

**EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case No: S/4106852/2017**

**Held in Glasgow on 15 March 2018**

**Employment Judge: Lucy Wiseman**

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**Mr Craig McLuskey**

**Claimant  
In Person**

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**Scottish Ministers**

**Respondent  
Represented by:  
Ms E Smith -  
Solicitor**

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**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

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1. The Tribunal decided there was jurisdiction to determine the claim because it was not reasonably practicable for the complaint of unfair dismissal to be presented on time and it was presented within such further period as was reasonable, and it would be just and equitable to allow the complaint of discrimination because of disability to proceed.
2. The claim will now proceed to be listed for a final Hearing.

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**REASONS**

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1. The claimant presented a claim to the Employment Tribunal on 30 November 2017 alleging he had been unfairly dismissed and discriminated against because of disability.
- 5 2. The respondent entered a response admitting the claimant had been dismissed, but denying the dismissal was unfair and denying the allegations of discrimination.
3. The Hearing today was a Preliminary Hearing to determine the issue of time  
10 bar.
4. I heard evidence from the claimant and I was referred to a jointly produced file of documents. I, on the basis of the evidence before me, made the following material findings of fact.

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**Findings of fact**

5. The claimant suffers from Hemiplegic Migraines, a condition brought on by stress. The condition impacts on brain cells and affects memory and  
20 movement. A hemiplegic migraine could be compared to a mini stroke.
6. The claimant commenced employment with the respondent on 3 August 2015 on a modern apprenticeship.
- 25 7. The claimant's employment ended on 2 August 2017.
8. The claimant understood he was a member of the PCS trade union. He had completed an application form for membership as part of the Induction process during the first two weeks of employment. He had subsequently  
30 received assistance from the local branch of the trade union.
9. The claimant was accompanied by Mr Nigel Cameron (trade union representative) at a meeting on 21 June 2017 to discuss his position and at

the appeal hearing on the 26 July 2017. Mr Cameron also submitted the grounds of appeal for the claimant.

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10. The claimant was advised, following his appeal being unsuccessful, that he could take a claim to an Employment Tribunal. The claimant contacted Mr Stephen Murray, PCS Secretary in Glasgow, on 3 August, and told him he would like to consider taking his case to a Tribunal.
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11. The claimant was not advised either by Mr Cameron or Mr Murray of the time limits for presenting a claim to an Employment Tribunal.
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12. The claimant was devastated at losing his job: it was the reason he got up out of bed in the morning. The claimant had become depressed during the appeal process and upon learning of the appeal outcome he was in despair.
13. The claimant believed, having spoken to Mr Murray on 3 August, that the trade union would take care of things for him regarding his claim.
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14. The claimant's mother, who is a long standing PCS member, received and dealt with communication from PCS on behalf of the claimant.
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15. The claimant attended at his doctor on 23 August and was prescribed an antidepressant. He was also referred to the Primary Care Team who in turn referred him to an organisation called Stepping Stones, who provide counselling.
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16. The claimant estimated it had taken 3/4 weeks for the antidepressant to start having an effect.
17. Mr Murray, PCS, contacted the union's legal team but an issue arose because the claimant's name could not be found on the membership list. Mr Murray knew, by 14 September, that the union centrally could not find any

record of the claimant having been a member. Mr Murray however believed his office had sent the claimant's membership form to PCS headquarters in 2015 when the claimant commenced employment. Mr Murray emailed headquarters to ask if, in the circumstances, anything could be done for the claimant.

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18. Mr Murray's request provoked considerable debate and requests for information which Mr Murray provided. He received confirmation on 26 October that as no trace of the claimant being a member could be found, the trade union could not offer support.

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19. Mr Murray informed the claimant's mother of this on 27 October. The claimant's mother told him on 31 October that the trade union could not take his case. The claimant's mother had delayed in telling the claimant because it was bad news following closely upon news the claimant's aunt had passed away suddenly.

