EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4113594/2021, 4113595/2021, 4113596/2021, 4113597/2021, 4113598/2021, 4113599/2021, 4113600/2021, 4113601/2021 and 4113602/2021

Held by Cloud Video Platform on 8 March 2022

Employment Judge Robert King

Mr David Don	**First Claimant Represented by: Mrs T Adamson - Trade Union Representative**
Mr Peter Craik	**Second Claimant Represented by: Mrs T Adamson - Trade Union Representative**
Mr Paddy O'Donnell	**Third Claimant Represented by: Mrs T Adamson - Trade Union Representative**
Mr Robert Strong	**Fourth Claimant Represented by: Mrs T Adamson - Trade Union Representative**
Mr John Muir	**Fifth Claimant Represented by: Mrs T Adamson - Trade Union Representative**
Mr Jock Hendry	**Sixth Claimant Represented by: Mrs T Adamson - Trade Union Representative**

Mr George Waterson	**Seventh Claimant** **Represented by:** **Mrs T Adamson - Trade Union Representative**
Mr William Clark	**Eighth Claimant** **Represented by:** **Mrs T Adamson - Trade Union Representative**
Mr Jake Stewart	**Ninth Claimant** **Represented by:** **Mrs T Adamson - Trade Union Representative**
I&H Brown	**Respondent** **Represented by:** **Mr S Johnston - Non practising Barrister**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Tribunal, having decided that the claimants' claims have been lodged out of time, and not being satisfied that it was not reasonably practicable for the claimants to lodge them in time, finds that it does not have jurisdiction to hear the claims, which are dismissed.

REASONS

1. The claimants have presented claims for unpaid holiday pay, relying on their right, under section 13 of the Employment Rights Act 1996, not to suffer unauthorised deductions from their wages.

2. The claimants' claims relate to unpaid holiday pay for the period prior to December 2014, but were not presented until 4 December 2021. The respondent resists all of the claims on their merits and also on the ground that

they are time barred in circumstances where it would have been reasonably practicable for the claimants to have presented them in time.

3. The claimants rightly concede that the claims were lodged out of time but say it was not reasonably practicable to present them in time. This Preliminary Hearing has therefore been fixed to determine the issue of time bar.

4. Of the nine claimants, the Tribunal heard evidence from David Don, John Muir, George Waterson and Paddy O'Donnell. For the respondent, the Tribunal heard evidence from Linda Campbell.

Findings in fact

5. Having heard evidence, the Tribunal finds the following facts to be admitted or proved.

David Don

6. Mr Don worked for the respondent as a plant operator from 1992 until he retired in June 2021. From on or around February 2015 he believed that the respondent had routinely underpaid his holiday pay in the period up to December 2014 by failing to take into account regular overtime payments when calculating his holiday pay. As he was unclear as to the extent of those alleged underpayments he asked management within the respondent for information about his holiday pay calculations in order that he could consider the matter further.

7. Unfortunately, he felt he was *"fobbed off"* by management when he asked for that information, which was not provided. However, he decided to pursue the matter no further because he was concerned that if he complained to the respondent about its alleged lack of cooperation or if he lodged a Tribunal claim, the respondent might force him to leave his employment.

8. In the early part of 2015, a group of the respondent's employees presented holiday pay claims to the Employment Tribunal, with the support of their trade union, in respect of the period prior to December 2014. Mr Don was aware that these claims had been made, but he was not part of that group as he was

not a trade union member. In or around May 2021, the respondent reached agreement with those employees in relation to their holiday pay claims.

9. When Mr Don was shown a letter dated 10 May 2021 from solicitors representing the employees who had been successful in achieving a settlement with the respondent in relation to pre-December 2014 holiday pay, he believed that the respondent would then also settle the holiday pay claims of any employees who were not union members and who had not raised proceedings in early 2015. However, the respondent did not make any such approach and as a result he decided to bring his own claim, which was presented on 4 December 2021 along with the other claims.

10. Mr Don was unaware of any employees who had been part of the group who raised holiday pay claims who had subsequently lost their job or had otherwise been badly treated by the respondent.

John Muir

11. Mr Muir was employed by the respondent between 1996 and 2016. His holiday pay claims also relate to the period prior to December 2014, which he accepts was when the respondent began to include overtime payments in its holiday pay calculations.

