



## **EMPLOYMENT TRIBUNALS (SCOTLAND)**

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**Case No: 4109156/2019**

**Preliminary Hearing Held at Glasgow on 3 December 2019**

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**Employment Judge A Kemp**

**Mr C Georgiev**

**Claimant  
No appearance**

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**Fife Law Centre**

**Respondent  
Represented by:  
Ms F McAulay  
Solicitor**

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

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The Tribunal does not have jurisdiction to consider the Claim and the Claim is dismissed.

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### **REASONS**

#### **Introduction**

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1. The Claim made was for unfair dismissal, for notice pay and for other sums due, which were understood to be in relation to sick pay. The respondent challenged whether the Tribunal had jurisdiction having regard to the terms of section 111(2) of the Employment Rights Act 1996, on time-bar.

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2. A Preliminary Hearing was fixed to determine that issue by Notice dated 12 October 2019. That was also referred to in correspondence from the Tribunal, and from the respondent copied to the claimant. The Preliminary E.T. Z4 (WR)

Hearing was referred to in a letter from the Tribunal dated 19 November 2019 which cancelled a Final Hearing arranged for 16 – 18 December 2019 but confirmed that the Preliminary Hearing would proceed.

- 5 3. Despite that the claimant did not appear. The start of the hearing was delayed slightly to allow him to do so. A check was made with the clerk, who explained that an attempt had been made to contact the claimant on 2 December 2019 to inform him that the hearing would start at 10.30am not 10am as the Notice had indicated, but without success. The claimant had therefore been informed of a 10am start. When there was no appearance by 10.45 the hearing commenced in his absence.
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### **The issues**

- 15 4. The issues that arose in the case were considered to be:
- (i) What was the effective date of termination?
  - (ii) If that was 8 March 2019, was it not reasonably practicable for the claimant to have presented his claim timeously under section 111(2) of the Employment Rights Act 1996?
  - 20 (iii) If so, was the claim presented within a reasonable period of time thereafter, under that same section?
  - (iv) In respect of the claim for notice pay, the issues were the same but the statutory basis for them was found within Regulation 7 of the Employment Tribunals (Extension of Jurisdiction) (Scotland) Order 25 1994.
  - (v) In respect of the claim for sick pay the issues were again the same but the statutory basis for them was found within section 23 of the Employment Rights Act 1996.

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### **The Facts**

5. No formal evidence was given. The following facts were established from the documents submitted by the respondent, from the pleadings, and from
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two further documents submitted by the respondent at my request at the hearing to establish when the claimant was informed of his dismissal, sent by e-mail on 5 December 2019.

- 5 6. The claimant is Mr Charles Georgiev.
7. The respondent is Fife Law Centre.
8. The claimant was employed by the respondent from 26 February 2015 as  
10 an administrator.
9. The claimant was summarily dismissed by letter from the respondent dated 8 March 2019. It was sent to him by email that day. It was received by the claimant that day.
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10. The claimant commenced Early Conciliation on 5 June 2019.
11. The Early Conciliation Certificate was issued on 4 July 2019.
- 20 12. The Claim Form was presented on 5 August 2019.

### **The Law**

13. Section 111 of the Employment Rights Act 1996 provides as follows, in  
25 respect of the claim for unfair dismissal:

#### **“111 Complaints to employment tribunal**

- (1) A complaint may be presented to an employment tribunal against an employer by any person that he was unfairly dismissed by the employer.
- 30 (2) Subject to the following provisions of this section, an employment tribunal shall not consider a complaint under this section unless it is presented to the tribunal—
- (a) before the end of the period of three months beginning with the effective date of termination, or

(b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.

5 (2A) Section 207A(3) (extension because of mediation in certain European cross-border disputes) and section 207B (extension of time limits to facilitate conciliation before institution of proceedings) apply for the purposes of subsection (2)(a).”

10 14. What is the effective date of termination is set out in section 97 of the Act, the material terms of which are as follows:

**“97 Effective date of termination**

(1) Subject to the following provisions of this section, in this Part 'the effective date of termination'—

15 (a) in relation to an employee whose contract of employment is terminated by notice, whether given by his employer or by the employee, means the date on which the notice expires,

(b) in relation to an employee whose contract of employment is terminated without notice, means the date on which the termination takes effect, and

20 (c) in relation to an employee who is employed under a limited-term contract which terminates by virtue of the limiting event without being renewed under the same contract, means the date on which the termination takes effect.

