EMPLOYMENT TRIBUNALS (SCOTLAND)

Cases Nos: 4105305/2022, 4106072/2022 and 4106037/2022

Final Hearing held in Dundee by Cloud Video Platform on 30 January 2023

Employment Judge A Kemp

Mr Gareth Thomas	**First claimant** **In person**
Mr Ian Mowbray	**Second claimant** **In person**
Mrs Elaine Mowbray	**Third claimant** **Represented by:** **Ian Mowbray,** **Husband**
Gas and Utility Technology Ltd	**Respondent** **No appearance**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

(i) The first claimant is awarded the sum of Four Thousand Four Hundred and Forty Pounds and Seventy Eight Pence (£4,440.78) (being for unlawful deduction from wages in the sum of £2,399.18 and for a statutory redundancy payment of £2,041.60), payable by the respondent.

(ii) The second claimant is awarded the sum of Fourteen Thousand Four Hundred and Eighty Pounds and Twenty Eight Pence (£14,480.28) in

respect of a statutory redundancy payment, payable by the respondent.

(iii) The third claimant is awarded the sum of Twenty Thousand Four Hundred Pounds (£20,400.00) in respect of a statutory redundancy payment, payable by the respondent.

REASONS

Introduction

1. This was a Final Hearing held remotely. There were originally three separate Claims with the first claimant under number 4105305/2022, the second claimant under number 4106072/2022 and the third claimant under number 4106037/2022

2. The claims have been ordered to be combined by order of 29 December 2022.

3. The first claimant claims for a statutory redundancy payment, and makes a claim for unlawful deduction from wages in respect of unpaid pay. The second and third claimants only seek a statutory redundancy payment.

Service

4. I understand that the respondent has ceased to trade. There is however no notice at Companies House shown on its website indicating that formal insolvency proceedings have commenced. The second claimant confirmed that that was the case. I considered that I was able to proceed with the hearing, subject to what follows.

5. There had been a difficulty with serving the Claim Form on the respondent. It was attempted by post on 4 October 2022, but returned by the Post Office marked “gone away”. A Final Hearing set for 13 December 2022 was postponed so that service may be attempted again. Service was attempted at the same address, by recorded delivery post, on 1 December 2022, but without success as the letter was again returned as not called for.

6. I noted the terms of Rule 15 however, which refers to the Tribunal being required to send a copy of the Claim, and a relevant Notice, to the respondent. That was done. It was sent to the correct address, being the registered office of the company as that is disclosed on the Companies House website which is 134 Whitehill Road, Glenrothes, KY6 2RP. That is given in the Claim by the first claimant as the address of Mr Alan Shaw and Mrs Lyndsey Shaw, directors of the respondent. In circumstances where the second and third claimants are directors of the company and aware of the claims, indeed they make them too as individuals and the second claimant emailed the Tribunal with a form of draft Response Form on its behalf, having regard also to the terms of Rule 2 and Rule 6, I considered that valid service has taken place against the respondent and that this Hearing was able to proceed. The second claimant confirmed that he did not seek, on behalf of the respondent, to present a Response Form and application for extension to receive it.

7. The claims made are all outwith the primary time-limits relevant to the claims made, which are set out below. The issue of jurisdiction is one that I must consider, and is addressed below also.

8. The respondent did (at least on one view) apply, in effect, for an extension of time to lodge a Response Form, by email from the second claimant, which was rejected by the Tribunal on 9 January 2023 as no Response Form or explanation for its absence was provided. That is because it was understood to be an application for extension by the respondent. On 27 January 2023 Mr Ian Mowbray emailed the clerk for the present hearing and attached a Response Form, asking that it be placed before the Judge. He confirmed however that the respondent did not seek to defend the claims made.

