



**EMPLOYMENT TRIBUNALS (SCOTLAND)**

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**Case No: S/4104521/2017**

**Held in Glasgow on 15 May 2018**

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**Employment Judge Lucy Wiseman**

**Mr Martin Porter**

**Claimant  
In Person**

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**Chief Constable of the Police Service of Scotland**

**Respondent  
Represented by:  
**Mr D Campbell -  
Solicitor****

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**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

25 The Tribunal decided:

- (1) the claimant is personally barred from pursuing the claim because he entered into a compromise agreement;
- (2) the claim was presented late and a Tribunal does not have jurisdiction to determine it and
- 30 (3) the claim is, for these reasons, dismissed.

**REASONS**

4. The claimant presented a claim to the Employment Tribunal on 8 September 2017 alleging he had made protected disclosures and had suffered detrimental treatment because of having made the protected disclosures.
5. The respondent entered a response denying the claim and asserting the claimant could not proceed with the claim because he had previously entered into a compromise agreement and the claim was time barred.
6. A Preliminary Hearing took place on 9 November 2017 at which the claimant was directed to provide further details of the protected disclosures said to have been made, to whom, when and details of the detriments said to have occurred. The claimant provided a document (respondent's document 5) setting out details of six disclosures said to have been made prior to a compromise agreement being signed in December 2012, and one disclosure said to have been made to the Chief Constable on the 7 August 2017. The document also detailed the detriments said to have occurred.
7. The Preliminary Hearing today was arranged to determine:-
- (i) whether the claimant is personally barred from pursuing the claim (or part thereof) because he entered into a compromise agreement;
  - (ii) whether the claim is time barred and
  - (iii) the issues to be determined should the claim proceed to a final hearing.
8. The Preliminary Hearing was, with the agreement of both parties, restricted to dealing with issues (i) and (ii).
9. I heard evidence from the claimant. I was also referred to a number of documents produced by each party. I, on the basis of the evidence before me, made the following material findings of fact.

**Findings of fact**

10. The claimant held the office of Constable with Strathclyde Police from 27 December 1984 until 16 December 2012, when he was retired by Strathclyde Joint Police Board (the police authority for the police force at that time) on the grounds of ill health.

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11. The claimant presented a claim to the Employment Tribunal on 31 December 2011 (respondent's documents 6). The complaint concerned allegations of making protected disclosures and suffering detrimental treatment which impacted on his health.

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12. The claimant presented a second claim to the Employment Tribunal on 14 February 2012 (respondent's document 18). The complaint concerned disability discrimination.

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13. A third claim was presented on 17 June 2012 concerning allegations of protected disclosures and detriment.

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14. The remedy sought by the claimant in the first and second claims was "reimbursement of lost earnings ... to continue until retired on medical grounds or certified fit for duty.." The claimant had, during a period of ill health absence, exhausted his entitlement to sick pay. He made a request of the Chief Constable to reinstate his salary because he had commenced Employment Tribunal proceedings.

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15. The claimant was, at the same time as pursuing the claims to an Employment Tribunal, seeking ill health retirement. The claimant (who was also a Police Federation representative) was represented during the ill health retirement process by a firm of solicitors (Hughes Dowdall) instructed by the Police Federation.

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16. The claimant was retired on ill health grounds, and his last day of service was the 16 December 2012. The claimant appealed that decision and was successful in having his retirement redefined as "injured in the execution of

duty". This process took a number of years and the decision to redefine the claimant's retirement was ratified in April 2017.

5 17. The claimant was also represented by Mr Foster of Hughes Dowdall in connection with the Employment Tribunal claims.

18. The respondent's representative, Mr Campbell, informed the claimant's representative, Mr Foster of Hughes Dowdall, that the claimant had made a request of the Chief Constable, for salary to be reinstated. This matter was within the knowledge of the claimant and his legal representative at the time the Compromise Agreement was entered into.

19. A compromise agreement was agreed to resolve the three claims presented by the claimant to the Employment Tribunal. The claimant had an opportunity to discuss the Compromise Agreement with Mr Foster, and received advice regarding the consequences of entering into the Agreement.

