



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: S/41 02777/201 8

Heard in Glasgow on 25 June 2018

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Employment Judge: Mr Robert Gall

15 **Mr J Brown**

Claimant
Represented by:-
Llvingstone Brown
Mr P Sturdy

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Wm Morrison Supermarkets Pic

Repondent
Represented by:-
Mr M Dempsey -
Advovate

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JUDGMENT

The Judgment of the Tribunal is that it was not reasonably practicable for the claim
30 to be presented within the appropriate time limit of 3 months. The claim is therefore
time-barred and cannot proceed, having regard to the terms of Section 111 of the
Employment Rights Act 1996.

As stated at the Hearing, in terms of Rule 62 of the Employment Tribunals
35 (Constitution & Rules of Procedure) Regulations 2013, written reasons will not be
provided unless they are asked for by any party at the hearing itself or by written
request presented by any party within 14 days of the sending of the written record

E.T. Z4 (WR)

of the decision. No request for written reasons was made at the hearing. The following sets out what was said, after adjournment, at the conclusion of the hearing. It is provided for the convenience of parties.

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REASONS

1. This case called for Preliminary Hearing ("PH") at Glasgow on 25 June 2018. Mr Sturdy appeared for the claimant. Mr Dempsey appeared for the respondents. A joint bundle of productions was lodged. I heard evidence from the claimant and also from Euan Cameron, solicitor.
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2. The claimant was dismissed by the respondents. He has presented a claim of unfair dismissal. He also seeks payment by way of notice pay, alleging that the failure to pay notice pay was a breach of contract. He also makes a complaint that there was no written statement of employment particulars supplied to him.
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3. It is accepted by the claimant that the claim was presented late. The PH was to determine whether or not it was not reasonably practicable for the claim to be presented within the relevant time period, namely three months from date of dismissal. The respondents accepted that, if I was persuaded that it was not reasonably practicable to present the claim within the three month period permitted, the claim had been presented within a reasonable period thereafter. The claimant accepted that the burden or onus of proof was upon him to persuade me that the claim ought to be permitted to proceed, notwithstanding being time barred.
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4. There was no particular challenge to the evidence either of the claimant or Mr Cameron. Mr Cameron gave evidence in difficult circumstances from his point of view. Reference is made to that below.
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5. When the claimant was dismissed, he lodged an appeal against dismissal. He also consulted a solicitor in the area in which he lives. That solicitor did

not carry out employment law work and made contact with Mr Cameron as a fellow solicitor to put him in contact with the claimant.

- 5 6. Mr Cameron has been qualified as a solicitor since 2004. The vast majority of his work as a solicitor has been in the field of criminal law. During 2015 he considered that work in the area of criminal defence had reduced. He decided therefore to expand his areas of work. He started doing more family law work and also decided that he would look to practice in the field of employment law. In 2016 he commenced a Masters course at Robert Gordon University in
10 employment law and practice. In the year preceding this PH he has handled three or four employment law cases at the most.
- 15 7. The claimant was dismissed on 21 September 2017. The three month time period for bringing of a claim of the type he seeks to bring commenced at that point.
- 20 8. The claimant was aware that he could bring a claim of unfair dismissal. Having lodged his appeal, he intended to proceed to an Employment Tribunal if need be. He had no knowledge however of any time limits which applied to presentation of any claim to an Employment Tribunal.
- 25 9. Contact was made between the claimant and Mr Cameron in October 2017. The claimant explained his situation to Mr Cameron. Mr Cameron did not issue any letter of engagement to the claimant. He did not send terms and conditions to him. He did not seek payment from the claimant. He did not at this point complete a legal aid application form on behalf of the claimant. There was no payment arrangement agreed between the claimant and Mr Cameron.
- 30 10. Texts were exchanged between the claimant and Mr Cameron. A copy of those appeared at pages 48 to 50 of the bundle. Those were fairly informal in their nature. The majority of them concerned progress, or lack of it, in relation to the appeal against dismissal which the claimant had lodged.

11. Mr Cameron was erroneously of the view that the time period for presentation of a claim of unfair dismissal was three months from date of outcome of the appeal. In fact the time limit for presentation in time of a claim to the Employment Tribunal expired on 20 December 2017, subject to any extension of time appropriately involved by reason of application being made for the Early Conciliation Certificate to ACAS.
12. On 20 December Mr Cameron had a conversation with someone within the respondents' organisation. That person confirmed that the appeal had not yet been determined. She made a remark about the time for lodging of form ET1 not starting until the end of the appeal process. Mr Cameron's own view that the three month period did not commence until the outcome of the appeal was known was reinforced by this comment.
13. On 19 January 2018 Mr Cameron met with the claimant. By that time the claimant was aware that his appeal had been unsuccessful. Mr Cameron met with him to fill out a legal aid application and to commence Employment Tribunal proceedings. At this point however through a conversation with a colleague who had in the past been involved in employment law work, Mr Cameron became aware that the three month period commenced at time of dismissal. He realised therefore that he was outwith time for presentation of form ET1. It was also his view that he should inform Mr Brown, the claimant, of this and advise him to seek separate representation. He therefore, very properly, spoke with the claimant and said that to him, also saying that the claimant may have a right of action against him. He arranged for the claimant to make contact with an experienced firm of employment solicitors. The claim was duly presented on 18 February after the ACAS Early Conciliation Certificate had been issued and the solicitors now instructed had obtained instructions from the claimant.
14. Although the contact and exchanges between Mr Cameron and the claimant were informal, Mr Cameron was nevertheless providing advice to the claimant as to his employment law position. He was aware that the claimant intended to proceed with an Employment Tribunal claim on the basis that he regarded

