# EMPLOYMENT TRIBUNALS (SCOTLAND)

**Case Nos: 4107437/19**

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**Preliminary Hearing Held at Glasgow on 10 February 2020**

**Employment Judge M Robison**

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| **Miss T Smith** | **Claimant**<br>**Not present**<br>**and not represented** |
| **Haven Products Ltd** | **Respondent**<br>**Represented by**<br>**Mr K McGuire**<br>**Counsel** |

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## JUDGMENT OF THE EMPLOYMENT TRIBUNAL

25 The Employment Tribunal, having decided that the claims of unfair dismissal and disability discrimination have been lodged out of time, and not being satisfied that it was not reasonably practicable to have lodged the claims in time, or just and equitable to allow them late, has no jurisdiction to hear the claims, which are dismissed.

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## REASONS

### Introduction

1. This is the fourth preliminary hearing set down in this case at which neither the
35 claimant nor any representative for the claimant has appeared.

2. At this preliminary hearing the Tribunal was due to consider the question of time bar; the respondent's application for expenses following previous aborted preliminary hearings; and any other relevant case management issues.

3. Mr McGuire appeared again for the respondent and applied for the claims to be dismissed or struck out.

**Background**

4. The claimant's representative, Mr R Miller, lodged a claim in the employment tribunal on the claimant's behalf on 21 June 2019, claiming unfair (constructive) dismissal and disability discrimination. The claimant in her ET1 stated that she had been employed from 1 November 2016 until 15 February 2019.

5. In the paper apart, the claimant stated that she would have been required to work one month's notice and had there not been a constructive dismissal the effective date of termination would be 15 March 2019, that "there was a conciliation period of 2 weeks, therefore the claimant has brought this claim in time".

6. The respondent lodged a response to the claim on 25 July 2019, confirming a date of termination of 15 February 2019, but stating, inter alia, "it is not clear how the claimant arrives at the conclusion that her employment would have terminated on 15 March 2019, in any event that assertion must be misconceived. On 4 February 2019 the claimant terminated her employment giving two weeks' notice in writing. The claimant's last day of work would have been 15 February 2019, which is the effective date of termination. The time for presentation of the claim expired on 14 May 2019, unless extended by the EC procedure. The EC procedure was commenced and ended on 21 June 2019. The claim form was presented on 21 June 2019. Therefore the time limit for presenting the claim had already expired when EC was started. The claim has been presented outside the statutory time limit and should be struck out accordingly".

7. A case management preliminary hearing took place on 21 August at which the claimant was not present and not represented. Shortly prior to the hearing, Mr Miller e-mailed to advise that he had suddenly been taken unwell and was unable to attend. That hearing proceeded in Mr Miller's absence, not least because he had offered to provide further particulars requested in the

respondent's agenda for that hearing, and he was directed to do so by 18 September 2019. A preliminary hearing to consider the time bar point was listed for 7 November 2019. It was stated that in the event that date was not suitable for Mr Miller or for the claimant herself, that Mr Miller should contact the Tribunal to request an alternative date.

8. By e-mail dated 7 October, the respondent applied for the claim to be struck out for non-compliance with orders, the unreasonable manner in which the claim is being conducted and the failure to actively pursue the claim. Alternatively they applied for an unless order for the claimant to comply with the tribunal's order set out in the PH note within 5 days.

9. By e-mail dated 9 October 2019, Mr Miller advised that he had not received a copy of the directions from the hearing of 21 August, and sought until 18 October to provide further particulars and an updated schedule of loss.

10. By e-mail dated 21 October, the respondent's solicitor complained of continuing non-compliance with the orders, and made a request for strike out for non-compliance, the unreasonable manner in which the claim was being conducted, failure to actively pursue the claim which failing an unless order.

11. By e-mails dated 22 October, Mr Miller provided a document headed "mitigating factor" (which appeared in particular to relate to the arguments regarding time bar) and an updated schedule of loss, making a request that the upcoming hearing be rescheduled for the benefit of the respondent.

12. Given the respondent's asserted failure of the "further particulars" to address relevant points, the respondent sought an unless order requiring the claimant to provide an explanation as to why she was unable to present her claim in time and providing further particulars of the claim, seeking a postponement of the preliminary hearing listed for 7 November given disadvantage the respondent would suffer as a consequence of these failures.

