EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4111959/2021

Open Preliminary Hearing Held by CVP on 7 March 2022

Employment Judge - A Strain

Ms C Silkowski	Claimant Represented by: Mr A McKenzie, Partner
Sanctuary Personnel Ltd	First Respondent Not present or Represented
Liquid Friday Limited	Second Respondent Represented by: Mr Burgess, Litigation Consultant

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that:

(1) the Claimant's claims of breach of contract are not res judicata; and

(2) the Claimant's Claim not having been presented within the 3 month time limit prescribed by the Extension of Jurisdiction (Scotland) Order 1994 paragraph 7 and it having been reasonably practicable to have done so is dismissed.

Background

1. The Claimant was represented by her partner, Mr McKenzie. She asserted claims of breach of contract and misrepresentation. The Ciaimant sought damages in respect of the misrepresentation and breach of contract to recover (i) tax and national insurance that had been deducted whilst she worked in Guernsey: (ii) losses in respect of additional costs and expenses (as the Respondent's actions had prevented her from accessing various expenses and allowances) and (ii rent deductions which the Claimant had incurred which were said to be due to misrepresentation on the part of the 2nd Respondent for the period 29 May 2019 to 29 September 2019.

2. The Claimant also sought recovery of tax and national insurance in respect of the period 1 March 2020 to 4 April 2020 incorrectly deducted by the 1st Respondent in breach of contract.

3. The 1st Respondent had lodged an ET3 but did not appear at the OPH and was not represented. Their ET3 set out that the matter had been dealt with in a previous Employment Tribunal (4100180/2020) and they denied any breach of contract.

4. The 2nd Respondent was represented by Mr Burgess, Litigation Consultant. The 2nd Respondent's position was that the present proceedings were *res judicata* and in any event out of time.

5. The Parties had lodged a Bundle of Documents with the Tribunal for tne purposes of the Hearing. Additional documents were lodged by the Claimant prior to the commencement of the Hearing.

6. The Tribunal heard submissions from the Claimant, her representative and Mr Burgess.

Findings in Fact

7. Having heard the submissions and considered the documentary evidence before it, the following facts were not in dispute:

7.1 The Claimant was employed by the 2nd Respondent from 29 May 2019 until 29 September 2019, working in Guernsey.

7.2 From September 2019 onwards she was employed by Silkowski and Mackenzie Limited and provided services through that company to Scottish Borders Council on behalf of the 1st Respondent. Silkowski and Mackenzie Limited contracted with the 1st Respondent during this period This contract ended in or around October 2020.

7.3 During the course of her employment with the 2nd Respondent deductions were made from her pay in respect of UK tax and national insurance and rent for accommodation costs.

7.4 During the period 1 March 2020 until 4 April 2020 the 1st Respondent deducted tax and national insurance from the monies paid to the Claimant.

7.5 On 13 January 2020 the Claimant raised proceedings (4100180/2020) against the 2nd Respondent which were dismissed on 23 July 2020 for want of jurisdiction.

7.6 On 24 July 2020 a further Claim (4104114/2020) was rejected by the tribunal. The tribunal were presented with no further information regarding this Claim.

7.7 On 28 September 2020 a further Claim (4104114/2020) against the 2nd Respondent was rejected under rule 12 of the ET Rules of Procedure on 21 October 2020. This decision was appealed and the appeal was rejected on 5 January 2021 (UKEATPAS/0086/20/SH).

7 8 The current Claim was presented on 14 October 2021.

Submissions

8. Both Parties made submissions

The Claimant

9. Mr Mackenzie submit ed that this was a new cause of action. The previous proceedings had been in respect of unlawful deductions from wages in terms of section 13 of the Employment Rights Act 1996 (4100180/2020).

10. Reference was made to the text on Evidence by F Raitt and D Field (2nd Edition, Chapter 5) on *res judicata.* It was submitted that to sustain a plea of res judicata the litigation must be between the same parties, in contested pre . s decree must have been pronounced and it must concern the same subject matter. The tribunal must ask *"what was litigated and what was decided"*

11. The proceedings must have involved the same grounds of action *(media concludendi).* In this case whilst the material facts and parties may be the same as the previous tribunal claims the grounds of action and subject matter were distinct.

12. The cases of ***Esso Petroleum*** *Co. v.* ***Law*** 1956 *SC* ***33*** and *Grahame v. Secretary of State* ***for Scotland 1951 SC 368*** were referred to in support of the Claimant's submissions.

13. In response to a question from the Employment Judge as to why the Claims could not have been brought before lodging the ET1 in tne present case, Mr Mackenzie stated that the Claims had been raised before in the previous tribunal proceedings.

The Respondent

14. Mr Burgess addressed the history of the ciaims against the 2nd Respondent.

15. Case Number 41001 80/2020 had been raised on 13 January 2020. It was raised oniy againt the 2nd Respondent although an attempt to include the 1s; Respondent had been made by the Claimant and rejected by the tribunal.

