

## **EMPLOYMENT TRIBUNALS (SCOTLAND)**

Case No: 4104129/16 Preliminary Hearing at Dundee on 14 February 2017

5

Employment Judge: M A Macleod (sitting alone)

10

Callum O'Donnell

Claimant  
Represented by  
Ms Nawrot  
Solicitor

15

Fife Council

Respondent  
Represented by  
Ms Sneddon  
Solicitor

20

### **JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

25 The Judgment of the Employment Tribunal is that the claimant's claims of unfair dismissal and unlawful deductions from wages are time barred, and are therefore dismissed for want of jurisdiction; and that it is just and equitable to allow the claimant's claim of disability discrimination to proceed to a hearing on the merits.

30

### **REASONS**

1. The claimant submitted a claim to the Employment Tribunal in which he  
35 complained that he had been unfairly dismissed, discriminated against on the grounds of disability and unlawfully deprived of wages due under his contract of employment.
2. The respondent presented a response to the Tribunal in which all claims  
40 were resisted and in addition it was asserted that the claims were presented out of time and therefore time barred.

3. A Preliminary Hearing was fixed to take place on 14 February 2017 in order to determine whether the Tribunal has jurisdiction to hear this claim on the basis of time bar.
4. The claimant appeared and was represented by Ms Nawrot. The  
5 respondent was represented by Ms Sneddon.
5. The claimant gave evidence on his own behalf. In addition, documents were placed before the Tribunal upon which both parties placed reliance.
6. Based on the information presented and the evidence given, the Tribunal was able to find the following facts admitted or proved.

10 **Findings in Fact**

7. The claimant commenced employment as a roadworker with the respondent on 8 August 2008. His employment terminated with effect from 10 February 2016, following his dismissal on the grounds of gross misconduct.
8. The claimant asserts that he suffers from Irritable Bowel Syndrome and  
15 Hyperthyrosis.
9. On 5 May 2016, the claimant notified ACAS of the claim under the Early Conciliation process (14). The Early Conciliation Certificate ("ECC") was issued on 5 June 2016, under the EC reference number R140112/16/01.
10. Following the claimant's dismissal, he submitted an appeal against the  
20 decision to the Appeals Sub-Committee. The Sub-Committee met on 20 June 2016 to hear the appeal (in the absence of the claimant, who was unwell), and issued its decision on 21 June 2016 (44). The decision of the Sub-Committee was that the appeal should be upheld in part, and  
25 that summary dismissal should be substituted by dismissal with notice.
11. On 29 June 2016, Ms Nawrot wrote to the respondent on behalf of the claimant (42) to raise a number of concerns, and to make the following request:

5                   “Can you confirm when a statement explaining the reasons for the decision will be made available to our client? He is conscious of the very limited amount of time he has left to submit his employment tribunal claim and will be a far better position to decide whether to proceed if he was aware of the council’s present position.”

10                   12. Susan Gilbert responded by email dated 29 June apologising for having failed to copy the decision letter to Ms Nawrot (43). She attached a copy of the minute of the appeal hearing (45), in which, at paragraph 114, a short record of the appeal was set out and confirmation of the decision given, without any detail of what was said at the appeal hearing provided.

15                   13. The claimant understood, following receipt of the ECC, that he had a further month within which to submit his claim to the Employment Tribunal, and that it required to be lodged by 5 July 2016. He said in evidence that he left it “to the last minute” because he was awaiting a copy of the minutes of the appeal hearing, since although he had the decision he did not know what had been said at the hearing. He was also unclear what notice pay he was due to receive, and what notice he was entitled to in relation to the decision.

20                   14. The claimant sent his ET1 to the Employment Tribunal by first class post on 4 July 2016. The copy produced at 1ff shows two date stamps on the ET1, 11 July and 1 August 2016. The claimant suggested that he had received the ET1 back from the Tribunal with an indication that the EC number was incorrectly noted upon it, and that he had sent it again, whereupon it was date stamped 11 July. There is no evidence to support this assertion. It is apparent that the claimant’s first attempt at lodging the ET1 took place when the Tribunal received it on 11 July 2016.

30                   15. The claimant contacted Ms Nawrot on 8 July (41) to discuss the terms of a letter he proposed to send to the respondent, but he was advised that it was best not to send that “now that you have submitted ET1”.

