



IN THE EMPLOYMENT TRIBUNAL (SCOTLAND) AT EDINBURGH

**Case No: 4102455/2019 Issued Following Open Preliminary Hearing Heard at
Edinburgh on 10 October 2019 at 10 am**

Employment Judge J G d'Inverno, QVRM, TD, VR, WS

Mr M Tamplin

**Claimant
In Person**

Crossing35 Limited

**Respondent
Represented by
Mr N Kaveripatnam,
Director**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is:-

(First) That the claimant lacks Title to Present and the Tribunal lacks Jurisdiction to Consider his statutory complaints of:-

- unlawful deduction from wages in respect of wages due for work done,
- in respect of accrued but untaken holiday pay,
- alleged unpaid notice pay; and,
- of the claimant's statutory complaint of failure to provide written terms of employment and wage slips,

by reason of time bar.

(Second) The claimant lacks Title to Present to the Employment Tribunal and the Tribunal lacks Jurisdiction to Consider the claimant's complaints of non-payment of wages including compensation for accrued but untaken paid annual leave entitlement, insofar as advanced as breach of contract claims arising upon termination of a Contract of Employment, by reason of time bar.

REASONS

1. This case called for Open Preliminary Hearing at Edinburgh on 10 October 2019 for determination of the Preliminary Issue of Jurisdiction (Time Bar).
2. The claimant, Mr M Tamplin, appeared on his own behalf; the respondent company, Crossing35 Limited, was represented by its Director Mr N Kaveripatnam.
3. The case is one in which the claimant complains of non-payment of arrears of wages including; wages for work done, holiday pay and notice pay.
4. The complaints are presented both as statutory complaints, in terms of section 13 of the Employment Rights Act 1996 (unauthorised deduction from wages) and concurrently in the name of claims for damages/specific performance in the face of alleged breach of contract, the latter invoking the Tribunal's contractual jurisdiction upon termination of a Contract of Employment.
5. The conferring of Title to pursue complaints before the Employment Tribunal is constrained by a requirement that parties, at first instance, present those complaints within a statutorily prescribed time limit, in the case of the instant claims three months from the date of the sums becoming due and, in the case of contractual claims within three months of the Effective Date of Termination of Employment. Although such claims, when pursued as contractual claims in the civil court in Scotland are subject to the prescriptive period limit of five years, in order to invoke the Tribunal's contractual jurisdiction, which arises only on

termination of the Contract of Employment, the claims must be presented to the Employment Tribunal within three months of the date of termination of employment.

6. In relation to both types of claim, statutory and breach of contract, a claim can only be presented by a claimant having first engaged with the early conciliation process operated by ACAS. In circumstances where a claimant commences early conciliation within the three month initial time limit the Conciliation Regulations operate to extend the three month time limit. Where a claimant commences early conciliation at a time after the expiry of the initial statutory time limit the occurrence of reconciliation does not operate to extend the initial time limit. Thus a party advancing a breach of contract claim may find themselves in a position where they have missed the three month time limit and thus lack Title to Present their breach of contract claim to the Employment Tribunal and the Tribunal lack Jurisdiction to hear it, but nevertheless are at liberty to proceed with those claims in the Sheriff Court within the five year prescriptive period.

7. In the instant case the following dates are found in fact and are relevant;-

Dates of commencement and termination of employment: 15 May 2018
and 2 September 2018

ACAS Conciliation Certificate dates: Date of receipt by ACAS of the EC
notification 14 December 2018

Date of issue by ACAS of the Certificate: 14 January 2019

Date of first presentation of the claim to the Employment Tribunal: 12
February 2019

8. In the instant case it was a matter of agreement between the parties and not in issue that the date of commencement of the claimant's employment was the 15th of May 2018 and the Effective Date of Termination of his employment 2nd September 2018. Further, as is clear on the face of the ACAS issued Certificate the claimant entered the early conciliation process with ACAS on the 14th of December 2018

and date of issue and ACAS issued the Certificate to the claimant by email on the 14th of January 2019.

The Issues

9. The issues for determination by the Tribunal at Open Preliminary Hearing was whether the claimant had Title to Present and the Tribunal had Jurisdiction to Consider its statutory complaints of unauthorised deduction from wages contrary to the provisions of section 13 of the Equality Act 2010, in terms of section 111(2)(a) which failing (b) of the Employment Rights Act 1996; and,

(Second) Whether the claimant had Title to Present and the Tribunal had Jurisdiction to Consider his complaints of breach of contract, invoking the Tribunal's concurrent contractual jurisdiction in terms of section 3(2) of the Employment Tribunals Act 1996 and Article 7(a) and Article 8B (if applicable) of the Extension of Jurisdiction Order 1994, which failing under Article 7(c) of the Extension of Jurisdiction Regulations.

