



**EMPLOYMENT TRIBUNALS (SCOTLAND)**

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**Case No: 4102922/2019**

**Held in Dundee on 7 June 2019**

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**Employment Judge I McFatridge**

**Mrs L Cameron**

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**Claimant  
In person**

**Caremore Aberdeen Ltd**

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**Respondent  
Not present and  
not represented  
(no ET3 lodged)**

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**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

30 The judgment of the Tribunal is

1. The respondent shall pay to the claimant the sum of One Thousand, Three Hundred and Thirty Eight Pounds and Sixty Two Pence (£1338.62) as a redundancy payment.
2. The claim of breach of contract (notice pay) was submitted timeously. The respondent shall pay the claimant Eight Hundred and Thirty Pounds and Seventy Six Pence (£830.76) as damages for breach of contract.

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E.T. Z4 (WR)

3. The claim of unlawful deduction of wages (failure to pay holiday pay) was submitted timeously. The respondent shall pay to the claimant the sum of One Thousand, Two Hundred and SixtyTwo Pounds and Seventy Six Pence (£1262.76) in respect of annual leave accrued but untaken as at the date of termination of employment.

### REASONS

1. On 12 March 2019 the claimant lodged a claim in which she claimed that she was due a redundancy payment together with sums in respect of notice pay and accrued holiday pay from the respondent following the termination of her employment on 23 October 2018. The respondent did not submit a response within the statutory period. An Employment Judge identified that the claim appeared to be lodged out of time in respect of the claims for holiday pay and notice pay. A hearing was therefore fixed to deal with the issue of time bar and thereafter, if appropriate, the substantive merits of the case. At the hearing the claimant gave evidence on her own behalf. She lodged a small number of documents. On the basis of the evidence and the productions I found the following essential facts to be proved.

#### Findings in fact

2. The claimant was employed by the respondent from 1 September 2015. She was employed as a van driver delivering frozen foods throughout north-east Scotland. The business had previously been run by a Michelle Robertson but she left the business and it was taken over by a Kevin Fennell in or about October 2017. The claimant was due two weeks' holiday at that time and Mr Fennell agreed that this could be taken but that her holiday year would start again with a full entitlement from 1 January 2018. The claimant's contract of employment was lodged which showed the holiday year running between 1 January and 31 December in each year.

3. On 22 October 2018 the claimant received a telephone call while she was on the road making deliveries in Crieff. She was told that she need not work the following day. On arriving back at the depot she was told by a member of staff that that particular member of staff had been told that the company was closing the following day. The following day the claimant was telephoned by Mr Fennell and told that the company had closed and that her employment was terminated with immediate effect.
4. The claimant received her pay at the end of October. She was paid for the hours worked up to 22 October. She was not paid anything in respect of notice pay nor was she paid a redundancy payment. She was not paid anything in respect of holidays accrued but untaken.
5. The claimant's average gross earnings were £15,468.50 gross per annum which equates to £297.47 per week. Her net earnings were £1200 per month which equates to £276.92 per week. As at the date of termination of her employment she was entitled to three weeks' notice. She did not receive any notice and is therefore entitled to £830.76 as a payment in lieu of notice.
6. The claimant had not used up any of her annual leave entitlement for 2018. The holiday year ran from 1 January. The claimant is entitled to 22.8 days' holiday being the pro rata entitlement for the period from 1 January to 23 October. This amounts to £1262.76.
7. The claimant had three full years' service during all of which she was over the age of 41 years. She is therefore entitled to a redundancy payment of 4.5 weeks' pay at her gross rate of pay which amounts to £1338.62.
8. Following her dismissal the claimant was advised by Mr Fennell that Mr Fennell was in the course of finalising matters. She was told that she would receive the outstanding sums due to her but that Mr Fennell was having difficulties with his bank. He mentioned to her that he was waiting on the Clydesdale Bank in Montrose sorting matters out. He blamed the bank for his difficulties and assured the claimant on numerous occasions that there would be no difficulty.

9. The claimant lives in Arbroath. Whilst there is a CAB service in Arbroath she was advised by friends that she would have serious difficulty getting an appointment and that they did not deal with employment matters in any event. There was no other source of advice open to her. She also allowed herself to be lulled into a false sense of security by Mr Fennell's protestations that everything would be sorted out. The claimant was entirely unaware of any time limits. The claimant had never been involved in this sort of situation before. The claimant was also suffering a degree of personal stress at the time due to having lost her job with absolutely no time to prepare for this. The claimant spoke to Mr Fennell roughly twice a week between October and January.
10. Towards the end of January the claimant suddenly had what she described as a "light bulb moment" where she realised that Mr Fennell was simply stringing her along. The claimant also became aware that the respondent owed money to a number of other creditors in the area. The claimant went on the internet and tried to seek advice there. On the basis of what she saw she decided that she should contact the Insolvency Service. She wrote to the Insolvency Service around the end of January 2019. The Insolvency Service responded on 6 February 2019. Their letter was lodged. In the letter they indicate that they are not prepared to make a payment in respect of holiday pay or notice pay because the employer is not insolvent as described in sections 166 or 183 of the Employment Rights Act 1996. With regard to redundancy payment they state that payment can only be made if an employer has accepted or has been proved by an Employment Tribunal to be responsible for it and has then refused or has not been able to make it. There is reference to the possibility of taking the Insolvency Service to an Employment Tribunal and a reference to the claimant having three months from the date of the letter to make her claim.
11. The claimant took from this letter that she would not be able to get anywhere with her claim until the company had taken steps to become formally insolvent. She took from this that the ball was in Mr Fennell's court and she contacted him immediately after she received this letter to ask him what he was doing with a view to making the company formally insolvent. At around this time

Mr Fennell stopped answering the claimant's calls and stopped responding to texts or e-mails.

