

EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: S/4105335/17

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Held in Glasgow on 9 February 2018

Employment Judge: David Hoey

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Miss Elizabeth Moore

**Claimant
Represented by:
Mr J McDonald**

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**Messrs GC Hardie & RC Hardie
Hardie Of Larbert & Hardie Of Stirling
Peugeot Dealership**

**Respondent t/a
Represented by:
Mr J Meechan -**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

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The judgment of the Tribunal is that, it being agreed that the claim was presented late, the Tribunal is satisfied that it was reasonably practicable for the Claimant to have lodged her claim within the statutory timescale and that accordingly the Tribunal has no jurisdiction to hear the claim which is dismissed

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REASONS

Introduction

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1. This is a claim for unfair dismissal which called for a Preliminary Hearing on time bar. The Claimant was represented by her friend, Mr McDonald and the Respondent was represented by Mr Meechan, Solicitor.

Issues agreed and to be determined

2. Prior to hearing evidence a discussion took place as to what the issues were that the Tribunal required to determine. It was agreed by both parties that the Claim Form had been sent to the Tribunal outwith the normal statutory time scale required for a claim for unfair dismissal. The claim had
5 been lodged 4 days late. The Tribunal therefore required to consider whether:-

1. It was reasonably practicable for the Claimant to have lodged the claim within the statutory timescale and
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2. If the tribunal was satisfied that it was not reasonably practicable to have lodged her claim within time, whether the Tribunal is satisfied that the claim was lodged within a period that the Tribunal considers reasonable.
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3. The Tribunal heard evidence from the Claimant and both parties summarised the factual and legal basis for their respective positions.

Findings in fact
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4. The Tribunal finds the following facts to be admitted or proved:-

1. The Claimant was unhappy with issues arising in connection with her employment during the latter period of her employment.
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2. In the course of speaking with her Doctor in May 2017, the Claimant learned of the right to claim unfair dismissal within the Employment Tribunal if her employment ended.

3. The Claimant knew there were time limits in respect of such a claim but was not clear as to the precise basis of such time limits and the impact early conciliation had in connection with the time limits for lodging a claim.
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The Claimant had asked her friend, Mr McDonald, to help her with her Employment Tribunal claim as she knew he had some experience in dealing with courts and Tribunals.

5 4. The Claimant initiated Early Conciliation with ACAS on 15 June 2017 (in relation to the ending of her employment and the dissatisfaction with her employment).

10 5. The Claimant provided ACAS with the contact details of her friend, Mr Moore (including his email address), who was her agent.

The Claimant had copies of the relevant forms from the Employment Tribunal and ACAS to allow her to embark upon early conciliation and to complete and lodge a claim.

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6. The Claimant's employment ended on 16 June 2017

7. The early conciliation period ended on 15 July 2017.

20 8. The early conciliation certificate was issued by ACAS by email on 15 July 2017 to Mr McDonald but Mr McDonald did not see the certificate (and therefore the Claimant did not see the certificate).

25 9. The Claimant had discussions with Mr McDonald every few weeks or so in the period July to October 2017.

10. Prior to 19 October 2017, the Claimant made no effort to contact ACAS to check what the position was in relation to the early conciliation certificate.

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11. Prior to 19 October 2017, the Claimant did not ask Mr McDonald to contact ACAS to find out what was happening in relation her early conciliation certificate.

12. On 19 October 2017 the Claimant telephoned ACAS to ascertain the position in relation to her early conciliation certificate.
- 5 13. On 19 October 2017 ACAS resent a copy of the early conciliation certificate to the Claimant and to Mr McDonald.
14. The first occasion the Claimant saw the early conciliation certificate relating to this claim was on 19 October 2017.
- 10 15. The Claimant lodged her Claim with the Employment Tribunal on 20 October.

Submissions

- 15 11. Mr McDonald accepted that the Claim had been lodged 4 days late. He said that he knew there was a 3 month time limit applicable to the claim. The Claimant had also spoken with the Employment Tribunal office and contacted ACAS to initiate early conciliation and knew that there were time limits. He submitted that the Claimant had never been to a Tribunal before
20 and was not aware of the precise time limits.
12. Mr McDonald's position was that the claim had been lodged late due to an "administrative error". He had not received the early conciliation certificate that had been sent initially by ACAS. He accepted that he knew the "clock was ticking" following the Claimant's employment ending. When the
25 Claimant contacted him on 19 October and ACAS resent the certificates the claim was lodged quickly (the next day).
13. Mr McDonald accepted that no attempt was made between June and 19
30 October to contact ACAS to find out what had happened in relation to the certificates. There was no specific reason given for not taking any action during this period. The Claimant was waiting to hear from ACAS. When she realised she had not heard anything (on 19 October) she took action.