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20. The claimant contacted the Citizens Advice Bureau for advice, but could not obtain an appointment until the following week.

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21. The claimant contacted some local solicitors but did not have the requested £300 to attend for an appointment to obtain advice.

22. The claimant contacted a No-Win-No-Fee company and was advised, on 15 November, that his claim was out of time and they would not take his case.

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23. The claimant contacted ACAS. The early conciliation certificate (document 9) confirmed the date of receipt by ACAS of the early conciliation notification was 20 November and the date of issue by ACAS of the certificate was also the 20 November 2017.

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24. The claimant presented a claim by post to the Employment Tribunal on 30 November 2017.

**Claimant's submissions**

25. Mr McLuskey invited the Tribunal to allow his claim to proceed late because he had not known of the time limit and had put the matter into the hands of the trade union in good faith. He had been very depressed and dispirited at the time and had done what he could once he had been told the union would not take on his case.

**Respondent's submissions**

26. Ms Smith referred to Section 111 Employment Rights Act which sets out the time limit for bringing a claim of unfair dismissal. The effective date of termination was 2 August 2017 and so the last day on which the claim could be presented was 1 November 2017. The claimant had not presented his claim, or commenced early conciliation, within the time limit. The claim had been presented late.

27. Ms Smith submitted the burden of proving that it was not reasonably practicable to present the claim in time rested with the claimant.

28. The claimant stated he did not know the time limit and was not told of the time limit. The correct test to apply is not whether the claimant knew of his rights but whether he ought to have known of them and, where a claimant is generally aware of his rights, ignorance of the time limit is not acceptable as a reason for delay (***Porter v Bandridge Ltd [1978] ICR 943***).

29. The claimant, knowing of his right to complain of unfair dismissal, was under an obligation to seek information and advice about how to enforce that right (***Trevelyan's (Birmingham) Ltd v Norton [1991] ICR 488***).

30. Ms Smith submitted the Tribunal needed to be satisfied the claimant's ignorance of the time limit was genuine and reasonable. Ms Smith submitted the claimant knew of the right to make a claim and ought to have known of the time limit, and that it was not reasonable for him to remain ignorant of

that, based on (i) knowing from 21 June meeting that his contract was going to be terminated; (ii) he could have taken advice at any time from 21 June onwards; (iii) the claimant had the benefit of trade union advice; (iv) the claimant was aware he could obtain advice from solicitors or the CAB; (v) the claimant could have made enquiries of the Tribunal; (vi) he failed to investigate how to make a claim and (vii) there was no allegation of any misrepresentation about the time limit from any party to the claimant.

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31. Ms Smith submitted the claimant was not physically prevented from making a claim in time. The statement that he is suffering from depression and receiving counselling is not sufficient to establish it was not reasonably practicable for him to have presented the claim in time. The claimant was sufficiently able to liaise with the trade union and seek advice once the trade union had confirmed its position. The claimant had not produced any medical evidence regarding the extent and scope of his illness and in the absence of such evidence the Tribunal should not accept his assertions (***Midland Bank v Samuels EAT 672/92***).

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32. This was not a case where the failure to meet the time limit was attributable to the trade union.

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33. Ms Smith submitted this was a case where it was reasonable practicable for the claim to have been presented in time. However, if the Tribunal decided it was not practicable to present the claim in time, it was submitted the claim had not been presented in a reasonable time thereafter. This submission was based on the fact the claimant unreasonably delayed for 10 days following receipt of the ACAS early conciliation certificate.

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34. Ms Smith referred to Section 123 Equality Act which sets out the time limit for bringing a complaint of disability discrimination. She noted the claimant had not yet set out details of the acts complained of and so she had taken the latest date for any alleged act as being 2 August 2017. The claim presented

on the 1 November was late and the issue for the Tribunal to determine was whether it would be just and equitable to allow the claim to proceed.

