



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4102187/2022 (V)

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Hearing held in Glasgow by Cloud Video Platform (CVP) on 4 July 2022

Employment Judge: J McCluskey

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Mr A Johnstone

**Claimant
In Person**

Milton & Stirling Ltd

**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 the claim for unlawful deduction from wages was presented out of time. The Tribunal is not prepared to exercise its discretion to hear the claim out of time. The Tribunal does not have jurisdiction to hear the claim and it is dismissed.

REASONS

Introduction

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1. This case called before me on 4 July 2022 for a final merits hearing. The claimant alleged that the respondent had made an unlawful deduction from his wages. The respondent had submitted an ET3 response. In the ET3 response the respondent stated that it wished to defend the claim and wished to focus on the claim being out of time.

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2. The respondent did not appear and was not represented at the hearing on 4 July 2022. I checked the file and saw that the respondent had been notified of the hearing to take place on 4 July 2022. He had not told the Tribunal that he was unable to attend on that date. He had not responded to the request for a CVP test the week before, which had been sent by email and followed

up by phone. The clerk tried to contact the respondent by email and by phone immediately before the hearing started, using the contact details provided by the respondent in the ET3. There was no reply. Having made various attempts to contact the respondent I was satisfied that it was in the interests of justice that the hearing should proceed.

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3. The notification of the hearing date to both parties stated that the claim appeared to have been presented outwith the period within which claims of this type should normally be brought. The notification stated that at the outset of the hearing the Tribunal would require to decide whether it can consider the claim as a preliminary issue.

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4. At the outset of the hearing, I noted that the case had been set down for two hours for full disposal. I considered that it may take some time to hear evidence from the claimant in connection with the preliminary issue of time bar. I raised with the claimant the possibility of dealing only with the preliminary issue of time bar at the hearing today. I explained to the claimant that if I decided that the Tribunal could consider his claim, a further hearing would be arranged to hear evidence in relation to the alleged unlawful deduction from his wages. The claimant agreed to proceeding in this way. I therefore determined that the hearing on 4 July 2022 would be converted into an open hearing on the preliminary issue of time bar only.

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Background

5. There is some procedural history to the claimant's interactions with the Tribunal, which are of relevance to this claim. The current claim (case number 4102187/2022) for unlawful deduction from wages was presented on 20 April 2022 (the second claim). This claim was presented out of time; hence the preliminary issue of time bar now being considered. The name of the respondent on the second claim is Milton & Stirling Ltd. This matches with the name of the respondent on the ACAS early conciliation certificate obtained by the claimant

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6. Prior to this, the claimant presented an in-time claim for unlawful deduction from wages on 6 January 2022. The claim was given the pre-acceptance case number: 4100088/2022 (the first claim). The name of the respondent on the first claim was "Stuart Stirling of Milton and Stirling Limited". The name of the prospective respondent on the ACAS early conciliation certificate was Milton & Stirling Ltd.
7. On 11 January 2022 the Tribunal wrote to the claimant and rejected his first claim as it was defective. The letter of 11 January 2022 stated: *"I have received your claim form and have referred it to... who has decided that your claim cannot be accepted..... It is defective for the following reason: (i) you have provided an early conciliation number but the name of the respondent on the claim form is different to that on the early conciliation certificate I am therefore returning your claim form to you. If you apply for reconsideration you must present your claim form again (amended if necessary). Please note that the relevant time limit for presenting your claim has not altered. You have the right to apply for a reconsideration of this decision under Rule 13. If you want to apply you must do so in writing within 14 days of the date of this letter quoting the pre-acceptance reference number shown above. Your application must: explain why you believe the decision to reject your claim is wrong or rectify the identified defect; and include your claim form (amended, if necessary, to rectify the defect); say if you wish to request a hearing to consider your application."*
8. On 18 January 2022 the claimant emailed the Tribunal using the email address provided in his ET1. His email stated *"I have stated to them for the terms of rejection was due to a & and a "and" can you get that fixed for me please?"*.
9. On 24 January 2022 the Tribunal responded to the claimant's email of 18 January 2022 and stated *"As per [previous correspondence], the name of the Respondent on the ET1 form and Early Conciliation Certificate do not match. I have enclosed a copy of the claim form and Early Conciliation Certificate."* The letter of 24 January 2022 was sent to the claimant by email using the

email address he had provided in his ET1 and with which the claimant had been emailing the Tribunal.

