EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4102410/2017

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Preliminary Hearing Held at Glasgow on 24 January 2018

10 **Employment Judge: Ms M Robison**

15 **Mr D McCrindle** — **Claimant in person**

David Frazer — **Respondent Represented by:- Mr R Honeyman**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

25 The Employment Tribunal, having decided that the claims for holiday pay and notice pay have been lodged out of time, and not being satisfied that it was not reasonably practicable to have lodged the claim in time, has no jurisdiction to hear these claims, which are dismissed.

30 The claim for redundancy pay is lodged in time, and this case should now be set down for a further hearing to determine that question.

REASONS

35 1. This preliminary hearing was set down following the judgment of Employment Judge Atack on 31 October 2017 to determine the name and identity of the employer.

2. The respondent was not represented at that preliminary hearing but has since instructed Mr Honeyman, solicitor, who represented him at this hearing. Mr Frazer did not attend. The claimant appeared in person.

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3. Although this preliminary hearing was set down to determine the identity of the employer, having perused the papers Mr Honeyman identified that there is also a jurisdictional issue on time bar. He wrote to the Tribunal on 22 January, copying in the claimant, to advise that he intended to raise this at this hearing as a preliminary issue that requires consideration. I did note that this was an issue which had first been highlighted by the Tribunal at the outset, although it would appear that the claimant was not made aware of that. Mr Honeyman very appropriately indicated that he would not object should Mr McCrindle wish to seek legal advice on the point, given the short notice. After some discussion with Mr McCrindle, he stated that he was happy for the hearing to go ahead, rather than have to return a third time to determine another preliminary issue.

4. While the issue for determination was the identity of the employer, Mr Honeyman accepted that Mr Frazer was the employer at the time of the claimant's dismissal. This is therefore no longer an issue which requires determination by the Tribunal. The claimant had brought along a Mr Henderson to support his argument regarding his employer, but it was agreed that his evidence was no longer required, so he was released.

5. The sole focus then is on the question of time bar. It was noted at the outset that the claimant is claiming redundancy pay as well as notice pay and holiday pay. It was noted that the legal tests to determine time limits, and whether the claims should be allowed even if they had been lodged out of time, were different.

6. I heard evidence from the claimant only. The claimant lodged a number of documents, some during the course of the hearing itself, which are identified by document number. I found the claimant to be a credible witness.

Findings in fact

7. The claimant is a qualified electrician. After a short period of employment with an organisation which he called Notrom Electrical in 2001, the claimant re-commenced employment with that company on 5 January 2004. During his time at Notrom Electrical he undertook courses to qualify to undertake specialist testing and was registered with Select, which is a regulatory body for the electrical trade. Registration with them entitled Notrom Electrical to be registered to carry out electrical inspections. The claimant carried out both compliance work and installations, for example for Casa Construction (9 October 2015 (document 1)).

8. The claimant said in evidence that his last full day of work was Friday 9 November 2016. When he arrived at work on Monday 11 November (as he

recalled), he was given a slip of paper by Mr Frazer headed up "redundancy" (document 2). He had no warning of redundancy.

9. That notice stated as follows: "You can claim Statutory Redundancy Pay if you're made redundant and if you've been continuously employed for 2 or more years; you apply in writing to your employer or an employment tribunal [employment tribunal web link] within 6 months of your job ending. You claim by filling out form RP1, which you can get by calling the redundancy payments enquiry line….find out more by reading the redundancy payments factsheet at [gov.uk web address]". Handwritten on that letter it stated that "Notrom Electrical Plumbing and Building Services Ltd taken over by Clyde Coast 2 Ltd".

10. The claimant telephoned the enquiry line that day. He was told that Clyde Coast 2 had ceased trading prior to that date.

11. The next day, Tuesday 12 November 2016, he went to the CAB for advice. The CAB got in touch with ACAS who said that he should ask his employer for confirmation of his redundancy in writing, which he did.

12. About two weeks later he received an undated letter from Mr Frazer in the post (document number 3) which was headed up "Clyde Coast 2 Ltd, 106 Boglemart Street, Stevenson" and continued "Duncan McCrindle….has been made redundant by Clyde Coast 2 Ltd. Last working day Friday 11/11/16. Employing Company Clyde Coast 2 Ltd has shut down and no longer trading. Duncan McCrindle was working with Clyde Coast 2 after a transfer of undertaking/transfer of business and staff including Duncan McCrindle from Notrom Electrical Plumbing and Building Services Ltd formerly of 9 Princes Place Adrossan".