5 35. Ms Smith referred to the case of ***British Coal Corporation v Keeble [1997] IRLR 336*** and to the factors which can be taken into account when considering the prejudice each party would suffer if an extension were refused. Ms Smith noted the delay had been of some 4 weeks and suggested that if any of the alleged acts of discrimination had occurred earlier than 2 August, the memory of potential witnesses may have faded. The reasons for  
10 the delay were as set out above and it was submitted the claimant had had time and opportunity to seek advice.

36. The claimant had known of the possibility of taking action on 2 August, but he had not approached the CAB or solicitors until the end of October.

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37. Ms Smith submitted the delay lay in the hands of the claimant and in the absence of any exceptional reason for the delay, the time limit should not be extended (***De Souza v Manpower UK Ltd EAT/234/12***).

20 38. Ms Smith submitted the Tribunal did not have jurisdiction to hear the claims and invited the Tribunal to dismiss the claim.

39. Ms Smith referred to the following authorities as part of her submission:  
25 ***Times Newspapers Ltd v O'Regan [1977] IRLR 101; Syed v Ford Motor Company Ltd [1979] IRLR 335; Wall's Meat Company Ltd v Khan [1979] ICR 52; Schultz v Esso Petroleum Co Ltd [1999] ICR 1202; Robertson v Bexley Community Centre t/a Leisure Link [2003] IRLR 434 Marks & Spencer v Williams Ryan [2005] ICR 1293; Hunwicks v Royal Mail Group plc EAT/03/07; Perth and Kinross Council v Townsley EAT/10/10; Cullinane v Balfour Beatty Engineering Services Ltd EAT/537/10;***  
30 ***Habinteg Housing Association v Holleron EAT/274/14.***

### Discussion and Decision

40. The claimant brought a claim alleging he had been unfairly dismissed. Section 111 Employment Rights Act provides that an Employment Tribunal shall not consider a complaint (of unfair dismissal) unless it is presented to the Tribunal before the end of three months beginning with the effective date of termination. However, if the Tribunal is satisfied that it was not reasonably practicable for the complaint to be presented in time, the late claim can be accepted if it was presented within such further period as the Tribunal considers reasonable.
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41. I must decide, with regard to the complaint of unfair dismissal, whether the claim was presented on time and if not, whether it was reasonably practicable for the claim to have been presented on time.
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42. There was no dispute regarding the fact the effective date of termination of the claimant's contract of employment was 2 August 2017. The claimant had a period of three months in which to bring his claim, or contact ACAS regarding early conciliation (that is, on or before 1 November 2017). The claimant did not do so, and accordingly the claim presented on 30 November 2017 was late.
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43. I next asked whether it had been reasonably practicable for the claimant to have presented the claim in time. The claimant put forward three points to explain why he had not been able to present the claim in time: (a) he had not known of the time limit for presenting the claim; (b) he believed the trade union was going to take his case and did not learn otherwise until 31 October and (c) he had acted quickly once he knew the trade union would not support him.
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44. I accepted the onus of proving that presentation of the claim in time was not reasonably practicable rested on the claimant. I further noted that in assessing reasonable practicability it 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*" (***Asda Stores Ltd v Kauser EAT 0165/07***).
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45. I had regard to the authorities to which I was referred and accepted that where a claimant is generally aware of his rights, ignorance of the time limit will rarely be acceptable as a reason for delay. I considered however that the claimant was in a different position to someone who knew they could bring a claim but did not do so in time. I say that because the claimant believed the trade union was going to look after matters for him in terms of a claim to the Employment Tribunal. The claimant understood, as at 3 August and having spoken to Mr Murray, that he would take the necessary action.
46. I accepted the claimant did not know of the time limit for bringing a claim. I further accepted it was reasonable for him not to have made enquiries regarding the time limit in circumstances where the day following his dismissal, he spoke with Mr Murray and told him he wanted to make a claim to an Employment Tribunal, and understood Mr Murray/the trade union would “*look after*” things for him.
47. The difficulty for the claimant came when the trade union took almost three months to confirm their position that they would not take his case. I accepted the claimant learned of this on 31 October. The claimant then had to act to find out how to bring a claim.
48. Ms Smith suggested to the claimant he could have taken this action earlier, and indeed he could have done: this was something that was possible. However, the claimant had no need to take earlier action because he believed the trade union would support him. Mr Murray made it clear (document 2) that he believed the claimant’s membership application form had been sent from the branch to headquarters and his position was that even if there was confusion regarding membership, the union should support him. Clearly Mr Murray’s request was seriously considered because more information was sought and it took 6 weeks for a decision to be made.