10. On 1 February 2022 the claimant contacted the Tribunal customer service team. He asked for a copy of the correspondence from the Tribunal dated 24
5 January 2022 to be resent to him as he did not believe he had received it.
11. On 7 February 2022 the Tribunal emailed the claimant a copy of their correspondence of 24 January 2022 as requested by the claimant.
12. On 16 March 2022 the claimant emailed the Tribunal using the email address
10 provided in his ET1 and which had been used subsequently by the claimant and the Tribunal. He stated "*I have been advised that my case has been closed. I am contacting you for a reconsideration of my case. My emails did not go through to my inbox. Instead, they went to my spam folder, and with no letter correspondence, I presumed the case was still getting investigated. I do apologise for this and would like to get this sorted as quickly as we can. If I can provide anything to help with this, please let me know.*"
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13. On 19 April 2022 the Tribunal responded to the claimant's email of 16 March 2022. The letter stated "*Your correspondence has been referred to... who would like to reiterate the point made in Tribunal letter sent 24/01/2022 that the claim was rejected because the name of the Respondent on the ET1 form and the Early Conciliation Certificate does not match. Judge... would also like to inform you that for your claim to be reconsidered you must present an*
20 *amended ET1*".
14. On 20 April 2022 the claimant presented a new ET1 claim form to the Tribunal. This is the second claim being considered today.

Findings in fact

15. The claimant's employment terminated on 18 October 2022. The claimant was paid monthly in arrears. The claimant received payment of wages for the month of October 2022 on 30 October 2022. The claimant alleges that there was an unlawful deduction from the wages paid to him on that date.
16. On 6 January 2022 when the claimant presented his first claim, he did not realise that the name of the respondent on the ET1 and on the ACAS early conciliation certificate were not the same.
17. On 6 January 2022 when the claimant presented his first claim his understanding was that he was close to the time limit for doing so. His understanding was that he only had one or two days left to present his claim.
18. On 11 January 2022 when his first claim was rejected by the Tribunal, the claimant did not have time to deal with it. He is a carer for two family members and they are his priority.
19. On 18 January 2022 the claimant had time to deal with the Tribunal correspondence of 11 January 2022. His understanding was that it was a simple administrative task to amend the spelling of the respondent's name. He emailed the Tribunal stating "*I have stated to them for the terms of rejection was due to a & and a "and" can you get that fixed for me please?*" This was all his email stated. He did not understand that anything more was required of him. His understanding was that he had presented an effective claim which required only that a spelling mistake was corrected.
20. On 24 January 2022 the Tribunal sent a letter to the claimant by email, using the same email address previously provided and used by the claimant. The letter stated the name of the respondent on the claim form and the ACAS early conciliation certificate did not match and enclosed a copy of both.
21. On 1 February 2022 the claimant contacted the Tribunal for an update on his claim. He was told the Tribunal had emailed a letter to him on 24 January 2022. He asked for a copy of this to be sent to him as he could not locate it.

The letter was resent to him by email on 7 February 2022. The claimant received this email on 7 February 2022.

22. The claimant did not contact the Tribunal after that until 16 March 2022.

23. Between 7 February 2022 and 16 March 2022, the Tribunal claim was not the claimant's priority. One of his family members, for whom he has caring responsibilities, was unwell during this period. His focus was on looking after them.

24. On 16 March 2022 the claimant emailed the Tribunal to find out how his claim was progressing. He also contacted the Tribunal by phone, on one or two occasions, on or around 16 March 2022.

