



## EMPLOYMENT TRIBUNALS (SCOTLAND)

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**Case No: 4105089/2020 (V)**

**Heard on CVP on 4 December 2020**

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**Employment Judge J Young**

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**Mr Tomasz Blawicki**

**Claimant  
In Person**

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**Williamson Design Florist Ltd**

**Respondent  
Represented by  
Mr A Bourke -  
HR Consultant**

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

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The judgment of the Employment Tribunal is that under section 23 of the Employment Rights Act 1996 and Article 7 of the Employment Tribunals Extension of Jurisdiction (Scotland) Regulations 1994 the Tribunal does not have jurisdiction to hear the claimant's complaints of deduction from wages or breach of contract which are dismissed.

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### **REASONS**

#### **Introduction**

ETZ4(WR)

1. In this case the claimant presented a claim to the Employment Tribunal on 24 September 2020. The date of receipt of notification to ACAS of early conciliation was 11 August 2020 with the Certificate being issued on 1 September 2020.  
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2. In his claim the claimant advised that he had been employed by the respondent between 1 September 2019 and 30 April 2020 and was owed holiday pay and arrears of pay. In particular he maintained that he had been short of pay for February, March and April 2020. He also claimed financial compensation as a consequence of failure to make proper payment.  
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3. In their response the respondent disputed the claim. They agreed that the claimant's employment commenced 1 September 2019 but maintained he was dismissed on 16 March 2020. They stated that he was an admitted alcoholic and was off work in January 2020; worked some hours in February 2020 before being absent again; that he came into work in mid March 2020, was abusive to staff and was dismissed for gross misconduct; and that he did not work in April or May 2020. They state that the claimant was paid in April and May 2020 but by mistake. It was explained that the company closed due to the Covid pandemic but that the claimant along with others had wages paid through furlough in April and May 2020 and he has been overpaid. They also maintained that the claim was presented out of time and so the Tribunal had no jurisdiction and it should be dismissed "with immediate effect" without further hearing.  
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4. The case was assigned to the "fast track" procedure and a hearing arranged for 4 December 2020. At the hearing no documents had been lodged by the parties. The claimant gave evidence with the assistance of an interpreter. As that evidence proceeded the claimant maintained that he had worked in January 2020; been off sick at the beginning of February 2020 but returned to work around 18 February 2020; and in March 2020 he was in work and the business was not wholly closed at that time. He denied that he had been sacked on 16 March 2020 but had worked for the whole of that month. He  
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stated that as he had symptoms of Covid isolation was necessary between 31 March and 16 April 2020 but that he had then worked until end April 2020. He had left work as he was not being paid.

5 5. His evidence continued with a narration of events around his attempts to be paid with reference to various emails and wage slips.

6. It was clear at this point that there was no likely resolution of the claim without being able to examine the emails and the wage slips to which reference was  
10 being made. I indicated that certain Orders would need to be put in place for production of documents by the parties. I was reminded by Mr Bourke that the respondents claimed the application was out of time in any event.

7. The hearing continued on the preliminary issue of time bar. Evidence was given  
15 by the claimant on that issue. From the evidence heard it is clear that there are substantial issues of fact in dispute between the parties including the issue of whether the claimant was in fact dismissed on 16 March 2020 as claimed by the respondent; and whether his claim of continued working through to end April 2020 is correct. Resolution of those issues would require a further hearing  
20 with Orders for production of documents to assist in determining the factual position. However for the purposes of time bar I have taken the evidence of the claimant at best in a consideration of whether any further hearing is necessary or the claim is out of time and so Tribunal has no jurisdiction to hear the claim.

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#### **Evidence of claimant on time bar**

8. The claimant's last day of employment was no later than 30 April 2020. That was the date noted as last day of employment on the P45 which he stated he  
30 had received. He had performed no work for the respondent beyond that date.

9. The claimant maintained that prior to his departure from the respondent he had made representation for payment of monies which he considered were due.

He was usually paid on the 28<sup>th</sup> of each month but he received no pay on 28 April 2020.

