



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case Number: 4104292/2020

5 **Held via telephone conference call on 11 November 2020**

Employment Judge P McMahon

Mr T Symons

**Claimant
In Person**

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Aviat Networks

**Respondent
Represented by:
Ms Collins -
HR Manager**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

20 The tribunal directs that:-

(i) The claimant's claim was submitted outwith the statutory time limit within which the claim that the claimant sought to make required to be submitted and the tribunal was not satisfied that it was not reasonably practicable for the claim to be presented within the applicable time limit and that the claim was presented within such further period which the tribunal considers reasonable.

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(ii) Accordingly, the tribunal does not have jurisdiction to consider the claimant's claim and it is dismissed.

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REASONS

Introduction

1. This preliminary hearing was listed, not to determine the merits of the claimant's claim but, rather, to determine a preliminary issue: time-bar.
- 5 2. This is a claim by Mr T Symons against Aviat Networks. At the outset of the hearing there was a discussion about the basis of the claimant's claim. The claimant clarified that his claim was that the respondent had agreed as part of a settlement agreement that his employment would terminate on 30 April 2020 but that his employment was terminated by the respondent with effect
10 from 3 April 2020 and that this was a breach by the respondent of the terms of a settlement agreement entered into between the claimant and the respondent.
- 15 3. The claimant was clear that he was not asserting that he remained in employment until 30 April 2020, and accepted that his employment was terminated with effect from 3 April 2020, but that this meant that the claimant lost out on the contractual benefits he would have been entitled to in respect of the period between 3 April 2020 and 30 April 2020 if he had remained in employment until 30 April 2020.
- 20 4. The claimant represented himself and the respondent was represented by Ms Collins in her capacity as an HR manager of the respondent.
5. No productions were lodged by either party. For the claimant, evidence was heard on oath from the claimant. The respondent did not lead any evidence. The claimant and Ms Collins, on behalf of the respondent, made brief closing submissions.

25 The issue

6. The issue to be determined by the tribunal is time-bar and has two elements, as follows:

6.1. was the claimant's claim submitted outwith the statutory time limit within which the claim that the claimant sought to make required to be submitted; and

5 6.2. if so, should the time limit be extended on the basis that it was not reasonably practicable for the claim to be presented within the applicable time limit and it was submitted within such further period as was reasonable.

Findings in fact

10 7. The tribunal considered the following relevant matters to be admitted or proved:

7.1. The claimant's employment with the respondent terminated on 3 April 2020.

15 7.2. In the course of April 2020, the claimant contacted the solicitor who had advised the claimant in relation to the settlement agreement the claimant had agreed with the respondent. The solicitor told the claimant that what the respondent had done was a breach of contract and offered to represent the claimant. The claimant declined because he thought that he could come to an amicable settlement with the respondent.

20 7.3. The claimant then engaged in the following exchange of correspondence with the respondent in relation to the matter:

25 7.3.1. On 24 April 2020 the claimant told Ms Collins of the respondent that he had contacted a lawyer and that they had said that what the respondent had done was a breach of contract and asked Ms Collins if the respondent had any comments on that and to make up the shortfall in the claimant's earnings.

7.3.2. On 28 April 2020 the respondent responded saying that their position was that, because the claimant had received an enhanced package, he should accept it and that the respondent was not going to pay the shortfall.

- 7.3.3. On 30 April 2020 the claimant contacted Ms Collins of the respondent and Ms Collins' line manager saying that he was not happy with the response he had received.
- 5 7.3.4. On 7 May 2020 the claimant chased a response to his communication of 30 April 2020 and received a response from the respondent on that date which was the same as the response he had received from them on 28 April 2020, i.e. that the respondent was not going to pay the shortfall.
- 10 7.3.5. On 22 June 2020 the claimant emailed the CEO of the respondent to seek the shortfall as he realised that he was not getting anywhere and highlighted his dissatisfaction and that he wanted an amicable solution.
- 15 7.3.6. On 30 June 2020 the claimant received an email in response from a VP legal officer of the respondent asking the claimant to address any further correspondence to the respondent to her. The claimant agreed to do this. There was no further direct contact between the parties before the claimant submitted his employment tribunal claim.
- 20 7.4. The respondent did not suggest at any time that the claimant should not submit an employment tribunal claim and/or that they were prepared to reach an amicable resolution of the matter with the claimant.
- 25 7.5. The claimant contacted ACAS on 10 July 2020 and the ACAS early conciliation period began on that date. The reason the claimant did so was because he had a friend who is involved in HR who told him he had to go through ACAS before going to the tribunal. He told the claimant to remember that this is time limited and "don't sit on it" but the claimant didn't think he said that there was a three month time limit. The claimant did not hear from ACAS until 5 August 2020. The ACAS conciliation period came to an end on 10 August 2020. The ACAS conciliation period ran from 10 July 2020 until 10 August 2020.
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7.6. The claimant's claim was submitted to the tribunal on 13 August 2020.