25 (2) Where—

(a) the contract of employment is terminated by the employer, and

(b) the notice required by section 86 to be given by an employer would, if duly given on the material date, expire on a date later than the effective date of termination (as defined by subsection (1)),

30 for the purposes of sections 108(1), 119(1) and 227(3) the later date is the effective date of termination.

(3) In subsection (2)(b) 'the material date' means—

35 (a) the date when notice of termination was given by the employer, or

- (b) where no notice was given, the date when the contract of employment was terminated by the employer”.

- 5 15. The provision for jurisdiction of a claim for breach of contract, for notice pay, is found within Regulation 7 of the Employment Tribunals (Extension of Jurisdiction) (Scotland) Order 1994 which states:

**“7 Time within which proceedings may be brought**

10 [Subject to article 8A and 8B, an employment tribunal] shall not entertain a complaint in respect of an employee's contract claim unless it is presented—

- (a) within the period of three months beginning with the effective date of termination of the contract giving rise to the claim, or  
(b) where there is no effective date of termination, within the period of three months beginning with the last day upon which the employee worked in the employment which has terminated, or

15 [(ba) where the period within which a complaint must be presented in accordance with paragraph (a) or (b) is extended by regulation 15 of the Employment Act 2002 (Dispute Resolution) Regulations 2004, the period within which the complaint must be presented shall be the extended period rather than the period in paragraph (a) or (b).]

- 20 (c) where the tribunal is satisfied that it was not reasonably practicable for the complaint to be presented within whichever of those periods is applicable, within such further period as the tribunal considers reasonable.”

- 25 16. The claim for sick pay may arise under section 23 of the Employment Rights Act 1996, which provides:

30 **“23 Complaints to employment tribunals**

- (1) A worker may present a complaint to an employment tribunal—  
(a) that his employer has made a deduction from his wages in contravention of section 13 (including a deduction made in

contravention of that section as it applies by virtue of section 18(2)),....

(2) Subject to subsection (4), an employment tribunal shall not consider a complaint under this section unless it is presented before the end of the period of three months beginning with—

(a) in the case of a complaint relating to a deduction by the employer, the date of payment of the wages from which the deduction was made, or

(b) in the case of a complaint relating to a payment received by the employer, the date when the payment was received.

.....

(4) 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.”

17. Before proceedings can be issued in an Employment Tribunal, prospective claimants must first contact ACAS and provide it with certain basic information to enable ACAS to explore the possibility of resolving the dispute by conciliation (Employment Tribunals Act 1996 section 18A(1)). This process is known as 'early conciliation' (EC), with the detail being provided by regulations made under that section, namely, the Employment Tribunals (Early Conciliation: Exemptions and Rules of Procedure) Regulations 2014 SI 2014/254. They provide in effect that within the period of three months from the effective date of termination of employment EC must start, doing so then extends the period of time bar during EC itself, and is then extended by a further month for the presentation of the Claim Form to the Tribunal. If not, then a Tribunal cannot consider a claim unless it was not reasonably practicable to have done so in time, and then if EC starts, and the Claim is presented, within a reasonable period of time.

18. Whilst the statutory provisions are from different sources, they are to the same effect. Unless it was not reasonably practicable to have presented

the Claim Form timeously, the Tribunal does not have jurisdiction to consider that Claim.

19. The question of what is reasonably practicable is explained in a number of authorities, particularly *Palmer and Saunders v Southend on Sea Borough Council [1984] IRLR 119*, a decision of the Court of Appeal in England. The following guidance is given:

“34. In the end, most of the decided cases have been decisions on their own particular facts and must be regarded as such. However, we think that one can say that to construe the words ‘reasonably practicable’ as the equivalent of ‘reasonable’ is to take a view too favourable to the employee. On the other hand, ‘reasonably practicable’ means more than merely what is reasonably capable physically of being done. ... Perhaps to read the word ‘practicable’ as the equivalent of ‘feasible’, as Sir John Brightman did in Singh’s case and to ask colloquially and untrammelled by too much legal logic, ‘Was it reasonably feasible to present the complaint to the Industrial Tribunal within the relevant three months?’ is the best approach to the correct application of the relevant subsection.