his dismissal as being unfair. Mr Cameron had not opened a file nor had he written to the claimant. That does not in my view however mean that he was not acting as a solicitor for the claimant. He gave advice, as mentioned. He made contact with the respondents on behalf of the claimant. What prevented him from acting in what might be viewed as a more conventional way as solicitor for the claimant by there being a file and correspondence, for example, was his own misunderstanding that the period of time for presentation of a claim commenced from the outcome of the appeal being known. That was when, in evidence, Mr Cameron said that he believed he would be "*working in earnest*" for the claimant.

15. Although cases to which I was referred by Mr Sturdy dealt with the situation where informal advice had been given by a solicitor, the scenario there was different to that in this case in my view. The claimant was not a friend of Mr Cameron. The engagement between the claimant and Mr Cameron went beyond one of informal discussion. The context was that of the claimant being referred to Mr Cameron as a solicitor in circumstances where the claimant regarded his dismissal as being unfair and intended, if necessary, to proceed with an Employment Tribunal claim.

16. The evidence from Mr Cameron was, to his credit, extremely candid. He accepted he had provided advice. He referred to his error. He said he considered that he had acted negligently. He had made a mistake which had caused the claimant to miss out on the opportunity of bringing a claim and of potentially obtaining the remedy which he wished. He referred to his panic when he realised that he had made a mistake and was erroneous in his understanding. This had clearly caused upset to him.

17. On his evidence, and indeed that of the claimant, it appears that the person to whom they spoke within the respondents' organisation regarded the appeal as not having been concluded on 20 December and was also of the view that the time for presentation of a claim did not start running until the appeal was determined. It appears in fact a letter of 20 December had been issued to the claimant. It had been sent however to an address at which the claimant by

then no longer stayed. Mr Cameron said in evidence that he did not blame the person within the respondents' organisation for his own failure. He was not "**pointing the finger**" at her.

5 18. The test in law is whether it was not reasonably practicable for the claim to be presented within three months of dismissal. There was a clear error on the part of Mr Cameron. That error was as to the law. The claimant had consulted a solicitor. In my view the contact between the claimant and Mr Cameron went beyond an "informal word". The claimant was entitled to rely on Mr
10 Cameron as a solicitor to whom he had been referred by a different solicitor. The claimant was ignorant of the time period of three months being applicable and of when that commenced. That is, in circumstances where he had employed a professional adviser, not something for which blame can be attached to him. In my view the cases, and particularly that of **Dedman** as
15 now confirmed in **Northamptonshire County Council v Entwistle** apply to the effect that where a solicitor is instructed, and makes a mistake as to the law, it cannot be said that it was not reasonably practicable for the claim to be presented in time, however unfortunate that mistake is both from the point of view of the solicitor involved and with regard to the effect it has on the
20 claimant. The test is not whether it is just and equitable for the claim to be permitted to proceed notwithstanding being late. Mr Cameron had the information in front of him as to the dismissal. He was aware that the claimant intended to proceed with an Employment Tribunal claim to dispute the fairness of the dismissal. It would seem that the only reason a claim was not
25 presented within three months of dismissal was the unfortunate and erroneous view on the part of Mr Cameron that the time period started from determination of the appeal rather than the decision to dismiss being communicated.

30 19. I appreciate that the claimant had ticked the box in form ET1 confirming that he wished to be reinstated as well as that confirming that he wished compensation. If he does pursue a remedy against Mr Cameron, he will clearly not be able to seek reinstatement. That unfortunate outcome however

does not in my view properly weigh in my determination of whether it was or was not reasonably practicable for the claim to be presented in time.

20. For the foregoing reasons therefore, notwithstanding sympathy which I have
5 both for the claimant and for Mr Cameron, whom I commend for his candid evidence, in my view, applying the statutory test, it was not reasonably practicable for the claim to be presented within three months. In those circumstances the claim is time-barred and cannot proceed.

10 **Employment Judge: R Gall**
Date of Judgment: 25 June 2018
Entered in register: 29 June 2018
and copied to parties

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