10. Subsequent to 30 April 2020 he had returned “twice a week” to obtain payment.  
5 It was explained to him that the “accountant was off site” but that payment would be made.
11. Emails had been exchanged with the respondent’s accountant about money due and also certain payslips were emailed. The last payment made of funds  
10 was on 11 May 2020 when the claimant received a payment for first 2 weeks of April 2020 when he had required to isolate.
12. He had still to be paid for wages earned including the remainder of April 2020. He made representation for pay through May 2020. Mr J Williamson of the  
15 respondent had indicated that the accountant was working from home and when she returned then payment would be made.
13. In an email to the claimant the respondent’s accountant indicated that payment to him for arrears would be paid by 28 May 2020. However no money was  
20 paid.
14. He had asked his son to take advice from the Citizens Advice Bureau who advised that he could make a complaint to the Employment Tribunal. He advised that he did not know initially about time limits but this had been  
25 mentioned by the solicitor at CAB. When he was made aware that there were time limits he advised that the “solicitor said count from last payment made which should have been 28 May 2020”.
15. He was not sure when this conversation would have taken place. There had  
30 been difficulties with communication because of the Covid pandemic.
16. When it became apparent no money was coming through and “debts were piling up” he made an application for Universal Credit and then entered the early conciliation process with ACAS before making his claim to the

Employment Tribunal. He had simply lost faith that he was going to be paid and so decided to make this claim. That claim included a claim for holiday pay in respect of holidays accrued but untaken to termination of employment.

## 5 **Submissions**

17. It was submitted by Mr Bourke that the case should be dismissed as there was no jurisdiction to hear the claim. He had been told by ACAS that the claim was out of time. There was no need for any consideration of the claim.

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18. The claimant indicated that he had not been paid when he was told he would have been paid namely on 28 May 2020 and so had 3 months from that time to raise the claim. That was what he had been advised. The respondent's accountant had told him that he would be paid on 28 May 2020 but that did not happen.

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## **Conclusions**

### **Statutory provisions on time limits**

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19. A worker may present a complaint to an Employment Tribunal for unpaid wages or payment in lieu of holiday on termination of employment under section 23 of The Employment Rights Act 1996 (ERA).

25 20. In that event under section 23(2) of ERA:-

“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 –

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- (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.....”.

21. The reference to a “deduction” is to the last “deduction... in the series or to the last of the payments so received”.

22. The “escape clause” attached to that provision is that time can be extended:-

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“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”.

10 23. In that case the Tribunal may consider the complaint if it is presented within “such further period as the Tribunal considers reasonable”.

15 24. It is also possible for a claim for unpaid wages or holiday pay to be made as a contract claim under the breach of contract provisions in Article 5 of The Employment Tribunals Extension of Jurisdiction (Scotland) Order 1994. In terms of Article 7 an Employment Tribunal shall not entertain a complaint in respect of an employee’s contract claim unless “it is presented within the period of three months beginning with the effective date of termination of the contract giving rise to the claim” or “where there is no effective date of termination within a period of three months beginning with the last day upon which the employee worked in the employment which was terminated”.

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25 25. Again time can be extended where the Tribunal is satisfied that it was not “reasonably practicable for the complaint to be presented within three months” if it is “presented within such further period as the Tribunal considers reasonable”.

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30 26. In each case the three month time limit is extended to facilitate conciliation with ACAS before institution of proceedings (s207B of ERA; Article 8A of 1994 Order). Essentially the period of time with ACAS for early conciliation is added to the three month period. Alternatively if the time limit is set to expire beginning with the first day of early conciliation and ending one month after the period of early conciliation is concluded then the time limit expires instead one month from the end of the conciliation period.

27. In the first instance therefore it is necessary to determine whether the complaint is out of time under reference to these provisions before considering the escape clause.

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**Is claim out of the primary time limit.**

28. Under section 23 of ERA a claim requires to be presented within three months of the “date of payment of the wages from which the deduction was made” and if that forms part of a series of deductions from the date of “the last deduction” in the series of payments.

29. In that respect the claim relates to wages and holiday pay which should have been paid to the claimant on 30 April 2020 (being when the claimant says employment was terminated) and so time would begin to run from that date. That would mean his Employment Tribunal claim should have been presented by 29 July 2020 with any extension allowed by early conciliation process. The date of receipt by ACAS of notification of the claim was 11 August 2020 and so there was no extension of time. The claim was not lodged with the Employment Tribunal until 24 September 2020 and so is outwith the statutory time limit.

