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EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4108387/2021 (V)

Held on 28 June 2021 by Cloud Based Video Platform

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Employment Judge Neilson

Mrs J Wright

**Claimant
In person**

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Allied Vehicles Limited

**Respondent
Represented by:
Mr Cartwright,
Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

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The Tribunal finds (i) that it was not reasonably practicable for the claimant's complaints to be presented within the statutory time limit but that (ii) the claimant's complaints were not presented within such further period as the Tribunal considers reasonable. It is therefore the judgment of the Tribunal that the Tribunal does not have jurisdiction to hear the claims brought by the claimant in these proceedings.

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REASONS

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1. At the Hearing on 28 June 2021 by CVP the claimant appeared in person and represented herself. The respondent was represented by Mr Cartwright, Solicitor.
2. The claimant lodged with the Employment Tribunal a number of documents numbered 1 through to 23.

3. The claimant gave evidence on her own behalf. No evidence was led by the respondent.
4. The issue to be determined at the hearing was whether or not the claim lodged by the claimant had been lodged outside of the time limit applicable to unfair dismissal claims and whether or not the Employment Tribunal had jurisdiction to hear it.

Findings in Fact

5. The claimant is the widow of John Wright, a former employee of the respondent (“Mr Wright”).
6. Mr Wright was employed by the respondent as a Quality Controller.
7. The claimant collapsed at work on 4 November 2019. He was taken to the Royal Infirmary that day. An abnormality was found on his lung. He attended his own doctor on 5th November 2019 and was signed off as fit to return to work on 6 November 2019.
8. On returning to work an issue arose as to whether or not Mr Wright had falsified the Fit Note provided by his doctor. He was asked by the respondent to attend a disciplinary hearing on 19 November 2019. Following the disciplinary hearing Mr Wright was dismissed for gross misconduct.
9. Mr Wright appealed against the decision to dismiss him. The claimant assisted Mr Wright in writing that letter. The appeal letter dated 26 November 2019 was sent to the respondent and received.
10. Mr Wright attended Wishaw General Hospital for a biopsy on 25 November 2019. On 4 December 2019 he was notified that he had lung cancer.
11. The respondent sought to arrange a date for the appeal hearing. Mr Wright was unable to attend an appeal hearing in December due to his health. The appeal hearing had been arranged for 12 December; rearranged for 17 December and rearranged again for 23 December. The respondent

rearranged the appeal hearing for 21 January 2020 in light of Mr Wright's ill health.

12. Mr Wright had a seizure at the beginning of January 2020 and was admitted to Wishaw General Hospital on 4th January where it was discovered that the cancer had spread to his brain.
13. The claimant contacted Debra Mackie at the respondent to explain that Mr Wright was not fit enough to attend the appeal hearing on 21 January 2020.
14. The claimant sent on to the respondent a copy of a letter of 22 January 2020 from Dr Panesar confirming that Mr Wright had cancer that was affecting his brain. The claimant sent on a further letter of 27 January received from Mr Wright's doctor confirming his medical condition.
15. Mr Wright died on 28 January 2020.
16. There was no further contact between the respondent and the claimant until November 2020.
17. In July 2020, Elise Mahood, a cousin of the claimant was found dead at her home. She had been assisting the claimant in dealing with her husband's affairs following his death.
18. The claimant has a son who is a biomedical scientist.
19. In or about November 2020 the claimant became aware that Mr Wright may have been entitled to a lump sum payment on his death. The claimant contacted Debra Mackie at the respondent to enquire about that and the state of the appeal. The respondent completed the necessary document in connection with the lump sum benefit on 24 November 2020 and sent that to the claimant under cover of a letter of 24 November from Michelle Campbell at the respondent.
20. The respondent had not been aware of the death of Mr Wright until contacted by the claimant in November 2020.

21. The claimant spoke with a lawyer and with ACAS in November 2020 regarding Mr Wright's employment position, his dismissal and the appeal. The claimant was advised at that time that she was out of time to bring an employment tribunal claim but that she could proceed and lodge a claim as it may be accepted although late.
22. The date of the early conciliation notification to ACAS was 27 November 2020.
23. The claimant did not contact lawyers or citizens advice in the period from November 2020 to March 2021
24. The claimant lodged the ET1 on 16 March 2021.

Submissions

25. The claimant maintained that she had not been aware of any time limits that applied to bringing Employment Tribunal proceedings until November 2020. She had not even been aware she could bring a claim to the Employment Tribunal until November 2020. She had been expecting the respondent to contact her regarding the appeal. She thought the appeal was still to be determined. The death of her husband had come as a considerable shock. Her cousin who had been assisting her following the death of her husband also died in July 2020. She was not sure if the respondents were open during the pandemic. Following November she had found it difficult to complete the ET1 – it was the anniversary of her husband's ill health and death during this time.
26. For the respondent Mr Cartwright confirmed that the respondents position was that it had been reasonably practicable to lodge the ET1 within the normal time limit but that in any event it would not be reasonable to extend time to 16 March 2021. In particular he drew attention to the fact that the claimant had consulted lawyers and ACAS and was aware of time limits in November 2020 but had still waited 3 months to lodge the claim. Mr Cartwright also referenced the fact that the claimants son was an educated person who could have assisted the claimant in bringing the claim. There

would be real prejudice to the respondent in not having finality to these proceedings.