35. What however is abundantly clear on all the authorities is that the answer to the relevant question is pre-eminently an issue of fact for the Industrial Tribunal and that it is seldom that an appeal from its decision will lie. Dependent upon the circumstances of the particular case, an Industrial Tribunal may wish to consider the manner in which and reason for which the employee was dismissed, including the extent to which, if at all, the employer’s conciliatory appeals machinery has been used. It would no doubt investigate what was the substantial cause of the employee’s failure to comply with the statutory time limit, whether he had been physically prevented from complying with the limitation period for instance by illness or a postal strike or something similar. [...] Any list of possible relevant considerations, however, cannot be exhaustive, and, as we have stressed, at the end of the day the matter is one of fact for the Industrial Tribunal, taking all the circumstances of the given case into account.”

20. In ***Asda Stores Ltd v Kauser UKEAT/0165/07***, a decision of the Employment Appeal Tribunal, Lady Smith at paragraph 17 commented that it was perhaps difficult to discern how:

5 “‘reasonably feasible’ adds anything to ‘reasonably practicable’, since the word ‘practicable’ means possible and possible is a synonym for feasible. The short point seems to be that the court has been astute to underline the need to be aware that the relevant test is not simply a matter of looking at what was possible but asking whether, on the facts of the case as found, it was reasonable to expect that which was possible to have been done.”

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21. In ***Schultz v Esso Petroleum Company [1999] IRLR 488*** the Court of Appeal stated that the approach to what was reasonably practicable should vary according to whether it falls in the earlier weeks or the far more critical later weeks leading up to the expiry of the period of limitation.
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22. ***Marks and Spencer plc v Williams-Ryan [2005] IRLR 562*** set out the issues to consider when deciding the test of reasonable practicability, which included (i) what the claimant knew with regard to the time-limit (ii) what knowledge the claimant should reasonably have had and (ii) whether he was legally represented
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23. The burden of proof is on the claimant to prove that it was not reasonably practicable to present the complaint in time: ***Porter v Bandridge Ltd [1978] IRLR 271***.
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### Submissions for respondent

24. Ms McAulay argued that the effective date of termination was 8 March 2019. She had set out her argument over time bar in a letter to the Tribunal, which was item one in her productions. She argued that the effect of the statutory provisions was that the claimant had submitted the claim out of time, and no evidence was submitted that it was not reasonably practicable to have done so earlier.
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25. The onus was on the claimant under reference to the case of *Porter*. She also referred to the test set out in *Palmer*.

26. It was in any event not what the claimant knew that was relevant. It was  
5 up to the claimant to make reasonable enquiries. He knew sufficient to  
commence early conciliation in time, and ACAS were likely to have  
informed him of the provisions on timebar. In any event, he ought to have  
known them, and there was no evidence from him, which had been part  
of his pattern of not responding to correspondence, or to the case  
10 management order which had been extended twice.

27. She sought the dismissal of the claim on account of the issue of timebar.

### Discussion

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28. The effective date of termination was I consider 8 March 2019. That was the date when the claimant had accessed the letter of that date confirming his summary dismissal.

20 29. In light of the statutory test, and the authorities set out above, I concluded that the claimant had been in time when starting Early Conciliation, but had presented the Claim Form one day late. The last day to do so timeously under the statutory provisions referred to was 4 August 2019.

25 30. I also concluded that the claimant had not established that it had not been reasonably practicable for him to have presented his Claim within the primary time period. The onus was on the claimant, and he did not appear to seek to discharge that.

30 31. I did consider whether the Claim Form disclosed any other claim, where the statutory provisions may be different, but was satisfied that it did not. There was no indication of that on the Claim Form, and the Schedule of Loss that the claimant provided did not indicate any other claim.

35 **Conclusion**

32. The Tribunal does not have jurisdiction to consider the Claim, and it must therefore be dismissed.

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Employment Judge:

A Kemp

Date of Judgement:

05 December 2019

Entered in Register,

10 Copied to Parties:

11 December 2019