Agreed Facts

10. Read shortly the above provisions confer upon the claimant Title to Present his claim and on the Tribunal Jurisdiction to Consider:-
- (a) his statutory complaints of unauthorised deduction from wages within the period of three months from the date upon which he first acquired an entitlement in law to the sums in question which failing, where he satisfies the Tribunal that it was not reasonably practicable for the complaint to be presented before the end of that period, within such further period as the Tribunal considers reasonable; And,
 - (b) in the case of his breach of contract complaints within three months of the Effective Date of Termination of his employment which failing where he satisfies the Tribunal that it was not reasonably practicable for him to present the complaint before the end of that period of three

months, within such further period as the Tribunal considers reasonable.

11. Both the claimant and the respondent's Director gave oral evidence on oath or on affirmation. Between them parties lodged a number of loose documents to some of which reference was made in the course of evidence and or submission (as set out above).

Agreed Facts

12. The following matters of agreed fact were not in dispute before the Tribunal:-
 - Date of commencement of the claimant's employment was 15th May 2018
 - Date of termination of the claimant's employment 2nd September 2018
 - Date of expiry of the initial three month time limit for raising of the breach of contract and statutory claims 1st December 2018
 - Date of claimant's first engagement with ACAS early conciliation 14th December 2018
 - Date of issue by ACAS of the Early Conciliation Compliance Certificate 14th January 2019
 - Date of first presentation of the claim to the Employment Tribunal 12th February 2019

Findings in Fact

13. In addition to the above agreed facts, on the oral and documentary evidence presented the Tribunal made the following essential Findings in Fact restricted to those necessary for the determination of the issues before the Tribunal.
14. In respect of the complaints of breach of contract the claimant first engaged with ACAS early conciliation on 14th December that is a date occurring after the expiry of the three months' time limit for raising his claims in terms of Article 7(a) of the

Extension of Jurisdiction (Scotland) Order 1994 and the Early Conciliation Regulations do not operate to extend the three months' time limit.

15. The claimant lacks Title to Present and the Tribunal lacks Jurisdiction to Consider his complaints of breach of contract in terms of Article 7(a) of the Extension of Jurisdiction (Scotland) Regulations 1994 ("the Extension of Jurisdiction Regulations") and his statutory complaints in terms of section 111.
16. The Title to Sue and Jurisdiction Issue for determination by the Tribunal in relation to the claimant's breach of contract and statutory complaints is thus:-

Whether the claimant has Title to Present and the Tribunal Jurisdiction to Consider his complaints of breach of contract in terms of Article 7(c) of The Extension of Jurisdiction Regulations, by reason of the claimant having satisfied the Tribunal that it was not reasonably practicable for him to have presented his breach of contract claims within the three month period which expired on 1st December 2018 and further that in subsequently presenting his complaints on 12th February 2019 he did so within such further period as the Tribunal considered reasonable; and, in relation to his statutory complaints, on the same basis in terms of section 111(2)(b) of the Employment Rights Act 1996.

Termination of Employment

17. By email dated 28th August 2018 the claimant gave the respondent statutorily required one week's notice of termination of employment with the effect that the claimant's employment with the respondent, having commenced on 8th May 2018 terminated on 2nd September 2018.
18. The Effective Date of Termination of the claimant's employment was 2nd September 2018. The wages in respect of which the claimant advances claims are wages said to be due for the part month of May, the months of June, July and August and 1st and 2nd of September all 2018. The claimant's entitlement in law to

be paid wages for those successive periods arose reciprocally with his performing work duties in each such periods.

19. The respondent's payroll operated monthly in arrears on the 5th day of the calendar month immediately following the month in which the wages were earned. The claimant's wages due to him for the part month of May and for the month of June 2018 were duly paid to him by the respondent via the respondent's payroll. No unauthorised deduction from the claimant's wages has occurred in respect of wages due to him in the months of May and June 2018.
20. No claim in contract exists in respect of wages due to the claimant by the respondent for the months of May and June 2018.
21. The claimant did not receive payment of his wages for the months of July, August and for the 1st and 2nd of September 2018.
22. The claimant's entitlement to receive those wages arose respectively, and at the latest, on the 5th of August and 5th of September in respect of July and August wages and, as at the Effective Date of Termination of his employment, 2nd September, in respect of 1st and 2nd September 2018.
23. The respondent acknowledged its indebtedness to the claimant in respect of wages due for the months of July, August and September 2018 but advised the claimant that it was unable to make timeous payment due to cash flow issues. The respondent acknowledged its indebtedness to the claimant and on a number of occasions between 5th August and 2nd September iterated and reiterated its intention to pay the claimant the sums due in respect of arrears of wages as soon as it was able.
24. There was no agreement between the parties that the claimant's entitlement to the wages or the respondent's obligation to make payment of them be suspended until some unspecified date in October 2018.