13. The claimant was then advised by ACAS to sent a grievance letter to his former employer, which he posted to Mr Frazer at the address for Clyde Coast 2 Ltd.

14. That letter (document number 4) is dated 21 November 2016, and states as follows: "I write to raise a grievance regarding my recent redundancy from your company which took place without prior notice on November 11 2016. I have contacted ACAS who have informed me that I am due 12 weeks notice pay and 1 week's holiday pay plus 1 weeks lying time. I am also entitled to a redundancy payment for my 12 years service which I estimate is approximately equivalent to 14 weeks pay. You have 14 days to respond to this letter or I will be forced to take further action to obtain the monies I am due."

15. The claimant received no reply to that letter. He had another meeting at the CAB on or around 12 December 2012. He subsequently spoke to someone

at the Insolvency Service on or around 28 December 2016, who advised that the company, Clyde Coast 2 had been dissolved some 6 months ago, that is prior to the termination of the claimant's employment.

16. Shortly thereafter, the claimant completed a form RP1 which he forwarded to the Insolvency Service. His application related to a company called G361 Products Limited trading as Notrom. He was advised by letter dated 10 January 2017 (document 8) from the Insolvency Service that paper claims were no longer being processed and that he should submit his claim on-line, which he did.

17. He subsequently received a letter from the Insolvency Service dated 17 February 2017 (document 7) which stated as follows: "I refer to your application for a statutory redundancy payment from the National Insurance Fund. You originally submitted an application against a company called G361 Products Limited and we advised you that, as this company was dissolved on 31 July 2015, they could not have been your employer as of 9 November 2016. Thank you for supplying a letter from Mr David H Frazer who has stated that you were dismissed as redundancy on 11 November 2016 by Clyde Coast 2 Limited. Unfortunately this cannot be the case either, as Clyde Coast 2 Limited was dissolved on 28 June 2016 and could not have employed you after that date. Due to the confusions surrounding who dismissed you as redundant on 11 November 2016, I am afraid that we have to refer you to an Employment Tribunal to resolve the matter. As an Employment Tribunal will not allow a case against a dissolved company to proceed, I would advise you to cite Mr David H Frazer as the respondent in this matter….."

18. The claimant took no action in relation to the claim following receipt of this letter. At this time, he was in the process of starting up his own business as a sole trader.

19. He was subsequently advised by a former colleague that there was a notification in an Ayr newspaper regarding what he understood to be the dissolution of one of the companies linked to the respondent. This prompted the claimant to contact ACAS around the beginning of May 2017. An early conciliation certificate was issued (document 6) on 5 May 2017, following receipt by ACAS of the EC notification on that same day.

20. The claimant filled out the ET1 application around that time but when he understood that he would have to pay £450 (sic) in fees he knew that he could not afford that, therefore he did not submit the application.

21. He read the factsheet on the government website and was aware that the rules relating to remission did not apply to him, and that he would have to pay the fee because of his circumstances. At that time, he had some savings,

which he was using to pay for a van so that he could start up in business as a sole trader. He did not claim any benefits at any time, because he had some work as he was building up his business.

5 22. Thereafter the claimant made some attempt to contact the respondent by telephone but without success.

23. Thereafter, he was informed by a colleague at CASA Construction, which is a company for which he was doing work as a sole trader, that changes had 10 been made and that he would no longer require to pay fees. In these circumstances, he submitted his application to the Tribunal on 16 August 2017.

24. The claimant was aware, because of what he had read in the 15 correspondence from ACAS and on the government website that claims to the employment tribunal were “time sensitive”.

Respondent’s submissions

20 25. Mr Honeyman for the respondent set out his understanding of the time line, which he submitted spanned over 10 months. While there are two different tests to be applied here, he submitted that on the face of it this claim is time barred in relation to the two different types of application.

25 26. With regard to the claims for notice pay and holiday pay, there is a three month window in which these claims should have been lodged. The claimant must show that it was not reasonably practicable for him to have lodged the claims within the three month time scale.

30 27. During the three month window, the claimant had consulted the CAB and the Insolvency Service, and had written to Mr Frazer. By his own admission, Mr McCrindle had made enquiries on the government website on 11 or 12 November 2016.