9. Notice of Final Hearing had been sent to the respondent by post but it did not seek to appear at the hearing.

Respondents

10. The claims are made against the respondent, which was the employer of the three claimants, but also at least on the face of the first claimant's claim form four other parties, all individuals in the claim by the respondent. It appeared from the file that that may have been rejected at the state of initial consideration, and in any event the Claim of the first claimant was at no stage served on any of the parties named by the first claimant as second to fifth respondents. It was discussed during the hearing that claimant had added those parties as respondents in error, and in the circumstances it did not appear that any claim against such respondents was competently before me, not least as the claims made in these Claims can only be directed to the employer,

Evidence

11. Evidence was heard from each of the first and second claimants. The third claimant, the wife of the second claimant, did not attend. The second claimant gave evidence as to her position, which was materially similar to his own. The claimants referred to documents when doing so. The second claimant wished to refer to additional documents, and I considered that it was in accordance with the overriding objective to allow him five working days to do so, as he latterly sought. Those documents were considered on receipt.

Issues

12. The issues are:

    (i) Does the Tribunal have jurisdiction?
    (ii) Is each claimant entitled to a statutory redundancy payment?
    (iii) Has there been an unlawful deduction from wages in relation to outstanding pay for the first claimant during the period from 15 December 2021 to dismissal on 4 February 2022?
    (iv) If the claims succeed, or any of them, to what remedy is that claimant entitled?

Facts

13. The following facts, material to the issues before the Tribunal, were found by the Tribunal.

14. The first claimant is Mr Gareth Thomas. His date of birth is 29 July 1993.

15. The second claimant is Mr Ian Mowbray. His date of birth is 25 August 1950.

16. The third claimant is Mrs Elaine Mowbray. Her date of birth is 25 November 1952.

17. The respondent is Gas and Utilities Technology Ltd. It is a company incorporated under the Companies Acts.

18. The first claimant was employed by the respondent from 25 July 2016. The first claimant's gross pay was £1,733 per month, and his net pay was £1,427 per month. He had an entitlement to pension valued at £36.40 per month.

19. The second claimant was employed by the respondent from 1 October 1996. The second claimant's gross pay was £1,743 per month, and his net pay was £1,395 per month. He did not have a pension entitlement.

20. The third claimant's gross pay was £2,442 per month, and her net pay was £1,942 per month. She did not have a pension entitlement.

21. By letters dated 7 January 2022 each of the claimants was informed by the respondent that they were being dismissed for redundancy on a period of notice of four weeks. The letters referred to making payment for a redundancy payment.

22. The employment of the claimants with the respondent in each case terminated on 4 February 2022. On or around that date the respondent ceased to trade.

23. The respondent has not made any redundancy payment to any of the claimants. The first claimant has not been paid for salary for the period from 15 December 2022 onwards.

24. At about the date of termination of employment a director of the respondent Mr Alan Shaw told the first claimant that he would make a claim for payment of the sums due to the Redundancy Payments Service ("RPS").

25. None of the claimants sought legal advice with regard to making the present claims, or time-limits that applied to them doing so. None of them undertook researches online into the position. They understood that the claims were to be addressed by the RPS. An application to the RPS was made on 10 May 2022, with a response received on 15 August 2022, and further guidance given on 22 August 2022.

26. The respondent had commenced a civil court claim against another party in March 2022. The respondent was not placed into any formal step of insolvency despite its ceasing to trade so as to be able to continue with that action. The action led to a decision in favour of the respondent on or around 17 July 2022 (details of the decision were not given in evidence). No payment following the decision has been received by the respondent, and the action may not yet be fully concluded.

27. In August 2022 the second claimant became aware that the action would not be concluded within six months of the termination of his employment. He also was informed in about early September 2022 that the RPS would not process the applications to them in respect of the respondent's former employees and their redundancy without there being administration.

28. On or around 8 September 2022 Mr Shaw informed the first claimant that he would require to commence his own claim.

29. The first claimant commenced early conciliation on 28 September 2022. He had attempted to do so on 26 September 2022 but provided inaccurate information. The certificate in relation to that was issued on 28 September 2022. The Claim Form was presented by the first claimant on 29 September 2022.