13. Although Mr Miller did not object, the postponement request and unless order were refused on 4 November, the claimant having provided further particulars (if not to the satisfaction of the respondent) and the preliminary hearing having been set down to hear evidence about the reasons for any delay in lodging the claim.

14. The claimant's representative provided further particulars by e-mail dated 6 November (although these were not copied to the respondent).

**Previous preliminary hearings**

15. By e-mail dated 7 November 2019, sent at 01.36, Mr Miller sought a postponement of the preliminary hearing citing his own imminent illness. That request was considered at the hearing on 7 November 2019, when the respondent was represented by Mr McGuire. Mr Miller could not be contacted, and it was noted that the claimant did not attend either, although it would have been expected that she would attend to give evidence, but it was not known what she was advised by Mr Miller. Despite Mr McGuire's opposition, the postponement was granted, and a hearing listed for 17 December. Mr McGuire reserved his position with regard to expenses.

16. The note following that adjourned preliminary hearing stated at paragraph 8 that, "Mr Miller will be expected to attend to represent his client on [17 December], or to make arrangements for alternative representation given the possibility that he may again be ill. In any event it is expected that the claimant will be in attendance as she will require to give evidence in support of the time bar point….the claimant's representative may also wish to give consideration to whether medical evidence might also be required".

17. When the case called on 17 December, again neither Mr Miller nor the claimant were in attendance, again Mr McGuire's opposition to an adjournment application was refused, and again he reserved his position on expenses.

18. In a note following that adjourned preliminary hearing, EJ Whitcombe stated at para 3 that: (b) "If, through no fault of his own, Mr Miller has chronic health issues which mean he is not able to discharge his professional obligations effectively and reliably then he must reflect on that and make appropriate alternative arrangements. While unforeseen illness can affect anyone, this is becoming a regular pattern. If he is unable for medical reasons to accept instructions to represent his clients at hearings then it is his obligation to make that clear in good time, so that clients can investigate other options for representation, or represent themselves….(e ) It is a matter of concern that the claimant failed to attend either this hearing or the earlier preliminary hearing intended to deal with the same points on 7 November 2019. That is surprising because the "time bar" points in issue would surely require the claimant to give evidence if there were to be any prospect of a finding that it was "not

reasonably practicable" to present an unfair dismissal claim within time, or that the discrimination claims were presented within a "just and equitable other period" after the expiry of the primary time limit. (f) Given the timing of the applications to postpone on each occasion, that begs the question whether the claimant was ever intending to attend the hearings to give evidence".

19. EJ Whitcombe's note continued, at para 3(g), "For similar reasons, it is a matter of concern that the respondent has not so far received any medical evidence at all to substantiate the reasons advanced in writing for the timing of the claimant's submission of the claim form to the Tribunal. Essentially, the claimant appears to argue that her health prevented her from submitting her claim at an earlier stage. The claimant could reasonably be expected to provide medical evidence in support of that argument. Since two hearing to deal with those points have been adjourned at very short notice the necessary evidence should already be in the possession of the claimant or her representative".

20. He therefore issued the following order: "By no later than 24 December 2019, the claimant must send to the respondent: a) all evidence, including medical evidence, relied on for the purposes of the "time bar" points. If none is relied on, then a short statement to that effect should be sent instead; (b) independent medical evidence, offered on a "soul and conscience" basis, substantiating the contention that Mr Miller was unfit to attend this hearing on 17 December 2019, and also the previous hearings on 21 August 2019 and 7 November 2019". A further preliminary hearing was set down to take place on 10 February 2020. Unusually, a copy of EJ Whitcombe's note and orders were also sent to the claimant at her home address.

21. The Tribunal received no further correspondence from Mr Miller or the claimant herself until an email dated 7 January 2020 from Mr Miller. He explained that he had barely attended work over the last month; that he is the only agent who deals with Tribunal matters; medical evidence regarding his illness is forthcoming; that he requires to attend further medical investigation and there is a possibility of alternative treatment; in light of which he made a request for a sist of one month during which he would provide all medical evidence; that if he is still ill thereafter that he will advise the claimant to seek alternative representation. This was opposed by the respondent.