7.7. The tribunal wrote to both parties by letter on 14 August 2020 advising that the claimant's claim appeared to have been submitted outwith the period within which claims/complaints of this type should normally be brought.

7.8. The claimant was not aware of the three month time limit to raise a claim in the tribunal before he submitted his claim to the tribunal. The claimant couldn't remember exactly when or how he found out that there was a three month time limit, he thought it was when the tribunal indicated that his claim was out of time. The claimant did not remember ACAS, the solicitor he spoke to (referred to at paragraph 7.2 above) or the friend he spoke to (referred to at paragraph 7.5 above) telling him that there was a three month time limit (although he did accept his friend told him that time was limited). There was no suggestion that the claimant was misled by the respondent or anyone else as to the existence or the length of the three month time limit.

7.9. The claimant did not otherwise make enquiries by, for example, looking at the employment tribunal website, or seek advice in relation to the respondent's actions and how, and within what time period, he could take action against the respondent in this respect. The reason that the claimant did not do so was because he thought he could come to an amicable settlement with the respondent in relation to the matter. Even when the respondent set out its position, the claimant still thought that they could come to an amicable settlement because he was employed by the respondent for so long.

7.10. Another reason the claimant did not seek advice was because the person the claimant would have sought advice from was a friend who was shielding due to the COVID-19 pandemic. The claimant accepted that he could have used the phone or email but he felt that this, the fact that his friend was shielding, made getting advice inconvenient in the circumstances.

Observations

8. The only evidence heard was from the claimant. His evidence was brief and straightforward and he appeared articulate and able to address questions and any clarifications sought in a reasoned manner. The tribunal considered the claimant to be giving an honest account of events as he remembered and understood them and there was no material dispute as to the evidence he gave on essential matters.

10 Relevant law

9. An employee or ex-employee can raise a claim for breach of contract against an employer or ex-employer in the civil courts in Scotland. In addition, the employment tribunal has jurisdiction to hear certain breach of contract claims which arise or are outstanding on the termination of an employee's employment in accordance with Section 3 of the Employment Tribunals Act 1996 (ETA) together with the Employment Tribunals Extension of Jurisdiction (Scotland) Order 1994 (the "Order").

10. Whilst an employee has 5 years to bring a claim for breach of contract in the civil courts, Articles 7(a) and (b) of the Order provide that a claim for breach of contract in the employment tribunal must be made:

"...(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 ..."

11. Article 8B of the Order provides that the primary time limits can be extended to facilitate ACAS early conciliation in certain circumstances. However, the Employment Appeal Tribunal has made clear that such an extension of time will not apply in circumstances where the ACAS early conciliation period

begins after the expiry of the primary time limits (see **Pearce v Bank of America Merrill Lynch UKEAT/0067/19**).

12. Article 7(c) of the Order provides that the primary time limits can also be extended,

5 *“(c) where the tribunal is satisfied that it was not reasonably practicable for the complaint to be presented...[within the time limit and the complaint was presented]...within such further period as the tribunal considers reasonable.”*

13. There is a strong public interest in claims being brought promptly and within a primary limitation period of three months (see **Cullinane v Balfour Beatty Engineering Services Ltd and anor EAT/0537/10**).

14. The onus of proving that presentation in time was not reasonably practicable rests on the claimant (see **Porter v Bandridge Ltd 1978 ICR 943, CA**).

15. The term ‘reasonably practicable’ does not mean reasonable, which would be too favourable to employees, and does not mean physically possible, which would be too favourable to employers, but means something like ‘reasonably feasible’ (see **Palmer and anor v Southend-on-Sea Borough Council 1984 ICR 372, CA**).