49. I was satisfied the claimant, upon learning the trade union would not support him, acted quickly to seek advice. He learned he had to contact ACAS and he did so on 20 November.

5 50. I, in addition to the above points, also had regard to the claimant's medical condition. I accept the claimant did not provide medical information regarding the impact of his condition during the period August to November; however, I had no reason to doubt what the claimant told me. I accepted the termination of his employment was devastating; that he was "*very depressed*" and that  
10 his family were worried about him "*harming*" himself. I considered this evidence supported the reason why the claimant so willingly left the matter of his claim to be dealt with by the trade union.

15 51. I concluded, having had regard to all of the above points, that it was not reasonably practicable for the claimant to present the claim in time.

52. Ms Smith invited me to accept the claim had not been presented within such further period as was reasonable. I however could not accept that submission. The early conciliation certificate was dated 20 November: there  
20 was no evidence to suggest when the claimant obtained receipt of the certificate. Further, the claimant completed the claim form and posted it to the Tribunal. I considered that taking all of this into account, 10 days could not be said to be unreasonable.

25 53. I next considered the complaint of disability discrimination. I acknowledged Ms Smith's submission that the acts of discrimination had not been specified and may have occurred earlier than 2 August. I accepted that for the purposes of this hearing, the date of 2 August had to be used.

30 54. I had regard to the terms of Section 123 Equality Act which provides that proceedings (the discrimination complaint) may not be brought after the end of three months starting with the date of the act to which the complaint relates, or such other period as the Employment Tribunal thinks just and equitable. The claim should have been presented to the Employment Tribunal (or the

early conciliation process commenced) on or before 1 November 2017. The claimant commenced early conciliation on 20 November and presented the claim form on 30 November: it was presented late.

5 55. I had regard to the factors referred to in the case of ***British Coal Corporation v Keeble*** (above). The delay was of some four weeks. The reasons for the delay are set out above and not repeated here. I did not consider the cogency of the evidence would be affected by a delay of four weeks.

10 56. I was satisfied the claimant acted promptly once he knew of the possibility of taking action. He contacted Mr Murray the day after he had been told by Mr Cameron that he could take a claim to an Employment Tribunal. Thereafter, the claimant acted promptly when he learned, on 31 October, that the trade union was not supporting his claim. He identified solicitors to phone and he  
15 contacted the CAB. The claimant found it difficult to access legal advice when he did not have the funds to pay for a meeting. He eventually obtained some advice on 15 November. He contacted ACAS on 20 November and presented the claim form on 30 November.

20 57. I concluded, for the reasons which are set out above, that it would be just and equitable to allow the claim to proceed.

58. I acknowledge that in allowing the claim to proceed there will be prejudice to the respondent because they will have to defend the claim. However, there  
25 will equally be prejudice to the claimant if the claim is not allowed to proceed because he will be unable to challenge the fairness of his dismissal and pursue the allegations of discrimination.

59. I, in conclusion, decided the claim was presented late, but (a) it was not  
30 reasonably practicable for the claim of unfair dismissal to have been presented in time and it was presented within such further period as was reasonable and (b) it would be just and equitable to allow the claim of disability discrimination to proceed.

5      **Employment Judge:    L Wiseman**  
       **Date of Judgment:    20 March 2018**  
       **Entered in register:   24 March 2018**  
       **and copied to parties**

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