12. In common with Mr Don, he had been concerned that he had been underpaid holiday pay before December 2014. Therefore, during 2015, he approached management within the respondent for information about his pre December 2014 holiday pay but his requests were ignored. As he felt that he was *"getting nowhere"* he gave up. He *"saw no need to chase further"* a matter that he considered to be *"water under the bridge".*

13. Mr Muir was also aware that other employees who were represented by a trade union had brought holiday pay claims in the Employment Tribunal. He became aware of that before he retired from the respondent in 2016. Although he was not in the respondent's employment the time the claims advanced by the union were settled, he was aware that those employees who

were not in the union were '*peeved*' that those in the union had achieved a settlement and they had received nothing.

George Waterson

14. Mr Waterson started with the respondent in the late 1980s and retired in 2019. His understanding is that his claim for unpaid holiday pay relates to the 1990s. He was unaware that the respondent had started to include overtime payments in holiday pay calculations in December 2014. Believing that he had been underpaid holiday pay he had, sought information from George Young, the plant manager but Mr Young had never replied to his requests. Nevertheless, he accepted that the respondent was a good employer.

15. In common with Mr Don, Mr Waterson was reluctant to pursue the matter further because he believed that he would lose his job if he raised a complaint. He worked on a seasonal basis and he was concerned that if he made a complaint then he would not be invited back for the next season. He was frightened to pursue the matter further because he had a young family to keep and his job was too important to him in the circumstances. He had therefore *'forgotten about it'.*

16. Mr Waterson was unaware of any other employees having made Employment Tribunal claims at all and he had only decided to make a claim after he discussed the holiday pay situation with the other claimants shortly prior to raising these claims in December 2021.

Paddy O'Donnell

17. Mr O'Donnell worked for the respondent between 1979 and 23 July 2021. His position was that the holiday pay that he had been underpaid related to the period prior to December 2014, going back as far as 2010. In common with some of his colleagues, he had from 2015 onwards approached the respondent's Ian Brown and its plant manager, George Young, for information about his holiday pay payments but neither had engaged with his request for information. As he had a young family of his own and was concerned that he

would find it hard to get another job, he did not pursue the matter because he was scared he would be paid off.

18. Mr O'Donnell subsequently became aware that a group of the respondent's employees who were trade union members had their Tribunal claims for holiday pay settled. However, he did not wish to raise his own claim and become a *"scapegoat".* He knew that he had the right to present a claim to an employment tribunal but he chose not to for that reason. He was concerned that nobody else was coming forward to make claims and he did not want to be the one who was causing trouble.

19. As far as he was aware, none of those claimants represented by the trade union had lost their jobs after they had made Tribunal claims.

Lynda Campbell

20. Lynda Campbell is the respondent's company secretary. In December 2014, in light of legal developments at that time, she issued a memo to all of the respondent's employees, including all nine claimants, in the following terms:

> *"Holiday pay – Christmas and New Year 2014*
>
> *Whilst the company has, in light of recent legal developments, decided to include certain overtime payments in the calculation of holiday pay this will be kept under review. Depending on further legal developments, the company may, at its sole discretion, decide to no longer include certain overtime payments in the calculation of holiday pay. If that is to occur, you will be advised in advance."*

21. On 6 January 2016, Miss Campbell issued the following further memo to all plant operators/labourers/fitters, including all nine claimants:

> "*Holiday pay – Christmas 2015 and New Year 2016*
>
> *Further to my memo last year regarding the payment of the holiday pay for Christmas 2014 and New Year 2015, I wish to advise the following:*

On the 4th November 2014, an Employment Appeal Tribunal in London handed down a Judgement relating to the calculation of holiday pay under the provisions of the EU Working Time Directive. As a result of this Judgement, it was necessary to amend the calculation of holiday pay for certain of the holidays under the provisions of the CIJC Working Rule Agreement to include average (over 12 complete weeks) overtime arising from WR.4 and taxable travel allowance in accordance with WR5.1.

Generally employers are treating the first 20 days of holiday in each year as "Euro" days, at average earnings, and the remainder in the traditional days. However, for ease of administration and transparency, the CIJC agreed to treat the 21 days of Industry holiday as Euro days and Public/Bank holidays in the traditional way.

To ease our own administrative burden, we have treated the first 21 days of holidays in the year at average earnings and the final eight days in the year at basic earnings. The wage payment received on 18 December 2015 reflected two days average earnings and date these at basic earnings."

22. These memos were issued in response to changes in the law that were causing concern within the industry. As a result, from December 2014 onwards, any holiday payments made to the respondent's employees, were based on average earnings and included overtime payments. The respondent accepted that would be the correct method of calculation of holiday pay in future.