25. The relative three month time limits for the raising of statutory complaints of unauthorised deduction from wages, applicable in terms of section 111(2)(a) of the Employment Rights Act 1996 and in terms of Article 7(a) of The Extension of Jurisdiction Regulations in respect of the contractual claims commenced at the latest, in relation to wages due for the month of July, on 5th August and in relation to wages due for the month of August and in respect of wages due for 1st and 2nd September, as at the Effective Date of Termination of employment that is on 2nd September, all 2018.
26. Such claim as the claimant may have had in respect of compensation for accrued but untaken proportionate paid annual leave entitlement fell due to be paid to him upon termination and as at the Effective Date of Termination of his employment namely 2nd September 2018 and the section 111(2)(a) ERA 96 3 month time limit ran from that date.
27. The applicable three month time limits accordingly respectively expired at the latest on 4th November and 1st December respectively.
28. The claimant entered ACAS facilitated early conciliation on 14th December 2018 that is upon a date after the expiry of the respective three months' time limits. The time limits are accordingly unaffected and are not extended by the operation of the late conciliation Regulations; and accordingly,
29. The claimant lacks Title to Present and the Tribunal lacks Jurisdiction to Consider, both in terms of section 111(2)(a) of the Employment Rights Act 1996, and Article 7(a) of The Extension of Jurisdiction Regulations his complaints of unauthorised deduction from wages in respect of wages claimed for the months of July, August and September 2018 the last subsuming the balance of so-called "notice pay" and for accrued but untaken paid annual leave entitlement, and in respect of his contractual claims.
30. The issue for determination by the Tribunal, in relation to the claimant's statutory claims is whether the claimant had Title to Present and the Tribunal Jurisdiction to

Consider his statutory complaints in terms of section 111(2)(b) of the Employment Rights Act 1996; and in relation to his brief of contract claims, in terms of Article 7(c) of The Extension of Jurisdiction Regulations.

The Loan (repayable on demand)

31. Shortly after receipt by the claimant of his May and June 2018 wages, the claimant made a loan to the respondent company in the sum of £2,801. No repayment date was agreed in respect of the loan which accordingly became a loan repayable on demand. In the months of July and August 2018 the claimant and the respondent's Director exchanged correspondence regarding repayment of the loan the claimant seeking repayment and assurance in relation to repayment. In his email communication of 28th August 2018 sent, in acknowledgement of the claimant's intimation notice of resignation sent on the same date, the respondent's Director acknowledged the company's indebtedness in respect of the loan and the fact that it was due and repayable as at that date.

32. Let it be assumed that non-payment of the loan gave rise to a claim falling within the terms of section 3(2)(a) of the Employment Tribunals Act 1996, that is to say "a claim for damages for breach of a Contract of Employment or other contract connected with employment", such as to bring it within the Tribunal's contractual Jurisdiction arising on termination of the Contract of Employment, the three months' time limit within which the claimant would have been entitled to present a complaint in respect of non-payment of the loan, invoking the Tribunal's contractual Jurisdiction on termination of a Contract of Employment commenced, as at the Effective Date of Termination namely 2nd September 2018, and expired on 1st December 2018. Separately, no such free standing claim for repayment of a loan is before the Tribunal.

Not reasonably practicable

33. The claimant was aware, during the initial three month statutory period during which he was entitled, of right, to present his complaints that three months' time

limit applied to their presentation. He separately had access to legal advice via an insurance policy and had accessed that advice speaking with the legal helpline prior to the expiry of the initial three month period. The claimant separately had access to the internet and to the various websites, including the Employment Tribunal's website upon which explanations about the three month time limits and their application are set out.

34. The claimant's decision to delay in presenting his applications until February of 2019 was predicated upon the erroneous assumptions on his part viz:-

(a) (Firstly) that because the money which he used to make a loan to the respondent company in July of 2018 was the money which he had some weeks earlier received in payment of wages for May and June, this meant that his wages for those months should be viewed as not having been paid;

(b) (Secondly), that his entitlement in law to be paid his wages for (May, June), July, August and the 1st to 5th September had all been suspended and deferred until some unspecified date in October 2018 and that accordingly, the three month time limit would commence on some unspecified date in October.

