



**EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case No: 4120172/2018**

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**Held in Glasgow on 11 December 2018**

**Employment Judge: Robert Gall**

10 **Mrs ML MacInnes**

**Claimant**  
**Represented by:**  
**Mr L Kennedy -**  
**Advocate**

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**British Red Cross**  
**The British Red Cross Society**

**Respondent**  
**Represented by:**  
**Mr R Bradley -**  
**Advocate**

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**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

The Judgment of the Tribunal is that:-

1. The Preliminary Hearing is postponed. It is set down, by agreement, for 10 AM on Monday, 7 January 2019 for 3 hours.

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2. The claimant is ordered to pay to the respondents the sum of £600 in respect of costs incurred relative to the Preliminary Hearing on 11 December 2018, which could not proceed in the circumstances detailed below.

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3. The purpose of the Preliminary Hearing on 7 January will be, in circumstances where it is accepted that the claim was presented late, to determine the issue of time bar and in particular to determine whether the Tribunal is persuaded that it was not reasonably practicable for the claim to be presented in time and that time should therefore be extended to enable the claim to proceed.

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**REASONS**

**E.T. Z4 (WR)**

1. This case called for a Preliminary Hearing (“P H”) at Glasgow on 11 December 2018. Mr Kennedy appeared for the claimant. Mr Bradley appeared for the respondents.
- 5 2. It was apparent at the outset of the P H that no witnesses were present for the claimant. The claimant herself was not present. Mr Watson, the solicitor who handled the presentation of the claim, was also not present.
- 10 3. I explored this point with Mr Kennedy. After discussion, he accepted that it was imperative to have Mr Watson present to give evidence. There had in this case been an original claim form presented. That presentation had occurred in time. The claim form had however been rejected as the correct details in respect of the ACAS Early Conciliation Certificate had not been completed. The claim form had then been presented a few days later with the correct details in respect of the ACAS Early Conciliation Certificate. By the  
15 time that presentation took place however the claim was out of time.
- 20 4. There are various cases in relation to late presentation of claims where solicitors have handled that process. Each case turns on its own facts. There are principles of law applicable. The critical matter however is obtaining evidence as to the circumstances of presentation of the second claim. It is upon those circumstances that the Tribunal must focus in determining whether or not to extend time. That determination by the Tribunal will turn upon whether it is persuaded that it was not reasonably practicable for the  
25 claim to be presented in time. Of relevance to that question are the facts and circumstances around presentation of the second claim. It is currently understood that presentation of the first claim and also the second claim were undertaken by a solicitor on behalf of the claimant. That solicitor was Mr Watson, although a clerical assistant Mr Ross may have been involved. It  
30 was accepted by Mr Kennedy that Mr Ross had acted under supervision of an under instruction from Mr Watson. Mr Kennedy confirmed that no point was taken that, as Mr Ross had been involved, different criteria applied to the issue before the Tribunal. The actings of the claimant’s representative were to be viewed on the basis that they were actings of a solicitor.

5. The claimant herself was, it appears, not involved in the process of presentation of the claim form. That is so both in relation to the first claim presented and presentation of the second claim, the claim currently before this Tribunal.
6. It had not been anticipated by Mr Kennedy that evidence would be led. He had lodged an outline written submission. As mentioned, he accepted, after discussion, that the Tribunal would require to hear evidence from Mr Watson.
7. Adjournments took place in order that Mr Kennedy could seek to contact Mr Watson with a view to establishing whether or not Mr Watson was able to attend Tribunal on 11 December. It transpired that Mr Watson was sitting as a Judge in the social entitlement chamber. He was unable to free himself to be able to attend as a witness.
8. Mr Kennedy sought postponement of the PH. He said that it was in the interests of justice for this to occur given that Mr Watson was not available as a witness today. A fresh date would then be set when Mr Watson, Mr Ross and possibly the claimant would give evidence.
9. Mr Bradley opposed postponement of the PH. Notice of the hearing had been given on 24 October 2018. It was quite clear that whether or not it was reasonably practicable for a claim to be presented in time turned upon the facts in each particular case. Evidence would be required. It was only now however that the claimant appeared to recognise the need for evidence to be heard. The respondents had instructed Mr Bradley to appear. There had been no application for postponement prior to this P H. Such an application could have been made if Mr Watson was not available to attend as a witness. There had been no satisfactory explanation as to why he was not present to give evidence.
10. If the Tribunal did postpone the P H, notwithstanding the objections from the respondents, Mr Bradley invited the Tribunal to award expenses against the

