



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4107050/2019

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Held in Glasgow on 9 August 2019

Employment Judge I Atack

10 **Sarah Louise Kelly**

**Claimant
Represented by:
Mr C Brown -
Representative**

15 **Hudson Digital Ltd**

**Respondent
Represented by:
Mr P Bryce -
Representative**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

20 The judgment of the Employment Tribunal is that the tribunal does have jurisdiction to hear the claimant's complaint of breach of contract.

REASONS

Introduction

1. In this case the claimant has brought a claim of breach of contract namely
25 that she had not been paid upon termination of her employment in respect of her full period of notice in terms of her contract of employment. The respondent alleges that the claimant accepted payment of four weeks' notice and had that not been accepted she had been required to work for eight weeks or placed on garden leave. The respondent also brings an employer's contract
30 claim seeking payment in respect of sums allegedly overpaid in respect of periods of absence and holiday. The details of the dates of absence and holidays were not specified in the ET3.

2. This case was set down for a full hearing although the parties were advised by a letter of 29 May 2019 that the issue of time bar in respect of the claimant's claim would be considered at the outset of the hearing.
3. Mr. Brown appeared for the claimant and Mr. Bryce purported to appear for the respondent. He advised me that the respondent's business had been sold the day before the hearing, that he had been a 75% shareholder in the respondent and that instructions had been given to place the respondent in liquidation. He denied he was a director of the respondent.
4. It was therefore not clear that Mr. Bryce had authority to appear on behalf of the respondent and apart from explaining his role he played no part in the proceedings.
5. In all the circumstances it was decided to proceed only on the preliminary issue of time bar at this stage. If the claimant was able to satisfy the Employment Tribunal that the claim was not time-barred her case would be able to proceed once the precise status of the respondent had been clarified and the consent of the liquidator, if any, or the court, if required, had been obtained.
6. Mr. Brown produced three productions, but those were not referred to in the course of these proceedings.
7. The claimant gave evidence and, following the conclusion of the case, I clarified the points of her evidence from the files relating to her claim.

Facts

8. I found the following material facts to be proved.
9. The claimant was employed by the respondent from 3 April 2018 until 28 January 2019 when her employment was terminated.
10. The claimant sent an early conciliation notification to Acas on 16 April 2019.
11. Acas issued an early conciliation certificate on the 18 April 2019.

12. The name of the respondent shown on the early conciliation certificate is Hudson Digital Ltd.
13. The claimant presented an ET1 to the employment tribunal on 25 April 2019.
14. That form was rejected on 29 April as the name of the respondent shown in
5 the ET 1 was that of Mr. P Bryce and accordingly differed from the name of the proposed respondent on the early conciliation certificate.
15. The Employment Tribunal purported to send a letter to the claimant advising her that the ET1 had been rejected and giving her 14 days to apply for a reconsideration. The letter was sent by email but the email address to which
10 it was sent was *sarahkelly@outlook.com* whereas the claimant's correct email address is sarahkelly@outlook.com.
16. The claimant did not receive the communication from the Employment Tribunal advising that her claim form had been rejected.
17. The claimant contacted the Employment Tribunal on 21 May to ascertain what
15 was happening to her claim and was advised both that her ET1 had been rejected and the reason why.
18. The claimant submitted a further ET1 on 23 May but as a new claim. She gave the name of the respondent as Hudson Digital Limited, which was the name shown on the early conciliation certificate.
19. She submitted it online and did not include a covering letter explaining what
20 had happened regarding the first ET1.
20. The Employment Tribunal treated the newly submitted claim as a separate claim from the first one as there was nothing to indicate that it was anything other than a new claim. There was no link made by the claimant to the
25 previously rejected claim.
21. The Employment Tribunal administration allocated a new case number to the new ET1. That was a different case number to the case number allocated to the ET1 presented in April which had been rejected. A new and separate file was opened for the new claim.

22. The claimant received a letter from the Employment Tribunal dated 29 May 2019 advising that it appeared the claim had been submitted outwith the normal time limit. It stated this matter would be dealt with by the Employment Tribunal as a preliminary issue at the commencement of the hearing on the merits.

Submission

23. Mr. Brown submitted that the claimant had done all she could to ensure the ET1 had been presented in time. She had presented it within 3 months of the date of termination. She had not received notification that the original claim had been rejected and had she done so she would then have re-presented it without delay. As she did not receive the letter notifying her of the rejection she was unaware that had happened.

24. Having heard nothing, she contacted the Employment Tribunal on 21 May to find out what was happening with her claim and once she had been advised of the rejection and the reason for that she presented the claim again.