16. On 23 July 2020 the tribunal dismissed 4100180/2020 for want of jurisdication.

17. On 24 July 2020 Case Number 4104114/2020 was rejected by the tribunal.

18. On 21 October 2020 a further claim (Case Number 412013707/2020) was submitted against the 2nd Respondent and rejected by Employment Judge S Walker under rule 12 of the ET Rules of Procedure.

19. The Claimant appealed the rejection decision on 27 October 2020. The appeal was rejected on 5 January 2021 by the EAT (UKEATPAS/0086/20/SH) at sift on the basis that the *"appeal is plainly hopeless since it has already been decided that the ET has no jurisdiction to consider the claim, that decision has not been appealed and is res judicata. "*

20. There had been nothing further until the current claim had been presented on 14 October 2021.

Claim has been presented out of time

21. Mr Burgess submitted that the claim related to the penod of 29 May 2019 to 29 September 2019 was presented outwith the time limits in respect of breach of contract claims which is contained in Article 7 of trie **Extension of Jurisdiction (Scotland) Order 1994.**

22. The burden of proof was on the Claimant to establish why it had not been reasonably practicable to have presented the Claim in time and that the Claim had been presented within such further period of time as the tribunal considers reasonable. That burden had not been discharged and the Claimant had managed to present the same subject matter cairns to the tribunal in the earlier tribunal proceedings referred to above.

Res Judicata

23. Mr Burgess submitted that finality of litigation was in the public interest. He made reference to the cases of *Virgin Atlantic Airways Limited v Zodiac Seats UK Limited [2013] UKSC 46; Arnold v National Westminster Bank PLC (1991) HL(E) 93; British Airways v Boyce 2001; Henderson v Henderson 1843 (Privy Council) 313; and Mansing Moorjani and Others v Durban Estates Limited and Others [2019] EWHC 1229.* These supported the proposition that the correct approach for the tribunal to adopt was to ask the question *"what was litigated and what was decided".*

24. In asking this question the tribunal should consider whether the *media concludendi* covered everything pertinent at the time to the matters claimed now. In his submission, the facts here were the same as in 4100180/2020 and the parties were the same. All that the Claimant was doing was adopting a different legal approach - breach of contract.

25. Under reference to *Mansing Moorjant and Others v Durban Estates Limited* and *Henderson v Henderson* it was submitted that the current claim may be an abuse of process. The Claimant had failed to appeal 4100180/2020 and as such the decision was final between the parties. It was not in the public interest to aloow the matter to proceed

The Relevant Law

Employment Tribunal Rules

26. Rule 2 of the Schedule 1 to Employment Tribunals (Constitution & Rules and Procedures) Regulations 2013 (the 2013 Rules) sets out that: *"The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly **and** justly **includes, so** far as practicable*— fa) *ensuring **that** the parties are on an equal footing: (b) dealing with cases in ways which are proportionate to the complexity and importance of the issues; (c) avoiding unnecessary **formality** and seeking flexibility in the proceedings: **(d)** avoiding delay, so far as compatible with proper consideration of the issues; and (e) saving expense. A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by. these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal."*

*Time L 1*s

27. **The law** relating to **time limits in respect of breach of contract claims** is **contained in the Extension of Jurisdiction (Scotland) Order 1994 which provides** as follows: -

Time within which proceedings may be brought

7. An employment tribunal shall not entertain a complaint in respect of an employee's contract claim unless it is presented —

'a)within the period of three months beginning with the effective date of termination of the contract giving rise to the claim, or

ib)where there is no effective date of termination, within the period of three mo - s beginning with the last day upon which the employee worked in the employment which has terminated, or

(c)where the tribunal is satisfied that it was not reasonably practicable for the complaint to be presented within whichever of those periods is applicable, within such further period as the tribunal considers reasonable,"

28 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 his 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 his claim in time, then the Tribunal must be satisfied that the time within which the claim was in fact presented was reasonable.

29. The Court of Appeal has recently considered the correct approach to the test of reasonable pra- 1 bi 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 pic 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 15 53).

2 The statutory language is not to be taken as referring only to physical m ora t cability 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). It** is **well** established that the principle that an advisers negligence or delay in presenting **a** claim is ascribed to the claimant applies **equally** where the adviser **is** not a solicitor but **a** Citizens Advice adviser or other employment consultant.

Res *Judicata*

30. In considering a plea **of** res judicata **the tribunal should** have regard to the decision of Lord Fairley in the Scottish EAT case of *Mr G Imrie v Right Track Scotland Limited UKEATS/0016/20/SH.* **Lord Fairley's** comments **at** paragraph 17 of his Judgment set out the 5 conditions that must be met **to** sustain such a plea:

"17. A plea of res judicata is a plea to the merits of the action. It should be sustained only where five cumulative conditions are ali met. These are that there must have been (i) a prior judicial decree of a competent court / tribunal: (ii) pronounced in in contested proceedings;

» between the same parties; - lative to the same subject matter; (v) on the same grounds (or media concludendi) (Esso Petroleum Co. v. 191 ?C '& « to Gi; Edinburgh Council 1994 SC 2). in Clink, for example it was held that the subject matter of a claim for damages forbreach of contract consisting of a failure to give proper notice of dismissal was not the same as a claim to the Employment Tribunal in respect of unfair dismissal. The factual background to both actions was the same dismissal, but the issues in the two actions were different. Collectively, the five elements of res judicata have often been summarised in the short question: "what was litigated and what was decided? ' (see Grahame v. Secretary of State for Scotland 1951 SC 368 at page 387)."

