



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4100038/2020 (V)

**Final Hearing
On 5 May 2020**

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Employment Judge M Robison

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Mr S Kerr

**Claimant
In person**

Forth Roofing Services Lanark

**Respondent
No response**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

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The Employment Tribunal, having decided that the claim for holiday pay has been lodged out of time, but being satisfied that it was not reasonably practicable to have lodged the claim in time, finds the claimant entitled to holiday pay, and orders the respondent to pay to the claimant the sum of THREE HUNDRED AND NINETY EIGHT POUNDS AND FIFTY THREE PENCE (£398.53).

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The claim for redundancy pay is lodged in time, and the Tribunal finds that the respondent shall pay to the claimant the sum of FIVE THOUSAND ONE HUNDRED AND NINETY POUNDS (£5,190).

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REASONS

1. A final hearing in this case was set down to take place on 17 April 2020, in respect of the claimant's claim for redundancy pay and holiday pay. Although this claim is undefended, and the claimant has supplied quantification of his

losses, the issue of whether or not the claim was time barred required to be determined.

2. Following the issue of the Presidential Guidance on the Covid-19 pandemic, coming into force 18 March 2020, all in person hearings were converted to telephone conference calls. At the telephone conference call on 17 April 2020, I proposed and Mr Kerr agreed that the matter of whether the claim had been lodged within the statutory time limits or not could be determined at a virtual hearing, which would take place by way of video conferencing.
3. The hearing was set down to take place on 5 May 2020. Holding entire hearings by video-conferencing is a new experience for the Employment Tribunals, and I wish to thank Mr Kerr for his patience in liaising with staff to set up the hearing, which included participating in a trial the day before this hearing.
4. Nevertheless we did have some difficulties with technology. After taking the oath and commencing his evidence, Mr Kerr's audio cut out. After some liaison with the clerk, it was possible for Mr Kerr to attend the hearing by use of his mobile, which allowed for audio but not video. In the circumstances, I was satisfied that the overriding objective was met by concluding the evidence by audio only.
5. The sole focus of the hearing was on the question of time bar. The claimant is claiming redundancy pay as well as holiday pay, and was aware that the legal tests to determine time limits, and whether the claims should be allowed even if they had been lodged out of time, are different.
6. I heard evidence from the claimant only via video conferencing. I found the claimant to be a candid and credible witness, and accepted his evidence in its entirety

30 **Findings in fact**

7. The claimant commenced employment as a roofer with the respondent in or around June 2005. He worked for a Gordon Paterson, whose father had set up the respondent company. He worked with one other roofer.

8. On Wednesday 14 August, Mr Paterson senior asked the claimant and his colleague to attend at his house. They were then advised that the company would be ceasing trading. The claimant and his colleague attended work on Thursday 15, Friday 16 and Monday 19, to complete jobs which the company had been undertaking.
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9. Otherwise the claimant had no warning that the company would cease trading or that his employment would be terminated. While he was aware that it was “quiet” in terms of workload, they had been in that position before and the work had picked up again.
- 10 10. At the meeting on 14 August, the claimant was advised that the company would be going insolvent, and that he should make a claim for a redundancy payment through the Government. This was repeated on Friday 16 and on Monday 19, which was the last day of his employment and the last day he saw Mr Paterson.
- 15 11. The claimant was paid all the wages which he was due. The claimant subsequently contacted the Government’s insolvency service to be told that no payment could be made because the respondent company was still registered with Companies House as an active company.
- 20 12. The claimant thereafter contacted Mr Paterson junior on the telephone several times. He advised him that he had no intention of making the company insolvent because he could not afford a liquidator, but that he was expecting one of the company’s creditors to do so. When the claimant telephoned him again sometime in October, he repeated that he would not make the company insolvent but expected a creditor to do so.
- 25 13. In or around early December, the claimant was discussing his claim with his wife’s work colleague, who suggested that there were time limits for making such claims. He then telephoned Mr Paterson who said that he did not know anything about time limits. The claimant then contacted ACAS on 23 December (see EC certificate) who the claimant understands contacted Mr Paterson on a couple of occasions, but no progress was made.
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14. An EC certificate was thereafter issued on 3 January 2020. On 6 January 2020, the claimant lodged his claim in the Employment Tribunal.
15. The claimant’s holidays were based on the calendar year. His entitlement was 28 days per year. By 19 August 2019, he had taken 13 days’ holiday.