20. The Compromise Agreement (respondent's document 32) was signed by the claimant and witnessed by Mr Foster on 19 December 2012; and signed by Mr Campbell and witnessed on 3 January 2013.

21. The Compromise Agreement was in the following terms

25 *"This Agreement has effect for the purposes of compromising by means of full and final settlement any and all of the following claims which Mr Porter has or may have against the Chief Constable arising out of his employment, including without prejudice to that generality:-*

(i) *any claim pursuant to the Equality Act 2010, as amended, in regard to any alleged act of disability discrimination;*

30 (ii) *any claim pursuant to the Employment Rights Act 1996 as amended in regard to any alleged protective [sic] disclosure;*

(iii) *any claim howsoever arising out of the matters set out more fully in the Employment Tribunal claims having reference numbers 4100148/2012; 4101727/2012 and 4106493/2012 initiated by Mr Porter at the*

*Employment Tribunal, Glasgow, in various stages in 2012 against the Chief Constable (and others, whether excluded from any claim by any concession or decision in those processes) whether arising out of statute or common law.”*

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22. The three Employment Tribunal claims were withdrawn.

23. The claimant presented a claim to the Employment Tribunal on 8 September 2017. The claim asserted the claimant had made protected disclosures regarding the concealment of information lawfully due to him, which had caused delay in the progression of the appeal and which had damaged his health.

24. The claimant noted on the claim form that the remedy he sought was wages for the period of the delay in the medical retirement appeal process; a retirement employment reference; an exit interview with the Deputy Chief Constable and a jubilee medal.

25. The claimant made a Subject Access Request for information in connection with his appeal in July 2014. The respondent concluded their search for information and informed the claimant in July 2016 that the information was missing.

26. The claimant acknowledged he was aware of the time limits for raising a claim with the Employment Tribunal. He also acknowledged that he had taken a decision not to raise a claim at this time because he “had to ensure justice was not defeated” by raising the claim.

### **Respondent’s submissions**

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27. Mr Campbell submitted the claimant was personally barred from pursuing the claim (which failing, a substantial part of the claim) on the grounds of his previously having entered into a Compromise Agreement. Mr Campbell referred to the respondent’s document 5, being the claimant’s further

particulars of the alleged protected disclosures and detriments. He understood from that document and the claimant's evidence that disclosures 1 – 6 had occurred prior to the Compromise Agreement having been signed, and had been compromised. One further disclosure was set out on page 9 of the document and was described as being a "post compromise agreement disclosure". Mr Campbell submitted, the further matters raised by the claimant were also compromised.

28. Mr Campbell referred the Tribunal to Section 203 Employment Rights Act and submitted the matters compromised fell within this section. The claimant had received independent legal advice from a relevant independent adviser and had stated in evidence that the compromise agreement "concluded everything regarding the matters raised".

29. Mr Campbell referred to the case of **University of East London v Hinton 2005 ICR 1260** where the Court of Appeal stated the key question was how the compromise agreement related to the employee's particular complaint. Further, that since the compromise agreement failed to state expressly the particular statutory provision or to supply a description of the legal nature of the factual basis of any proceedings "arising under statute" or to mention public interest disclosures or any detriment suffered by the employee, the appeal would be allowed.

30. Mr Campbell referred the tribunal to paragraph 24 of the Judgment and submitted there was reference in the compromise agreement in this case to the three claims brought by the claimant. Further, the compromise agreement was sufficiently clear and specific to knock out this claim (or a large part of it).

31. Mr Campbell also referred to **Hilton UK Hotels Ltd v McNaughton EATS/0059/04** and to paragraph 20 of the Judgment where it was noted that the statutory requirement that a compromise agreement "must relate to the particular complaint" does not limit its cover to complaints that have already been presented to an Employment Tribunal (*Hinton*). However, a "blanket agreement" simply signing away all an employee's tribunal rights, will not do

(*Lunt*). The actual or potential claim must be identified by a generic description or a reference to the section of the statute giving rise to the claimant. Also, whilst all parties may agree that a compromise agreement is to cover future claims of which an employee does not and could not have had knowledge, to do so effectively, the terms of their agreement must be absolutely plain and unequivocal.