Discussion and Decision

The tribunal considered each issue in turn:

Res Judicata

31. In the current claim the Claimant seeks recovery of (i) tax and national insurance that had been deducted whilst she worked in Guernsey; (ii) losses in respect of add ional costs and expenses (as the Respondent's actions had prevented her from access various expenses and allowances) and (iii) rent deductions made by the Second Respondent from her pay in breach of her contract for the period 29 May 2019 to 29 September 2019.

32. The >o seeks recovery of tax and national insurance in respect of the period 1 March 2020 to 4 April 2020 deducted by the First Respondent in breach of contract.

33. There was no information provided with regard to the subject matter of the previous tribunal claims other than 4100180/2020. EJ Docherty's Decision was produced and referred to by the tribunal. This case

concerned the Claimant's claims under section 13 of ERA 1996 (unlawful deductions). The Claimant asserted that (i) she had been subject to double taxation by the 2nd Respondent and that tax and national **insurance** should not have been deducted by the 2nd Respondent and (ii) the ? Respondent had deducted accomodation costs (rent) which were claimed unlawful deductions. The period in question was for the period of employment with the 2nd Respondent whilst she was in Guernsey commencing May 2019.

34. It is of note that the 1st Respondent was not party to those proceedings. The tribunal also notes that the claims in respect of losses from an inability to claim certain allowances and expenses and also the tax and national insurance deducted by the 1st Respondent in the period 1 March 2020 to 4 April 2020 did not feature in the previous claim 4100180'2020.

35. The tribunal applied the approach set out by Lord Fairley in ***Imrie*** *(supra),* addressed the 5 cumulative conditions and asked the question, what was litigated and what was decided in case 4100180/2020?

36. It was clear to the tribunal that 4100180/2020 had not dealt with any claims against the 1st Respondent nor had it dealt with any claims in respect of breach of contract or losses due to an inability to claim certain allowances and expenses against the 2nd Respondent. Whilst clearly the issue of deduction of tax and national insurance and accomodation costs (rent) formed the subject matter of 4100180/2020, arose from the same period of employment as present and the same parties as present it was claim under section 13 of ERA 1996 (unlawful deductions). The present case was a case of breach of contract seeking damages and contained allegations of misrepresentation.

37. EJ Docherty in 4100180/2020 had made judgment on the section 13 claims only. As such the tribunal considered and found that the media concludendi in that case were distinct from the claims now sought to be

asserted. Further the facts (whilst similar) differed in certain important respects such as the allegations of m representation.

38. There was no question at all of the losses due to an inability to claim certain allowances and expenses or any against the "I" Respondent having been determined in 41001[p] _[r]'2O.

39. Accordingly, what was litigated and what was decided in 4100180/2020 was distinct from what was claimed in the current case.

40. In so far as Claims (4104114/2020 and 412013707/2020) were concerned the tribunal had little information regarding the subject matter of the Claims but it did not appear that either case had led to a Judgment in contested proceedings between the Parties. Accordingly, what was litigated and what was decided in these cases appeared distinct from what was claimed in the current case.

41. Accordingly, the tribunal find that the plea of res judicata is not made out and is unsuccessful.

Time Limits

42. The tribunal noted that the claims of breach of contract against the 2nd Respondent should have been made within the period of three months beginning with the effective date of termination of the contract giving rise to trie claim *{Article 7 of the Extension of Jurisdiction (Scotland) Order 1994).* The Claimant's employment with the 2nd Respondent had ended on 29 September 2019. The current claim was presented on 14 October 2021. It was considerably out of time.

43. The claim in respect of the period 1 March 2020 to 4 April 2020 for breach of contract against the 1st Respondent should also have been presented within 3 months of the date of termination of the contract giving rise to the claim. It too was considerably out of time, in passing, the tribunal note that such a claim could not be pursued in any event by the Claimant given

that she was employed by her own company Silkowski and Mackenzie Limited during this period of time.

44. The tribunal then considered whether it was not reasonably practicable for the claim to have been presented in time. In that regard it was of note that Mr Mackezie asserted the claims had been raised before in the previous proceedings. There was no suggestion by him that it had not been reasonably practicable to have presented the claims in time.

45. The tribunal also noted the procedural history that the Claimant has presented numerous claims to the tribunal (including an Appeal to the EAT) in the period between the termination of her employment and the raising of the current proceedings.

46. The tribunal consider and find that it was reasonably practicable to have presented the claim in time and accordingly it does not require to consider the second element of the test in Article 7(c).

47. The claim has been presented out of time. The tribunal cannot consider it and it is dismissed.

Employment Judge: **A Strain**
Date of Judgment: **31 March 2022**
Entered in register: **04 April 2022**
and copied to parties