35 28. The test in relation to reasonable practicability is a strict test, and the question is whether the claimant was physically or mentally able to present his claim. The only difficulty which the claimant can prey in aid in this case is that until 17 February, he was unsure who his employer was at the end of his employment. The position became clear when he was directed to make a 40 claim against Mr Frazer in the letter of 17 February 2017, but the claimant did nothing until he completed the EC form in May, and again did nothing until 16 August 2017.

29. Mr Honeyman submitted that Mr McCrindle could not satisfy either leg of the 45 two stage test, that is that he cannot show that it was not reasonably

practicable to have lodged the claim within three months, and nor could he say that it was lodged in a reasonable period thereafter.

30. The claimant could have taken professional advice during that period, but beyond consulting the CAB, he had not.

31. With regard to the redundancy pay element of this claim, while the test on whether to allow a claim late is just and equitable, which gives more latitude, the claimant was aware that the claim was time sensitive. However, once the claimant was aware of the correct respondent he should have taken action. There are no circumstances upon which he could rely to support such an extension, for example he cannot say that he was not aware of the need to make a claim, or the time limits, nor was he out of the country nor unaware of the correct respondent.

32. Mr Honeyman submitted forcefully that the fact that the claimant has said that he could not afford to pay the fee should not be a reason to allow a just and equitable extension. It had been open to him to apply for remission, but he had failed to do so and in any event the fee was only £250 (sic) at that point.

33. Relying on **Robertson v Bexley [2003] IRLR 434**, a decision of the Court of Appeal which states that the exercise of discretion in this case is the exception and not the rule, he submitted that this is not an exceptional case and that the Tribunal should find the claim time barred and it should be dismissed.

Submissions for the claimant

34. Mr McCrindle relied on the points he had made in evidence. He said that he had applied for payment from the Government and had not asked Mr Frazer for anything. However, Mr Frazer had given him false information regarding his claim, and but for that he would not have required to make the claim. He has only pursued the claim against Mr Frazer after he gave him false information and was left with no option but to pursue this route.

The relevant law

35. The law relating to time limits in respect of claims relating to unpaid notice pay is contained the 1996 Act and the Employment Tribunals (Extension of Jurisdiction (Scotland) Order 1994 (the 1994 Order).

36. Article 7 of the 1994 Order states that an employment tribunal shall not entertain a complaint in respect of an employee's contract unless it is presented within the period of three months beginning with the effective date of termination of the contract giving rise to the claim. Article 7(c) states that where a tribunal is satisfied that it was not reasonably practicable for the

complaint to be presented within that time, then a complaint can be lodged within such further period as the tribunal considers reasonable.

37. The law relating to time limits in respect of arrears of holiday pay is contained in the Working Time Regulations 1998. Regulation 30(2) 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 on which it is alleged that the payment should have been made, 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 three months.

38. Thus in relation to each of these claims, the tribunal must consider whether it was not reasonably practicable for the claimant to present his claim in time, the burden of proof lying with the claimant. If the claimant succeeds in showing that it was not reasonably practicable to present his claim in time, then the tribunal must be satisfied that the time within which the claim was in fact presented was reasonable.

39. The Court of Appeal in the case of **Palmer and Saunders v Southend-on-Sea Borough Council [1984] IRLR 119** considered the meaning of the phrase "not reasonably practicable". In that case Lord Justice May said that "we think that one can say that to construe the words "reasonably practicable" as the equivalent of "reasonable" is to take a view that is too favourable to the employee. On the other hand, "reasonably practicable" means more than merely what is reasonably capable physically of being done.... the words...mean something between these two. Perhaps to read the word "practicable" as the equivalent of "feasible" as Sir John Brightman did in [**Singh v Post Office [1973] ICR 437, NIRC**] and to ask colloquially and untrammelled by too much legal logic—"was it reasonably feasible to present the complaint to the [employment] tribunal within the relevant three months?"—is the best approach to the correct application of the relevant subsection."

40. Claims in respect of redundancy payments require to be determined by an employment tribunal under section 163 of the Employment Rights Act 1996 ("the 1996 Act"). Section 164 states that an employee does not have any right to a redundancy payment, unless, before the end of the period of six months from the date of dismissal, an employee has made a claim for the payment by notice in writing given to the employer (s164(1)(b); or the question as to the employee's right to, or the amount of, the payment (s164(1)(c), or a claim for unfair dismissal, has been referred to an employment tribunal (s164(1)(d).

