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EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4108486/2021

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**Hearing Held by Cloud Based Video Platform (CVP) on 19 August 2021 and
by written submission dated 9 September 2021**

Employment Judge Neilson

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Mr J Fernandes

**Claimant
In Person**

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Conduit Finance Limited

First Respondent

CFJK CF Limited

Second Respondent

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

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The Judgment of the Employment Tribunal is that the claims brought by the
claimant are time barred and are dismissed.

REASONS

Background & Issues

- 5 1. This case called for a hearing by way of CVP on 19 August 2021. There was no appearance lodged by or on behalf of the first and second respondent. The claimant was represented by Ms Jenkins, solicitor. During the course of the hearing it became apparent that there was a potential issue regarding whether or not the claims had been lodged within time. The Tribunal allowed the
10 claimant and his solicitor a period of 14 days within which to lodge written representations on the time bar issue. The claimant's solicitors notified the Tribunal on 2 September 2021 that they had withdrawn from acting and the Tribunal granted the claimant a further period within which to lodge written submissions on the time bar issue. Written submissions were lodged by the
15 claimant on 9 September 2021.
2. The Tribunal has taken into consideration the evidence led at the CVP on 19 August and the written submissions lodged by the claimant on 9 September 2021.
3. At the outset of the CVP hearing on 19 August Ms Jenkins applied to amend
20 the name of the second respondent. There were originally three respondents – however the claim has only proceeded against the first and second respondent. The second respondent changed its name on 12 April 2021 to CFJK CF Limited. The Tribunal allowed that amendment.
4. In light of the rather confusing position regarding name changes it is important
25 to clarify which legal entity is which by reference to the registered number of the limited company. The first respondent is company number SC618993. The second respondent is company number SC618998. The third respondent is company number SC459680. The Tribunal is satisfied that the claim has been properly brought against both the first and second respondent having

regard to the company names at the time and the names on the ACAS certificates.

5. The issues to be determined by the Tribunal were whether the claimant was entitled to (a) pursuant to regulations 16 and 30 of the Working Time Regulations 1998 payment of amounts due for holiday taken in 2019 which were not calculated with reference to normal remuneration to include bonus; and (b) pursuant to regulations 14 and 30 of the WTR a payment for 21 days accrued but untaken holiday in 2020; and (c) compensation in the sum of £5,625 in respect of non-payment of a contractual bonus.
6. There was an Inventory of Documents produced by the claimant and witness evidence was taken from the claimant and Ms Laura Greig, PA/Administrator.

Findings in Fact

7. The claimant commenced employment on 4 February 2019 with Conduit Finance Limited (SC459680) – the third respondent under a contract of employment dated 12 December 2018 (“the Contract”).
8. The claimant was originally employed as Manager of Corporate Finance and was promoted in early 2020 to Director of Corporate Finance.
9. On 18 February 2019 Conduit Finance Limited (SC459680) (the third respondent) changed its name to CFJK Limited.
10. On 18 February 2019 CFJK Limited (SC618993) (the first respondent) changed its name to Conduit Finance Limited.
11. CFJK Limited (SC459680) – the third respondent- has ceased trading.
12. From July 2019 the claimant was paid his salary by CFJK Group Limited (SC618998) (the second respondent).
13. On 15 April 2020 CFJK Group Limited (SC618998) (the second respondent) changed its name to Conduit Finance Group Limited.

