



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4107319/2018

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Held in Glasgow on 24 August 2018

Employment Judge: F J Garvie

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Mr D Glen

**Claimant
In Person**

Glencare Slaters Ltd

**Respondent
No Appearance**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that:-

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1. The respondent failed to pay to the claimant a redundancy payment on termination of his employment and it is ordered to pay to the claimant a redundancy payment of £7,579.500 (Seven Thousand, Five Hundred and Seventy Nine Pounds).

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2. The respondent failed to pay the claimant's holiday entitlement on termination of employment and it is ordered to pay to the claimant the sum of £1,119.30 (One Thousand One Hundred and Nineteen Pounds and Thirty Pence).

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3. The claimant was dismissed in breach of contract in respect of notice and the respondent is ordered to pay damages to the claimant in the sum of £6,708 (Six Thousand Seven Hundred and Eight Pounds).

REASONS

1. The claimant presented a claim, (the ET1) on 8 June 2018. An ACAS Early Conciliation certificate was issued, the date of receipt by ACAS being 7 June

E.T. Z4 (WR)

2018 and the date of issue also on 7 June 2018. The claimant gave the dates of his employment as being 16 March 1998 until 1 December 2017. He seeks a redundancy payment, outstanding holiday pay and notice pay. He specifies this at section 8.2 of the ET1.

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2. Section 8.2 also continued as follows:

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“The company closed its doors on 1 December 2017 and we were told that same day. I received my last pay from Glencare on Friday 8 December 2017 but did not receive redundancy or notice payment.

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Another ex-employee, Mrs Wendy Orr, did a letter for me and her and posted them to Glencare Slaters Limited on 4 December 2017 asking about redundancy and the notice payment but we did not hear anything back.

The office number for Glencare Slaters no longer works.”

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3. When the claim was presented, it was noted that it appeared to be timebarred and that standard timebar letters were to be issued. The file was not referred to an Employment Judge. The claim was acknowledged by Notice dated 14 June 2018 addressed to the claimant. The same Notice was sent to the respondent directing that if they wished to submit a response, (the ET3) they must do so by 12 July 2018. No response was received. The file was then referred to Employment Judge Frances Eccles who directed that the case should proceed to a Preliminary Hearing on timebar this had been identified as a preliminary issue. For whatever reason on receipt of that instruction, letters were sent to the claimant and to the respondent confirming the Final Hearing would proceed on 24 August 2018. It was not made clear either in the Notices dated 14 June 2018 nor in the further letters of 18 July 2018 that timebar had been identified although clearly should have been given the claim is, on the face of it, out of time. Instead, the Notices of 14 June 2018 refers to a Notice of Final Hearing to be held on 24 August 2018 at 10am.

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4. There was no one present for or on behalf of the respondent.
5. It was explained to the claimant that the clerk would remain present during the Hearing. The claimant duly gave evidence.

5 **Findings of Fact**

6. The Tribunal found the following essential facts to have been established.
7. The claimant's date of birth is 14 February 1982. He commenced employment with the respondent on 16 March 1998 and his employment ended on 1 December 2017, as already explained by him in the ET1 at section 8.2. He worked 39 hours per week and was paid a gross weekly wage of £559. As at termination of employment, the claimant was 35 years of age and he had completed 18 full years of service with the respondent.
- 15 8. The claimant could not remember his exact holiday entitlement but he knew that he had taken two weeks in the summer and that the respondent's premises were closed over the Christmas and New Year period each year. In addition, there were about a further five days and two statutory days' holiday which were given to all the employees. The claimant worked in the respondent's business along with two other individuals whom he referred to as being like him, "tradesmen". There were also two apprentices. The work they carried out was mostly slating. The claimant in his time had been an apprentice and had then qualified as a slater.
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- 25 9. The claimant explained that when the company closed, he was told this on 1 December 2017 and he did receive his final pay until the following Friday. He did not receive a redundancy payment or notice pay.
10. He explained that, in addition to himself and the other two tradesmen/slaters and the two apprentices, there was a secretary. This was Mrs Wendy Orr. The claimant understood from her that Mrs Orr drafted a letter to the respondent on his behalf and this was posted by her to the respondent on or
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about 4 December 2017. In the letter she enquired about redundancy and notice payments due to the claimant.

- 5 11. He did not hear anything back. As indicated, he did not see the letter which Mrs Orr drafted. The claimant did not subsequently see his two former colleagues after the respondent's business closed. They have some mutual friends but he has not had any further contact with them.
- 10 12. The claimant did not take any advice as to what he should do and, apart from Mrs Orr drafting and posting a letter on his behalf, he heard nothing further from the respondent. He did not contact, for example, the Citizens Advice Bureau. He thought he might have looked on a website but he was unclear which one this was or when he had done so. Eventually, he spoke to someone at ACAS but he was not able to provide any details of how and why this
15 contact with ACAS was made.
- 20 13. Following the termination of his employment, it was close to Christmas. The claimant did not make any enquiries about whether he was eligible for any benefits.
- 25 14. The claimant found some work in the building trade but this has been on a casual basis and he has been unable to find any permanent employment since his employment with the respondent ended.
- 30 15. The claimant was not aware that there were time limits to comply with if he wanted to submit a claim to the employment tribunals. He was ignorant of what steps he could take until as indicated above, he eventually contacted ACAS.
16. The ACAS Certificate was issued on the same date as the date of receipt by them on 7 June 2018.
17. As indicated above, the claimant seeks a redundancy payment, outstanding holiday pay and notice pay.

