



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case Number: 4106914/2017

Preliminary Hearing held in Glasgow on 27th June 2018

Employment Judge M Whitcombe

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Mr I Povse

**Claimant
In person**

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Innseagan House Hotel Limited

**First Respondent
Represented by:
Mrs Parker**

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Portsonachan Hotel Limited

**Second Respondent
Represented by:
Mrs Parker**

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Judith Elizabeth Parker

**Third Respondent
In Person**

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David John Parker

**Fourth Respondent
Represented by:
Mrs Parker**

JUDGMENT ON A PRELIMINARY ISSUE

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The judgment of the Tribunal is that all of the claims are dismissed because they were presented out of time and the Tribunal therefore has no jurisdiction to hear them.

REASONS

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Introduction

1. This Preliminary Hearing has been listed to consider jurisdictional time points or, more colloquially, the issue of “time bar”. That was identified as a preliminary issue by Employment Judge Doherty at a previous Preliminary Hearing for the purposes of case management held on 22nd February 2018.
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2. The Response was filed in the name of the First Respondent only. It was not necessary to consider the implications of that at this hearing since the time point applied equally to the claims against all Respondents.
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3. The Claimant represented himself at this Preliminary Hearing. All of the Respondents were represented by Mrs Parker, who is also the Third Respondent. Neither the Claimant nor Mrs Parker are legally qualified and I was careful to explain to them the issues to be determined and the procedure that would be adopted. At the end of the hearing I reserved my decision.
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Issues and Background Facts

4. The following paragraphs outline the context in which the time limit issues have arisen.
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5. In a claim form presented to the Tribunal on 8th December 2017 the Claimant brought the following claims:
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 - a. automatically unfair dismissal on the grounds of having made a protected disclosure and/or asserting a statutory right (sections 103A and 104 of the Employment Rights Act 1996);
 - b. unauthorised deductions from wages in that the Claimant was allegedly paid less than the national minimum wage (section 13 of the Employment Rights Act 1996 read with section 17 of the National Minimum Wage Act 1998);
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c. failure to make a payment in respect of accrued but untaken rights to paid annual leave as at the date of termination of employment (section 13 of the Employment Rights Act 1996 and/or regulations 14 and 30 of the Working Time Regulations 1998);

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d. failure to provide a written statement of particulars of employment (section 1 of the Employment Rights Act 1996);

e. failure to provide itemised pay statements (section 8 of the Employment Rights Act 1996).

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6. For present purposes all of those different types of claim have one thing in common: a claim form must normally be presented to the tribunal within the period of three months beginning with the effective date of termination (or the last deduction in any series so far as claims for unlawful deductions are concerned, or the date on which any payment in respect of paid annual leave should have been made), unless the claimant can show that it was “not reasonably practicable” to do so. See sections 11, 23(2) and (3) and 111 of the Employment Rights Act 1996 and regulation 30 of the Working Time Regulations 1998.

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7. All of that is now subject to the extensions of time potentially available as a result of ACAS early conciliation. The short point for present purposes is that in order to benefit from any extension of the three month period identified above, the early conciliation process must be initiated within that same period. A “late” initiation of early conciliation cannot revive a limitation period that has already expired (see section 207B(3) of the Employment Rights Act 1996).

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8. In this case early conciliation was initiated (“Date A”) on 19th October 2017. Early conciliation ended (“Date B”) on 21st November 2017.

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9. The Claimant does not argue that it was “not reasonably practicable” to bring

claims within the applicable limitation period. The tribunal's jurisdiction to hear the claims, and therefore the outcome of this Preliminary Hearing, turns solely upon my findings regarding the effective date of termination and the last deduction in the alleged series.

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The parties' contentions

The Respondents' position

10. All of the Respondents contend that the Claimant's employment terminated on 17th July 2017.

11. If that contention is correct, then the commencement of early conciliation on 19th October 2017 ("Date A", in the statutory language) was too late to generate an extension of the period within which a claim form should have been presented to the Tribunal. The unextended limitation date of 16th October 2017 would therefore continue to apply and the claim form presented on 8th December 2017 would therefore be presented well out of time.