22. The application was refused by EJ Whitcombe on 20 January 2020 for the following reasons: “there have been many delays and postponements already. The hearing is still some time away, and Mr Miller should consider whether his health is such that he can properly accept the claimant’s instructions to appear on 10/2/20. If not, then the claimant could instruct a different representative, or appear in person. The interests of justice now weigh heavily in favour of avoiding delay, allowances for the representative’s health cannot be made indefinitely. If necessary the costs aspect could be postponed but time bar (at least) will be dealt with on 10/2/20”.

**Preliminary hearing 10 February 2020**

23. When the case called, neither Mr Miller nor the claimant were in attendance. No further communication was received from Mr Miller or the claimant relating to attendance at the hearing.
24. Mr McGuire made a series of alternative applications.
25. As I understood it, his primary submission was that the Tribunal should proceed to hear the time bar point, based on his submissions and the written case for the claimant. He submitted that both claims were out of time; and that given the claimant is not in attendance to pursue the claims, she cannot succeed. While the respondent’s position is that time started to run from 15 February 2019, even accepting the claimant’s written case that time ran from 18 February, the claims are still lodged out of time. The claimant’s explanation for the delay was, initially at least, that she had taken time to realise how the treatment by the respondent had affected her; and that she could not have reasonably made the claim in time due to her psychological ailments.
26. He submitted that, on the papers, the claimant has not shown that it was not reasonably practicable to have lodged the claim in time; nor established that it was just and equitable to extend time. He said that he relied on the case of *Bexley* that there is a presumption against extending time, and that it is for the claimant to convince the Tribunal that it was just and equitable to allow the claim although late. The claimant, who has not given evidence, has failed to prove that the claims should be allowed, although late.
27. In the alternative, Mr McGuire submitted that the claim should be struck out under rule 37(d) that the claim had not been actively pursued; under rule 37(c)

for non-compliance with an order of the Tribunal, specifically the order dated 17 November 2019 which was in clear terms and which had not been complied with to any extent, there being no need for a Tribunal to have specifically issued a strike out warning; and under 37(b) that the manner in which the proceedings have been conducted by or on behalf of the claimant has been unreasonable, as is clear from the procedural history of this case.

28. He argued that strike out was proportionate and justified in this case, given the history of the case and the previous warnings and the very clear order of the Tribunal on 17 November. He relied on the fact that this is the fourth preliminary hearing at which neither the claimant nor her representative has appeared. He suggested that if the representative was too ill to appear, that it was a straightforward matter to instruct a member of the Faculty of Advocates to represent the claimant.

29. During discussions about alternatives, Mr McGuire argued that an "unless order" in respect of the order of 17 November 2019 was not necessary or appropriate because that was likely to prolong matters, and would not guarantee that we would not find ourselves some months down the line in the same position. This may be the situation if the claimant's representative were to advise simply that they do not intend to rely on any medical evidence (given the terms of the order of 17 November). With regard to prejudice to the claimant, if the claimant does intend to pursue her claim, then if the case is dismissed she has the option at that stage of seeking a reconsideration or appealing the decision.

30. He submitted that the claimant herself has had plenty of opportunities to attend the hearing to confirm her intention to pursue the claim; and if any failure is to lie at the door of her representative, then she can rely on any decision to dismiss in that regard.

31. Mr McGuire reserved his position with regard to expenses, and said that in the event that the claim was struck our or dismissed, then the respondent representative if so advised would make an application within the appropriate time limit.

**The relevant law**

32. The law relating to time limits in respect of unfair dismissal is contained in the Employment Rights Act 1996. Section s111(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 effective date of termination or 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.

33. Where the claim is lodged out of time, the tribunal must consider whether it was not reasonably practicable for the claimant to present the claim in time, the burden of proof lying with the claimant. If the claimant succeeds in showing that it was not reasonably practicable to present the claim in time, then the tribunal must be satisfied that the time within which the claim was in fact presented was reasonable. This is a question of fact for the Tribunal (*Walls Meat Co Ltd v Khan* 1979 ICR 52).

34. Section 123 of the Equality Act 2010 states that a complaint must be made to the employment tribunal before the end of three months starting with the date of the act of discrimination, or such other period as the employment tribunal thinks just and equitable. Conduct extending over a period is to be treated as done at the end of the period; failure to do something is to be treated as occurring when the period in question decided upon it.

35. The discretion to extend time is broader than under the “not reasonably practicable” formula (*DPP v Mills* 1998 IRLR 494), and the court’s power to extend time on the basis of what is just and equitable entitles the tribunal to take into account anything which it judges to be relevant (*Hutchison v Westward Television Ltd* 1977 IRLR 69).