25. On 19 April 2022 the claimant received an email from the Tribunal. His understanding from that email was that he had to present a new claim form, which he did on 20 April 2022. This is the second claim. The name of the respondent on the second claim and on the ACAS early conciliation certificate are the same.

26. The claimant could provide no explanation for any delay in the period 16 March 2022 to 20 April 2022, when the claimant presented his second claim.

27. The claimant spoke to ACAS about presenting his first claim and time limits for doing so prior to 6 January 2022. After that did not seek advice from anyone about his first claim or his second claim or about time limits.

Relevant law

Unlawful deduction from wages

28. Section 13 Employment Rights Act 1996 (ERA) Right not to suffer unauthorised deductions provides -

“(3) *Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after*

deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion."

29. Section 23 ERA Complaints to employment tribunals provides -

5 “(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....*

 (2) *Subject to subsection (4), 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*
10 *complaint relating to a deduction by the employer, the date of payment of the wages from which the deduction was made...*

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

15 (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."*

20 *Extension of time for ACAS early conciliation*

30. Section 207B Extension of time limits to facilitate conciliation before institution of proceedings provides -

 “...(2) *In this section—*

 (a) *Day A is the day on which the complainant or applicant*
25 *concerned complies with the requirement in subsection (1) of section 18A of the Employment Tribunals Act 1996 (requirement to contact ACAS before instituting proceedings) in*

relation to the matter in respect of which the proceedings are brought, and

5 (b) *Day B is the day on which the complainant or applicant concerned receives or, if earlier, is treated as receiving (by virtue of regulations made under subsection (11) of that section) the certificate issued under subsection (4) of that section.*

(3) *In working out when the period beginning with the day after Day A and ending with Day B the period beginning with the day after Day A and ending with Day B is not to be counted.*

10 (4) *If a time limit set by a relevant provision would (if not extended by this subsection) expire during the period beginning with Day A and ending one month after Day B, the time limit expires instead at the end of that period.”*

Not reasonably practicable

15 31. The burden of proving that it was not reasonably practicable for the claim to be presented within the ordinary limitation period is on the claimant (**Porter v Bandridge Ltd [1978] IRLR 271**).

20 32. In assessing the reasonably practicable element of the test, the question which the Tribunal has to answer is “what was the substantial cause of the employee's failure to comply” and then assess whether, given that cause, it was not reasonably practicable for the claimant to present the claim in time (**London International College v Sen [1993] IRLR 333** and **Palmer and Saunders v Southend-on-Sea Borough Council [1984] IRLR 119**).

25 33. In **Software Box Ltd v Gannon 2016 ICR 148**, the EAT considered the application of the ‘not reasonably practicable’ extension in circumstances where the claimant was mistaken in their belief that proceedings were pending. Langstaff J stated (paragraph 41) that as a matter of principle, the fact that a complaint was made within time and then rejected did not and should not preclude consideration of whether the tribunal should have

jurisdiction in respect of a second claim on the same ground. The legislation required consideration of the second complaint which was made, as and when it was presented. Referring to **Wall's Meat Co Ltd v Khan 1979 ICR 52, CA**, he stated that the focus should be on what was understood by the claimant and whether, on the basis of that understanding, it was not reasonably practicable for the claimant to bring the second claim earlier.

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34. The EAT revisited this question in **Adams v British Telecommunications plc 2017 ICR 382**, with the EAT confirming (per Simler P) that the focus in such a situation must be on the second claim, and that the fact that the claimant was able to present a claim within time does not preclude consideration of whether the Tribunal should have jurisdiction in respect of a second claim on the same ground.
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Further reasonable period

35. Where the Tribunal concludes that it was not reasonably practicable for the claimant to have presented his claim in time then it must go on to consider whether it was presented in such further period that the Tribunal considers reasonable.
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36. In assessing such further period as the Tribunal considers reasonable, account is to be taken of all relevant factors including the length of the further delay and the reason for it, the actual knowledge which the claimant had regarding their rights (particularly the application of the time limit) and what knowledge they could reasonably be expected to have or investigations they could reasonably be expected to make about their rights (**Northumberland County Council v Thompson UKEAT/209/07**).
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25 **Discussion and decision**

37. The claimant alleges that he suffered an unauthorised deduction from wages on 30 October 2021. The ordinary limitation period for presenting his claim ended on 29 January 2022. Having regard to section 207(B)(2) ERA, Day A is 29 October 2021 and Day B is 9 December 2021. The period beginning

with the day after Day A and ending with Day B is 41 days. Under section 207(B)(3) the time limit for the claimant to present his claim is 11 March 2022.