16. The claimant received the ET1 back from the Tribunal after 11 July as the EC number was incorrect. He had noted the number as R140122/16/01, as opposed to R140112/16/01. He thought that this was a problem with ACAS rather than with the form, and resubmitted it. On this occasion, the same form was received by the Tribunal on 1 August.

17. The Tribunal wrote to the claimant rejecting the claim form (15) on 3 August 2016. The Tribunal advised:

*"I have received your claim form but am unable to accept it because it is defective for the following reason:*

*(a) Under Rule 10 of the Rules of Procedure, a claim cannot be accepted unless specific information is provided by the claimant. The information you have not provided in relation to your claim is shown below:*

- the correct early conciliation number as it appears on the early conciliation certificate provided by ACAS."*

18. The claimant wrote to the Tribunal by letter which was received on 31 August 2016 (17). He confirmed that he had contacted ACAS and insisted that the details he had provided were correct. He attached a further copy of the ECC and directed the Tribunal to contact ACAS if there remained any issue with the certificate.

19. On 2 September 2016, the Tribunal replied to the claimant (19):

*"Employment Judge M Kearns has directed your application for reconsideration of the decision to reject the claim made on 31 August 2016 cannot be considered because:*

- the notified defect has still not been rectified. The number on the certificate is 140112/16/01. The number given at paragraph 2.3 of the form is 140122/16/01. The tribunal does not have discretion where a prospective claimant fails to follow the rule."*

20. On or about 12 September, the claimant contacted Ms Nawrot and instructed her to act on his behalf in the submission of his claim to the Tribunal. He signed a mandate on that date to this effect on 14 September 2016 (21).

5 21. Ms Nawrot wrote to the Tribunal on 12 September 2016 (23). She confirmed that her client had instructed her that on the first occasion he was notified that there was an error on the form, he was at work and therefore could not immediately check the accuracy of the number. She pointed out that “our client has learning difficulties”. He struggles to deal  
10 with correspondence and relies upon others to assist him. The instructions to change the claim form were, she said, not clear to the claimant. She sought, in effect, to have the Tribunal reconsider its rejection of the claim form.

15 22. The Tribunal granted that application for reconsideration, and conveyed to the claimant that it was decided that the claim could be accepted (39) by letter dated 27 September 2016. It was therefore treated as having been presented on 12 September 2016.

20 23. The claimant suffers from dyslexia, which affects his ability to comprehend what he reads. He struggles with both reading and writing letters, and has assistance to enable him to do so, from a friend.

### **Submissions**

24. Both Ms Nawrot and Ms Sneddon made short submissions on the question of time bar.

### **The Relevant Law**

25 25. Section 111(2) of the Employment Rights Act 1996 (“ERA”) provides:

*“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.”*

5

26. What is reasonably practicable is essentially a question of fact and the onus of proving that presentation in time was not reasonably practicable rests on the claimant. “That imposes a duty upon him to show precisely why it was that he did not present his complaint.” (**Porter v Bandridge Ltd** [1978] ICR 943).

10

27. The best-known authority in this area is that of **Palmer & Saunders v Southend-on-Sea Borough Council** 1984 IRLR 119. The Court of Appeal concluded that “reasonably practicable” did not mean reasonable but “reasonably feasible”. On the question of ignorance of the law, of the right to make a complaint to an Employment Tribunal and of the time limits in place for doing so, the case of **Porter (supra)** ruled, by a majority, that the correct test is not “whether the claimant knew of his or her rights, but whether he or she ought to have known of them.” On ignorance of time limits, the case of **Trevelyan (Birmingham) Ltd v Norton** EAT 175/90 states that when a claimant is aware of their right to make a claim to an employment tribunal, they should then seek advice as to how they should go about advancing that claim, and should therefore be aware of the time limits having sought that advice.

15

20

25

28. Section 123(1) provides that:

*“Proceedings on a complaint within section 120 may not be brought after the end of –*

- (a) *the period of three months starting with the date of the act to which the complaint relates, or*
- (b) *such other period as the employment tribunal thinks just and equitable.”*

5           29. The Tribunal referred to the well known decision in **Robertson v Bexley**  
**Community Centre t/a Leisure Link [2003] IRLR 434**, in which the  
court confirmed that it is of importance to note that time limits are  
exercised strictly in employment and industrial cases. “When tribunals  
consider their discretion to consider a claim out of time on just and  
10           equitable grounds there is no presumption that they should do so unless  
they can justify failure to exercise the discretion. Quite the reverse. A  
tribunal cannot hear a complaint unless the applicant convinces it that it  
is just and equitable to extend time. So, the exercise of discretion is the  
exception rather than the rule.”