16. A claimant’s lack of knowledge of a right to make a claim may, in some circumstances, amount to it not being reasonably practicable to present a claim in time, but the claimant’s lack of knowledge must be reasonable and relevant matters will include what opportunities the claimant had to find out about their rights and whether those opportunities were taken (and if not, why not) and whether the claimant was misled or deceived (see **Dedman v British Building and Engineering Appliances Ltd 1974 ICR 53, CA**).

17. The relevant test is not whether the claimant knew of his or her rights but whether he or she ought to have known of them (see **Porter v Bandridge Ltd 1978 ICR 943, CA**).

18. Lack of knowledge of the time limit within which to present a claim is rarely an acceptable reason for delay. When a claimant knows of his or her right to

complain he or she is under an obligation to seek information and advice about how to enforce that right (see **Trevelyan (Birmingham) Ltd v Norton 1991 ICR 488**).

19. Further, where a claimant is aware that there is a time limit but fails to make enquiries about it, he or she cannot claim to be reasonably ignorant of what that time limit is (see **Sodexo Health Care Services Ltd v Harmer EATS 0079/08**).
20. If a respondent in their interactions with a claimant misleads the claimant in some way as to the existence and nature of time limits, the employer's actions may be taken into account by a tribunal considering the claimant's ignorance of the time limit (see **Fisons plc and anor v Jeffries EAT 524/97** and **Andrews v Kings College Hospital NHS Foundation Trust and anor EAT 0614/11**).
21. In carrying out an assessment of whether a claim was presented 'within such further period as the tribunal considers reasonable', the assessment must always be made against the general background of the primary time limit and the strong public interest in claims being brought promptly (see **Cullinane v Balfour Beatty Engineering Services Ltd and anor EAT 0537/10**).
22. An assessment of whether a claim was presented 'within such further period as the tribunal considers reasonable' should take into account all the circumstances of a case, including what the claimant did; what he or she knew, or reasonably ought to have known, about time limits; and why it was that the further delay occurred (see **Nolan v Balfour Beatty Engineering Services EAT 0109/11**).

25 Submissions

Claimant's submissions

23. The claimant made brief oral submissions. In summary, these submissions were as follows:

24. The claimant thought the matter could be resolved amicably. His only complaint was the change to the termination date and the financial loss caused to him.

25. The main reason for the late submission of his claim was ignorance. The reason he did not check time-limits was he thought that time was unlimited. When a friend said it was time limited, with hindsight he thinks he should have checked. But he also thinks the respondent should have told him the time-limit.

Respondent's submissions

26. The respondent's representative made brief oral submissions. In summary, these submissions were as follows:

27. The time-limits exist for a reason and are set by Parliament. Any extension should be the exception to the rule.

28. The claimant has not made out why there should be an exception to the rule.

29. The respondent should not have to defend a claim that was not submitted in accordance with the rules.

Discussion and decision

30. The issue for the tribunal to determine has two elements:

30.1. was the claimant's claim submitted outwith the statutory time limit within which the claim that the claimant sought to make required to be submitted; and

30.2. if so, should the time limit be extended on the basis that it was not reasonably practicable for the claim to be presented within the applicable time limit and it was submitted within such further period as was reasonable.

31. As noted above under the relevant law section, breach of contract claims can be raised in the civil courts in Scotland and, whilst an employee has 5 years to bring a claim for breach of contract in the civil courts, the time limits for

raising such a claim in the employment tribunal are set out at Articles 7(a) and (b) of the Order and are:

“(a) within the period of three months beginning with the effective date of termination of the contract giving rise to the claim, or

5 *(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 ...”*

32. In the circumstances that it was a matter of agreement between the parties that the claimant’s employment with the respondent terminated on 3 April
10 2020, the primary time limit for the claimant to submit his claim was 2 July 2020. It was also a matter of agreement that the claimant’s claim was not submitted until 13 August 2020.

33. As also observed in the relevant law section above, Article 8B of the Order provides that the primary time limits can be extended to facilitate ACAS early
15 conciliation in certain circumstances. However, as observed by the Employment Appeal Tribunal in the case of **Pearce v Bank of America Merrill Lynch UKEAT/0067/19**, such an extension of time would not apply where the ACAS early conciliation period began after the expiry of the primary time limits, and in this case ACAS early conciliation began on 10 July 2020,
20 after the expiry of the primary time limit on 2 July 2020. Accordingly, no such extension of the primary time limits could apply in this case.

34. Therefore, in relation to the first element of the issue to be determined by the tribunal, the tribunal concluded that the claimant’s claim was submitted
25 outwith the statutory time limit within which the claim that the claimant sought to make required to be submitted.

