



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4101812/2022

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Held in Glasgow on 15 May 2023

Employment Judge L Docherty

10 **Mr Alexander Craig**

**Claimant
Represented by:
Ms S Akavicius and
Mr P Martin -
Strathclyde Law
Clinic**

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Express Buffet Ltd

**Respondent
No response
[No ET3 submitted]**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that it does not have jurisdiction to consider the claims of unfair dismissal; unauthorised deduction of wages; failure to pay a redundancy payment; failure to pay holiday pay; and breach of contract in respect of failure to give notice.

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REASONS

1. The claimant presented claims on 6 April 2022 of unfair dismissal; unauthorised deduction of wages to include failure to pay the national minimum wage and pension contributions; failure to pay holiday pay; and breach of contract.

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2. There was no response to the claim, however it was not considered appropriate to grant a judgement under Rule 21 of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013 (the Rules), as there was a preliminary issue regarding the Tribunal's jurisdiction to consider the claims on the grounds that they were presented out with the relevant statutory

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time limits, and whether the claimant had sufficient qualified service to present a claim of unfair dismissal and failure to pay a redundancy payment. There were also issues with the quantification of the claim from information produced by the claimant.

- 5 3. A final hearing was fixed at which the claimant attended accompanied by two student representatives, Ms Akavicis and Mr Martin. There was no appearance by the respondent.
4. The claimant gave evidence of his own behalf and lodged a bundle of documents.

10 **Findings in Fact**

5. The respondents operated a buffet style Indian Restaurant. The claimant commenced working with the respondent's in or around August 2019. He was employed as a Kitchen Steward.
6. The claimant did not receive a contract of employment but he did receive wage slips. The claimant worked 6 days a week, on average from 11 am to 10 pm. He was paid £300 per week directly into his bank account.
7. The claimant understood that he was entitled to 5.6 weeks holiday per annum. Claimant. The claimant did not take holiday leave during his employment. He understood the holiday year ran in parallel with the tax year.
- 20 8. The first Covid lockdown was implemented in March 2020. As a result of this, on 13 March 2020 the claimant was told that the restaurant would be closing. He was paid wages up until 13 March 2000. He was told by his employer that restaurant would remain closed until the pandemic 'broke up'. He had no further contract from his employer.
- 25 1. In or around July 2021 he was contacted by the Head Chef. The claimant attended his workplace in July 2021 but found that it was closed. He was told that the restaurant was closed for kitchen refurbishments. The claimant made no further efforts to contact the respondents.

2. Someone from the respondent's contacted the claimant in April 2022, asking him to go back to work for the respondents and advising him that the business was under new management. The claimant was unfit for work at this point had been certified as unfit for work for some time.
- 5 3. The claimant received correspondence in 2021 from Nest advising that his employer had not made payments they had a legal obligation to pay under the auto enrolment pension scheme.
- 10 4. The claimant did not receive any payment either from the DWP, or his employer. The claimant contacted the DWP at some point prior to May 2020 but had difficulty getting through to them. When he did manage to speak to them, he explained that that he had no money coming in. They suggested to him that he should have been paid under the Furlough scheme. They also advised him that it was his employer's responsibility to pay him wages under this scheme, not the responsibility of the DWP.
- 15 5. The claimant obtained an emergency appointment with the DWP in May 2020 which he attended. He required to obtain copies of bank statements from his bank, which he had to pay for, in order to display these to the DWP.
- 20 6. The claimant was made award of universal credit from May 2020. The claimant continued to receive Universal Credit, other than in June, September and December 2021, when the claimant explained there was a claw back or deduction from his Universal credit to reflect an overpayment.
7. Due to Covid restrictions, there was restricted access to face to face advice during lockdown periods, and the Covid restrictions made obtaining advice on the telephone more difficult than had previously been the case.
- 25 8. In or around June or July 2021 the claimant was able to contact the CAB in Kilmarnock and obtained assistance from them to file for personal bankruptcy. The CAB completed the paperwork and the application lodged on behalf of the claimant and the application was granted by the Accountant in Bankruptcy on 26/07/21.