30. The second claimant commenced early conciliation on 23 September 2022. The certificate in relation to that was issued on 27 September 2022.

The Claim Form was presented by the second claimant on 15 November 2022.

31. The third claimant commenced early conciliation on 23 September 2022. The certificate in relation to that was issued on 27 September 2022. The Claim Form was presented by the third claimant on 15 November 2022.

Submissions

32. Brief submissions were made inviting me to find for the claimants.

The law

33. The Employment Rights Act 1996 ("the Act") provides for a right to a redundancy payment by virtue of section 136. Redundancy is defined in section 139. The amount is calculated by reference to section 162, which is based on calculations of a week's pay under sections 212 – 214 of the Act. There is a statutory limit to the figure for purposes of the redundancy payment under section 136, which at the time of the claimant's dismissal was £544 per week.

34. There is a requirement to commence a claim within six months under section 164 of the Act, and if not within that period may proceed if it is just and equitable to do so and a claim is made to the Tribunal (as one of the steps that may be taken) within a further period of six months thereafter.

35. Pay for sums earned during employment is wages under section 27 of the 1996 Act. A failure to pay it is an unlawful deduction from wages under section 13. A claim for unlawful deduction from wages may be made to the Tribunal under section 23.The claim must be made within three months of the deduction, or if there is a series of deductions the end of them. A claim may be presented outwith that time if the Tribunal is satisfied that it was not reasonably practicable to have done so within the time, and it is presented within a reasonable time thereafter, under section 23(4).

36. There is a further matter to consider, which is the effect of early conciliation on assessing when a claim was commenced. Before proceedings can be issued in an Employment Tribunal, prospective claimants must first contact ACAS and provide it with certain basic information to enable ACAS

to explore the possibility of resolving the dispute by conciliation (Employment Tribunals Act 1996 section 18A(1)). The Employment Tribunals (Early Conciliation: Exemptions and Rules of Procedure) Regulations 2014 provide in effect that within the periods of three or six months from the relevant date for a claim, here the effective date of termination of employment, EC must start, doing so then extends the period of time bar during EC itself, and time is then extended by a further month from the date of the certificate issued at the conclusion of conciliation within which the presentation of the Claim Form to the Tribunal must take place. If EC is not timeously commenced that extension of time is inapplicable, but the requirement to undertake EC remains.

Just and equitable

37. The term what is "just and equitable" is the same term in discrimination law, and has been commented on in that context. In ***Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] ICR 1194*** the Court of Appeal held:

> "First, it is plain from the language used ("such other period as the employment tribunal thinks just and equitable") that Parliament has chosen to give the employment tribunal the widest possible discretion. Unlike section 33 of the Limitation Act 1980, s 123(1) of the Equality Act does not specify any list of factors to which the tribunal is instructed to have regard, and it would be wrong in these circumstances to put a gloss on the words of the provision or to interpret it as if it contains such a list. Thus, although it has been suggested that it may be useful for a tribunal in exercising its discretion to consider the list of factors specified in section 33(3) of the Limitation Act 1980 (see ***British Coal Corporation v Keeble [1997] IRLR 336***), the Court of Appeal has made it clear that the tribunal is not required to go through such a list, the only requirement being that it does not leave a significant factor out of account: see ***Southwark London Borough Council v Afolabi [2003] EWCA Civ 15; [2003] ICR 800*** , para 33. The position is analogous to that where a court or tribunal is exercising the similarly worded discretion to extend the time for bringing proceedings

under s 7(5) of the Human Rights Act 1998: see ***Dunn v Parole Board [2008] EWCA Civ 374; [2009] 1 WLR 728***, paras [30]-[32], [43], [48]; and ***Rabone v Pennine Care NHS Trust [2012] UKSC 2; [2012] 2 AC 72*** , para [75].