38. Turning to section 207(B)(4), the time limit of 11 March 2022 does not fall during the period beginning with Day A and ending one month after Day B. There is no further extension under section 207(B)(4), The time limit for the claimant to have presented his claim alleging an unlawful deduction from wages remains 11 March 2022.

39. The second claim was presented by the claimant on 20 April 2022, which is nearly six weeks after the ordinary limitation period expired. Section 23(4) ERA provides that where the Tribunal is satisfied that it was not reasonably practicable for a complaint to be presented in time, the Tribunal may consider the complaint if it is presented within such further period as the Tribunal considers reasonable. This is a two-stage test.

First stage of the test

40. I began this stage of my deliberations by noting that the burden of proving that it was not reasonably practicable for the claim to be presented within the ordinary limitation period was on the claimant (**Porter v Bandridge Ltd**).

41. A reason why a claimant may not present their claim within the ordinary limitation period is the mistaken belief that the claim is already proceeding.

42. This is a case where on 11 January 2022 the claimant's understanding was that his claim had been accepted by the Tribunal. His understanding was that in order for his accepted claim to progress he required only to confirm a change from "and" to "&" regarding the spelling of the respondent's name. He did not understand that there were other aspects to the name of the respondent on the claim form which did not match with the name of the respondent on the ACAS early conciliation form. He did not understand that he required to do more than send an email to the Tribunal, in the terms which he did on 11 January 2022, about the change of spelling. He did not understand that his claim had been rejected by the Tribunal.

43. Following the guidance in **Software Box Ltd v Gannon** and **Adams v British Telecommunications plc**, I satisfied myself that the fact that the claimant was able to present a claim within time does not preclude consideration of whether the Tribunal should have jurisdiction in respect of a second claim on the same ground. The focus in such a situation must be on the second claim.
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44. In further considering **Software Box Ltd v Gannon** I then asked myself what was understood by the claimant when his first claim was rejected and whether, on the basis of that understanding, it was not reasonably practicable for the claimant to bring his second claim before expiry of the ordinary limitation period on 11 March 2022. In answering this question, I also asked myself whether the claimant should have made further enquiries after receipt of the letter on 11 January 2022 rejecting his claim and providing information on next steps.
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45. I was also guided by the test to reasonable practicability as set out in **Wall's Meat v Khan**, which requires me to focus on what was reasonably understood by the claimant.
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46. I am satisfied that this is a case where the claimant concluded as at 11 January 2022, and thereafter until he presented his second claim, that he had already presented a claim that remained effective. He was mistaken in this view. He did not understand that his claim had been rejected. He did not understand that the time limit clock was still ticking in relation to his first claim. His understanding was that he had presented an effective claim which required only that a spelling mistake was corrected.
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47. I then asked myself whether it was reasonable of him to have reached the conclusion that he had already presented a claim which remained effective?
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48. I am satisfied that it was not reasonable for him to have reached this conclusion. In determining this question, I had regard to the letter from the Tribunal which he received by email on 11 January 2022. The letter includes wording which states “*Your claim cannot be accepted...I am therefore returning your claim form to you...*” The following two sentences in the letter
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were then stated in bold which drew attention to them *“If you apply for reconsideration you must present your claim form again (amended if necessary). Please note that the relevant time limit for presenting your claim has not altered.”* The claimant’s claim form had been returned to him. The claimant was told that he would need to present his claim form again (amended if necessary) if he wished to apply for reconsideration. This sentence was in bold on the letter. The claimant was told that the relevant time limit for presenting his claim had not altered. This sentence was also in bold on the letter. It is clear that the claimant did not follow the instructions for reconsideration of his claim.

