



## **EMPLOYMENT TRIBUNALS (SCOTLAND)**

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Case No: 4110178/2019 Preliminary Hearing at Edinburgh on 30 October 2019

Employment Judge: M A Macleod

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Tracy Ramsay

Claimant  
In Person

Mohammad Aslam

Respondent  
Represented by  
Ms S Mackie  
Solicitor

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### **JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

The Judgment of the Employment Tribunal is that the claimant's claim is dismissed on the grounds that the Tribunal lacks jurisdiction to hear it, on the basis that it is time-barred.

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### **REASONS**

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1. In this case, the claimant presented a claim to the Employment Tribunal on 14 August 2019 in which she complained that she had been unlawfully deprived of pay in respect of holidays accrued but untaken as at the date of termination of her employment.

2. The respondent submitted an ET3 resisting the claimant's claim.

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3. A Preliminary Hearing was fixed to take place on 30 October 2019 in order to determine whether the Tribunal has jurisdiction to hear the claimant's claim, on the basis that it may be time-barred.

4. The claimant appeared on her own behalf, and the respondent was represented by Ms Mackie.
5. During the course of the hearing a number of issues arose in relation to the correct identity of the respondent, both because the respondent confirmed that he did not, personally, employ the claimant, but did so in the capacity of Wallyford DayToday Supermarket Limited, and because the claimant's employment was transferred under the Transfer of Undertakings (Protection of Employment) Regulations 2006 to another company, Rayyan 1 Enterprises Limited in March 2019.
- 10 6. It is appropriate for me to address the issue of time bar before setting out my views on whether or not the correct respondent has been sued in this case, since the time bar issue would require to be resolved whichever respondent were in the proceedings.
7. The claimant gave evidence on her own behalf.
- 15 8. Based on the evidence presented, the Tribunal was able to find the following facts admitted or proved.

### **Findings in Fact**

9. The claimant was employed by the respondent in the capacity of Wallyford DayToday Supermarket Limited from 11 September 2017 until 24 March 2019, when her employment – in her understanding – transferred to Rayyan 1 Enterprises Limited, a company which the respondent has no involvement in running. The claimant worked, and continues to work under new management, as a post office counter clerk.
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10. Her employment ended with the respondent on 24 March 2019. She was not satisfied that she had received her full holiday entitlement, nor been paid in full for it, when her relationship with the respondent's business ended. In May 2019, the claimant contacted ACAS by telephone to ask for advice about how to claim for the pay in relation to her outstanding holidays. She wrote to the respondent in June to ask for their proposals to settle her complaint, but did not receive any payments in response.
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11. The claimant notified ACAS of her intention to raise Tribunal proceedings against the respondent on 13 June 2019. The Early Conciliation Certificate (ECC) was received by the claimant on 13 July 2019.

5 12. The claimant telephoned ACAS on receipt of the ECC, and they advised her how to take the matter forward and make her claim to the Tribunal. They told her that if she wanted to take the matter forward, she needed to complete her claim online. The claimant was concerned for her job if she raised a claim against the respondent, because although he was no longer involved in the company which employed her, he remained the postmaster  
10 for the post office and therefore was still in the shop from time to time in that capacity. The claimant feared that if she raised a claim it would have negative implications for her in the workplace, and she did not wish things to be any more awkward than they already were there.

15 13. ACAS told the claimant that she needed to submit her claim by no later than 13 August 2019. The claimant was aware of this, but hesitated to submit the form. She explained that she completed the form several times but deleted it immediately, until 14 August 2019 when she submitted the claim form which was received by the Tribunal. She was a day late in doing so, and was aware that she had left it until after the deadline before presenting  
20 her claim. In her evidence before me, she said "I knew it was my fault". She also said that there was nothing in her life which would or did prevent her from lodging the claim in time – just "normal family life".

25 14. The claimant also confirmed that she received her final pay – less, in her view, what she was due in respect of holidays – on 24 March 2019. She was normally paid on the final day of each month. She received her final salary from Mr Aslam by way of payment of cash handed to her on 24 March 2019.

15. When the new company took over the shop, the claimant was unaware of any of the details and had not been consulted as to the transfer.

16. For the respondent, Ms Mackie submitted this is a claim for holiday pay under section 23(2) of the Employment Rights Act 1996. The claim, she said, is out of time, and there are no grounds for extending time.

17. The claimant continues to work, but her employment was transferred from the respondent's company to Rayyan 1 Enterprises Limited on 24 March 2019 by the operation of TUPE. That company is the appropriate respondent in this case.

18. The alleged unlawful deduction from wages took place on the last day of the claimant's employment, on 24 March 2019. By the operation of the early conciliation system, the claimant's last day for presenting her claim was 13 August 2019.

19. Under section 23(2) of ERA, the Tribunal shall not consider a claim such as this claim unless it is presented within three months of the date of the payment of wages from which the deduction was made, and under section 23(4), Ms Mackie submitted, provides that where the Tribunal is satisfied that it was not reasonably practicable for the complaint to have been presented within that three month timescale, the Tribunal may consider the complaint if it has been presented within such further time period as the Tribunal considers reasonable.