23. Miss Campbell accepted that in or around 2019, Mr Don had approached the respondent about a potential pre-December 2014 holiday pay claim. She admitted that the respondent had not engaged with him because it was felt that there was little it could do about it any such claim at that stage, because of the passage of time.

24. Miss Campbell understood that Mr Don was annoyed that other employees within the respondent had made Tribunal claims for holiday pay and he had

not been included. So far as those claims were concerned, they had been lodged in time and had eventually been settled. The claimants' trade union membership had been a neutral factor in the respondent's decision to settle the claims.

25. Of the nine claimants who had raised the claims that had been settled, six were still employed, one was deceased and two had retired. In Miss Campbell's opinion, there was no reason why any employee should fear losing their job for making a claim for holiday pay.

26. Miss Campbell had not encouraged any of the claimants to take advice about their legal rights to bring holiday pay claims, but nor did she discourage them. This was a matter that she left to them. In her view, the business was a traditional family business that sought to foster strong relations with its long serving employees and there would have been no issue if any of the claimants had taken independent advice or had raised tribunal claims if they felt that was the right thing to do.

Submissions

Claimants

27. On behalf of the claimants, Miss Adamson firstly confirmed that the remaining five claimants who had not given evidence had all had similar understandings of their right to bring a claim and the same or similar reasons for not having done so.

28. All nine claimants had felt aggrieved that they had not been provided with information that they had requested from the respondent. Their disappointment had been compounded by the fact that those claimants who *had* made claims had eventually received settlements.

29. She explained that all nine claimants were unsure of their rights but were anxious about pursuing them and in particular raising concerns or complaints with the respondent either directly or at the employment tribunal because they

were genuinely concerned for their jobs in what she described as a *"cutthroat industry".*

30. In the circumstances, she submitted that it had not been reasonably practicable for them to bring their claims on time.

Respondent

31. On the respondent's behalf, Mr Johnston submitted that the time limit for raising claims had expired no later than December 2014, since when all the claimants had been paid an appropriate rate of holiday pay including overtime pay.

32. In his submission, the reasons given by some of the claimants for having not raised a claim was not viable. The claimants had accepted that the respondent had been a good company to work for. All of them had long service. One of them had talked about the potential claim being *"water under the bridge".* Another had said that *"he didn't want to be a scapegoat".*

33. Mr Johnston submitted that there was no reason for any of the claimants to be fearful for their job. None of the employed claimants who had made claims had lost their job because they had done so. They could in any event have taken private advice and not informed the respondent. They could also have taken advice about victimisation. The claimants should have recognised that the union members who had brought claims in 2015 had not lost their jobs and the reason now advanced by them for not raising their claims on time was not sufficient justification for not pursuing their legal rights.

34. In Mr Johnston's submission, the claimants had made a choice not to pursue their claims when the respondent had refused to engage with requests for information in circumstances where they knew they were able to submit a claim or seek advice.

35. For many years, the claimants had been aware of the right to bring a claim and had delayed in doing so for reasons that were not tenable. Ultimately they had chosen to act as they did.

36. It was accepted that the company did not encourage its employees to raise claims but that was irrelevant. It has no such obligation so long as it does not mislead or discourage its employees and there was no evidence that it had done so.

37. The claims were therefore out of time in circumstances where it was reasonably practicable for them to have been brought in time and they ought to be dismissed.

Relevant law

38. The law relating to time limits in respect of these claims is contained in section 23 of the Employment Rights Act 1996, which provides -

> *(1) A worker may present a complaint to an employment tribunal—*
>
> *(a) that his employer has made a deduction from his wages in contravention of section 13 (including a deduction made in contravention of that section as it applies by virtue of section 18(2)),*
>
> *(b) that his employer has received from him a payment in contravention of section 15 (including a payment received in contravention of that section as it applies by virtue of section 20(1)),*
>
> *(c) that his employer has recovered from his wages by means of one or more deductions falling within section 18(1) an amount or aggregate amount exceeding the limit applying to the deduction or deductions under that provision, or*
>
> *(d) that his employer has received from him in pursuance of one or more demands for payment made (in accordance with section 20) on a particular pay day, a payment or payments of an*

amount or aggregate amount exceeding the limit applying to the demand or demands under section 21(1).

(2) Subject to subsection (4), an employment tribunal shall not consider a complaint under this section unless it is presented before the end of the period of three months beginning with—

(a) in the case of a complaint relating to a deduction by the employer, the date of payment of the wages from which the deduction was made, or

(b) in the case of a complaint relating to a payment received by the employer, the date when the payment was received.