16. His gross weekly wage was £415.20.
17. The claimant's date of birth is 11 March 1987.

The relevant law

- 5 18. The law relating to time limits in respect of arrears of holiday pay is contained in the Working Time Regulations 1998. Regulation 30(2) states that an employment tribunal shall not consider a complaint unless it is presented before the end of the period of three months beginning with the date on which it is alleged that the payment should have been made, or within such further
10 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.
19. Thus the tribunal must consider whether it was not reasonably practicable for the claimant to present his claim in time, the burden of proof lying with the
15 claimant. If the claimant succeeds in showing that it was not reasonably practicable to present his claim in time, then the tribunal must be satisfied that the time within which the claim was in fact presented was reasonable.
20. The Court of Appeal has recently considered the correct approach to the test of reasonable practicability (*Lowri Beck Services Ltd v Brophy* [2019] EWCA
20 Civ 2490). Lord Justice Underhill summarised the essential points as follows:
 1. The test should be given "a liberal interpretation in favour of the employee" (*Marks and Spencer plc v Williams-Ryan* [2005] EWCA
Civ 479, [2005] ICR 1293, which reaffirms the older case law going back to *Dedman v British Building & Engineering
25 Appliances Ltd* [1974] ICR 53)
 2. The statutory language is not to be taken as referring only to physical impracticability and for that reason might be paraphrased as whether it was "reasonably feasible" for the claimant to present his or her claim in time: see *Palmer and Saunders v Southend-on-Sea Borough Council* [1984] IRLR 119....
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 3. If an employee misses the time limit because he or she is ignorant about the existence of a time limit, or mistaken about when it expires in their case, the question is whether that ignorance or mistake is reasonable. If it is, then it will [not] have been

reasonably practicable for them to bring the claim in time (see *Wall's Meat Co Ltd v Khan* [1979] ICR 52); but it is important to note that in assessing whether ignorance or mistake are reasonable it is necessary to take into account any enquiries which the claimant or their adviser should have made.

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4. If the employee retains a skilled adviser, any unreasonable ignorance or mistake on the part of the adviser is attributed to the employee (*Dedman*)...

5. The test of reasonable practicability is one of fact and not law (*Palmer*).

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21. Claims in respect of redundancy payments are determined by an employment tribunal under section 163 of the Employment Rights Act 1996 ("the 1996 Act"). Section 164 states that an employee does not have any right to a redundancy payment, unless, before the end of the period of six months from the date of dismissal, an employee has made a claim for the payment by notice in writing given to the employer (s164(1)(b); or the question as to the employee's right to, or the amount of, the payment (s164(1)(c), or a claim for unfair dismissal, has been referred to an employment tribunal (s164(1)(d).

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22. Section 135 of the Employment Rights Act 1996 states that an employer shall pay a redundancy payment to an employee if his employee is dismissed by reason of redundancy.

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23. Section 162(1) states that the amount of a redundancy payment shall be calculated by (a) determining the period, ending with the relevant date, during which the employee has been continuously employed, (b) reckoning backwards from the end of that period the number of years of employment falling within that period, and (c) allowing the appropriate amount of each of those years of employment.

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24. Section 162(2) states that the appropriate amount means (a) one and a half week's pay for a year of employment in which the employee was not below the age of forty-one, (b) one week's pay for a year of employment in which he was not below the age of twenty-two, and (c) half a week's pay for each year of employment not within paragraph (a) and (b).

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25. The relevant date for the purposes of calculating the redundancy payment is the effective date of termination, that is, in terms of Section 145(a) where the contract is terminated by notice, the date on which that notice expires; where the dismissal is without notice, the date of which the termination takes effect (Section 145(b)).

Tribunal decision

Redundancy pay

26. The claimant's last day of employment was 19 August 2019. In this case that is the effective date of termination. Claims for redundancy payments must be lodged with the Tribunal within 6 months of that date. The claimant had until 18 February 2020 to lodge his claim, so that having lodged the claim on 6 January 2020, he was well within the time limits. This Tribunal therefore has jurisdiction to determine his claim for redundancy pay.

27. Redundancy payment is calculated on the basis of a claimant's length of service relative to the last day of employment, namely 19 August 2019. That, therefore, was the relevant date for the purposes of calculating his redundancy payment.

28. At the date of his dismissal the claimant was 33 years old. He commenced employment in June 2005. He had therefore completed 14 full years' of service

29. The claimant was paid (gross) £415.20 per week. Redundancy pay is therefore calculated on the basis of that sum, which does not exceed the maximum entitlement.

