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EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4104759/2020

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Preliminary Hearing held by telephone conference on 19 April 2021

Employment Judge J Young

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Sneha Saktivel

**Claimant
In Person**

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Kamasutra Restaurant

**Respondent
Not Present and
Not Represented**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

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The Judgment of the Tribunal is that:-

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1. The claim of failure to pay holiday pay and gratuity was not made within the period of three months of 19 August 2019 but the Tribunal is satisfied that it was not reasonably practicable for the claim to be presented before the end of the relevant period of three months; and that the claim can be considered as it was presented within such further period as is considered reasonable, all in terms of Section 23 (2) and (4) of the Employments Rights Act 1996.

2. The respondent shall pay to the claimant the sum of **Two Hundred and Ninety Seven Pounds and Seventy Eight pence (£297.78)** being pay due to her in respect of holidays accrued to date of termination of her employment but not taken; and

5 3. The respondent shall pay to the claimant the sum of **Ninety Four Pounds (£94.00)** being gratuities earned by her to date of termination of her employment

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REASONS

1. In this case the claimant presented a claim to the Employment Tribunal complaining that she had not been paid holiday pay or gratuity by the respondent. She advised that she had been employed by the respondent in the period between 20 January and 19 August 2019 as a Waitress. She presented that claim on 7 September 2020 having notified ACAS under the early conciliation procedure on 22 August 2020 with a Certificate issued on 7 September 2020.

20 2. The claim was sent to the respondent by letter of 11 September 2020 advising that in order to be allowed to defend the claim they should make a response by 9 October 2020. The appropriate response form was attached to that letter. No response was received.

25 3. The claimant was asked for further specification of her claim and on 22 October 2020 intimated detail of the calculation of her claim for holiday pay and gratuity. She specified her pay over the period 11 February 2019 to 19 August 2019 together with the hours worked per week and pay received. She made a calculation of holiday pay due of 3.01 weeks with an average weekly pay over the 12 weeks preceding termination of employment of £98.39 per week, making the total holiday pay due of £297.78. She also advised that she had not been included in gratuity payments and in terms of the payslips

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received the minimum gratuity was calculated at 0.25 pounds per hour and therefore the amount due came to £94.00 in respect of hours worked.

4. By letter of 19 December 2020, both the claimant and respondent were advised that a final hearing in this case would take place by means of Telephone Conference Call on 11 January 2021 at 11:30 am. The notice was sent to the respondent for information only given the failure to respond to the intimated claim. The respondent was advised at that time that they would only be able to participate to the extent permitted by the Employment Judge who would hear the case.
5. There was a failure by the claimant to attend the Conference Call because a close friend died and she had to attend to the necessary arrangements. The Employment Judge adjourned the hearing at that time and sought an explanation for the claimant's failure to attend. The Note following the adjournment of the hearing was forwarded to the respondent on 27 January 2021 for their information. Subsequent to the claimant's explanation for failure to attend the hearing a further date was fixed for 19 April 2021.
6. At the time, the claimant attended and gave evidence. She explained that she had taken a vacation in India around January 2021 and due to the incidence of Covid had been unable to make a return to the UK. Her call was from India and so communication was at times difficult but was sufficient to enable to the following findings to be made.

Findings

7. The claimant had come to the UK around September 2018 and her first employment was with the Respondent as a Waitress. She commenced work with the Respondent from 20 January 2019.
8. Around 15 August 2019 she took a vacation to India to return to Glasgow on 24 September 2019. However, when she returned and made contact with the Restaurant regarding her shift times she received no response. While she had

spoken with the Manager there on several occasions from the first week in October 2019 she had received no information on when she should return to work. She had sought information on payments due but no payment was forthcoming. She received no P45 or other employment documents.

5 9. Around December 2019 she found another job. She had no knowledge of Employment Tribunals or that she could make a claim for any payment due to her. She had a conversation in August 2020 with a colleague at her new job about her experience with the respondent and they advised that she could make an application to an Employment Tribunal for payment of holiday and
10 the gratuity.