41. An employee is not however deprived of his right to a redundancy payment, if, during the period of six months immediately following the six months after the date of dismissal, the employee makes a claim for the payment by notice in writing given to the employer; or refers the question as to his right to, or the amount of, the payment, or makes a claim for unfair dismissal to the employment tribunal, and it appears to the tribunal to be just and equitable that the employee should receive a redundancy payment (section 164(2)).

42. In determining whether or not it is just and equitable that an employee in these circumstances should receive a redundancy payment, the employment tribunal shall have regard to the reason shown by the employee for his failure to make a claim in writing for a redundancy payment or to lodge a claim in the employment tribunal; and all the other relevant circumstances (section 164(3)).

Tribunal decision

Holiday pay and Notice pay

43. Claims for unpaid notice pay or outstanding holiday pay must be lodged within three months of the date of dismissal. Only where the tribunal considers that it was not reasonably practicable to present the claim in that time will a claim be allowed late, and even then, only if it has been lodged within a reasonable period thereafter.

44. Although the claimant was confused about the days of the week leading up to his dismissal, there was no dispute that the date of dismissal was 11 November 2016. The time limit for lodging a claim was therefore 10 February 2017. The claim not having been lodged until 16 August 2017, it was lodged more than six months after the time limit. In such circumstances, I find that these claims have been lodged out of time.

45. In this case, the claimant was aware that he could pursue claims against his employer once he was informed of his redundancy, having consulted the CAB the very next day after receiving notification. He became unclear about who he should pursue the claim against, and that confusion was compounded by the respondent advising that his employment had transferred to another company on the date he was advised of the redundancy.

46. However, I accepted Mr Honeyman's submission that by 17 February he was then made aware, by the Insolvency Service, that he ought to pursue a claim against the respondent. Nor could it be said that the claimant in this case was ignorant either of the requirement to claim or of the time limits for claiming, by his own admission having got advice from ACAS and the government factsheets, and no doubt from the CAB as well, although he could not recall.

Certainly by his own admission he knew that claiming was "time sensitive". It was therefore perfectly feasible for the claimant to have lodged a claim.

47. I could not therefore say, on the evidence that I heard, that it was not reasonably practicable to have lodged a claim within the three month statutory time limit. Further and in any event, the claim having been lodged on 16 August 2017, almost six months after the expiry of the time limit, it could not be said that the claimant had lodged his claim within a reasonable period of the time limit having expired. Even if I could have said that it was not reasonably practicable to lodge the claim until 17 February, he had not lodged the claim within a reasonable period thereafter.

48. In all these circumstances, the Tribunal is not satisfied that it was not reasonably practicable for the claimant to have lodged the claim within the three month time limit.

49. In all the circumstances, the Tribunal, having decided that the claims for holiday pay and notice pay have been lodged out of time, and not being satisfied that it was not reasonably practicable to have lodged the claim in time, finds that the Tribunal has no jurisdiction to hear these claims, which are dismissed.

Redundancy Pay

50. The situation with redundancy pay is of course different. During the course of the hearing, I referred parties specifically to section 164 of the Employment Rights Act which sets out (and is discussed above) the circumstances when an employee will be entitled to a redundancy payment. One of these situations is where the employee has made a written claim for the payment to the employer. During the course of evidence, the claimant stated that he had been advised by ACAS shortly after his dismissal that he should send a written grievance to his employer seeking payment of the redundancy pay. He said that he did that and during the course of evidence produced a letter dated 21 November 2016, which he said that he had posted to his employer at the address in the letter notifying him of his redundancy.

51. Mr Honeyman said that he was not aware of that letter because his client had not produced it to him. When I asked him whether he thought that letter "counted" for the purposes of section 164, I understood him to state that the requirement was also to lodge a claim within that time frame because otherwise the matter would be left open ended (and as I understood his argument there would be no time limit for lodging a claim in the employment tribunal).

52. I have given further consideration to Mr Honeyman's argument and I do not accept his submission. I accepted the claimant's evidence that he had made

a claim in writing to his employer for a redundancy payment, and that letter is written to Mr David Frazer at the address in the redundancy notice, within six months of his dismissal. I accept that letter “counts” for the purposes of section 164(1)(b). I therefore find that the claimant has taken the necessary action with in the six month period to secure the right to a redundancy payment.