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The Claimant's position

12. The Claimant's contention in the ET1 and at this hearing was that his employment came to an end on 25th July 2017.

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13. If that contention is correct, then the commencement of early conciliation on 19th October 2017 ("Date A") would be within the period of three months beginning with 25th July 2017 and would therefore lead to an extension of the normal limitation period. "Date B" was 21st November 2017 and therefore the new limitation date would be 21st December 2017 (based on "Date B" plus one month). That would in turn mean that a claim form presented on 8th December 2017 would be presented within time.

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Video Link

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14. At the Claimant's request he attended the hearing by video link. He would

otherwise have been unable to attend since he cannot afford to travel to the UK. For him, access to justice could only be achieved if he attended from Slovenia by video.

5 15. Unfortunately it did not prove possible to test the quality of the video link on the day prior to the hearing as the tribunal administration would have wished. The hearing was not without its problems. At times the quality of the link was not good and on more than one occasion it dropped altogether. On each occasion the hearing was adjourned for a short period until a satisfactory link
10 could be re-established. It seemed that the equipment being used by the Claimant was contributing to those difficulties. For example, the quality of the sound improved markedly once the Claimant began to use headphones and a microphone.

15 16. In order to allow for the difficulties experienced by all the hearing proceeded at a rather slow pace, probably taking 2 to 3 times as long as it might have done in person. That was necessary in order to ensure a fair hearing. At the end of the hearing I checked both with the Claimant and also with those present in the hearing room in Glasgow that they had (in the end) been happy
20 with arrangements. All confirmed that they had been. I am very grateful to the parties and to their witnesses for their persistence and also for the very considerable efforts made by the Tribunal staff to overcome technical difficulties and to achieve a fair hearing.

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Evidence

17. I heard evidence from the Claimant, who gave his evidence in the English
30 language through the video link. The Claimant did not call any other witnesses. He was cross-examined by Mrs Parker on behalf of the Respondents.

18. The Respondents called evidence from Mr Sparks (Food and Beverage Manager at a sister hotel) and Mr Smith (Manager). Mrs Parker did not herself give evidence, acknowledging that her knowledge of events was entirely based upon what she had been told by others. She was content to rely on the evidence given by others. The Claimant cross-examined those witnesses via video link.

Findings of Fact

19. Having heard the evidence and the parties' submissions I made the following findings of fact on the balance of probabilities. Since these facts all go to the question of the Tribunal's jurisdiction to hear the claims the Claimant bears the burden of proving those facts on the balance of probabilities.

Summary

20. In summary, I accept the Respondents' case regarding the effective date of termination of the Claimant's employment. I find that the Claimant's employment came to an end on 17th July 2017 as contended for by the Respondents and not 25th July 2017 as contended for by the Claimant. I do so because the Respondents' evidence was clear, consistent and corroborated. That can be contrasted with the Claimant's evidence which was equivocal, inconsistent and contradicted by his earlier statements. I therefore preferred the Respondent's evidence on the balance of probabilities.

Detail

21. The Claimant worked in various capacities for one of more of the Respondents from 18th February 2017. He was given accommodation in the grounds of the two hotels. In April 2017 he moved to the Innseagan Hotel near Fort William where he lived in a camper van within the hotel grounds. The Claimant was supplied with electricity through a connection to the van.

22. The Claimant was off sick from 27th June 2017 until 15th July 2017. He thinks that he is entitled to wages up to 11th July 2017 but not beyond. He does not think that he is entitled to wages up until 25th July 2017.

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23. The Claimant at first volunteered in his evidence in chief that he did not turn up for work after 11th July 2017, although he also gave entirely contradictory evidence in cross-examination that he carried on working until 25th July 2017. Later still in cross-examination, he said that his last working day had been on an unknown date in June. Neither of those additional answers sits easily with his belief that he is entitled to wages up to 11th July 2017 but not beyond.

