



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4109206/2021

Held in Dundee by CVP on Monday 25 October 2021

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Employment Judge Rory McPherson

Mr. Farhan Munawar

**Claimant
No appearance**

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Interpreter: S Ricci

**Grove Retail Ltd
t/a Shell Bawbee**

**Respondent
Represented by:
T Rajendran
Manager**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

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The judgment of the Employment Tribunal is that the claimant's claims for arrears of pay and other payments are dismissed as the Tribunal does not have jurisdiction.

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REASONS

Introduction

Preliminary Procedure

1. The claimant presented his claim on **Thursday 15 April 2021**, for what he described in the ET1 as arrears of pay and other payments describing that

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- the respondent "*told me that after receiving the shirt she would pay me my salary.*" It did not set out any description of his period of employment. The presentation of the claim followed initiation of ACAS Early Conciliation on **Friday 11 September 2020** and the issue of certificate on **Sunday 11 October 2020**.
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2. The respondents presented their ET3 on **Monday 26 April 2021**, resisting the claims, including asserting that the start date was **Tuesday 4 May 2020**, and the date of termination of his employment was **Sunday 6 August 2020**.
- 10 3. The Tribunal directed that there should be a telephone preliminary hearing held on Wednesday 30 July 2021. The respondent attended by audio, but the claimant did not attend. It was noted that attempt was made to contact the claimant at the telephone number and email provided on the ET1.
- 15 4. A further telephone case management Preliminary Hearing was appointed for **Wednesday 1 September 2021**, at which both parties attended. Today's **one-day** hearing was appointed to take place via CVP. The respondent was ordered to provide documentation, including rota and any documentation relied upon showing or tending to show that the respondent was entitled to reduce or withhold pay in the event of non-
- 20 return by the claimant of respondent property by Wednesday 15 September 2021. The claimant was directed to confirm his position regarding respondent rota by **Wednesday 29 September 2021**. Both parties were ordered to provide copies of copies of documents they proposed to rely upon to the Tribunal (and each other) by 12 Noon Friday
- 25 22 October 2021.
5. The respondent provided a copy extract rota and as the claimant did not respond within the time set out in the note, the Tribunal issued communication to the claimant **Thursday 30 September, Monday 6 October, and Monday 11 October 2021**, to which the claimant again
- 30 did not respond, the Tribunal subsequently confirmed it would be assumed that the claimant did not object to the respondent rota and the claimant had no documentation to provide.

6. Both parties were notified of the CVP Test. The Tribunal is advised that the claimant attended the CVP test. The claimant also attended for the start this 1-day Hearing scheduled to start at 10 am. An interpreter had been arranged for the claimant. The respondent did not initially attend, in accordance with Rule 47 of the 2013 Rules to allow the clerk to make such enquiries as were practicable by making telephone contact with the respondent, and the claimant was advised that the start of the hearing would be postponed to 10.30 am. Thereafter the clerk contacted the claimant, who advised that he would use an alternate device to take part and advised that he would be starting work at 11 am despite the clerk reminding that the hearing had been scheduled for the day. The claimant did not subsequently re-join before 11 am and further time was arranged to allow the claimant to join. In that period, the respondent manager responded to contact made that morning and indicated that they had a family illness but would join CVP. Both parties were advised via the telephone numbers provided that the hearing would start at 11.45. Only the respondent manager Ms Rajendran attended and gave evidence.

Findings in Fact

7. The claimant was employed by the respondent as a cashier from **Tuesday 4 May 2020** and date of termination of his employment was **Sunday 6 August 2020**. ACAS Early Conciliation was initiated on **Friday 11 September 2020** and certificate was issued on **Sunday 11 October 2020**. The claimant subsequently presented his claim for non-payment of wages on **Thursday 15 April 2021**.

Relevant Law

8. Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013, (the Tribunal Rules) (the 2013 Rules) Rule 47 provides as follows:
- “47. If a party fails to attend or to be represented at the hearing, the Tribunal may dismiss the claim or proceed with the hearing in the absence of that party. Before doing so, it shall consider any information which is available to it, after any enquiries that may be practicable, about the reasons for the parties' absence.”*

9. A primary issue for the Tribunal was whether the claimant's complaints presented within the time limits set out in Sections 111(2)(a) & (b) of the Employment Rights Act 1996 (ERA 1996) that is whether it was not reasonably practicable for a complaint to be presented within the primary time limit.
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10. Some claims may be argued to have been lodged out with 3 months less one day time limit (allowing for the operation of ACAS early conciliation). The provisions of section **207B of ERA 1996**, since 2014, provide for an extension to that period where the claimant undergoes early conciliation with ACAS. In effect, initiating early conciliation "*stops the clock*" until the ACAS certificate is issued, and if a claimant has contacted ACAS within time, he will have at least a month from the date of the certificate to present his claim.
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11. Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before **Thursday 17 December 2020** is potentially brought out of time so that the Tribunal may not have jurisdiction to deal with it.
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12. The burden of proving that it was not reasonably practicable to present a claim in time is a high threshold and rests firmly on a claimant as set out in **Porter v Bannister Ltd** [1978] ICR 943 (**Porter**).
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Breach of contract

13. Article 3 of the Employment Tribunals Extension of Jurisdiction (Scotland) Order 1994 provides that proceedings may be brought before an Employment Tribunal by an employee to recover contractual sums due, and the claim is outstanding on termination of the employee's employment. Non-payment of wages is a breach of contract.
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14. As the claim was NOT brought within three months from the date of termination of employment, which is the appropriate time limit, the Tribunal has no jurisdiction to consider this claim under Article 3.
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Unlawful Deduction of Wages

Relevant law

15. Section 13 of ERA 1996 provides, so far as is relevant:

5 *"(1) An employer shall not make a deduction from wages of a worker employed by him unless:*

(a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract; or

10 *(b) the worker has previously signified in writing his agreement or consent to the making of the deduction. ...*

(3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion, the amount of the deficiency shall be treated for the purposes of this part as a deduction made by the employer from the worker's wage on that occasion. ...

15 *(5) For the purposes of this section an agreement or consent signified by a worker does not operate to authorise the making of a deduction on account of any conduct of the worker, or any other event occurring, before the agreement or consent was signified."*

20 16. However, such claims must be brought within three months, beginning with the date of the payment of wages from which the deduction was made as per section 23(2) ERA 1996.

Discussion and Decision

25 17. I considered all the information which was available to me. Such enquiries as were practicable were made, including the Tribunal's clerk making enquiries seeking to contact initially the respondent by telephone and thereafter claimant by telephone. I am satisfied that it was reasonable to proceed in all the circumstances.

30 18. If there is a valid explanation for the claimant's non-attendance beyond 10.30 am and he can meet the relevant high test that it was not reasonably practicable for him to have presented his claim in time, it would be open to him apply within 14 days for reconsideration of this decision.

19. On the basis of the available information, the claimant has not established that it was not reasonably practical for the claim to have been presented in time. I am of the view that a dismissal of the claim is appropriate in these circumstances and in accordance with the overriding objective in terms of Rule 2 of the 2013 rules to deal with cases fairly and justly.

Conclusion

20. The claimant's claims for arrears of pay other payments are hereby dismissed.

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15	Employment Judge:	R McPherson
	Date of Judgment:	25 October 2021
	Date sent to parties:	26 October 2021