The Law

27. Section 111(2) of the Employment Rights Act 1996 (“ERA”) provides that:-
5 “...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 is not reasonably practicable for the complaint to be presented
10 before the end of the period of three months.”
28. These time periods may be modified by the ACAS conciliation process.
29. The test as to whether or not an unfair dismissal claim should be received although late is a two stage test under section 111(2)(b). Firstly the issue is whether or not it was not reasonably practicable to lodge within the original
15 time period. If it was not then the Employment Tribunal must go on to consider whether the time that has elapsed since then is itself a reasonable period.
30. In accordance with *Dedman v British Building and Engineering Appliances 1973 IRLR 379* and *Marks and Spencer v Williams-Ryan 2005 IRLR 562* the relevant principles to be applied from these authorities are:-
- 20 30.1 section 111(2)(b) ERA should be given a liberal construction in favour of the employee;
- 30.2 it is not reasonably practicable for an employee to present a claim within the primary time limit if she was, reasonably, in ignorance of that time limit;
- 25 30.3 however, a claimant will not be able to successfully argue that it was not reasonably practicable to make a timely complaint to an employment tribunal, if she has consulted a skilled adviser, even if that adviser was negligent and failed to advise her correctly;

30.4 the question of reasonable practicability is one of fact for the tribunal, and should be decided by close attention to the particular circumstances of the particular case;

5 30.5 it is not reasonably practicable to bring a claim if a claimant is unaware of the facts giving rise to the claim. However, once they have discovered them, a tribunal will expect them to present the claim as soon as reasonably practicable, rather than allowing three months to run from the date of discovery;

10 30.6 if a claimant knows of the facts giving rise to the claim and ought reasonably to know that they had the right to bring a claim, a tribunal is likely not to extend time. If the claimant has some idea that they could bring a claim but does not take legal advice, a tribunal is even less likely to extend time.

Discussion & Decision

15 31. In considering the first issue – whether or not it was reasonably practicable to bring the claim before the end of the period of 3 months (as adjusted by any ACAS conciliation requirements) the Employment Tribunal had regard to the particular facts of the case. This was clearly a very tragic set of circumstances. The claimant does have the right under section 206(3) of the
20 ERA to bring proceedings on behalf of her deceased husband. In circumstances where her husband has suddenly been taken ill with cancer and where there was such rapid deterioration leading to his death it was clear, in the view of the Employment Tribunal, that it was not reasonably practicable to bring the claim with the three month time limit as adjusted. Mr Wright died
25 at the end of January 2020. It is entirely understandable that the claimant would be in shock. The claimant was not aware of any time limits that might apply at that time. The fact that her son may be an educated person is not in our view relevant to that consideration in these circumstances. It was not unreasonable for the claimant to consider that the appeal was still an
30 outstanding issue. In all these circumstances we do consider that it was not reasonably practicable to bring the claim within the stipulated time period.

32. Turning to consider the second test. Was the claim presented within a reasonable time thereafter?

33. During the period from the death of Mr Wright through to November 2020 the claimant remained ignorant of her right to bring a claim and of the time limits that might apply. She had to deal with the death of her cousin who was assisting her. There had been no contact from the respondent. In November 2020 the Claimant did obtain legal advice and did speak to ACAS. The claimant was aware in November 2020 that there were time limits, that she could bring a claim and that in fact she was already late in doing so. She was advised to lodge the claim in any event as it may be possible to get an extension. However the claim was not lodged until 16 March 2021. The Employment Tribunal specifically asked the claimant for the reason for the delay between November and 16 March 2021. The claimant's position was that she found it to be an upsetting time as this period coincided with the anniversary of the illness and death of her husband. Whilst the Employment Tribunal has considerable sympathy with the claimant for the sad circumstances that she was in we do not consider that it would be reasonable in all the circumstances to extend the time period to 16 March 2021. In light of the steps that the claimant had taken in November 2020 we would have expected that a reasonable period to thereafter lodge the claim would have been the end of January 2021 at the latest. In the absence of any other evidence to explain the delay between November 2020 and 16 March 2021 the decision of the Employment Tribunal is that the second test is not satisfied and that the claim is accordingly out of time.

25 Employment Judge: Stuart Neilson
Date of Judgment: 02 July 2021
Entered in register: 07 July 2021
and copied to parties

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