20. In this case, Ms Mackie argued that it could not be said that it was not reasonably practicable for the claim to have been presented within that timescale. It is unclear as to why the claimant would be concerned about her ongoing employment. The respondent is no longer her employer and she understands that. It renders the excuse for the delay in presentation of the claim to be illogical.

21. In any event, it is not clear what changed between 13 and 14 August to make her feel that her job would now be safe if she presented her claim on that second date. It is clearly possible for the claimant to have presented the claim in time. The claimant understood her rights and the deadline. As a result, the Tribunal lacks jurisdiction to hear this case.

### **The Relevant Law**

22. Section 23 of ERA sets out the basis upon which the Tribunal may exercise its discretion in extending time for a late claim in these circumstances.

23. What is reasonably practicable is essentially a question of fact and the onus of proving that presentation in time was not reasonably practicable rests on the claimant. “That imposes a duty upon him to show precisely why it was that he did not present his complaint.” (**Porter v Bandridge Ltd [1978] ICR 943**).

24. The best-known authority in this area is that of **Palmer & Saunders v Southend-on-Sea Borough Council 1984 IRLR 119**. The Court of Appeal concluded that “reasonably practicable” did not mean reasonable but “reasonably feasible”. On the question of ignorance of the law, of the right to make a complaint to an Employment Tribunal and of the time limits in place for doing so, the case of **Porter (supra)** ruled, by a majority, that the correct test is not “whether the claimant knew of his or her rights, but whether he or she ought to have known of them.” On ignorance of time limits, the case of **Trevelyan (Birmingham) Ltd v Norton EAT 175/90** states that when a claimant is aware of their right to make a claim to an employment tribunal, they should then seek advice as to how they should go about advancing that claim, and should therefore be aware of the time limits having sought that advice.

### **Discussion and Decision**

25. There are three questions for the Tribunal to ask itself in this case, as follows:

1. Was the claim presented outwith the statutory time limit?
2. If so, was it not reasonably practicable for the claimant to have presented the claim within the time limit, and if it was, was the claimant then presented within such further time as the Tribunal considers reasonable?

3. What, if any, effect does the TUPE transfer have on the question of jurisdiction?

26. The claim should have been presented by 13 August 2019. It was not presented to the Tribunal until 14 August. It was therefore presented a day late. The claimant accepted this. Her pay was given to her on the last day of her employment, and that is when the statutory timescale started to run.

27. The Tribunal must consider whether it was not reasonably practicable for the claimant to have presented the claim in time. In this case, the claimant was transparently honest and indeed candid about her actions and thinking in advance of the decision to submit her claim.

28. She was hesitant to make her claim because she was worried that it would make things awkward in the shop, given that Mr Aslam was present on a regular basis. However, nothing in her life prevented her from doing so, and indeed, she was aware of the deadline of 13 August 2019, because ACAS told her about it. Having been made aware of the deadline, the claimant said that she prepared a claim form several times but deleted it, and eventually reached the stage of submitting it only once the deadline had passed.

29. The claimant was unable to provide any further explanation than that for her failure to present the claim in time. It was, in my judgment, reasonably practicable – or reasonably feasible – for her to have presented her claim in time. There was no reason for her not to have done so by 13 August 2019. She was in possession of all the information she needed by that date, and indeed she was preparing for the submission of a claim well in advance of the date.

30. Her explanation that she was worried that it might have a negative impact upon the workplace atmosphere was not, as Ms Mackie said, a logical one. She found herself able to submit the claim on 14 August 2019. If that were so, the same circumstances applied on the day before, but she was unable to explain why she could not have presented the claim on 13 August, nor indeed before then. Nothing had changed, and therefore it is clear that her

anxiety about the impact on her workplace did not prevent her lodging the claim in time.

31. Accordingly, I am bound to find that it was reasonably practicable for the claim to have been lodged by the claimant in time.

5 32. The third issue, then, is whether the TUPE transfer has any impact on the question of jurisdiction. In my judgment, it does not. It may well be that the claimant has not raised her claim against the correct respondent, in that the effect of TUPE would be to transfer any liabilities under her contract of employment to her new employer, including any claim in respect of holiday pay. However, the payment under consideration, and the liability which may 10 therefore have been transferred, was made on 24 March 2019, and it is from that payment that the claimant complains the deduction was made. Moving to a new employer would not change that date, nor would it close the gap between the end of the statutory time limit and the lodging of the claim. Accordingly, while the claimant may not have presented her claim 15 against the correct employer, it was still reasonably practicable for her to have done so within the statutory time limit, and therefore that issue does not affect the Tribunal's decision that the claim must be dismissed on the grounds that it lacks jurisdiction to hear it.

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33. The claimant's claim is therefore dismissed for want of jurisdiction.

**Employment Judge: M MacLeod**

25 **Date of Judgement: 7<sup>th</sup> November 2019**

**Entered in Register: 8<sup>th</sup> November 2019**

**And Copied to Parties**

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