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32. Mr Campbell submitted the matters the claimant raised in these proceedings (as set out in paragraph 8.2 of the claim form) were covered by the compromise agreement or flow naturally from it. The claimant seeks reinstatement of wages: the first two claims were raised to address this. The correspondence between Mr Campbell and Mr Foster referred to the claimant having raised this issue, and therefore, it was submitted, there could be no doubt this was included in the compromise agreement. The reference/service letter also flowed from this. The medal and the exit interview fall to be considered differently, but can be seen as matters flowing naturally from the conclusion of the claimant's service. Mr Campbell submitted these matters were covered by the compromise agreement.

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33. Mr Campbell next referred the Tribunal to Section 48 Employment Rights Act which sets out the time limit for presenting a claim regarding protected disclosures and detrimental treatment. He referred the tribunal to the cases of **Flynn v Warrior Square Recoveries Ltd 2014 EWCA Civ 68** at paragraph 6; and **McKinney v Newham London Borough Council 2015 ICR 495** at paragraph 8 as authority for his position that time for presenting a claim starts to run from the date of the employer's act or failure to act rather than from the date when the detriment is first suffered, or when the employee first learned of it.

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34. Mr Campbell also referred to **Dedman v British Building and Engineering Appliances Ltd 1973 ICR 53** and **Walls Meat Co Ltd v Khan 1979 ICR 52** as authority for the approach to the issue of reasonable practicability. Mr Campbell submitted the claimant had, during his evidence, conceded he took a deliberate decision in 2016 not to raise the proceedings. He waited for a

decision to be taken regarding his belief documents and/or information had been destroyed.

5 35. Mr Campbell submitted it had been reasonably practicable for the claim to be presented within three months of the claimant learning information had been destroyed. The claim was late and had not been presented within a further reasonable period.

10 36. Mr Campbell invited me to dismiss the claim.

### Claimant's submissions

15 37. Mr Porter sought to challenge the compromise agreement on the basis (i) Mr Foster had not been an independent legal adviser because he had been appointed by the Chief Constable; (ii) the terms of the agreement were not sufficiently specific to exclude this claim inasmuch as it was not possible to compromise something which had not yet happened; (iii) it was not possible to compromise the issue of the certificate of service/reference or the medal because they were statutory matters and (iv) the claimant had, at the time of signing the compromise agreement, lacked the mental capacity to understand it.

20 38. Mr Porter referred to **Industrious Ltd v Horizon Recruitment UKEAT/0478/09** and to paragraph 27 of the Judgment.

25 39. Mr Porter referred to section 203 Employment Rights Act and to the phrase "particular proceedings". He submitted the only matter referred to was the claims. Further, the wording of section (ii) of the agreement was too wide and could not cover disclosures not already made; and the reference to "any claim" was also too wide. Mr Porter submitted Mr Foster had not been an independent advisor because he had been acting for the employer/associated employer. Mr Foster was not the claimant's solicitor: he was the Federation's solicitor. The Police Federation is an organisation which is sub-servient to the Chief Constable.

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40. Mr Porter confirmed he had produced medical reports in the documents he had brought to the tribunal today.

5 41. Mr Porter agreed Mr Campbell had been right in stating the claimant chose not to report matters in the early stages due to the situation in which he found himself. Mr Porter submitted that due to the gravity of the consequences of raising a claim, it had not been reasonable or practicable for him to do it earlier.

10 42. Mr Porter's status had changed in April 2017. The fact there had been a decision not to amend his certificate of service was a detriment and this had occurred in the last 3 months.

15 43. Mr Porter told the tribunal he had been stuck in a horrible situation and could not come to an employment tribunal without it defeating the ends of justice.