49. If the claimant had read the letter carefully, he would have seen that his claim had not been accepted and his claim form had been returned to him. This ought to have alerted him to the fact that something more was required than the email which he sent to the Tribunal on 18 January 2022 asking it to sort out his administrative error *“can you get that fixed for me please?”* After receiving the letter from the Tribunal on 11 January 2022 he did not seek advice on what he should do next. This was despite being aware that there was a time limit in relation to his claim, his understanding, albeit mistaken, that the time limit expired one or two days after 6 January 2022 and the terms of the letter of 11 January 2022. The letter drew the claimant’s attention to time limits. The claimant was aware of time limits. This ought to have alerted him to the fact that something more was required in relation to compliance with time limits than the email he sent to the Tribunal on 18 January 2022.

50. Taking all of these matters into account it appears to me that it was not reasonable for the claimant to have reached the conclusion that he had already made a claim which remained effective.

51. I have also considered the period between 11 January 2022 when the first claim was rejected and the expiry of the ordinary time limit on 11 March 2022. There was various correspondence between the claimant and the Tribunal in that period. The Tribunal correspondence reiterated what had been said in the letter of 11 January 2022 that the claim had been rejected and why. I am

satisfied that there was nothing in the period after rejection of his first claim and until expiry of the ordinary time limit which made it reasonable for the claimant to have reached the conclusion that he had already made a claim which remained effective.

5 52. The claimant stated in evidence that for a period after 7 February 2022 he had additional caring responsibilities for a family member who was unwell. This meant that consideration of his claim was not his priority and he was unable to contact the Tribunal again until 16 March 2022.

10 53. In assessing the reasonably practicable element of the test, I have to decide what was the substantial cause of the claimant's failure to comply. I am satisfied that the substantial cause was that the claimant concluded that he had already made a claim that remained effective. The substantial cause of the claimant's failure to comply with the time limit for presenting a claim was not because of the illness of a family member. For this reason, the claimant's
15 additional caring responsibilities in the period 7 February to 16 March 2022 were not relevant to my decision making.

Second stage of test

54. Where the Tribunal concludes that it was not reasonably practicable for the claimant to have presented his claim in time then it must go on to consider
20 whether it was presented in such further period that the Tribunal considers reasonable.

55. Having concluded that it was reasonably practicable for the claimant to have presented his claim in time, there is no need for me to consider the second stage of the test.

25 56. If, however, I am wrong on the first stage of the test, and it was not reasonably practicable for the claimant to have presented his claim in time, I am satisfied that he did not present his claim in a further reasonable period.

57. The time period from expiry of the normal time limit on 11 March 2022 and the presenting of his second claim on 20 April 2022 is nearly 6 weeks. In

assessing the delay in that period, I am required to take account of all relevant factors including the length of the further delay and the reason for it. It is also relevant for me to assess the actual knowledge which the claimant had regarding their rights (particularly the application of the time limit) and what knowledge they could reasonably be expected to have or investigations they could reasonably be expected to make about their rights (**Northumberland County Council v Thompson UKEAT/209/07**).

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58. Having done so, I have noted that the claimant provided no explanation for the further delay once he was back in contact with the Tribunal on 16 March 2022. He was aware of the application of time limits. He did not seek advice on what he should do. The claimant stated, candidly in my view, that he wasn't as prepared as he should have been and got bogged down throughout the process. For these reasons I am satisfied that if I had required to consider the second part of the test in section 23(4) ERA I would have concluded that his second claim was not presented in such further period that I consider reasonable.

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59. In conclusion, the Tribunal is not prepared to exercise its discretion to hear the claim out of time. The Tribunal does not have jurisdiction to hear the claim and it is dismissed.

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Employment Judge: Jacqueline McCluskey
Date of Judgment: 28 July 2022
Entered in register: 29 July 2022
and copied to parties