19. That said, factors which are almost always relevant to consider when exercising any discretion whether to extend time are: (a) the length of, and reasons for, the delay and (b) whether the delay has prejudiced the respondent (for example, by preventing or inhibiting it from investigating the claim while matters were fresh)."

38. That was emphasised more recently in ***Adedeji v University Hospitals Birmingham NHS Foundation [2021] EWCA Civ 23*****,** which discouraged use of what has become known as the ***Keeble*** factors as form of template for the exercise of discretion. Section 33 of the Act referred to is in any event not a part of the law of Scotland***.***

39. The decisions from the EAT have not always been entirely consistent on how the discretion is to be exercised. In one line of authority, the absence of a good reason for a delay was held not to be fatal to the possible exercise of the discretion. That line emanates from the cases of ***Pathan v South London Islamic Centre UKEAT/0312/13*** and ***Szmidt v AC Produce Imports Ltd UKEAT/0291/14***, in both of which the EAT held that the tribunals erred in concentrating entirely on the reason for the delay at the expense of other factors; in particular, the relative prejudice to both parties if an extension of time were or were not granted. The other line is to the effect that an acceptable explanation for the delay is indeed fatal to exercising the discretion in favour of the claimant, and commences in ***Habinteg Housing Association Ltd v Holleron UKEAT/0274/14*** in which the EAT allowed an appeal against the decision of a tribunal to grant an extension of time to a claimant who provided no evidence or explanation for the delay in presenting her claim.

40. In ***Rathakrishnan v Pizza Express (Restaurants) Ltd [2016] IRLR 278****,* the EAT in effect preferred the former approach expressing the opinion that a multi-factoral approach was required with no single factor determinative. In that case the balance of prejudice and the potential

merits of the claim (as to which the tribunal had heard evidence) were held to be relevant factors to take into account. In ***Edomobi v La Retraite RC Girls School UKEAT/0180/16*** a different division of the EAT (presided over by a different Judge) in effect preferred the latter approach, with the Judge adding that she did not "understand the supposed distinction in principle between a case in which the claimant does not explain the delay and a case where he or she does so but is disbelieved. In neither case, in my judgment, is there material on which the tribunal can exercise its discretion to extend time. If there is no explanation for the delay, it is hard to see how the supposedly strong merits of a claim can rescue a claimant from the consequences of any delay."

41. In ***(1) Wells Cathedral School Ltd (2) Mr M Stringer v (1) Mr M Souter (2) Ms K Leishman: EA-2020-000801*** the EAT did not directly address those authorities but stated that, in relation to the issue of delay, "it is not always essential that the tribunal be satisfied that there is a particular reason that it would regard as a good reason".

42. In ***Accurist Watches Ltd v Wadher UKEAT/0102/09*** the EAT stated that, whilst it is good practice, in any case where findings of fact need to be made for the purpose of a discretionary decision, for the parties to adduce evidence in the form of a witness statement, with the possibility of cross-examination where appropriate, it was not an absolute requirement of the rules that evidence should be adduced in this form. A tribunal is entitled to have regard to any material before it which enables it to form a proper conclusion on the fact in question, including an explanation for the failure to present a claim in time, and such material may include statements in pleadings or correspondence, medical reports or certificates, or the inferences to be drawn from undisputed facts or contemporary documents.

43. If there is negligence by a solicitor that need not prevent application of the extension: ***Virdi v Commissioner of Police of the Metropolis [2007] IRLR 24*** a principle that was applied in ***Benjamin-Cole v Great Ormond Street Hospital for Sick Children NHS Trust UKEAT/0356/09***.

Reasonably practicable

44. The terms of Section 23 of the 1996 Act are different in kind to the test referred to in the preceding paragraphs, but the test is the same as that in respect of unfair dismissal. The claim must be commenced within a period of three months unless it was not reasonably practicable to have done so, in which event it must be presented within a reasonable period of time from when it was. The claim is commenced by EC if made timeously.