35. There was no proper basis in fact or in law for that assumption. The claimant could have, and in the circumstances, ought reasonably to have sought and obtained clarification from the sources, including that of legal advice available to him, before deciding to delay in the presentation of his claims based upon his erroneous assumption. Had he done so he would have been aware that the relative three month time limits would have begun to run, at the latest, respectively from the dates upon which payroll payment would have been made to him for his wages due for the months of July, August and the days worked by him in the first week of September insofar as his claims were to be advanced as statutory complaints of unauthorised deduction from wages. Insofar as they were to be advanced as breach of contract claims arising on termination of a Contract of

Employment, he would and ought reasonably in the circumstances should have been aware the three month time limit for presenting such complaints in the Employment Tribunal would have begun to run on the Effective Date of Termination of his employment namely 2nd September 2018. Further, that those time limits would have expired, at the latest on 4th December 2018.

36. There was no physical impediment or other factor which would have prevented the claimant from contacting ACAS to commence the early conciliation process within the initial three month time limits and subsequently timeously presenting his complaints to the Employment Tribunal within such extended period as would have resulted from his doing so.
37. The claimant has not established, on the balance of probabilities that it was not reasonably practicable to timeously present his claims whether as statutory claims or claims in breach of contract in terms of section 111(2)(b) of the Employment Rights Act 1996 or Article 7(c) of The Extension of Jurisdiction Regulations and the claims accordingly fall to be dismissed.

Applicable Law

Discussion and Disposal

38. The provisions which prescribe the Tribunal's Jurisdiction in respect of the claims advanced, both as statutory complaints and as complaints of breach of contract are as set out in the paragraphs above. As is also noted in those paragraphs the three month time limit, insofar as it applies to breach of contract complaints operates only to restrict the claimant's Title to raise such complaints in the Employment Tribunal and the Tribunal's Jurisdiction to consider them. The claimant remains at liberty to raise such claims in the sheriff court throughout the five year prescriptive period which applies to them.
39. As found in fact, the claimant's decision to delay in the presentation of his complaints is one which proceeded upon a mistaken assumption on his part that

the sums which he was claiming by way of wages both in terms of a statutory complaint and in contract, were sums, his entitlement to which, had been suspended and deferred until some unspecified date in October by way of mutual agreement between himself and the respondent's Director. The evidence presented at hearing did not support such a proposition. The position of the respondent's Director was that he unequivocally acknowledged, and had acknowledged at the relevant times, the debt due to the claimant by way of arrears of wages while at the same time explaining that because of cashflow problems he was unable to pay them when they fell due. It was his declared aspiration to have paid them "in October". While the claimant at some point in the period of his employment had accepted that explanation he ultimately determined to resign because of, amongst other matters the continuing non-payment of the sums to him and uncertainty/lack of confidence that they would be paid. Those facts fall short of establishing an agreement, the effect of which was to suspend until an unspecified date in October the claimant's first entitlement in law to his wages. The fact that no date in October was specified by either party merely serves to illustrate in probability that such agreement had been entered into.

40. Throughout the relevant three months' time limits the claimant had, available to him the means, including access to a legal helpline by which he could have sought clarification. By placing the full facts before a legal or other advisor he would have been aware that his entitlement in law to receive the sums had not been suspended or postponed and that the time limits ran in the case of his August wages from 5th September at the latest the same being the payroll date upon which he was contractually entitled to receive payment of his August wages and wages for the notice period worked by him in September. In the case of his current factual claims again from the 5th of September being the Effective Date of Termination of his employment. The last of the time limits expired in fact on 4th December 2018. The claimant did not engage with ACAS and the Early Conciliation Regulations until 14th December there being a date falling after the expiry of the three month time limit. The Regulations do not operate to extend the time limit. The claimant's claim was accordingly presented late and thus he lacked

Title to Present and the Tribunal Jurisdiction to Consider the complaint in terms of section 111(2)(a) of the Employment Rights Act 1996.

41. The issue for determination thus became whether the claimant could satisfy the Tribunal that it was not reasonably practicable for him to have presented his statutory and or breach of contract complaints at any time prior to the expiry of the three month limit on 4th December 2018. There was no physical impediment or other factor in play which would have operated or did operate to prevent the claimant from timeously presenting his claims. As the Tribunal has found in fact, on the balance of probabilities and on the preponderance of the evidence presented, the claimant has failed to satisfy it that it was not reasonably practicable (by which is meant reasonably feasible) for the claims to have been timeously presented. The claimant accordingly lacks Title to Present and the Tribunal lacks Jurisdiction to Consider his complaints both statutory and contractual, in terms of

section 111(2)(b) of the Employment Rights Act 1996 and Article 7(c) of The Extension of Jurisdiction Regulations. The claims are accordingly dismissed.

Date of Judgement: 6th November 2019

Employment Judge: JG d'Inverno

Date Entered in Register: 6th November 2019

And Copied to Parties