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24. Later, the Claimant changed his evidence again, saying “I can’t remember the dates, it could be 17th July 2017”, and “employment terminated somewhere between 17th and 25th July 2017, I don’t know”. That is commendably frank, but does nothing to enhance the reliability of his evidence.

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25. The Claimant took issue with hygiene in the hotel kitchen and on 12th July 2017 he reported the matter to Environmental Health. They visited the kitchen the next day and closed it down. Shortly after the visit from Environmental Health the electricity supply to the Claimant’s van was withdrawn.

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26. The Claimant’s evidence was extremely inconsistent regarding the date he physically left the premises. At one point he said he was “kicked off” on 14th July 2017, but at another point in the evidence he said he was still present on 16th and 17th July and probably left on 22nd or 23rd July 2017. In response to a suggestion that he had left for good by 16th or 17th July he acknowledged that he had indeed left at one point (which he did not date precisely) but maintained that he returned on about 19th July 2017 following contact with the police in Fort William who had seized the keys to his van. The Claimant later accepted that he might have been in London on 18th, 19th and 20th July 2017, saying “possibly, I don’t know, I really don’t know the dates”. The Claimant also said that he was on site on 20th, 21st and 22nd July 2017.

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27. I am afraid that the Claimant's evidence was so inconsistent on this point that I was unable to give it much weight. I prefer the clear and consistent evidence of the Respondent's witnesses that the Claimant was not seen on site after 16th or 17th July 2017.

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28. The Claimant gave notice orally, and did not write a letter, send an email or send a text in that connection, whether at the same time or subsequently. On the crucial issue of *when* he gave notice, his evidence was unclear and equivocal. When first asked in cross-examination he failed to answer at all. He did not comment when it was put to him that he gave a week's notice on 12th July 2017, before leaving on 16th or 17th saying that he was never coming back.

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29. The Respondents' witnesses said that it had been their (hearsay) understanding that the Claimant had given a week's notice during the period 13th to 15th July 2017 and was not seen after that. Mr Sparks saw the Claimant's van on 13th July but did not seem him working at any point between 13th and 20th July 2017.

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30. Overall, the Claimant's evidence is inconsistent and generally unsatisfactory whereas the Respondent's is clear and apparently credible.

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31. I do however give weight to the Claimant's own prior written statement on the point, given that it is entirely consistent with the Respondent's case and inconsistent with his own. In an email to the Tribunal dated 1st February 2018 (which was not copied by him to the Respondents as it should have been) the Claimant stated clearly that "termination of employment was on 17th July 2017".

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32. I find on the balance of probabilities that the Claimant probably did give a week's notice at some point between 13th and 15th July 2017 but, in breach of contract, was neither ready nor willing to work in accordance with that contract during the notice period, despite being fit enough to do so from at least 15th July 2017. I also find that the Claimant left site entirely never to

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return on 17th July 2017. From that date he was not merely in breach of contract by failing to present himself for work, he also indicated by his conduct that he actually resigned with immediate effect on the date of his departure. As the Claimant stated in his email of 1st February 2018, and as the Respondent stated in its Response (ET3), the effective date of termination was 17th July 2017.

Reasoning and Conclusions

33. I therefore find that the last day of the Claimant's employment was 17th July 2017. The date of the last deduction in any series of deductions, and the date on which any payment in respect of untaken entitlement to paid annual leave should have been paid was also, at the latest, 17th July 2017.

34. Time therefore began to run in all claims on 17th July 2017. The early conciliation notification came more than three months later on 19th October 2017, and therefore the primary limitation period was not extended by early conciliation. The claims were therefore presented well out of time on 8th December 2017. The Claimant does not argue that it was for any reason "not reasonably practicable" to claim within time.

35. All of the claims currently before the Tribunal are therefore dismissed on the basis that the Tribunal has no jurisdiction to hear them.

Employment Judge M Whitcombe

Dated: 4th July 2018

JUDGMENT SENT TO THE PARTIES ON: 11 July 2018