10. As soon as she was aware she was able to do so she made the application. When asked how it was she was unaware or had made no enquiry about the ability to take a claim through a Tribunal she responded that she had come from a country which had no such procedure in place and it was only due to
15 the conversation she had with a colleague in her new employment that she understood that she was able to process a claim.

11. She confirmed that she had not taken any holiday in the year prior to 15 August 2019 when employed by the respondent and she had not been paid any holiday pay in respect of the leave that she had then taken. As explained
20 when returned to the UK around 24 September 2019 she had been unable to get any response from the respondent as to a return to work, or payment or P45 despite request.

12. She advised that Alok Singh was a Manager within the business but I did not consider that was sufficient to identify him as the employer. Her wage slip
25 advised that payment of wages was from "Kamasutra Restaurant".

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Relevant law

13. The law relating to time limits in respect of failure to make payment of wages such as holiday pay or gratuities is contained in the Employment Rights Act 1996. Section 23 advises that an Employment Tribunal shall not consider a complaint unless it is presented before the end of the period of three months beginning with the date payment of wages was due or was presented in such further period as the Tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.
14. Thus, where the claim is lodged out of time the Tribunal must consider whether it was not reasonably practicable for the claimant to present the claim on time. The burden of proof lies with the claimant. If the claimant succeeds in showing that it was not reasonably practicable to present the claim in time, then the Tribunal must then be satisfied that the time within which the claim was in fact presented was reasonable.
15. The Court of Appeal has considered the correct approach to the test of reasonable practicability (*Lowri Beck Services Limited -v- Brophy* [2019] EWCA Civ 2490). There the essential points were summarised as:-
- (1) the test should be given a “liberal interpretation in favour of the employee”
 - (2) the statutory language is not to be taken as referring to physical impracticability and for that reason might be paraphrased as whether it was “reasonably feasible” for the claimant to present his or her claim on time.
 - (3) If an employee misses the time limit because he or she is ignorant about the existence of a time limit, or mistaken about when it expires in their case the question is whether that ignorance or mistaken belief is reasonable. If it is then it will not have been reasonably practicable for them to bring the claim on time. However, it is important that in

assessing whether ignorance or mistake are reasonable to take into account any enquiries which the claimant or their advisor should have made.

5 (4) If the employee retains a skilled advisor any unreasonable ignorance or mistake is attributable to the employee.

(5) A test of reasonable practicability is one of fact and not law.

Decision

16. In this case the employment of the claimant terminated 15 August 2019. That was the last day that she worked. She was unable to obtain any response
10 from the Restaurant when she returned from vacation on 24 September 2019. She was due holiday pay in respect of holiday due but untaken up to date of termination and that was not paid.

17. She should have raised her claim within three months of 15 August 2019 but did not do so until approximately one year later when she intimated her early
15 conciliation application to ACAS.

18. She stated that she was ignorant of the existence of Employment Tribunals and not simply that there was a time limit attached to claims. Her explanation was that she came from a country which had no tradition in claims of this sort being processed through Tribunal procedure. She did not know that she could
20 make this claim until she had a conversation with a colleague in August 2020 when she immediately processed this claim.

19. I had no reason to disbelieve the claimant on her position. I accepted that she came to the UK in or around September 2018 and not long after obtained her first employment in Glasgow. It is the case that she came from a country
25 without a tradition in Employment Tribunal claims. I accepted that she was not aware of the ability to make this claim until August 2020 and so it was not reasonably practicable to make this claim within the necessary time limit. Once she learned of the ability to make this claim she acted promptly. Accordingly, I was satisfied that the complaint could be heard.

20. The claimant had provided a detailed calculation of her holiday pay and gratuity amount. Having considered the calculation I can see that she had approached the matter in the correct manner and so I award her the sum of Two Hundred and Ninety Seven Pounds Seventy Eight Pence (£297.78) in
5 respect of pay for holidays due to date of termination but untaken and Ninety Four Pounds (£94.00) in respect of gratuity.

10 Employment Judge: Jim Young
Date of Judgment: 02 May 2021
Entered in register: 13 May 2021
and copied to parties

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