9. In January 2022 the claimant contacted the ACAS regarding his employment situation with the respondents. He believed that he had not been paid all the wages which were due to him in respect of Furlough and the national minimum wage.
- 5 10. The dates of receipt of the ACAS certificate was 31 January 2022, and the certificate was issued on 13 March 2022.
11. On the suggestion of ACAS, the claimant contacted a firm of solicitors and Ayr, who could not provide him with assistance but suggested a firm of solicitors in Kilmarnock. They claimant contracted this firm, but they also could
io not provide assistance. The claimant then contracted the Law Society and obtained a listing of bodies who might provide him with help.
12. The claimant lodged a claim with the Tribunal which was received on 6 April 2021. He claimed unfair dismissal; a redundancy payment; notice pay; holiday pay, and arrears of pay.
- 15 13. The claimant was not represented when the claim was lodged. He provided an email address at which he could be contacted on his ET1.
14. In July 2022, the claimant obtained an appointment with the Strathclyde University Student Law Clinic who represented him at this hearing.

Note on Evidence

- 20 15. There was no appearance by the respondents, and therefore there was no challenge to the claimant's evidence and cross-examination. The tribunal did not form the impression that the claimant was seeking to deliberately mislead, but it was unable to conclude that his evidence was credible and reliable on all matters.
- 25 16. An example of this is the claimant said that the housing estate in which he lived was closed by the police until a week before the covid restrictions were lifted in Scotland at the end of the first lockdown period and that it was not possible to leave the Estate. He offered this in explanation as to why he had not sought advise at an earlier stage.

17. While clearly travel restrictions were in place as a result of the COVID restrictions, it was difficult to accept that the police had locked the Estate in which the claimant lived, preventing him and other residents from leaving it until 1 week before the Covid restrictions were lifted Scotland wide.
- 5 18. Another example is the claimant said he had no computer, iPad, or telephone on which he could obtain access the Internet. He could not however clearly explain however how he obtained details in order to contact the CAB in April 2021 when an application for Bankruptcy proceedings was made on his behalf, or ACAS in 2022 about his employment dispute. In addition, the
10 claimant had contacted two firms of solicitors and the Law Society
19. Further, the fact that the claimant had an email address which he used on his ET1 is inconsistent with him not having a computer, laptop iPad or phone on which he could obtain internet access.
20. There were also some inconsistencies between the claimant's oral evidence,
15 and the written submissions produced on his behalf. The most noticeable of these is that in his written submissions in advance of the hearing, it was said that the claimant attended work on 4 July, but that the premises were closed, but in his oral evidence the claimant said that he worked a shift on 4 July and was then told that the restaurant was going to close so that work could be
20 done on the kitchen in order to make it complaint with local authority regulations. On balance, the claimant considered it more likely that the position set out in the written submissions were to be preferred, as it appeared inherently unlikely that the restaurant would have opened up for one day on 4 July 2021 and then closed again.

25 **Consideration**

21. There is a preliminary jurisdictional issue for the Tribunal to consider in respect of all of the claims, as they are presented out with the three month statutory time limit which applies.
22. A claim for a redundancy payment has a 6 month limitation period, however
30 the entitlement to bring such a claim depends on an employee having 2 years

qualifying service, which for reasons dealt with below, the Tribunal was not satisfied the claimant had.

23. Section 23 of the Employment Rights Act 1996 (the ERA) provides:

“(1) A worker may present a complaint to an employment tribunal

5 *(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)),*

.....

10 *(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 —*

15 *(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—

20 *(a) a series of deductions or payments, or*

25 *(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. ”*

24. Similar provision apply to the enforcement of the right not to be unfairly dismissed (Section 111 (3) of the ERA); breach of contract (Section 7 of the

Employment Tribunal Extension of Jurisdiction (Scotland) Order 1994); and failure to pay holiday pay (section 30 of the Working time Regulations 1998).

25. It is submitted that the date upon which the claimant's employment came to an end was unclear, but that it was at some point between July 2021 August 2021. This submission was on the basis that the claimant had attended his workplace in July 2021 and had been told that it was temporarily closed.
26. The tribunal however satisfied that the claimant's employment came to an end in March 2020. As of that date, the business closed, with no indication of when it might reopen other than '*when the pandemic broke up*'. The claimant was not told that he would continue to be paid and he ceased receiving payment of wages from 13 March, the last day he worked. No indication was given to him to suggest that his employers would continue to keep in touch with him. The tribunal was not persuaded that the claimant worked again on the 4 of July 2021, only that he attended the premise and found them closed and was told that they would continue to be closed.
27. While the DWP suggested to the claimant that he should have been paid under the Furlough scheme, he was not paid at all. It was the responsibility of the claimant's employer to pay his wages, not the DWP.
28. The claimant was awarded universal credit from May 2020. The Tribunal was satisfied that his contract of employment did not subsist beyond March 2019 in circumstances where he did attend work, was not given any indication of when he would work again, was not paid wages, and commenced receiving universal credit.
29. The effective date of termination was 13 March. This was the last date which the claimant worked and was paid. The effect of this conclusion is that the claimant does not have the requisite qualifying service to present the claim of unfair dismissal or for non-payment of a redundancy payment.
30. Regardless of whether the claimant's employment terminated on 13 March 2020, or in July/ August 2021, as contended for, the claims in respect of non-

payment of wages; failure to holiday pay; and breach of contract are considerably out of time.