14. Conduit Finance Group Limited (SC618998) (the second respondent) changed its name to CFJK CF Limited on 12 April 2021.
15. The second respondent was the trading entity that all business went through from May 2019 to the end of the claimant's employment.
- 5 16. The second respondent was operating a business under the trading name of "Conduit Finance" that provided corporate and real estate finance advice.
17. From about July 2019 the claimant was employed by the second respondent under the terms of the Contract.
18. The claimant was entitled to a basic salary under the Contract of £45,000 per
10 annum.
19. The claimant was entitled to a bonus under the Contract.
20. Clause 4.4 of the Contract provided "*Bonus – 5% of gross fees generated above target for deals you work that are not originated by you. 10% of gross fees from deals you originate and convert. Quarterly fee target needs to be achieved or surpassed to qualify for bonus. Bonus paid out in salary run the*
15 *month after quarter end.*"
21. The quarter referred to in Clause 4.4 is quarters based on a calendar year.
22. The quarterly fee target for 2019 was £25,000 per quarter.
23. The quarterly fee target for 2020 was £200,000 per quarter.
- 20 24. The quarterly fee target for the second, third and fourth quarters of 2019 were exceeded by the claimant.
25. The claimant received bonuses in 2019 in respect of his work on the Empire deal.
26. In 2019 the claimant worked on a deal for the second respondent known as
25 "the Swan Deal". The claimant was not the originator on that deal.

27. The fees generated on the Swan deal by the second respondent were £225,000. This was invoiced to the client by the second respondent in two amounts of £112,500 each in 2019. The invoice dates were 27 August 2019 and 8 November 2019. The client paid the first amount of £112,500 to the second respondent on 23 December 2019.
28. The bonus to which the claimant was entitled under the Contract in respect to the Swan deal was £11,250.
29. The claimant received a bonus payment of £5,625 for the Swan deal in his payslip in January 2020.
30. By letter of 25 March 2020 the second respondent placed the claimant on furlough leave from 1 March through to 31 May 2020 in accordance with the Government furlough scheme. There was no requirement on the claimant to work during that period. The second respondent maintained the claimant's salary during this period at 100% of basic salary.
31. The claimant did not take any holidays during the calendar year 2020.
32. The claimant did not take any paternity leave during March, April or May 2020.
33. The claimant was entitled under his contract to 28 days holiday per calendar year. The holiday year was 1 January to 31 December.
34. In 2019 the claimant took 17 days holiday and was paid his basic salary only for those holidays. The holiday dates were 22 September to 4 October 2019 and 19 to 27 December 2019.
35. The claimant had accrued 21 days holiday as at the date of termination of his employment on 1 October 2020. The claimant was not paid for those holidays on the termination of his employment.
36. The claimant's employment with the second respondent terminated on 1 October 2020.

37. The date of receipt by ACAS of the Early Conciliation notification in respect of the second respondent was 19 November 2020.
38. The date of issue of the Early Conciliation Certificate was 2 January 2021.
39. The date the claimant lodged his claim with the Tribunal against the second
5 respondent was 18 March 2021.
40. The claimant was advised following the termination of his employment, by MacRoberts LLP, a firm of solicitors.

The Law

41. Under regulation 16 of the Working Time Regulations 1998 (“WTR”) a worker
10 has a right to be paid in respect of any period of annual leave. A claim in respect of failure to pay may be made under regulation 30 to an Employment Tribunal.
42. Under the WTR a worker has an entitlement to be paid on termination in respect of accrued holidays – regulation 14. A claim in respect of failure to
15 pay may be made under regulation 30 to an Employment Tribunal.
43. The claims under both regulation 14 and 16 of the WTR must, under regulation 30, be presented within 3 months of the date when payment should have been made. The Tribunal has a discretion to extend the time for presentation of the claim to such further period that the Tribunal considers is
20 reasonable where the Tribunal is satisfied that it was not reasonably practicable to present within the original time period.
44. In addition a claim for failure to pay holiday pay, whether under regulation 14 or 16 of the WTR, may be brought as an unlawful deductions claim under section 23 of the Employment Rights Act 1996 (“ERA”). The time limit for
25 presenting such a complaint is three months from the date of payment of the wages from which the deduction was made, or where there are a series of deductions, the date of the last payment in the series. Where the tribunal is satisfied that it was not reasonably practicable for a complaint under section

23 ERA to be presented within the three months it may consider the complaint if it is presented within such period as the Tribunal considers reasonable.