45. The question of what is reasonably practicable is explained in a number of authorities in the field of unfair dismissal law, in which the test is materially the same, particularly ***Palmer and Saunders v Southend on Sea Borough Council [1984] IRLR 119,*** a decision of the Court of Appeal. It suggested that it is appropriate: "to ask colloquially and untrammelled by too much legal logic, 'Was it reasonably feasible to present the complaint to the Industrial Tribunal within the relevant three months'?"

46. In ***Asda Stores Ltd v Kauser UKEAT/0165/07***, a decision of the EAT, Lady Smith commented that it was perhaps difficult to discern how:

> "'reasonably feasible' adds anything to 'reasonably practicable', since the word 'practicable' means possible and possible is a synonym for feasible. The short point seems to be that the court has been astute to underline the need to be aware that the relevant test is not simply a matter of looking at what was possible but asking whether, on the facts of the case as found, it was reasonable to expect that which was possible to have been done."

47. In ***Marks and Spencer plc v Williams-Ryan [2005] IRLR 562*** the Court of Appeal set out the issues to consider when deciding the test of reasonable practicability, which included (i) what the claimant knew with regard to the time-limit (ii) what knowledge the claimant should reasonably have had and (iii) whether he was legally represented.

48. In ***Lowri Beck Services Ltd v Brophy [2019] EWCA Civ 2490***, the Court of Appeal stated that the test of reasonable practicability should be given

a liberal interpretation in favour of the employee. The claimant did not have professional advice, which was held to be a factor in his favour.

49. Ignorance of a time limit has been an issue addressed in a number of cases. In ***Wall's Meat Co Ltd v Khan [1979] ICR 52*****,** the test which Lord Denning had earlier put forward in another case was re-iterated as -

> "It is simply to ask this question: Had the man just cause or excuse for not presenting his complaint within the prescribed time? Ignorance of his rights—or ignorance of the time limit—is not just cause or excuse unless it appears that he or his advisers could not reasonably be expected to have been aware of them. If he or his advisers could reasonably have been so expected, it was his or their fault, and he must take the consequences."

50. The burden of proof is on the claimant to prove that it was not reasonably practicable to present the complaint in time: ***Porter v Bandridge Ltd [1978] IRLR 271.*** The strict nature of the test was more recently emphasised by the EAT in the case of ***Cygnet Behavioural Health Ltd v Britta [2022] EAT 108.***

Discussion

51. I considered that the witnesses were credible and reliable. I was also satisfied that the second claimant's evidence in relation to the position of his wife the third respondent was capable of being accepted. Rule 41 indicates that the Tribunal shall seek to avoid undue formality. The circumstances of the second and third respondents were to all intents and purposes the same as to the presentation of the claims being late.

52. Firstly in respect of the issue of jurisdiction, it is not enough that there is no Response Form. The Tribunal must be satisfied that it has jurisdiction before it can consider such a claim, as it is a creature of statute. I considered that the claims to the Tribunal for a statutory redundancy payment had been made outwith the first period of six months, but within the second period, by each of the claimants, and that it was just and equitable to allow the same, such that I was satisfied that the claimants fell within the terms of section 164 of the 1996 Act. That is because the

first claimant had understood from a director of the respondent that a claim to the RPS would be made, he did not seek legal advice, and whilst he may well have been prudent to have undertaken his own researches into how to progress matters when payment was not made within two months he did not, trusting the director in effect. So far as the second and third claimants are concerned they too thought that the matter would be addressed by the RPS, did not seek legal advice on the point, and did not research time-limits. All the claimants proceeded in the belief that the RPS would resolve matters, and for that reason did not do more at that time. In all the circumstances I consider that it is just and equitable to allow those claims. Whilst there was delay, that delay is not unduly long, at less than two months.

53. In so far as the claim by the first claimant under the 1996 Act for unlawful deduction from wages is concerned, I was clear that the first claimant had not been paid for salary from 15 December 2021 to 4 February 2022. I have sympathy for him given those facts, but they are not sufficient given the law that I require to apply.