### **Discussion and Decision**

20 44. I firstly had regard to the issue of the compromise agreement. Section 203 Employment Rights Act provides that any provision in an agreement is void in so far as it purports to preclude a person from bringing any proceedings under this Act before an Employment Tribunal. There are, however, a number of exclusions to this general provision, and one such exclusion is set out in  
25 section 203(2)(f), which provides that the general rule does not apply to any agreement to refrain from instituting or continuing any proceedings if the conditions regulating settlement agreements (formerly compromise agreements) under this Act are satisfied in relation to the agreement.

30 45. The conditions regulating settlement agreements are:-  
a) the agreement must be in writing;  
b) the agreement must relate to the particular proceedings;  
c) the employee or worker must have received advice from a relevant independent adviser as to the term and effect of the proposed agreement

and in particular its effect on his ability to pursue his rights before an Employment Tribunal;

- d) there must be in force, when the adviser gives the advice, a contract of insurance or an indemnity provided for members of a professional body covering the risk of a claim by the employee or worker in respect of loss arising in consequence of the advice;
- e) the agreement must identify the adviser and
- f) the agreement must state that the conditions regulating settlement agreements under this Act are satisfied.

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46. Mr Porter's first challenge related to whether Mr Foster was an independent legal adviser. The claimant described Mr Foster as having been instructed by the Chief Constable. I understood Mr Porter's challenge was based in the fact that only police constables can be a member of the Police Federation; police constables are subject to the control and direction of the Chief Constable and therefore the Federation came under the control of the Chief Constable. I could not accept Mr Porter's assertion the Police Federation came under the control of the Chief Constable. The Police Federation is a staff association formed to represent the interests of its members. This sometimes brings the Police Federation into conflict with the Chief Constable and it sometimes means the Federation support claims brought by officers against the Chief Constable. The Police Federation instructs its own solicitors to act on its behalf or on the behalf of its members. I could not, against that background, accept the claimant's assertion that the Police Federation was under the control of the Chief Constable.

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47. Mr Porter also described the Federation as an associated employer. I could not accept this suggestion because there was no basis for asserting the Police Federation employed the claimant.

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48. I next considered the terms of the compromise agreement. Clause 2 of the agreement was in the following terms:

*"This Agreement has effect for the purposes of compromising by means of*

*full and final settlement any and all of the following claims which Mr Porter has or may have against the Chief Constable arising out of his employment, including without prejudice to that generality:*

- 5 (i) *any claim pursuant to the Equality Act 2010 as amended, in regard to any alleged act of disability discrimination;*
- (ii) *any claim pursuant to the Employment Rights Act 1996 as amended in regard to any alleged protective [sic] disclosure;*
- 10 (iii) *any claim howsoever arising out of the matters set out more fully in the Employment Tribunal claims having the reference numbers 4100148/2012; 4101727/2012 and 4106493/2012 initiated by Mr Porter at the Employment Tribunal, Glasgow, in various stages in 2012 against the Chief Constable (and others, whether excluded from any claim by any concession or decision in those processes) whether arising out of statute*
- 15 *or common law”.*

49. The cases to which I was referred provide useful guidance in respect of the matters raised by Mr Porter regarding the level of specification required and whether it is possible to compromise future claims which have not yet

20 occurred.

50. In **Lunt v Merseyside Tec Ltd 1998 ICR 17** the case involved an employee who wrote to her employer stating she was suffering from a stress related illness caused by harassment, victimisation and sex discrimination and

25 wished to agree a settlement. A compromise agreement was entered into whereby the employer agreed to terminate the employee's employment for reasons of ill-health and to make specified payments to the employee in return for which the employee agreed to accept in full and final settlement of all claims for unfair dismissal, redundancy and breach of contract. The employee

30 subsequently brought a claim of sex discrimination, unfair dismissal, victimisation and breach of contract. The EAT upheld the tribunal's decision the employee was precluded from proceeding with the claim of unfair

dismissal, victimisation and breach of contract, but could proceed with the claim of sex discrimination.