45. Claims under the WTR and section 23 of the ERA will be extended to take into account pre-claim conciliation.

5 46. A claim for breach of contract may be brought under section 3(2) of the Employment Tribunals Act 1996 and the Employment Tribunals Extension of Jurisdiction (Scotland) Order 1994 (“the 1994 Order”). The claim can only be made following termination of employment and must be outstanding on termination of employment. The claim must be brought within the period of
10 three months beginning with the effective date of termination of the contract – article 7 of the 1994 Order. This period is extended under article 8B of the 1994 Order to allow for pre-claim conciliation. Where the Tribunal is satisfied that it was not reasonably practicable for the claim to be presented within the three month period it may allow the claim to be presented within such further
15 period as the Tribunal considers is reasonable.

47. The test for an extension of time in respect of claims under the 1994 Order, the WTR and section 23 of the ERA is a two stage test. Firstly the issue is whether or not it was not reasonably practicable to lodge within the original time period. If it was not then the Employment Tribunal must go on to consider
20 whether the time that has elapsed since then is itself a reasonable period.

48. 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:-

25 48.1 The extension provisions should be given a liberal construction in favour of the employee;

48.2 it is not reasonably practicable for an employee to present a claim within the primary time limit if he was, reasonably, in ignorance of that time limit;

30 48.3 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 he has consulted a skilled adviser, even if that adviser was negligent and failed to advise him correctly (however there may be exceptional circumstances where this principle may not apply);

5 48.4 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;

 48.5 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;

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 48.6 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.

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Submissions

49. The claimant's solicitor made submissions at the close of the hearing on 19 August 2021. These were substantially repeated by the claimant in his written submissions dated 9 September 2021.

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50. In respect of the issue of time bar the claimant started in his written submissions:- "The Claimant would like to highlight to the Employment Tribunal that this case was being advised and managed by a former lead representative within MacRoberts LLP who has since resigned from the legal firm. In the Claimant's position is that the failure of the former legal representative to submit a claim in time for the breach of contract claim does not negate the facts of the case where there has been a breach of contract and that outstanding sums are due payable, as detailed in the subsequent sections."

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Discussion

51. The Tribunal heard evidence from Ms Laura Greig and from the claimant. Ms Greig had worked for the business known as Conduit Finance and in particular for the principal behind the business, Mr Jamie Davidson from May 2019 onwards. Ms Greig is a highly experienced freelance PA/Administrator and the Tribunal found her evidence to be entirely credible. The Tribunal also found the evidence of the claimant to be credible.

52. It was the evidence of Ms Greig that the Conduit Finance business had been effectively transferred over to the second respondent in or about May 2019 and that all staff were transferred over at or around that point in time. The documentary evidence – wage slips and the P45 also pointed towards the second respondent being the employer of the claimant. Although the claimant does appear to have been originally employed by the third respondent the Tribunal was satisfied that at some point between May and July 2019 his employment had transferred to the second respondent. It was likely, based on the evidence of Ms Greig and the claimant, that that transfer was a transfer under the Transfer of Undertakings (Protection of Employment) Regulations 2006 – however in any event the Tribunal was satisfied that as a matter of fact the claimant continued his employment with the second respondent under the terms of the written contract from December 2018 and that it is the second respondent that will have any liability to the claimant in respect of his various claims, to the extent that these are made out and are in time.

53. There were three claims brought by the claimant as referenced at paragraph 5 above.

25 **The Underpayment of Holiday pay**

54. Dealing firstly with the claim under regulations 16 and 30 of the WTR. This was a claim for underpayment of holiday pay as the second respondent allegedly failed to take into account the bonus payments made to the claimant in 2019 when calculating his holiday pay. However the first issue that the Tribunal has to consider here is whether or not this claim is in time. The claim

should, in accordance with regulation 30 of the WTR, have been presented within 3 months “beginning with the date on which it is alleged the exercise of the right should have been permitted.” The correct payment for these holidays should have been made at the end of the month in which the holidays were taken. According to the payslips the payment dates were 28 September 2019; 28 October 2019 and 20 December 2019. The 3 month period would run from each these dates.