30. The claimant is entitled to one week's pay for each year of employment when he was 22 or over, that is 10 weeks' pay, and to one half week's pay when he was under 22, that is 5 week's half pay, and 12.5 weeks' pay altogether. In these circumstances, the claimant is entitled to 12.5 times his weekly pay, that is 12.5 x £415.20, which is a total of £5,190. I find the claimant is entitled to that sum in respect of redundancy pay.

Holiday pay

31. In contrast, claims for outstanding holiday pay must be lodged within three months of the date of dismissal. Only where the tribunal considers that it was

not reasonably practicable to present the claim in that time will a claim be allowed late, and even then, only if it has been lodged within a reasonable period thereafter.

- 5 32. In this case the date of dismissal was 19 August 2019. The time limit for lodging the claim was therefore 18 November 2019. The claimant approached ACAS on 23 December 2019, that is just over a month after the time limit had expired. Normally the time limit will be extended by the length of time it takes ACAS to issue the EC certificate, but in this case the time limit had already passed so no extension is given
- 10 33. The claimant's claim for holiday pay is therefore lodged out of time.
34. I went on to consider whether it was reasonably practicable for the claimant to have presented the claim in time.
35. The claimant's position is simply that he was unaware of the time limits. His evidence was that he was led to believe by his employer that he could claim from the Government. His employer then went on to advise that he could not afford to make the company insolvent.
- 15 36. The claimant contacted his employer several times by telephone, and he particularly recalls a telephone call in October, when he was advised the same thing by his former employer.
- 20 37. Having heard nothing further, it was not until he was speaking to his wife's colleague that he heard that there were time limits for making a claim. His best recollection was that this was in early December. He then contacted his employer again by telephone who advised that he was not aware that there were time limits for making a claim.
- 25 38. I accepted that the claimant's position is that he was ignorant of time limits. He did not get advice. He said in evidence that he had worked for his employer for 14 years and that he had trusted him.
39. I concluded that this ignorance in the circumstances was "reasonable" and that it was not reasonable practicable for the claimant to have lodged the claim in time, since he was not aware of the time limits until early December.
- 30 40. Having concluded that it was not reasonably practicable to have lodged the claim in time, I had to decide whether the time lapse between him becoming aware of the fact that there were time limits and lodging the claim were reasonable.

41. Once he heard about the possibility of time limits in early December, he contacted his employer a week or so later and then ACAS a week or so after that. I noted that ACAS had not apparently advised him of time limits, but rather advised him that they had attempted to contact his former employer.
- 5 While the claimant had contacted ACAS on 23 December the EC certificate was not issued until 3 January. Three days later, on 6 January the claimant lodged the claim. In find in the circumstances, particularly that these events took place over the holiday period, that the claimant had lodged his claim within a reasonable time of him having become aware that there were time
- 10 limits.
42. In all the circumstances, the Tribunal, having decided that the claims for holiday pay have been lodged out of time, was however satisfied that it was not reasonably practicable to have lodged the claim in time, and that the claim was lodged within a reasonable time of him becoming aware of the time
- 15 limits. The claimant is therefore entitled to claim payment for accrued but untaken holidays.
43. The claimant's holidays were based on the calendar year. His entitlement was 28 days per year. By 19 August 2019, he had taken 13 days' holiday.
44. Although the claimant had submitted that he was due 15 days holiday pay, as
- 20 I understood it that was calculated on the basis of a full calendar year. The claimant's employment was terminated on 19 August, so that he was only entitled to claim the relevant proportion of the untaken holidays.
45. The claimant is therefore entitled to the appropriate proportion of holidays due for the period from 1 January 2019 to 19 August 2019, which is a total of
- 25 231 days. On the basis that the claimant was entitled to 28 days over the course of the whole year, this means that the claimant would have been entitled to 17.8 days leave over the relevant period of employment. The claimant had taken 13 days during the course of the year and therefore is entitled to receive payment for 4.8 days untaken during the relevant period.
- 30 46. The claimant was paid £415.20 (gross) per week and worked a five day week. This is a daily rate of £83.04 per day, and a total of £398.53 for the 4.8 days outstanding. I therefore find that the claimant is entitled to the sum of £398.53 in respect of holiday pay.

Employment Judge:

M Robison

Date of Judgement:

11 May 2020

Entered in Register,

5 Copied to Parties:

18 May 2020