(3) Where a complaint is brought under this section in respect of—

(a) a series of deductions or payments, or

(b) a number of payments falling within subsection (1)(d) and made in pursuance of demands for payment subject to the same limit under section 21(1) but received by the employer on different dates,

the references in subsection (2) to the deduction or payment are to the last deduction or payment in the series or to the last of the payments so received.

(3A) Section 207B (extension of time limits to facilitate conciliation before institution of proceedings) applies for the purposes of subsection (2).

(4) Where the employment tribunal is satisfied that it was not reasonably practicable for a complaint under this section to be presented before the end of the relevant period of three months, the tribunal may consider the complaint if it is presented within such further period as the tribunal considers reasonable.

39. Thus where a claim has been lodged outwith the three month time limit, the Tribunal must consider whether it was not reasonably practicable for the claimant to present the claim in 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 be satisfied that the time within which the claim was in fact presented was reasonable.

40. The Court of Appeal has recently considered the correct approach to the test of reasonable practicability. In ***Lowri Beck Services Ltd v Brophy 2019 EWCA Civ 2490***, Lord Justice Underhill summarised the essential points as follows:

1. The test should be given a "liberal interpretation in favour of the employee" (***Marks and Spencer plc v Williams-Ryan*** **[2005] EWCA Civ 470, [2005] ICR 1293**, which reaffirms the older case law going back to ***Dedman v British Building & Engineering Appliances Ltd*** **[1974] ICR 53**).
2. The statutory language is not to be taken as referring only 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 in time: see ***Palmer and Saunders v Southend-on-Sea Borough Council [1984] IRLR 119.***
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 mistake is reasonable. If it is, then it will not have been reasonably practicable for them to bring the claim in time (see ***Wall's Meat Co Ltd v Khan*** **[1979] ICR 52);** but it is important to note that in assessing whether ignorance or mistake are reasonable it is necessary to take into account any enquiries which the claimant or their adviser should have made.
4. If the employee retains a skilled adviser, any unreasonable ignorance or mistake on the part of the adviser is attributed to the employee (***Dedman***).
5. The test of reasonable practicability is one of fact and not of law (***Palmer***).

Discussion and decision

41. The Tribunal relied on the claimant's representative's admission that those claimants who had not given evidence were advancing the same arguments as those who had given evidence.

42. The Tribunal had no difficulty in concluding that the date that time began to run was December 2014, when the respondent had changed its approach to holiday pay to include overtime payments.

43. It also found that all of the claimants from whom it heard evidence were concerned during 2015 at the latest, that they may have been underpaid holiday pay prior to December 2014. However they had all delayed in presenting claims relating to that period until their claims were presented together on 4 December 2021.

44. It is perfectly understandable that individuals will be reluctant to complain to their current employer and, even more so, to bring Tribunal claims against their current employer. However, it was clear that none of the claimants had even taken private advice as to their rights to pursue holiday pay claims, which the respondent would not have needed to know about.

45. While the Tribunal heard evidence of concerns held by some of the claimants that they feared for their jobs should they have made complaints or raised proceedings, there was no evidence whatsoever that this concern was well founded. Indeed the respondent's unchallenged evidence was that the employees who presented claims for holiday pay in time had suffered no adverse consequences as a result. In particular, none of them had suffered the penalty of dismissal that some of the claimants had feared would be the consequence of their pursuing their claims.

46. If the claimants were ignorant of their rights then that was not reasonable ignorance in circumstances where they could have taken independent advice.

Indeed it was surprising that they did not, as all of those who gave evidence had genuinely believed that they had been underpaid.

47. Instead, when frustrated by a lack of response from the respondent to requests for information, they had chosen to give up and it was patently obvious that their interest in pursuing their claims had only been rekindled when they discovered, in 2021, that their union member colleagues' Tribunal claims had been settled.

48. The test of reasonable practicability is one of fact and not of law and the Tribunal finds that it would in fact have been reasonably practicable for the claimants to bring their claims in time.

49. The Tribunal does not therefore need to consider whether the claimants raised their claims within a reasonable time after the original time limit expired.

50. In all the circumstances, the Tribunal does not have jurisdiction to hear the claimants' claims, which are dismissed.

Employment Judge: **R KIng**
Date of Judgment: **30 March 2022**
Date sent to parties: **31 March 2022**