



**EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case No: S/4103656/2018**

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**Held in Glasgow on 18 July 2018**

**Employment Judge: Rory McPherson**

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**Mr AS Gilchrist**

**Claimant  
In Person**

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**Argyle & Bute Council**

**Respondent  
Not Present and  
Not Represented**

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**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

The judgment of the Employment Tribunal is that under Section 23 of the  
25 Employment Rights Act 1996 the Tribunal does not have jurisdiction to hear the  
claimant's complaint for holiday pay which is dismissed.

**REASONS**

**Introduction**

**Preliminary Procedure**

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1. The present matter arose out of a dispute as to the payment of holiday pay.  
This hearing was appointed to consider the preliminary issue of whether the  
claim had been submitted in time or was time barred.

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2. The respondent had submitted an ET3 and were notified of the hearing but  
advised that they did not propose to attend.

**E.T. Z4 (WR)**

3. The Tribunal heard evidence from the claimant.

4. The Tribunal was also referred to documents provided by the claimant and  
5 where such documents are referred to they are described.

### Findings in fact

5. The claimant was employed as a school janitor with the respondent and had been employed since February 2010.

10 6. Due to an arthritic condition in his knee the claimant was on sick leave from around May 2017.

7. The claimant's employment with the respondent ceased due to retirement on 24 October 2017.

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8. In his ET1 the claimant identifies that his concerns related to holiday pay payments covering "*8 weeks holiday*" and "*any outstanding bank holidays for the year 2017*" prior to 24 October 2017.

20 9. Subsequent to the termination of employment the claimant received a last wage slip in November 2017. This wage slip was not provided by the claimant and the specific date of receipt is not clear beyond the claimant's explanation that it was received in November 2017.

25 10. G had sought to raise his concerns on the "*8 weeks holiday*" payment and "*any outstanding bank holidays for the year 2017*" with A&B by telephone on a number of occasions following the termination of his employment and the end of 2017. In particular G had left a number of telephone messages with A&B but had received no response.

30 11. The claimant made contact with ACAS in January 2018 to seek information. Following discussion with ACAS the claimant wrote by recorded delivery to the respondent on or about 7 January 2018 seeking their response to his concerns. The respondent responded on 12 January 2018 stating "*I am*

*writing to acknowledge your recorded delivery letter received by us on 11<sup>th</sup> January 2018. I have passed this letter to our Senior HR Manager, Mr Tom Kerr, who will be in touch with you as soon as possible.”*

12. The claimant thereafter waited for a response until on or about 24 January 2018 when he again made contact with ACAS to discuss the matter. No action was taken beyond making that contact and the claimant did not keep any record of his discussion with ACAS on that date.

13. The claimant, who not had sought legal advice, had believed at the time that making contact with ACAS had initiated any relevant claim although it was not suggested that any information received from ACAS had caused him to form that belief.

14. Subsequently the claimant initiated the Early Conciliation procedure and a certificate was issued dated 7 March 2018 and which confirmed that receipt by ACAS of the Early Conciliation Notification form was 5 March 2018.

15. The claimant subsequently submitted his ET1 which was received by the Tribunal on 26 March 2018.

## 20 **Submissions**

16. The claimant made oral submission to the effect, as he had indicated in his ET1 paragraph 15 that he had sought to engage with the respondent but they had consistently failed to substantively respond and that he had not received a final wage slip until a date in November.

## 25 **Relevant law**

17. Section 23 of the Employment Rights Act 1996 (ERA 1996) requires that a complaint in relation to a deduction from wages (which would include a failure to pay holiday pay due) must be presented within 3 months of the date of payment of the wages from which the deduction was made, subject to any extension of time as a result of the Early Conciliation provisions. ERA 1996 s23 (4) provides that an extension to the time limit may be granted if the

Tribunal is satisfied that it “*was not reasonably practicable for the complaint to be presented before the end*” of the three month period where the complaint is presented “*within such further period as the tribunal considers reasonable*”.

5 18. I am minded that there have been judicial attempts to establish a clear definition of “*reasonably practicable*”. In Palmer & Another –v- Southend On-Sea Borough Council [1984] IRLR 119 the Court of Appeal reviewed the authorities and concluded that “*reasonably practicable*” means “*reasonably feasible*”. In Asda Stores Ltd –v Kauser EAT/0165/07 Lady Smith at para 17  
10 described that the “*relevant test is not simply a matter of looking at what was possible but to ask whether, on the facts of the case as found, it was reasonable to expect that which was possible to have been done*”.

19. Section 207B of ERA 1996 provides that where a claimant who is still within the three month time engages ACAS Early Conciliation this has the effect of  
15 pausing the otherwise expiring time limit until such time as the Early Conciliation certificate is received, and, in such circumstances once Early Conciliation has ended a claimant has at least one month in which to present the claim.

**Discussion and decision**

20 20. Against the background that the claimant was actively engaging on his concerns with the respondent including but not restricted to the issue of a recorded delivery letter to the respondent on or about 7 January 2018 it is not considered that it can be said that it was not reasonably practicable for the complaint to be presented before the end of the relevant three month period.

25 21. In all the circumstances it is reasonable to expect that which was possible, specifically the lodging of the claim within time, to have been done.

30 22. Given that the claim was received by the Tribunal on 26 March 2018 it is not considered that the claim was presented within any reasonable period following upon the expiry of the three month time limit. Even if the wages were

paid on the last date in November being 30 November 2017, this claim would still have been presented outside the statutory time limit.

- 5 23. In all the circumstances ACAS Early Conciliation did not operate to extend the already expired time limit.

**Conclusion**

24. The claim was presented after the expiry of the three month time limit and there are no grounds to extend the time limit. The Tribunal has no jurisdiction to consider the claim.

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25. A copy of this judgment will be sent to ACAS.

15 Employment Judge: R McPherson  
Date of Judgment: 06 September 2018  
Entered in register: 07 September 2018  
and copied to parties