31. Such claims can proceed in circumstances where The Tribunal is satisfied that:

5 (1) *it was not reasonably practicable to lodge the claims within the statutory three month limitation period ;*

(2) *that the claims was lodged within a reasonable period thereafter.*

32. It rests with the claimant to demonstrate that it was not reasonably practicable to lodge the claim within three months, and where that is found to be so, that
10 it that was lodged within a reasonable period thereafter.

33. What is reasonably practicable is a question of fact, and one for the tribunal to decide.

34. Not reasonably practicable has been explained as being *not being feasible*.

35. The reason advanced on behalf of the claimant as to why he is not was not
15 able to present his claim on time was confusion as to his employment status, the date of termination/dismissal be ambiguous. It was said that the claimant attempted to get money from the respondents from 4 July 2021 onwards but was unable to get a response. He then tried to get legal advice and support; he contacted two law firms who were unable to provide assistance. This
20 meant that the claimant was unable to properly explore his options in relation to legal advice, because as a result of the Covid restrictions as he was unable to leave his house to do so.

36. It was also said that he did not have access to a computer, therefore exploring options online was not possible, and free legal services were difficult to obtain.
25 The claimant eventually obtained an appointment with the Law Clinic in July 2022, but by then the clam was already lodged.

37. While the tribunal takes into account that the Covid restrictions were likely to make obtaining access to legal services more difficult than prior to lockdown, it could not be suggested that no such services were available to the claimant.

38. The claimant was clearly able to contact and obtain assistance from the CAB in Kilmarnock in July 2021 when he enlisted their help in making a bankruptcy application. No reason was advanced by the claimant as to why by this stage he did not make enquiry from the CAB about his right to bring a claim against his employer. By July 2021 the claimant had not been paid wages for over a year. On the claimant's submission and taking his case to its highest by July/August 21 he was trying to find out whether he still had a job.
39. The claimant did not appear to do anything about his claim until January 2022, when he first contracted ACAS. By this point his claims were very significantly out of time. There was no satisfactory explanation as to when these steps were taken by the claimant in January 2022, but not at any point before that. The two solicitors he referred to were both contacted after the claimant had been in touch with ACAS. There was no evidence about the claimant's state of health to suggest that this prevented him from bringing a claim.
40. While the tribunal was not satisfied that this was the case, even if as the claimant claimed he had no Internet access, he clearly has the use of the telephone. Before the end of the limitation period, he had spoken to the DWP, attended an emergency appointment with them, and arranged with his bank to obtain bank statements. By June/ July 2021 he had contacted the CAB and instructed them to instigate bankruptcy proceedings on his behalf.
41. Ignorance of the right to bring a claim, or the time limits which applies can only excuse a default if that ignorance is itself reasonable.
42. Given the claimant's engagement with other agencies, such as the DWP and the CAB, the tribunal was satisfied that the claimant would have reasonably been able to make enquiry as to whether he potentially had a claim against his employer, and what time limits applied to such a claim, and that it was unreasonable for him not to have done anything about this until January 2022.
43. Even if it was not reasonably practical for the claimant to have lodged a claim within three months from 13 March 2020 due to confusion as to whether his employment had come to an end, and Covid restrictions making it more difficult to obtain legal advice, it could not be said that by July / August 21 the

claimant could have been unaware that he had not been paid for one year and that his employment had come to an end. At that point however, he took no steps to pursue his claim, and did not do anything until late January 2022, the claim not being presented till 6 April 2022. The Tribunal was therefore not satisfied that the claim was presented within a 'reasonable period thereafter'.

44. The effect of this conclusion is that the Tribunal does not have jurisdiction to consider any of claimant's claims.

10 **Employment Judge: L Doherty**
Date of Judgment: 17 May 2023
Entered in register: 18 May 2023
and copied to parties

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