54. I was, just, satisfied that it was not reasonably practicable to have presented the claim timeously. That timeous presentation would have meant starting early conciliation for the unlawful deduction from wages claims by 4 May 2022, and presenting the Claim Form within one month of the Certificate issued thereafter. Early Conciliation was commenced substantially late. The reason for it was given as above, in essence trusting a director on this, and not having legal advice or conducting his own researches because of that. The overall circumstances were set out in a letter from the first claimant to the Tribunal dated 13 October 2022, which he spoke to in evidence and which I accepted. I accepted that the claimant did not in fact know of the time-limits.

55. The second part of the test is what knowledge of that the first claimant should reasonably have had. That takes account of all the circumstances, which include what a director told him in circumstances of the cessation of trading of his employer that a claim to the RPS was being made. The claimant knew the detail of time-limits only when I explained that to him, but did not seek it at the time because of what the director had said. It

seems to me that although the bar is a high one in this regard, and higher than for the just and equitable test by a material margin, as explained in ***Britta***, the claimant has met it. The test is of reasonable practicability, and is construed as set out above. Whilst he may well have been more prudent to have conducted researches at the time, and recognised that more than just redundancy may have been engaged, prudence is not the standard. I consider that in all the circumstances of the present case he has met the test as to reasonable practicability, if only just.

56. The next aspect is whether or not the Claim was presented within a reasonable period. The claimant was aware from an email of 8 September 2022 that a Claim was required. He did not attempt EC until 26 September 2022, and then there was a two day delay because of an error that was made. It did appear to me that the period from 8 to 26 September 2022 was quite long. Where there was a Claim to make, and EC is a relatively simple first step required, I would normally have expected that to have commenced quickly, within a few days of 8 September 2022. The claimant took some time to find out about the issues, and to prepare the Claim Fomr in the terms that he did. The delay was over two weeks. What is required is not however perfection, and this is in the context of someone without legal advice or experience. In all the circumstances, although this is at the upper end of what may be considered reasonable, I am prepared to find that it was, if again only just.

57. I have concluded that I have jurisdiction for the claim under the 1996 Act.

Remedy

58. The **first claimant** has a claim for pay for the period 15 December 2021 to 4 February 2022. It is a period of 51 days. For this purpose I take the net pay only, which is the equivalent of £329.30 per week. I calculate the sum due for the relevant period to be £2,399.18, and its not being paid is a deduction from wages under Part II of the 1996 Act.

59. The claim for a statutory redundancy payment so far as the first claimant is concerned succeeds. I am satisfied that the test for the same is met. The amount is quantified at the gross weekly wage of £399.92, added to which is the pension of £36.40 per month, the equivalent of £8.40 per

week, a total of £408.32 per week, multiplied by five being the complete years of service, which is the total sum of £2,041.60. The total of the award is £4,440.78.

60. The **second claimant** was also dismissed for redundancy and his claim in that regard succeeds. He is over the age of 41 for all his service, which was for 24 complete years. The payment is 24 multiplied by 1.5 multiplied by £402.23 being the weekly equivalent of his gross pay, which is a total of £14480.28.

61. The **third claimant** is in a similar position to that of the second respondent, her husband, and her claim also succeeds. She only seeks a statutory redundancy payment. The third claimant is over the age of 41 for all her service, which was for 25 complete years. The payment is 25 multiplied by 1.5 multiplied by £544 (the statutory limit to a week's pay applying as the actual gross pay was higher than that), which is a total of £20,400.

Conclusion

62. I have made the awards above accordingly. The other aspect of the first claimant's claim is dismissed for the reasons given. For the avoidance of doubt my decision is based on the claims presented to me and the evidence given. Any issue as to applications made to the RPS are determined by that body.

Employment Judge :- A Kemp

Date of Judgment : 09 February 2023

Date sent to parties : 20 February 2023