18. In his claim under section 9.2, he specifies this giving a breakdown for redundancy, holidays and notice pay.
- 5 19. He indicated that the redundancy sum was calculated using the gov.uk redundancy calculator. The amount sought for holidays was for two weeks being the balance of holidays due to him. He indicated that he was seeking one week's notice as he understood that was his entitlement as he was paid weekly. That is incorrect since he his statutory entitlement is based on his
10 lengthy of service and so he is entitled by law to the maximum 12 weeks' notice.
20. The claimant was unable to provide any further information.
- 15 21. It was explained to him that, in relation to a redundancy payment, this is dealt with in terms of section 164 of the Employment Rights Act, (the 1996 Act) and see below under the heading 'The Law'.
- 20 22. It was also explained that, in relation to entitlement to notice pay and holiday pay there is a three month time limit which is that before the end of the period of three months beginning with the effective date of termination, the complaint has to be submitted or 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

The Law

“164 Claims for redundancy payment

(1) An employee does not have any right to a redundancy payment unless, before the end of the period of six months beginning with the relevant date

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(a) the payment has been agreed and paid,

(b) the employee has made a claim for the payment by notice in writing given to the employer,

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(c) a question as to the employee’s right to, or the amount of, the payment has been referred to an employment tribunal, or

(d) a complaint relating to this dismissal has been presented by the employee under section 111

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(2) An employee is not deprived of his right to redundancy payment by subsection (1) if, during the period of six months immediately following the period mentioned in that subsection, the employee –

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(a) makes a claim for the payment by notice in writing given to the employer,

(b) refers to an employment tribunal a question as to his right to, or the amount of, the payment, or

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(c) presents a complaint relating to his dismissal under section 111,

(d) and it appears to the tribunal to be just and equitable that the employee should receive a redundancy payment.

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(3) In determining under subsection (2) whether it is just and equitable that an employee should receive a redundancy payment, an employment tribunal shall have regard to –

(a) the reason shown by the employee for his failure to take any such step as is referred to in subsection (2) within the period mentioned in subsection (1), and

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(b) all the other relevant circumstances”.

23. In relation to the claim for outstanding this is dealt with in terms of the Working Time Regulations 1998.

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24. Regulation 30 is as follows:

“30 Remedies

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(1) A worker may present a complaint to an employment tribunal that his employer –

(a) has refused to permit him to exercise any right he has

....

(b) has failed to pay him the whole or any part of any amount due to him under regulation 14 (2) or 16 (1)

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(2) Subject to regulations 30A and 30B, an employment tribunal shall not consider a complaint under this regulation unless it is presented

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(a) before the end of the period of three months beginning with the date in which it is alleged that the exercise of the right should have been permitted (or in the case of a rest period or leave extending over more than one day, the date in which it should have been permitted to begin) or, as the case may be, the payment should have been made;

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(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.”

25. Section 86 of the Employment Rights Act 1996 deals with the rights of an
5 employee to minimum notice on termination of employment.

26. This states as follows:

“86 Rights of employer and employee to minimum notice

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(1) The notice required to be given by an employer to terminate the contract of employment of a person who is being continuously employed for one month or more –

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(a) is not less than one week’s notice if his period of continuous employment is less than two years,

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(b) is not less than one week’s notice for each year of continuous employment if his period of continuous employment is two years or more but less than twelve years, and

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(c) is not less than twelve weeks’ notice if his period of continuous employment is twelve years or more.”

27. As with the holiday pay claim, the time limit for presentation of a complaint is before the end of the period of three months.

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28. Given the claimant’s employment was terminated on 1 December 2017, the three months’ expired on 28 February 2018.

Deliberation and determination

29. In relation to the redundancy payment, the Tribunal gave careful consideration to what was said by the claimant. It was satisfied from the claimant that Mrs

Orr had submitted a letter to the respondent in relation to notice and redundancy. Accordingly, the Tribunal concluded that this met the requirements set out in section 164 (1) in that in terms of section 164 (1)(b), a claim for the payment by notice in writing had been sent to the respondent before the end of the period of six months beginning with the relevant date and section 164 (2) directs that an employee is not deprived of his right to a redundancy payment by subsection (1), if during the period of six months immediately following the period mentioned in that subsection, the employee referred the issue to an employment tribunal as to his right to the amount of the payment.