35. Noting the provisions at Article 7(c) of the Order, the tribunal proceeded to consider the second element of the issue to be determined i.e. should the time limit be extended on the basis that it was not reasonably practicable for the claim to be presented within the applicable time limit and it was submitted
30 within such further period as was reasonable.

36. In doing so, the tribunal considered the reasons put forward by the claimant for the delay in submitting his claim in light of the guidance in the authorities referred to in the relevant law section above.
37. The main reason put forward by the claimant for the late submission of his claim was that the claimant did not know there was a time limit, he thought time to raise a claim was unlimited.
38. The tribunal noted the guidance in the **Dedman** case referred to in the relevant law section above that a claimant's lack of knowledge of a right to make claim may, in some circumstances, amount to it not being reasonably practicable to present a claim in time. However, it was also noted in that case that the claimant's lack of knowledge must be reasonable taking into account what opportunities the claimant had to find out about their rights and the extent to which these opportunities were taken. Similarly, the tribunal noted the guidance in the **Porter** case also referred to in the relevant law section above, that the relevant test is not whether the claimant knew of his or her rights but whether he or she ought to have known of them.
39. The tribunal also noted that lack of knowledge of the time limit within which to present a claim is rarely an acceptable reason for delay and the guidance in the **Trevelyan** case referred to in the relevant law section above that, when a claimant knows of his or her right to complain, he or she is under an obligation to seek information and advice about how to enforce that right.
40. The tribunal concluded that the claimant's lack of knowledge in this case, whether it was lack of knowledge of the right to make a claim as well as lack of knowledge of the time limits for doing so, or just a lack of knowledge of the time limits for making a claim, could not amount to it not being reasonably practicable for the claimant to present the claim in time because, even if he was not aware of his rights to raise a claim for breach of contract and/or the applicable time limits for doing so, he ought to have been so aware, and it could not be concluded that the lack of knowledge was reasonable, because the claimant had opportunities to find out about his rights and did not take up those opportunities and the reasons given by the claimant for not doing so

were insufficient. The tribunal reached this conclusion for the following reasons:

5 40.1. The claimant had been told in April 2020 by the solicitor who had previously advised him in relation to a settlement agreement with the respondent that what the respondent had done was a breach of contract and he put this contention to the respondent and engaged in an exchange of correspondence with the respondent about this during the period 24 April 2020 to the end of June 2020.

10 40.2. The solicitor the claimant spoke to offered to represent the claimant in this respect but the claimant declined this offer on the basis that he thought he could come to an amicable settlement with the respondent.

15 40.3. Other than as set out at 7.2 and 7.5 above, the claimant did not make any enquiries by, for example, looking at the employment tribunal website, or seek advice in relation to the respondent's actions and how, and within what time period, he could take action against the respondent in this respect and, again, his only reason for not doing so was that he thought he could come to an amicable settlement with the respondent in relation to the matter.

20 40.4. The claimant's thought process that he could come to an amicable settlement with the respondent in relation to the matter appeared to be based solely on a hope that the respondent would do so given the length of time the claimant had been employed by respondent, rather than, for example, on the basis of any indication given or representation made by the respondent that they were prepared to reach an amicable settlement of the matter.

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30 40.5. The only other reason the claimant gave for not seeking advice was that the claimant would have sought advice from a friend who was shielding due to the COVID-19 pandemic. However, whilst the claimant felt that this made getting advice inconvenient in the circumstances, there was no suggestion that he could not have sought advice, even if it could not be face to face, by email or phone. The tribunal noted that the claimant

was communicating with the respondent by email during this period and that the claimant accepted that he could have made contact by phone or email. In any event, the tribunal could not conclude that limiting oneself to seeking advice in relation to this matter only from one such a friend was a sufficient reason for not seeking advice generally.

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41. Further, the tribunal noted the guidance in the **Fisons** and **Andrews** cases referred to in the relevant law section above that the employer's actions may be taken into account by a tribunal considering the claimant's ignorance of the time limit. However, there was no suggestion in this case that the respondent had misled or deceived the claimant in relation to time limits. The tribunal did not consider that the respondent was under any positive duty to advise the claimant of the time limits.

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42. Although the claimant's position was that the main reason for the late submission of his claim was that the claimant did not know there was a time limit, the claimant also stated during the preliminary hearing that another reason for the late submission of his claim was that he considered that the respondent's interactions with him amounted to "stalling tactics".