53. Further, it is apparent from section 164, as confirmed by the High Court in **Bentley Engineering Company Ltd v Crown and Miller 1976 ICR 225**, when considering the equivalent provision in force at the time, that there is indeed no time limit for lodging a claim if any one of the conditions set out in that section has been satisfied.

54. I therefore find that the claimant’s claim for a redundancy payment has been lodged in time.

55. Although I did not accept Mr Honeyman’s argument that the letter did not “count”, in the event that I am wrong about that, I went on to consider Mr Honeyman’s argument that the relevant action to secure the right was the lodging of the Tribunal claim on 16 August 2017. He accepted that the claim had been lodged within the six months after the first six months following the dismissal, and in such circumstances relied on section 164(2) which states that the claimant would only be entitled to a redundancy payment if he lodged the claim within that second six month period if “it appears to the Tribunal to be just and equitable that the employee should receive a redundancy payment”.

56. In support of his argument, he relied on the decision of the Court of Appeal in the case of **Robertson v Bexley [2003] IRLR 434**, and submitted that the Tribunal should only find that it is just and equitable to extend time in an exceptional case, and this claim did not fall into that category.

57. As Mr Honeyman acknowledged, that case related to the test for discrimination cases, where the time limit can be extended where it is considered just and equitable. I gave consideration to Mr Honeyman’s submission in that regard, and I took the view that the test in relation to the circumstances when a redundancy payment claim was properly made is slightly different from that test. In particular, the test which I must apply is whether or not it appears to be just and equitable that the employee should receive a redundancy payment. That requires me not only to have regard to the reason shown by the employee for the failure to lodge the claim but also all the other relevant circumstances. That includes, as I understand it, taking some account of the merits of the claim.

58. In this case, the claimant explained that the reason for the delay in lodging the claim in the employment tribunal was that he was under the impression that the company against whom he could claim was in liquidation. He was prompted to go to ACAS for early conciliation when he heard from a former colleague that a newspaper had carried some information about the respondent and/or one of his companies. He contacted ACAS on 5 May 2017 (which is within the six month period from the date of dismissal). I have found that he completed the relevant ET1 form. He did not however lodge that form because he said that he could not afford the fees. He understood the fees to be £450, although in fact he would only have had to pay £160 and then £230 in addition should the case come to a hearing. Nevertheless he concluded that he could not afford the fees and that was the reason he did not lodge at that time.

59. Given that his former employer had not been entirely straight with him, this is clearly one of those situations where a potential claimant will weight up the risks and decide against the investment. While the claimant did have some savings, he took the perfectly sensible decision to apply those for the purchase of a van to seek to ensure that he could earn a living in the longer term.

60. I have found that the claimant was advised by a work colleague that he no longer required to pay fees. He could not recall when that was, but the decision of the Supreme Court relating to fees was of course 26 July 2017. The claimant lodged his claim with the employment tribunal on 16 August 2017. He therefore lodged his claim a reasonable time after he had heard, and indeed within a reasonable time of that judgment being issued.

61. In assessing whether or not it is just and equitable to allow the claimant's claim for a redundancy payment to proceed, I take into account the fact that some of the confusion and delay experienced by the claimant in this case was because the respondent gave him incorrect information regarding the correct identity of his employer as at the date of termination, and in particular that he advised the claimant that he should seek a redundancy payment from Clyde Coast 2 Limited, when he must have known at that time that the company had been dissolved.

62. Mr Honeyman was clearly firmly of the view that the decision not to proceed because of fees should not be a factor which I ought to take into account when considering whether it was just and equitable for the claim to proceed. I was mindful however that there has been a good deal of publicity around that very possibility, given that the Tribunal has discretion in the matter, and here can take account of all relevant circumstances. I was mindful too that the test that I was applying was whether or not it was just and equitable for the claimant to receive a redundancy payment in all the circumstances. Mr

Frazer clearly envisaged that Mr McCrindle was entitled to a redundancy payment, having notified him of his rights in that regard on the day of his dismissal.

5 63. In all these circumstances, I consider that it is just and equitable that the claimant should receive a redundancy payment, and therefore that this claim should proceed, even if lodged outwith the original six month time limit.

64. A further final hearing should therefore be set down to consider claimant's
10 claim for redundancy pay.

15 **Employment Judge: M Robison**
Date of Judgment: 29 January 2018
Entered in the Register: 02 February 2018
and Sent to Parties