claimant. He referred to Rule 76 (1) (c) of the Employment Tribunals (Constitution & Rules of Procedure) 2013. That enabled a Tribunal to award expenses where a late postponement had occurred. In this case the respondent's application was made during the course of the PH. Expenses were quantified in the sum of £600, being the fee of Mr Bradley.

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11. In the alternative Mr Bradley referred to Rule 76 (1) (a). In his view the conduct of the claimant through representatives was unreasonable to the extent that it justified an award of expenses.

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12. Mr Bradley recognised that any award of expenses under these rules would be against the claimant. He expressed the hope that the claimant's solicitors would accept responsibility for making any such payment. If that was not so, he referred to the terms of Rule 80. Those permitted an award against a representative in the circumstances detailed in that Rule, a wasted costs order.

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13. Mr Kennedy said that Mr Watson was not involved in any business appointment. The circumstances of his sitting in the social entitlement chamber were not known. It was accepted however that it was necessary for him to give evidence, "imperative", said Mr Kennedy. Mr Kennedy said it was open to the Tribunal to reserve any decision in respect of expenses. He said that if there was to be a finding, the terms of Rule 76 (1) (c) were applicable, rather than those of Rule 76 (1) (a). He confirmed that he was content to give the undertaking on behalf of Mr Watson that any award of expenses would be met by Mr Watson or his firm, with the claimant being kept free of any liability in that regard. I confirmed specifically with Mr Kennedy that he was content that I note that. He gave me that confirmation.

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14. I clarified with Mr Kennedy whether or not it was accepted on behalf of the claimant that the claim currently before the Tribunal, the second claim, was presented out of time. He confirmed that this was accepted.

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15. I considered the various arguments relating to the proposed postponement. It seemed to me that the position was entirely unsatisfactory. It ought to have been appreciated that the question of whether or not it was not reasonably practicable for the claim to be presented in time would require to be determined on the basis of the facts established by the Tribunal as applying in this case. That, it appeared, had not been appreciated. Mr Watson was not available as a witness. He had taken up sitting with the social entitlement Tribunal although he knew about the P H in this case.
16. I appreciated the frustration of the respondents. Whilst no evidence was to be led from the respondents, they had instructed Mr Bradley and two representatives had appeared to be with them for instruction purposes.
17. Considering the interests of justice, I concluded that it was appropriate to postpone this PH. It is now accepted for the claimant that evidence is essential. It did not seem appropriate to me to continue with this PH and to make a decision without that evidence.
18. I recognised however that this very late realisation by the claimant has caused cost and inconvenience to the respondents. This is not unexpected non-attendance by a witness, as might occur in the case of illness for example. I regard it as appropriate to make a costs award. I am comforted in making that award against Mrs MacInnes by the confirmation specifically given that she will not be asked to meet the sum due in terms of that award. Mr Watson or his firm will meet the sum awarded. I therefore order that the sum of £600 is paid by the claimant to the respondents by way of expenses in respect of the postponement of this PH.
19. Discussion took place as to an alternative date for this PH. It was agreed that it would be set down for 3 hours on the morning of 7 January 2019, commencing at 10 AM. The clerk to the Tribunals is requested to issue the appropriate hearing notices to parties.

20. Given that the claimant accepts that the claim was presented out of time, there will be evidence as to the circumstances in which that occurred with submissions then be made by each party as to why the Tribunal ought to extend time from the claimant's perspective and why, from the respondents' perspective time ought not to be extended. The decision will turn upon whether the claimant is able to persuade the Tribunal that it was not reasonably practicable to present the claim the claim in time and that time should be extended, the claim having been presented within a reasonable time.

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**Employment Judge: Robert Gall**  
**Date of Judgment: 19 December 2018**  
**Entered in register : 20 December 2018**  
**and copied to parties**

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