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43. The tribunal did not consider on the evidence presented that the respondent could be described as using "stalling tactics" to any material extent that could make it not reasonably practicable for the claimant to submit his claim in time. There was no indication that the respondent suggested at any time that the claimant should not submit, or should delay in submitting, an employment tribunal claim and/or that they were prepared to reach an amicable resolution of the matter with the claimant and there did not appear to be any significant delay in the respondent responding to the claimant in relation to the dispute. In addition, as noted above, there was no suggestion that the respondent sought to mislead or deceive the claimant in relation to time limits. Accordingly, the tribunal did not consider that the actions of the respondent could amount to it not being reasonably practicable for the claimant to present the claim in time.

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44. Even in a case where the tribunal is satisfied that it was not reasonably practicable for the claimant to submit their claim in time (which, as noted above, is not the case here), that does not mean that time should be extended, the tribunal would then go on to decide whether the claim was presented
5 'within such further period as the tribunal considers reasonable'. As the tribunal did not conclude in this case that it was not reasonably practicable for the claimant to submit his claim in time anyway, the second part of that test, whether the claim was presented 'within such further period as the tribunal considers reasonable', is not engaged in this case.
- 10 45. That said, it was observed by the tribunal that, whilst it was not clear when the conversation the claimant had with the friend who informed him that time was limited and he should not "sit on it" took place, as this conversation was what prompted the claimant to contact ACAS on 10 July 2020, that conversation must have taken place by then. Taking into account the guidance in the
15 **Cullinane** and **Nolan** cases (in relation to the 'within such further period as the tribunal considers reasonable' test) and the guidance in the **Sodexo** case (in relation to knowledge of time limits) in the relevant law section above, the tribunal considered that the claimant, armed with the knowledge of what his friend had said by this time, would be more rather than less likely to be
20 expected to make enquiries as to what the time limit for submitting his claim to the tribunal was and submit his claim without further delay.
46. Accordingly, in the circumstances and for the reasons set out above in this section, and in light of the guidance provided in the case law referred to in the relevant law section above, including that the onus of proving that
25 presentation in time was not reasonably practicable rests on the claimant (see **Porter**), that there is a strong public interest in claims being brought promptly and within a primary limitation period of three months (see **Cullinane**) and the term 'reasonably practicable' does not mean reasonable, which would be too favourable to employees, and does not mean physically possible, which would
30 be too favourable to employers, but means something like 'reasonably feasible' (see **Palmer**), the tribunal reached the conclusion that:

- 46.1. the claimant's claim was submitted outwith the statutory time limit within which the claim that the claimant sought to make required to be submitted,
- 46.2. the tribunal was not satisfied that it was not reasonably practicable for the claim to be presented within the applicable time limit and that the claim was presented within such further period which the tribunal considers reasonable, and
- 46.3. accordingly, the tribunal does not have jurisdiction to consider the claimant's claim and it is dismissed.
47. For completeness, whilst it was a matter of agreement that the claimant's employment with the respondent terminated on 3 April 2020 and the evidence was that the claimant treated his employment as having been terminated on that date, at least from 6 April 2020 when the respondent notified the claimant directly that his employment was terminated with effect from 3 April 2020, there was also reference by the claimant to him only becoming aware that his employment had been terminated by the respondent on 3 April 2020 through a colleague and it was only on querying this with the respondent that the respondent notified the claimant directly on 6 April 2020 that his employment was terminated with effect from 3 April 2020. Accordingly, it was observed by tribunal that the actual termination date of the claimant's employment may have been 6 April 2020. However, this was not the claimant's position and, in any event, even if the claimant's employment with the respondent had terminated on 6 April 2020, rather than 3 April 2020, the claimant's claim would still have been out of time, it's just that expiry of the time limit would have been 5 July 2020 rather than 2 July 2020. The tribunal considered that this would have made no material difference to its conclusion that the claimant's claim was out of time and that this was not a case in which it was not reasonably practicable for the claim to be presented within the applicable time limit and it was submitted within such further period as was reasonable for the same reasons stated above in this section and that, therefore, the tribunal has no jurisdiction to hear the claimant's claim.

Employment Judge: Paul McMahon

Date of Judgment: 19th February 2021

Entered in Register: 24th February 2021

5 Copies to Parties