30. Even looking to the best position for the claimant as 11 May 2020 as “the date that payment of wages from which the deduction was made” (albeit this may well be disputed by the respondent) his claim would still be out of time. That would mean he had three months from 11 May 2020 to lodge his claim (with any extension of time allowed by the provisions on early conciliation).

31. Accordingly the claim should have been lodged with the Employment Tribunal on 10 August 2020. However the date of receipt by ACAS of the EC notification was 11 August 2020 which would mean that the time period could not be extended because the early conciliation notification was one day late and so outwith the statutory time limit. It would only have been if notification to ACAS was on 11 August 2020 that time would have been extended.

32. It is perhaps important to note that when a claim is to be presented within a period “beginning” with a particular date that date must be included in the calculation of the time allowed. So a period of three months beginning with 11  
5 May ends on 10 August.

33. It could not be said that time would start to run from the date of an anticipated payment of 28 May 2020. There was no deduction made then or payment made which was short. In terms of the claimant’s position that was essentially  
10 a debt due for wages which should have been paid as at 30 April 2020.

34. Insofar as the claim can be pursued as a contract claim then time runs “from the date of termination of the contract giving rise to the claim or where there is no effective date of termination within the period of three months beginning  
15 with the last day upon which the employee worked ....”.

35. In this case the last date from which time could run would be 30 April 2020 which would mean that the claimant would require to lodge his claim by 29 July 2020. Again he did not lodge his notification to ACAS until 11 August 2020  
20 which was beyond the three month period and so there is no extension for the early conciliation process.

36. Again the claim was not lodged with the Tribunal until 24 September 2020 which is beyond the time limit.

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### **Escape clause**

37. However the statute also provides that time can be extended if it was “not reasonably practicable” for a claimant to have lodged his claim within the  
30 statutory period. This escape clause has been the subject of a good deal of case law.

38. Attempts had been made to establish a clear general and useful definition of “reasonably practicable”. It has been held that it 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”. In *Asda Stores Limited v Kauser* EAT0165/07 it was stated that the relevant test “is not simply a matter of looking at what was possible but to ask whether on the facts of the case as found it was reasonable to expect that which was possible to have been done”.

39. Many reasons are put forward as to why it was not “reasonably practicable” to present a claim in time.

40. In this case the claimant did not maintain that he was ignorant of his rights to make a claim. He had asked his son to make enquiry of CAB. That enquiry had been made and he had been told that he could make a claim to the Employment Tribunal.

41. Where the claimant is generally aware of his or her rights ignorance of the time limit is rarely acceptable as a reason for delay. That is because a claimant who is aware of his or her rights will generally be taken to have been put on enquiry as to the time limit. It has been held that when a claimant knows of his or her right to complain to an Employment Tribunal he or she is under an obligation to seek information and advice about how to enforce that right. Indeed that appears to be the position here as the claimant did make some further enquiry about time limits and was told that he had three months from the last date when a payment was not made. His position was that he had been told a payment would be made on 28 May 2020 and so had three months from that date. However that was not the case as the time limit started to run in my view from 30 April 2020 when the payments claimed fell due but not paid and so there was a deduction.

42. If this was wrong advice then it has certainly been established that an advisor’s incorrect advice about time limits or other fault leading to the late submission of a claim will bind the claimant. The CAB have been held to be “skilled advisors” in this respect and so incorrect advice from the CAB has been treated as the fault of the claimant him or herself.

43. No other explanation for the claim being lodged late was available from the claimant. He seemed to be active in May 2020 in pursuing his rights and there is no evidence of any illness or disability which would have prevented him making a claim. He could have instituted his claim after there was a failure to pay on 28 May 2020. He had until 29 July 2020 to make the notification to ACAS and then make his Tribunal claim.

44. The time limit is strictly enforced and in this case I find that it was reasonably practicable for the claim to have been presented within the three month time limit which as indicated even on the best position for the claimant runs from 11 May 2020 being the date of the last payment he received (albeit that payment was made beyond 30 April 2020 being the date I consider was the correct date from which to assess time limit).

45. Accordingly the Tribunal has no jurisdiction to hear the claims for deduction from wages which includes holiday pay and they must be dismissed.

Employment Judge: Jim Young  
Date of Judgment: 21 December 2020  
Entered in register: 23 December 2020  
and copied to parties

**I confirm that this is my Judgment in the case of Blawicki v Williamson Design Florist and that I have signed the Judgment by electronic signature.**