15           30. Section 140B of the Equality Act 2010, inserted by Schedule 2 to the  
Enterprise and Regulatory Reform Act 2013, provides, at subsection (2):

- i. *“Day A is the day on which the complainant or applicant 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*
- 20           ii. *Day B is the day on which the complainant or applicant 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.”*

25           31. Subsection (3) goes on: *“In working out when the time limit set by section 123(1)(a) or 129(3) or (4) expires the period beginning with the day after Day A and ending with Day B is not to be counted.”*  
30

32. Under subsection (4), the section now provides: *“If the time limit set by section 123(1)(a) or 129(3) or (4) would (if not extended by this subsection) 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.”*

### **Discussion and Decision**

33. It is necessary to consider the claims made under the relevant statutory tests to which they are subject.

34. With regard to the unfair dismissal and unlawful deductions from wages claim, the test is whether the claim was submitted *“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.”*

35. In effect, there are two stages to this test: firstly, was it not reasonably practicable for the claimant to have submitted the claim within the three month period (suitably adjusted to take into account the Early Conciliation process); and if it was not, then was it submitted within such further period as the Tribunal considers to be reasonable?

36. It is well established that this is a high test for the claimant to overcome. In this case, the claimant’s employment ended without notice on 10 February 2016. Three months from that date would take the claimant to 9 May 2016.

37. The Early Conciliation process was commenced by the claimant’s notification to ACAS within that three month period, on 5 May 2016. Accordingly, the limitation period in this case ended one month after Day B, which here was 5 June 2016, and therefore took the claimant until 4 July 2015.

38. The claimant did not submit his claim by 4 July 2016. He sought to submit it by posting on that date, but it was not ultimately accepted by the Tribunal until the reconsideration process found in his favour on

27 September, and it was treated as having been accepted, for the first time, on 12 September 2016.

39. There is no doubt, then, that the claim was presented out of time.

5 40. Was it not reasonably practicable for the claimant to have submitted the claim in time? The claimant asserts that he suffers from a condition which causes him difficulty in reading and writing documents, namely dyslexia. There appears to have been no dispute about this assertion by the respondent. He also said that he has help from a friend to read and write correspondence. He did not specifically say that he had had  
10 assistance from that friend in putting together the ET1. It is clear, however, that he had access to legal advice in advance of submitting the ET1 in this case from Fife Law Centre.

15 41. The claimant attempted to submit his ET1 on the first occasion on 4 July by post, and the date stamp showing the receipt of the ET1 by the Tribunal was 11 July. It is not clear what happened in the interim period but that was the first day upon which the Tribunal received the ET1. What followed was a somewhat prolonged correspondence in which the claimant continued to insist for some weeks that he had presented the correct ECC number on his ET1, when in fact he had made an error in  
20 entering it on to the form.

25 42. The claimant gave evidence that he understood that he had one month after the date of issue of the ECC. That date he took to be 5 July, which is why he sent the form on 4 July. There is no evidence that he succeeded in presenting a claim form to the Tribunal by 5 July. The only evidence which exists as to the date of receipt of the form is the date stamp of 11 July. As a result, I am forced to conclude that the claim, albeit in incompetent form, was presented to the Tribunal on 11 July, some 6 days late.

30 43. The error may have come about due to the claimant's dyslexia, though no evidence was given on this point. The claimant was referred to as having "learning difficulties", a slightly ambiguous phrase. In my

judgment, the claimant, while clearly suffering from a condition which may well cause difficulties with the transfer of data from one place to another in written form, emerged as an intelligent and capable individual in his evidence.

5 44. It is not clear to me that it was not reasonably feasible for the claimant to have submitted his unfair dismissal and wages claims in time. He accepted that he left the presentation of the claim until the last minute because he wanted to know the reasons for his appeal having been turned down. In effect, the claimant chose to wait until the deadline  
10 before submitting his claim to the Tribunal. He must, therefore, accept the consequences of having done so.