36. The onus is on the claimant to persuade the tribunal that it is just and equitable to extend time, but the exercise of discretion is the exception rather than the rule (*Robertson v Bexley Community Centre* 2003 IRLR 434).

**Tribunal deliberations and decision**

37. This is a hearing to determine time bar and therefore whether the Tribunal has jurisdiction to hear the claims. This is the third such hearing to determine that

question, and the fourth preliminary hearing when neither the claimant nor her representative has attended to argue the point.

38. Given the procedural history of this case described above, I took the view that it was appropriate to proceed to determine the time bar point in the absence of the claimant or her representative.

39. I therefore based my decision on the papers presented on the claimant's behalf. I noted from those papers that the latest that time could be said to start to run was 18 February 2019, giving the claimant the benefit of the doubt. A claim would require to be lodged within three months of that date. The claim having been lodged on 21 June 2019 (the EC notification having been made after the time limit has passed), that is over one month beyond the time limit, and therefore it is clear that the claim has been lodged out of time.

40. I then went on to consider whether any of the exceptions applied. As the claimant did not attend I did not have the benefit of her evidence. I based my considerations on the written submissions which had been made on her behalf.

41. In the document headed "mitigating factor", it is explained on behalf of the claimant that after she resigned from her employment, it took her some time to appreciate how the respondent's treatment had affected her and only thereafter decided to get legal advice. I understood it to be suggested that the delay might relate to the claimant's medical condition and to her disability.

42. While the claimant subsequently met with her representative (it is not clear whether that was within the time limit or not) she states that she was unable to revert to her representative for a number of weeks because of her psychological ailment, and hesitant in providing a response to her representative. It was stated there that delay in the matter at this point was due to the claimant's psychological issues and ailments.

43. In the "mitigating factor" document, the claimant's representative set out in some detail the therapy which the claimant was undergoing for her conditions. The note is descriptive and does not explain why undergoing that therapy might mean that she could not lodge a claim. Indeed it would appear that she consulted her representative within the time limit or at least shortly thereafter, but some time elapsed before she instructed her representative to lodge the claim. I could not say on the basis of that information alone that it was "not reasonably practicable" for her to have lodged the claim in time.

44. Having found that it was not “not reasonably practicable” to lodge the claim in time, there was no requirement for to consider the question of whether the claim was lodged within a “reasonable” time thereafter. Even if she did consult her representative slightly outwith the time limit, I could not say that to delay lodging the claim while she thought about it meant that she had lodged the claim within a reasonable time. In such circumstances, the unfair dismissal claim has been lodged out of time, and therefore is dismissed.

45. I turned to consider whether it was just and equitable to allow the discrimination claim to be lodged late. I accept that my discretion to extend time is broader than under the “not reasonably practicable” formula (*DPP v Mills* 1998 IRLR 494). However time limits are exercised strictly in employment cases, and the onus is on the claimant to persuade the Tribunal that it is just and equitable to extend time and the exercise of discretion is the exception rather than the rule (*Robertson v Bexley Community Centre* 2003 IRLR 434).

46. In this case, the claimant did not attend to give evidence to convince the Tribunal that it was just and equitable to allow the claim although late. Despite orders to lodge medical evidence, I had no medical evidence to consider which might have persuaded me that there were equitable reasons to allow a late claim.

47. In the circumstances of this case, I was not convinced that it was just and equitable to extend time to lodge the discrimination claim, and therefore that claim is also dismissed having been lodged out of time.

48. Mr McGuire argued in the alternative that the claim should be struck out for various reasons, outlined above. I had a good deal of sympathy with Mr McGuire’s arguments, given the unfortunate procedural history of this case. I was conscious however that I had not heard from Mr Miller either in oral or written submissions why the claim should not be struck out.

49. However and in any event, given that I have decided that the claims should be dismissed for jurisdictional reasons, there was no requirement for me to make any final ruling on that alternative application.

50. The question of expenses of the aborted hearings is reserved, and I understand that should the respondent decide, upon reflection, to seek expenses, they will make the appropriate application within the appropriate time limit.

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| Employment Judge: | M Robison |
| Date of Judgement: | 14 February 2020 |
| Entered in Register, Copied to Parties: | 19 February 2020 |