25. He submitted that the claimant should be allowed to proceed with her claim.

Decision

The Law

26. The claimant's claim of breach of contract is brought under Article 3 of the Employment Tribunals Extension of Jurisdiction (Scotland) Order 1994 (the "Order"). In terms of Article 7(a) a claim should be brought within three months beginning with the effective date of termination of the contract giving rise to the claim or where the tribunal is satisfied that it was not reasonably practicable for the complaint to be presented within three months, within such further period as the tribunal considers reasonable.

27. By virtue of section 18 A of the Employment Tribunals Act 1996 a person intending to bring a claim must contact Acas before instituting Employment Tribunal proceedings. The procedure involves the following stages:-

- the potential claimant informs Acas that he or she intends to bring a claim
- if the claimant agrees to early conciliation, Acas instructs a conciliation officer
- 5 • the Acas conciliation officer has one month to attempt to resolve the dispute between the parties, which may be extended by a further two weeks
- if settlement is not reached, or if either party decides at any point not to continue to participate in conciliation, the Acas conciliation officer
- 10 issues the claimant with an EC certificate
- the prospective claimant may then bring a claim

28. Section 18A (8) provides as follows:

15 *“A person who is subject to the requirement in subsection (1) may not present an application to institute relevant proceedings without a certificate under subsection (4)”.*

29. **The Employment Tribunals (Early Conciliation: Exemptions and Rules of Procedure) Regulations 2014** set out what a prospective claimant must do to satisfy the requirement for early conciliation. It provides at regulation 2 (2) that an early conciliation form presented to Acas must contain the

20 prospective claimant’s name and address and the prospective respondent’s name and address. The form may be submitted either using an online form from the Acas website or sent by post to the Acas address set out in the early conciliation form.

30. Article 8B of the Order provides an extension of the time limit to facilitate

25 conciliation before institution of proceedings. Put shortly, the effect of applying for early conciliation is to stop the clock running in respect of time bar.

The Issues

31. The issues to be decided in this case were: –

(i) Was the claimant's complaint presented before the end of the period of three months beginning with the effective date of termination?

5 (ii) If not so, was presentation in time not reasonably practicable?

(iii) If so, was the complaint presented within such further time limit as the tribunal considers reasonable?

32. The claimant was dismissed from her employment on 28 January 2019 and accordingly she had until 27 April to present her claim in the normal way. She applied to Acas on 16 April and received the Early Conciliation certificate on 18 April. She presented her claim to the Employment Tribunal on 25 April which was within 3 months of the termination of her employment.

33. Because of the early conciliation provisions and Article 8B(4) of the Order she had until 19 May to present her claim.

15 34. The claimant was unaware that her initial form had been rejected for the simple reason that the letter informing her of that fact was sent to an incorrect email address. Having heard nothing from the Employment Tribunal, she contacted the administration on 21 May and was advised that her original claim had been rejected and the reason for that. The claimant then sent a further ET1 with the correct name of the respondent on 23 May 2019. On the face of it the further claim was out of time.

35. I was satisfied that the claimant had not learnt that her original claim had been rejected until she telephoned to inquire what was happening on 21 May. She then presented a new claim within two days.

25 36. The claimant had no reason to believe her initial claim had not been accepted until she made her telephone call. Whilst it is regrettable that she delayed presenting that first claim until 25 April, the fact is she did present that claim in time. She made an error in naming Mr. Bryce as the respondent but that could easily have been changed had she received the letter from the

administration advising her of the rejection of her claim and the reason for it. The reason she did not receive that email was through no fault of the claimant.

37. The onus is upon the claimant to show why it was not reasonably practicable to have presented the claim in time and in my judgment she has discharged that onus. I was satisfied that because of the error made in sending the email
5 advising of the rejection to the wrong address it was not reasonably practicable for the claimant to present her claim in time. I was satisfied that had she received that email she would have rectified the fault and applied for a reconsideration of the rejection. It is difficult to see that such an application
10 would have been refused. It was because she had not received the notification of the rejection of her ET1 that she did not apply for a reconsideration.

38. I was also satisfied that the claimant had presented her claim within a reasonable time after being advised on 21 May of the rejection of her initial claim. I am therefore satisfied that the claim has been presented in time and
15 should be allowed to proceed.

39. I took into account the overriding objective set out in the Employment Tribunals (Constitution and rules of Procedure) Regulations 2013, to deal with cases fairly and justly. I did not consider that in the particular circumstances of this case it would be in the interest of justice to refuse the claimant's claim
20 on the basis that it was time-barred.

40. The case will be relisted for a full hearing in respect of the claimant's claim of breach of contract and the employer's counterclaim. It will be necessary to ascertain the nature of the respondent's insolvency and whether the consent of the court is required before the claims can proceed.

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Employment Judge: I Atack
Date of Judgment: 15 August 2019
Date sent to parties: 19 August 2019