45. There is no basis upon which it can be found that the claimant was prevented from submitting his claim by his dyslexia. He had access to legal advice from the Fife Law Centre prior to presenting his claim. He  
15 understood that there was a time limit within which he required to present his claim.

46. Accordingly, it is my judgment that the claimant cannot demonstrate that it was not reasonably practicable for him to have presented his claim of unfair dismissal or unlawful deductions from wages within the statutory  
20 deadline. Although he did present a claim to the Tribunal within 6 days of the end of the deadline, he did not present it successfully, owing to the fact that there was an error in the EC number on the form. He was able to correct that error when it became apparent to him that he required to seek assistance in order to have the rejection of the claim  
25 overturned. Since that assistance was available to him when he presented the claim initially it is my judgment that it was reasonably practicable for him to have sought such assistance and presented the claim in time.

47. The unfair dismissal and unlawful deductions claims are therefore out of  
30 time, and time barred, and are dismissed accordingly.

48. With regard to the claimant's claim of disability discrimination, it is important to recognise that the test to be applied is different, namely whether the claim was presented within such a time as the Tribunal regards as just and equitable.

5 49. It is necessary, in my judgment, to consider the period between 4 July  
and 12 September, during which the claimant corresponded with the  
Tribunal in an attempt to persuade it to accept his claim form. He  
appeared to have been confused about the reason why his form was  
rejected on two separate occasions, despite being informed that the  
10 reason was that the ACAS EC number was incorrect. The claimant also  
had access to legal advice through the Fife Law Centre and, for reasons  
which are not entirely clear, decided not to seek it on this particular  
matter until September.

15 50. That said, this is a different test to that of reasonable practicability. What  
distinguishes this case from one in which the ET1 is simply lodged four  
months late is that the claimant had attempted to lodge it within what he  
understood to be the time limit available to him, by sending it to the  
Tribunal by first class post on 4 July.

20 51. This is a case in which the claimant is suffering from dyslexia, a  
condition which in his case causes him difficulty with reading and writing  
documents. He said that he has access to a friend who assists him with  
such matters, though he did not precisely confirm in this case whether  
he had sought the assistance of that friend in submitting the ET1 in July.

25 52. I require to consider the balance of prejudice which would arise in this  
case in the event of each decision open to me. I have reflected upon  
this and have concluded that the claimant would suffer a considerably  
heavier burden of prejudice in the event that I were to refuse to allow the  
claim to proceed than the respondent if I were to allow it. The claimant  
would lose all right to make a claim before the Tribunal in respect of his  
30 employment with the respondent. He would have no further recourse to  
justice. His unfair dismissal claim having been dismissed, he would lose

his remaining cause of action. That is a draconian punishment for a claimant in his circumstances.

53. On the other hand, while the respondent would require to prepare and present a defence to a claim of discrimination if it is allowed to proceed, they would lose the windfall benefit of succeeding in a claim which has been dismissed for reasons outwith their control and relating to the claimant's failures. In my judgment, that balance falls heavily on to the claimant rather than on to the respondent.

54. It is my judgment, with some hesitation, that the claimant did present his claim for discrimination on the grounds of disability within such other time (beyond the 3 months period) as I consider just and equitable. The claimant may not have taken advice, which it was open to him to do, but it is clear from the evidence that he insisted that the claim was in its correct form because he had not realised the small but significant numerical error he had made in entering the EC number on the form. Given that this was the only error in the completion of the form, and that the passage of time is unlikely to have had a significant effect on the memories of witnesses or the capacity of the respondent to defend itself against this claim, it appears to me to be just and equitable, in all the circumstances, to permit the claimant's claim of discrimination on the grounds of disability to proceed.

55. Accordingly, the claimant's claims of unfair dismissal and unlawful deductions from wages are dismissed for want of jurisdiction, but his claim for discrimination on the grounds of disability is permitted to proceed.

56. A hearing on the merits of this case should now be listed, based on parties' responses to date listing letters to be issued with this Judgment. In addition, a short Preliminary Hearing, perhaps convened by telephone conference call, should be arranged in order to allow the Tribunal to issue directions in respect of the preparations for that hearing on the merits.

5 Employment Judge: Mr Murdo A MacLeod  
Date of Judgment: 3 March 2017  
Entered in Register: 7 March 2017  
And copied to parties.

10