30. The Tribunal was satisfied that, in this case, the claimant is entitled to a redundancy payment which is calculated based on his age and length of service. The calculation of the redundancy payment based on the claimant being aged 35 and date of dismissal with 18 full years' service and earning gross £559 per week and so this amounts to £7,579.50. This has been calculated in accordance with the Gov.UK calculator and a copy of that calculation will be enclosed with a copy of this Judgment.

31. Turning to the application for holiday pay and notice pay, as indicated the time limit is three months unless the Tribunal is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months and it is then presented within such further period as the Tribunal considers reasonable, where it is satisfied that it was not reasonably practicable to present the claim.

32. As indicated above, the claimant had assistance from Mrs Orr in that she sent a letter about redundancy and notice pay to the respondent. There is no mention from the claimant of her raising the issue of holiday entitlement that was outstanding.

33. The issue for determination here is that what is reasonably practicable is a question of fact and this is a matter for this Tribunal to decide.

34. In **Wall's Meat Co Limited v Khan** 1979 ICR52 the Court of Appeal said this:

5 “The test is empirical and involves no legal concept. Practical common sense is the keynote and legalistic footnotes may have no better result than to introduce a lawyer’s complications in what should be a layman’s pristine province. These considerations prompt me to express the emphatic view that the proper forum to decide such questions is the [employment] tribunal, and that their decision should prevail unless it is plainly perverse or oppressive.”

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35. The onus of proving that the presentation in time was not reasonably practicable rests with the claimant and that imposes a duty upon him to show precisely why it was that he did not present his complaint – **Porter v Bandrige Limited** 1978 ICR 943 CA.

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36. The issue of reasonably practicable has been considered over the years. A complete ignorance of the right may make it not reasonably practicable to present the claim in time. The ignorance itself must be reasonable.

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37. Here, it seems that the claimant relied on Mrs Orr to take steps on his behalf. He did not then follow up matters when nothing was forthcoming from the respondent. He mentioned having checked a website but was unable to say when he checked this and he was clear that he had not contacted the Citizens Advice Bureau. It was only much later on that he contacted ACAS apparently on 7 June 2018 since that is the date of receipt and issue by them of the EC Certificate.

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38. The case law on what is not reasonably practicable relates generally to unfair dismissal claims but it also applies in relation to where there is, as here a complaint, for outstanding holiday pay and statutory notice pay.

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39. There was no confusion here. The claimant just appears not to have been aware of what he should do next and he did not take any steps to consult anyone.

40. After considerable deliberation, the Tribunal concluded that it was satisfied that, in those circumstances, it was not reasonably practicable for the claimant to have presented the complaints in relation to holiday pay and notice pay in time, that is before the expiry of the three months which would have been 28 February 2018.

41. It was explained to the claimant that had he approached ACAS before 28 February 2018, then any time spent in ACAS would have been added on under the stop the clock provisions but he did not do so and so, by the time he contacted ACAS, his complaint in relation to holiday pay and notice pay was more than three months beyond the statutory three month period.

42. The Tribunal then had to consider whether, in those circumstances, the further period was reasonable.

43. It remains unclear to the Tribunal on what basis the claimant eventually contacted ACAS but given it was more than three months after the expiry of the original time limit, the issue was whether it was presented within a period that was then reasonable. The difficulty, of course, is that the claimant was not aware of the original three months' time limit. He had no information about the time limit so the issue for the Tribunal was whether it would be reasonable to extend time where he had no knowledge of the time limit, did not seek advice and so it took him another three months plus beyond the expiry of the original time limit.

44. After considerable deliberation, the Tribunal concluded that, in these unusual circumstances, it would be reasonable to allow the complaints in relation to holiday pay and notice pay to proceed albeit they are made out of time. It did so on the basis that given the claimant's ignorance of his rights and time limits that the further period beyond the original three months was reasonable.

45. Although this claim should have been heard as a Preliminary Hearing, HMCTS had failed to inform the claimant of this was what Judge Eccles had directed. It was explained at the end of this Hearing that if the Judge was satisfied that the case could proceed, then there was sufficient information to

deal with the application in relation to the redundancy payment as well as holiday pay and notice pay.

5 46. Having concluded that the complaint in relation to a redundancy payment was in time and that the complaints for holiday pay and notice pay should be allowed to proceed by extending time, the Tribunal further concluded that the claimant is entitled to the outstanding holiday pay sought of £1,119.30. His notice pay was calculated as £559.65 which does not accord with the figure given at section 6 where he refers to £559. In relation to notice pay, the
10 Tribunal was satisfied that the claimant is entitled to an award based on weekly pay of £559 which multiplied by 12 (being the statutory maximum) gives a figure of £6,708.

15 47. Accordingly, the respondent is directed to pay to the claimant a redundancy payment, holiday pay and notice pay as follows:

A redundancy payment on termination of his employment of £7,579.500;

20 Holiday pay on termination of employment of £1,119.30 and

Damages for the breach of contract in respect of notice £6,708.

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30 Employment Judge: F J Garvie
Date of Judgment: 06 September 2018
Entered in register: 07 September 2018
and copied to parties