14. Mr McDonald asked the Tribunal to exercise its discretion given the circumstances to allow the claim to proceed to a Full Hearing on the merits.

5 15. Mr Meechan submitted that if a claim is not lodged within the statutory time scale, the Tribunal has no jurisdiction to hear the claim. His position was that the Tribunal had no jurisdiction to hear the claim in this case as it was reasonably practicable to lodge the claim within the timescale and that it was not in any event lodged within a reasonable period.

10 16. The Claimant's employment ended on 16 June 2017. Early conciliation had been initiated on 15 June and concluded on 15 July 2017. The original 3 month time limit would have ended on 15 September 2017. Early conciliation resulted in this being extended until 16 October. Both parties agreed that the claim had been lodged 4 days late.

15 17. Mr Meechan submitted that the Claimant had the opportunity upon expiry of the early conciliation period in July or during August, September and early October to contact ACAS to check the position in relation to the early conciliation certificate. There was ample time for this to have been done.
20 The Claimant did not do so nor did she ask her friend to do so. In short it was unreasonable for her to have taken no action.

18. Mr Meechan referred to a number of authorities, namely:-

25 ***Revenue v Garau UKEAT/348/16***

Porter v Bandridge Ltd [1978] IRLR 271

Palmer v Southend [1984] IRLR 119

Reed v Fraine UKEAT/520/10

Robertson v Bexley [2003] IRLR 434

30 19. Mr Meechan submitted said that the Respondent was entitled to the benefit of the expiry of a limitation period (*Garrau*). The onus is on the Claimant to show that it was not reasonably practicable to lodge her claim within the statutory period. That the test is one of reasonable feasibility (*Palmer*)

20. Mr Meechan argued that there was an obligation on the Claimant to make reasonable inquiries during the relevant period. At the time of her dismissal the Claimant knew she had the right to claim unfair dismissal and she ought to have checked the position in relation to time limits.
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21. Ignorance of time limits by itself would not satisfy the reasonable practicability test (*Porter* and *Reed*). Mr Meechan argued that ignorance of the rules as to early conciliation is not sufficient to justify not lodging a claim in time – something more was required, such as "*physical prevention*" or illness. There was no such evidence in relation to this before the Tribunal in this case.
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22. He submitted that in *Reed* the claim had been lodged 1 day late. In that case the Claimant had made no inquiries and proceeded on a false assumption (as to how time limits were calculated). He submitted that the Claimant proceeded on a false assumption (that the time limit began to run upon receipt of the certificate) but this was not enough to satisfy the legal test to allow the claim to proceed.
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23. He submitted that the Claimant had waited some 20 weeks after her resignation before taking positive action to progress her claim. Inquiries should have been made sooner.
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24. Mr Meechan also pointed to the absence of any explanation in the Claim Form as to reasons why the Claim was late (although he accepted that the Claimant stated in evidence that she believed the claim was in time when she lodged it).
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25. Relying upon the overriding objective, Mr Meechan said that the rules apply to both parties who should be placed on an equal footing with due regard to fairness. The Claim could have been raised within the statutory time period. It was reasonably practicable to have done so and in any event the Claimant the claim was not lodged within a reasonable time.
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26. Mr McDonald, in response, emphasised that the Claimant believed the claim was lodged in time as she thought the time limit began to run upon receipt of the certificate and she lodged the claim as soon as she could upon receipt of the certificate.

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Relevant law

27. Section 111(2) of the Employment Rights Act 1996 states:

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"Subject to the following provisions, an Employment Tribunal shall not consider a complaint under this section unless it is presented to the tribunal -

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(a) before the end of the period of three months beginning with the effective date of termination

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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."

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28. What is reasonably practicable is essentially a question of fact for the Tribunal to determine. The onus of proving that presenting the claim in time was not reasonably practicable rests on the Claimant. As the court said in **Porter v Bandridge** 1978 ICR 943: *"That imposes a duty upon him to show precisely why it was this he did not present his complaint [in time]"*.