51. In **Hinton** (above) it was stated, at paragraph 24, that *“If actual proceedings are compromised it is good practice for the particulars of the proceedings and of the particular allegations made in them to be inserted in the compromise agreement in the form of a brief factual and legal description.”*

52. In **Hilton UK Hotels Ltd** (above) the EAT, in its conclusions at paragraph 20 of the Judgment, set out the relevant legal principles as follows:

*“Firstly, no compromise agreement can have the effect of excluding a future claim under the Equal Pay Act unless it complies with the requirements of the provisions of section 77 of the Sex Discrimination Act to which we have referred. Secondly, the statutory requirement that a compromise agreement “must relate to the particular complaint” does not limit its cover to complaints that have already been presented to an employment tribunal (Hinton). Thirdly, a “blanket agreement” simply signing away all an employee’s tribunal rights, will not do (Lunt). The actual or potential claim must at least be identified by a generic description or a reference to the section of the statute giving rise to the claim (Hinton). Fourthly, whilst parties may agree that a compromise agreement is to cover future claims of which an employee does not and could not have had knowledge, to do so effectively, the terms of their agreement must be absolutely plain and unequivocal. Fifthly when interpreting a parties’ contract, the terms of the parties’ contract may be such that it is permissible to consider parole evidence as to the state of knowledge of the parties at the time that the contract was made.”*

53. There was no dispute regarding the fact the claimant’s previous claims involved allegations of having made protected disclosures, suffering detrimental treatment and disability discrimination. There was also no dispute regarding the fact the remedy sought by the claimant included

reinstatement/reimbursement of wages to continue until retired on medical grounds or certified as fit to return to work.

54. The current claim is one of having made protected disclosures and suffering  
5 detrimental treatment. The remedy sought included wages for the period of the medical retirement process resulting in the successful appeal that his health issues were due to an injury in the execution of duty as a police officer.

55. I noted the issue of delay was raised in both claims.

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56. Mr Porter sought to argue that the terms of the compromise agreement were not sufficiently specific to compromise the current claim, and that it was not possible to compromise a future claim. I considered the terms of the compromise agreement were clear and specific as to the claims and types of  
15 claims included in the agreement. The agreement referred to claims the claimant “had or may have” against the Chief Constable, and it referred to a claim brought under the Employment Rights Act in regard to any alleged protected disclosure. I decided, for these reasons, that I could not accept the claimant’s assertion the agreement was not sufficiently specific.

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57. I have set out the relevant authorities to which I was referred and these authorities made clear that it is possible to compromise future claims provided the terms of the agreement are clear. I considered the terms of the compromise agreement were clear insofar as they related to claims of  
25 disability discrimination and claims regarding protected disclosures.

58. I decided the claimant compromised the claims he had against the Chief Constable, and he also compromised claims he may have against the Chief Constable arising out of his employment and in regard to any alleged  
30 protected disclosures. I acknowledge the claimant’s argument that the current claim concerns a future alleged disclosure, however I considered the key point to be the type of claim brought by the claimant. I was satisfied the type of claim – being protected disclosures – was compromised.

59. I also had regard to the fact the claimant accepted Mr Campbell had written to Mr Foster, his legal representative, to inform him the claimant had raised the issue of reinstatement or reimbursement of wages with the Chief Constable. This happened prior to any discussion regarding the compromise agreement. I was accordingly satisfied that both the claimant and his legal representative were aware of this issue at the time of the compromise agreement being discussed and signed.
60. Mr Campbell acknowledged the service certificate, exit interview and jubilee medal were not remedies previously sought by the claimant and arguably were not covered by the compromise agreement. I considered, however, that these matters are not free-standing claims: they describe the alleged detrimental treatment suffered by the claimant because he made a protected disclosure. I concluded that if the claim regarding an alleged protected disclosure cannot proceed, the alleged detrimental treatment also cannot proceed.
61. The final challenge raised by the claimant was that he was not mentally able, at the time of signing the compromise agreement, to understand its effect. The claimant, in his documents for this hearing, produced a number of medical reports. I noted the medical reports did not deal specifically with the issue of the claimant's mental ability to understand and enter into a compromise agreement.
62. I further noted the claimant was, at the time of the compromise agreement, going through an ill health retirement process. I inferred from this that it would have been open to either party to seek guidance regarding the claimant's ability to enter into and understand a compromise agreement should there have been any concerns about this at the time. This issue was not raised at the time, and indeed has not been raised by the claimant before today.
63. I acknowledge the claimant's ill health, but in circumstances where there is no medical evidence to support the claimant's position that he was mentally unfit

to understand the consequences of entering into a compromise agreement, I could not accept his submission regarding this matter.