12. Around the beginning of March the claimant contacted ACAS. She was advised that it would cost money to place the company into formal insolvency and that there was a possibility that this might never happen. She was advised that she should start early conciliation with a view to lodging a claim against the company. The claimant then commenced early conciliation on 8 March. The certificate was issued on 8 March and the claimant submitted her claim form online on 12 March.

### 10 **Observations on the evidence**

13. I found the claimant to be an entirely credible and reliable witness. It is clear to me that she had no experience of Tribunals and was very much out of her depth. I was in absolutely no doubt that she had been unaware of the existence of any time limits until she was advised of this by ACAS in March 2019 by which time the time limit had expired. I also questioned her carefully about the availability of advice in the area where she lives. It was clear to me that there was no realistic possibility of her obtaining advice on employment law matters from anywhere. At the end of the day the claimant had perhaps been too trusting of Mr Fennell's repeated statements that he would sort matters out.

### 20 **Discussion and decision**

#### *Time bar*

14. With regard to the claim for a redundancy payment the time limit for a reference to the Tribunal is contained within section 164. An employee has six months beginning with the relevant date. In my view the relevant date in this case was 23 October when the claimant was advised by Mr Fennell that she was being dismissed. The claimant had put 22 October in her ET1 but it was clear from her evidence that on that date all she knew was what she had been told by a fellow member of staff. She had not herself received any notice from her employer. It therefore follows that the claimant had until 22 April to lodge her

claim with the Tribunal. The claim was lodged on 12 March and so is clearly within time.

15. With regard to the claims in respect of notice pay and outstanding holiday pay the provisions are similar albeit they are contained in different pieces of legislation. I shall use the wording in section 23 of the Employment Rights Act 1996 which applies to the holiday pay claim. The provisions in respect of the notice pay claim are contained within the appropriate statutory instrument granting jurisdiction but are essentially the same. For the avoidance of doubt the rules are also essentially the same under Regulation 30 of the Working Time Regulations 1998. In each case the start date is the date on which the payment became due. In this case I believe the payment became due when the claimant received her final pay slip which was 31 October. The claim to the Tribunal ought to have been submitted within three months which means the claim ought to have been submitted by 27 January. The claimant would have been entitled to an additional period of time had she commenced early conciliation prior to 27 January but she did not. These claims are therefore, on the face of it, around six weeks out of time. Section 23(4) however states that

“Where the employment tribunal is satisfied that it was not reasonably practicable for a complaint under this section to be presented before the end of the relevant period of three months the tribunal may consider the complaint if it is presented within such further period as the tribunal considers reasonable.”

The test in this case mirrors the test for making a claim of unfair dismissal where the period is three months from the date of termination of employment. There is a considerable body of case law which assists Tribunals with the interpretation of this clause. The Tribunal requires to adopt a two-stage approach. First of all the Tribunal must decide whether it was not reasonably practicable for the claimant to submit the claim within the initial three month period. If the Tribunal finds that it was reasonably practicable then that is the end of the matter. The claim is time barred. If on the other hand the Tribunal accepts that it was not reasonably practicable then the Tribunal requires to look

at the second stage which is whether or not the claim was lodged within a reasonable period thereafter.

16. In this case I was satisfied on the evidence that the claimant was genuinely ignorant of the existence of time limits until she was told of them by ACAS around the beginning of March. That however in terms of the case law is not sufficient for me to make a finding that it was not reasonably practicable for her to submit her claim within that timescale. I had to look beyond that and consider whether or not the claimant's ignorance of time limits was reasonable. In this case I consider that her ignorance was indeed reasonable. I take into account that the claimant had not been involved in any such proceedings before. She did not have access to any advice from anyone. She did not even have access to advice from colleagues since this was a very small workforce. If the claimant lived in a large city she might well have access to advice from a solicitor or from Citizen's Advice Bureau but I entirely accepted her evidence that this was not available to her in Arbroath. I also think it is highly relevant that during the three month period the claimant was being assured by her former employer's Director that matters were in hand and that she would be receiving her money. I consider that in those circumstances an employee who has no familiarity with Tribunal proceedings or previous knowledge of the existence of time limits might well quite reasonably believe that she required to take no steps to familiarise herself with these things. I am therefore satisfied that it was not reasonably practicable for the claimant to submit her claim within the initial three month period.

17. Subsequent to this period the claimant did go online and try to access advice. She decided that the appropriate course of action was to write to the Insolvency Service. The response she received from the Insolvency Service is not particularly helpful. In particular it does not anywhere say that there is a time limit on her raising Tribunal proceedings against her former employer. Most of the letter does indeed talk about the need for a formal insolvency process before any payment can be made out of government funds. I therefore consider it is unsurprising or at least not unreasonable of the claimant to take from this that what needed to happen was for her former employer to take steps

to formally make the company insolvent so that she could be paid. The claimant's evidence was that she had put this to Mr Fennell and shortly after this he had broken off all contact with her. She said that it was only when she spoke to ACAS that ACAS told her that it would cost the employer a substantial amount of money to formally become insolvent. It was clear to me that once the claimant did contact ACAS she acted with a fair amount of speed and submitted her claim within a reasonable time thereafter. On this basis I am satisfied that the Tribunal has jurisdiction to hear the claims for holiday pay and notice pay as well as the claim for a redundancy payment.

18. I was satisfied on the basis of the evidence that the claimant's earnings were as stated and that the payments she is due under each head are as set out in my findings of fact.

**Employment Judge:**  
**Date of Judgment:**  
**Date sent to parties:**

**Ian McFatridge**  
**26 June 2019**  
**27 June 2019**