55. If the claim is made under section 23 of the ERA then the 3 months run from the date of the last payment in the series. On the evidence it was clear that no bonus was earned in 2020 as the claimant did not in any quarter achieve the target of £200,000. Whilst that may have been a very high target it was what was agreed in the employment contract. In any event no holidays were taken in 2020. Accordingly the last date for payment in any series of payments in respect of the regulation 16 claim was 20 December 2019.

56. The claim should have been lodged by 19 March 2020. In fact the claim was not lodged until 18 March 2021. The Tribunal has a discretion to extend the time for lodging under both the WTR and the ERA where it is satisfied that it was not reasonably practicable to present the claim before the end of the period of three months.

57. The issue of time bar was not really addressed in the submissions made following the hearing in August and it was for that reason that the Tribunal allowed the claimant an additional period of time to make any submissions regarding time bar. The claimant’s position on time bar is essentially that the failure to lodge the claim in time sits with his former solicitors. The claimant was being advised by MacRoberts LLP. The claimant offered no further explanation. In these circumstances, and in the absence of any other explanation, the Tribunal determines that there is no basis upon which it can be said that it was not reasonably practicable to bring the claim within the original time limit. Where there are lawyers acting and a time limit is not complied with that by itself will not be grounds for arguing that it was not reasonably practicable to present the claim in time. There would have to be

some other exceptional circumstances. There was no evidence offered as to what those other circumstances might be. Even if there were grounds to say that it was not reasonably practicable to bring the claim before October 2020 then in any event in light of the fact that the claimant was being professionally
5 advised at least from October 2020 it would not be reasonable to extend the time limit through to 18 March 2021. Accordingly the claim in respect of the under payment of holiday pay is time barred.

The non-payment of Accrued Holiday Pay

58. Dealing next with the claim for failure to pay accrued holiday pay. The Tribunal
10 was satisfied on the evidence that the claimant had not taken any holidays in 2020. Accordingly when his employment terminated on 1 October 2020 he was due 21 days accrued holiday pay. Payment should have been made in the October payroll on 28 October 2020. In respect of the second respondent the EC notification was made on 19 November 2020 and the ACAS certificate
15 was issued on 2 January 2021. Under both the WTR and the ERA the claim should have been presented by no later than 12 March 2021. It was presented on 18 March 2021. The claimant was being advised by solicitors. As outlined above there was no further explanation proffered as to the failure to lodge within the time limit. In these circumstances the claim is time barred.

20 The Breach of Contract Claim

59. The claim for breach of contract was outstanding upon the termination of employment. The time for lodging the claim runs from 1 October 2020. In respect of the second respondent the EC notification was made on 19 November 2020 and the ACAS certificate was issued on 2 January 2021. The
25 claim should have been presented by no later than 12 February 2021. It was presented on 18 March 2021. The claimant was being advised by solicitors. As outlined above there was no further explanation proffered as to the failure to lodge within the time limit. In these circumstances the claim is time barred.

60. Had the claim not been time barred the Tribunal is satisfied that under the
30 terms of the Contract the 5% bonus was due once the fees were generated.

The ordinary interpretation of that phrase would cover the position where the fees are invoiced to the client. The payment was not subject to actual payment of the invoice by the client. If the second respondent had wished to make payment conditional on actual payment of the invoice by the client it should have expressly said so. In the absence of any such express provision the ordinary interpretation of clause 4.4 of the Contract is that payment was due in the month after the end of the quarter in which the fees were invoiced. The second invoice was issued in November 2019. The second instalment of the bonus was due in January 2020. Had the claim not been time barred the Tribunal would have found the claimant entitled to the sum of £5,625.

Employment Judge: S Neilson
Date of Judgment: 7 November 2021
Entered in register: 9 November 2021
and copied to parties