and what period should reasonably be allowed in those circumstances for the proceedings to be instituted, having regard to the strong public interest in claims being brought promptly, and against a background where the primary time limit is three months: see *Cullinane v Balfour Beatty Engineering Services Ltd* UKEAT/0537/10 (5 April 2011, unreported).

APPLICATION OF THE LAW TO THE FACTS

- 5.1 The Claimant accepts that she did not present her Tribunal claims in time. Her last payment was received some time in mid-July 2019 but she did not present her claim until 28 January 2020. That is more than six months from the date of the last deduction. I have to decide whether it was not reasonably practicable for the Claimant to present her claim by mid-October 2019. That means something between not physically possible to present the claim by mid-October 2019 and not reasonable to present the claim by mid-October 2019.

- 5.2 I find that it was reasonably practicable to present the claim by mid-October.
- 5.3 The Claimant knew throughout her time working at the Lord Robert what hours she worked and how much pay she received. If she was paid less than the National Minimum Wage level for the hours worked, she must have known that. However, her understanding throughout was that she was not an employee but a business owner. As such, she did not think she was entitled to National Minimum Wage. She thought she and her business partner were working for modest sums to get the business up and running, and she hoped once the business started to earn a profit, she would receive her share. From her perspective, that did not happen, so after four years she left the business and got her investment back in full. In that sense, there was no dispute about pay. The Claimant got what was agreed between the two business owners.
- 5.4 The Claimant told me that she was really distressed after finding out in December 2019 that she had been removed as a Company Director in May 2015 and had been treated as an employee. She said that she had put her heart and soul into the pub thinking that it was her business and that she had been misled. It is important to emphasise that nothing that happened stopped this from being the Claimant's business. She was still a joint owner and 50-50 business partner in the Respondent until she left the business and withdrew her investment in July 2019.
- 5.5 The Claimant's argument is that it was not reasonably practicable to present the claim in time because she did not know that she had been removed as a Director and had been treated as an employee until the tax inspector told her this in December 2019.
- 5.6 Being a Company Director and being an employee are two separate things. A Company Director can be a fully self-employed business person but they can also be a worker or an employee. Whether or not somebody is a Company Director does not determine whether they are self-employed, a worker or an employee. If the Claimant had been a Company Director and also a worker or an employee she would still have been entitled to National Minimum Wage. But if she had been a Company Director and a fully self-employed business person, she would not. So, whether or not she was a Company Director was not fundamental to whether the Claimant was entitled to National Minimum Wage. The fact that she did not know until December 2019 that she had been removed as a Company Director in May 2015 therefore did not mean that it was not reasonably practicable to bring a claim for National Minimum Wage before that.
- 5.7 The much more central factor is the Claimant's employment status. If she was a fully self-employed business person she was not entitled to National Minimum Wage, but if she was a worker or an employee she was.
- 5.8 The situation is slightly complicated by the fact that the Claimant did not think she was a worker or an employee and that she was one of two business partners with a 50-50 say in running the Respondent. That might give rise to a question whether there was a contract between the Claimant and the Respondent under which she was engaged as its worker or employee at all. Of course, if there was not, she would not be entitled to National Minimum Wage in any event and the question of

time limits would be irrelevant. But the Respondent accepts and avers in these proceedings that the Claimant was an employee and entitled to National Minimum Wage. I have therefore assumed that is correct.

- 5.9 The Claimant's position is that she did not know that she was an employee for four years and only found out from the tax inspector. She did not know about her right to claim National Minimum Wage until then. I have come to the view that, assuming she was an employee, it was not reasonable for the Claimant to be unaware of that. She was an equal partner and co-owner of the business and she believed she was a Director too. However, she appears to have taken no steps to deal with her own tax affairs during that entire period. If she had done so, she would inevitably have discovered that Mr and Mrs Matthews had set her up as an employee of the Respondent. Even if she was not a sophisticated business person, it was not reasonable for the Claimant not to deal with her own, personal tax affairs, believing she was self-employed. The Claimant was a 50:50 owner of the business and had invested £10,000 of her own money in it, but she never even checked the bank balance in four years. On her case, she thought she was a Company Director too but she seemingly took few, if any, steps to fulfil the obligations she would have had if that were right, such as exercising her own independent judgment rather than simply relying on Mr Matthews. Again, she may not have been sophisticated, but information about the duties of Company Directors is easy to find, in plain English, on the internet. If the Claimant had taken reasonable steps to fulfil her duties as a Company Director, believing that is what she was, she would again, inevitably, have found out that she was treated as an employee.
- 5.10 I therefore find that it was reasonably practicable for the Claimant to present her claim for National Minimum Wage by mid-October 2019. This was reasonably feasible. If she had taken minimal steps to deal with her own tax affairs or to understand the operations of a business for which she was 50% responsible, in which she had invested £10,000 of her own money, and of which she believed she was a Company Director, she would have found out that she was being treated as an employee and would have known that as such she was not being paid National Minimum Wage.
- 5.11 If it was reasonably practicable to present the claim in time, the Tribunal cannot extend the time limit and the claim cannot continue. In those circumstances, I do not need to go on and decide whether the claim was presented within a reasonable period.

S-J Davies

Employment Judge Davies
15 June 2020