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29. In **Palmer v Southend** 1984 IRLR 119 the Court of Appeal stated that "reasonably practicable" does not mean reasonable (on its own) but instead means "reasonably feasible".

30. On the question of ignorance of the law and ignorance of time limits for raising a claim, the Court in **Porter** (by majority) said that the correct test is

"not whether the Claimant knew of his rights but whether he ought to have known of them".

5 With regard to ignorance of time limits in cases where a Claimant is aware of their right to make a claim, the Claimant ought to make inquiries as to the applicable time limits.

Decision

10 30. The Tribunal is required to apply the legal test to decide whether the claim can proceed. The Tribunal considered the authorities provided by Mr Meechan in full and considered the evidence of the Claimant and the submissions made on her behalf carefully together with the submissions of Mr McDonald.

15 31. Ultimately, the test is whether, from the evidence before the Tribunal (ie the findings in fact above), the Tribunal believes that it was not reasonably practicable for the Claimant to have lodged the claim within the statutory timescale. If it was not reasonably practicable to have done so, the Tribunal
20 must then decide whether the claim was actually lodged within such period as the Tribunal considers reasonable.

25 32. This test is different from that, for example, that exists in discrimination claims where the issue is whether it is "*just and equitable*" to allow a claim to proceed although late. That test would allow wider considerations to be taken into account.

30 33. In this case, however, the Tribunal requires to apply the above test: was it reasonably practicable for the Claimant to have lodged her claim with the Employment Tribunal in time? If it was not, was the claim lodged within a reasonable period of time?

34. The Tribunal considered the Claimant's evidence very carefully. The Claimant knew that there were time limits but was not aware what the

specific time limits were. The Claimant's friend (whom she consulted in relation to the claim and during its progress) was aware of the 3 month time limit. The Claimant had relatively frequent discussions with her friend following the initiation of early conciliation.

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35. The original 3 month time limit expired on 15 September 2017. By this stage the early conciliation period had also expired (which expired on 15 June 2017). The Claimant took no steps to check herself (or ask her friend to check) the position in relation to the early conciliation certificate despite knowing that she needed the certificate to lodge her claim. There was no evidence before the Tribunal to justify why no action was taken during that period to ascertain the position and progress matters.

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36. The time limits in relation to a claim are important and it is incumbent upon parties to consider the relevant time limits and ensure their claims are lodged within the time period fixed by statute. The rules exist to create some degree of certainty for both parties to litigation.

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37. In the Tribunal's view, it was reasonably practicable for the Claimant to have lodged her claim within the statutory time period. She could have spoken within ACAS or asked her friend to do so prior to expiry of the time limit in this case. The Claimant knew that the conciliation certificate formed an important part of the proceedings but took no action until 19 October 2017 when she initially contacted ACAS on 15 June 2017.

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38. While the Claimant may have believed that the time limit began to run from the moment she received the early conciliation certificate, the Claimant did not take any steps to check the correct position in relation to time limits. The position in the Reed case above is similar to the present case (where the claim was lodged 1 day late due to an error in belief about time limits). In that case it was held that it was reasonably practicable for the Claimant to have lodged the claim in time since it was reasonable to undertake inquiries to check the position in relation to time limits. Given the importance of time limits and the specific facts in this case, the Tribunal has concluded that it

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was reasonably feasible for the Claimant to have lodged her claim within the statutory time period. It was unreasonable to wait until 19 October 2017 to contact ACAS in the circumstances.

5 39. Had this been a claim for unlawful discrimination which had been lodged late, the Tribunal may well have concluded that it would be just and equitable to extend the time limit and allow the case to proceed but in this case the statutory test is different. The Claimant requires to satisfy the Tribunal that it was not reasonably practicable to have lodged her claim (for
10 unfair dismissal) in time. On the facts, the Claimant has not done so.

40. Had the Tribunal concluded that it was not reasonably practicable to have lodged the claim within the statutory time limit, the Tribunal would have been satisfied that the claim was lodged within such period as was
15 reasonable. The Claimant lodged her claim the day after she obtained the relevant information from ACAS.

41. As the claim was not lodged within the statutory time scale and it was reasonably practicable to do so, the claim is dismissed, the Tribunal having
20 no jurisdiction to consider it.

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Employment Judge: D Hoey
Date of Judgment: 16 February 2018
30 **Entered in register: 22 February 2018**
and copied to parties

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