5 64. The claimant referred me to two case authorities, and I have had regard to those cases (in respect of the tribunal's jurisdiction to consider whether a compromise agreement is void) in reaching my decision.

10 65. I, in conclusion and having had regard to all of the points set out above, decided the claimant cannot proceed with the current claim because he entered into a compromise agreement.

15 66. I next had regard to the issue of timebar. I had regard to the terms of section 48 Employment Rights Act which sets out the time limit for bringing a claim to the Employment Tribunal. The section states that an employment tribunal shall not consider a complaint unless it is presented before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates 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 of  
20 three months.

25 67. The first issue for the tribunal to address is the act or failure to act about which the claimant complains. There was a difficulty with this because the claimant was not able to clarify this issue when asked about it. I accordingly had regard to the claimant's document in which he set out the alleged protected disclosures and detrimental treatment (respondent's document 5). I noted the protected disclosure said to have taken place after the compromise agreement had been signed occurred on the 7 August 2017. The document did not however set out the detrimental treatment said to have occurred  
30 because of this protected disclosure having been made.

68. I also had regard to the claim form (respondent's document 1) which set out a short summary of events leading to the claimant's appeal and the fact his retirement was redefined as being an injury in the execution of duty. This

5 decision, the claimant states, was ratified by the Police Authority on or about 17 April 2017, with the Police then being notified of the status change. The claimant asserted he is being treated differently to other officers who have been injured in the execution of their duty, and he is seeking reinstatement of wages for the period of the delayed medical retirement process. The delay in the medical retirement process is linked to the claimant's assertion that information was destroyed or concealed. The claimant told the tribunal that he learned of the destruction of data in July 2016.

10 69. I could not reconcile the fact the matters set out in the claim form occurred prior to the claimant's position that his last protected disclosure occurred in August 2017. It appeared to me that whilst there was an assertion that a protected disclosure was made in August 2017, there was no assertion that detrimental treatment had occurred because of that disclosure. The complaint  
15 in respect of that disclosure is that no action was taken regarding the matters raised.

70. I concluded, on the basis of the information before me and having had regard to the fact the claimant's focus was on the issue of destruction (and/or  
20 concealment) of information, that July 2016 was the key date, because that is when the claimant said he learned the information was missing.

71. The claim form was presented on 8 September 2017 which is more than a year after the claimant learned the information was missing. The claim is late.  
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72. The claimant sought to argue that it had not been reasonably practicable for him to present the claim in time because presenting a claim earlier would have "defeated the ends of justice". The claimant accepted he was aware of the right to bring a claim to the Employment Tribunal and aware of the time limits  
30 for doing so. The claimant's clear evidence to the tribunal was that he took a deliberate decision to delay presentation of his claim, due to the situation he was in.



73. I considered the crucial facts to be that the claimant knew he could bring a claim; he knew of the time limits for doing so and deliberately decided to delay presentation of the claim. I considered that in those circumstances it was reasonably practicable for the claimant to bring the claim but he chose not to do so. The claim is late and, because it is late, a tribunal does not have jurisdiction to determine it.

74. I, in conclusion, decided:-

- (i) the claimant is personally barred from proceeding with the claim because he entered into a compromise agreement and
- (ii) that in any event, the claim is time barred.

75. The claim is dismissed for these reasons.

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Employment Judge: Lucy Wiseman  
Date of Judgment: 30 May 2018  
Entered in register: 06 June 2018  
and copied to parties

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