



## **EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case No: 4103759/2023**

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**Held via Cloud Video Platform (CVP) in Edinburgh on 27 September 2023**

**Employment Judge R King**

**Mr T Mcinerney**

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**Claimant  
In Person**

**Sword Construction UK Ltd**

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**Respondent  
Represented by:  
Mr P Lappin -  
Senior Legal  
Consultant**

### **JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

20 The Judgment of the Tribunal is that the claim is dismissed on the ground that it is time barred.

### **REASONS**

#### **Introduction**

1. The claimant has presented a claim for unpaid holiday pay in the sum of  
25 £6,187, which he claims the respondent failed to pay him on the termination of his employment. The respondent denies that the claimant was an employee or a worker during his engagement with it and therefore it denies he is owed any holiday pay at all. In any event it asserts in the first place that his claim is time barred and should therefore be dismissed on that ground.  
30 This open preliminary hearing was therefore fixed in order to deal only with the issue of time bar.

#### **Relevant law**

2. Section 30 of the Working Time Regulations 1998 provides that any claim for unpaid holiday pay must be presented before the end of the period of three

months beginning with the date on which the payments should have been made or within such period as the Tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period. Similar considerations apply to such a claim brought in terms of section 23 of the Employment Rights Act 1996.

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3. The claimant has not specified the statutory provision he relies on, but both avenues available to him have the same time limit and the same test to be applied in circumstances where a time limit is not met. Either claim is also subject to the extension of time provided by the Acas early conciliation rules.
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### Issues

4. The issues for the Tribunal were therefore:
- a. did the claimant present his claim within the statutory time limit, as extended by the Acas early conciliation rules?
  - 15 b. if he did not, was it reasonably practicable for him to have presented his claim within the statutory time limit?
  - c. if it was not reasonably practicable for him to do so, did he present his claim within such further period as was reasonable?

### Witnesses

- 20 5. The claimant gave evidence on his own behalf and referred to a log of texts between himself and Scott Foley of Unite the Union, which he produced. No evidence was called by the respondent.

### Findings in fact

25 Having heard evidence from the claimant, the Tribunal makes the following findings in fact.

6. The claimant was engaged by the respondent as a shuttering joiner between 7 February 2022 and 18 November 2022. The legal nature of his relationship with the respondent is disputed. The claimant believes that he was either an

employee or a worker. The respondent denies that the claimant was either an employee or a worker and maintains he was at all times self-employed.

7. Because it believed he was self-employed the respondent made no payment whatsoever of holiday pay to the claimant during the engagement or upon its termination on 18 November 2022. However, the claimant believed that on termination he was entitled to a payment of accrued holiday pay in the sum of £6,187.
8. In December 2022, the claimant therefore contacted his Unite union representative, Scott Foley for advice. Mr Foley is a full time employed official of the union and a regional organiser. Mr Foley advised the claimant that he “*had a case*” to recover unpaid holiday pay. Mr Foley told the claimant that he would contact Unite’s legal department who would instruct their solicitors and they in turn would contact the claimant to discuss his case. Mr Foley informed the claimant that in the meantime he would be his single point of contact for his claim. The effect of this conversation was that the claimant had instructed his trade union to act on his behalf to recover the unpaid holiday pay he believed he was due.
9. The claimant subsequently received an e-mail from Thompsons Solicitors informing him that they were looking into the merits of his case and would revert to him when they had done so.
10. As he received no further contact from Unite’s solicitors and had no contact from Mr Foley after December 2022, the claimant contacted Acas on 14 February 2023 to commence the early conciliation procedure. He did so personally because he was aware of the deadline for commencing early conciliation and did not want to miss it.
11. On 2 March 2023 Mr Foley informed the claimant that he had been in touch with Thompsons and that he would continue to engage with them on his behalf. The Acas early conciliation certificate was issued to the claimant on 28 March 2023. Upon receipt he emailed that to Mr Foley and also tried to contact him by telephone. He believed that Mr Foley was still acting on his

behalf at that time and would be instructing Unite's solicitors to present a claim.

12. The claimant had no word from Mr Foley for the next several months. He became frustrated that Mr Foley did not respond to texts sent to him on 11 April and 7 May 2023 to the extent that on 1 June 2023, he texted Mr Foley -

*"Why aren't you answering my calls or emails?"*

13. On 4 July 2023, the claimant texted Mr Foley -

*"Morning Scott. Any update? Is there a time limit on claiming this?"*

That same day Mr Foley replied -

10 *"Hi Thomas. The solicitor wasn't around on Friday but I am trying again tomorrow in between appointments. If we can run with the claim then it would be the civil court where you get five years to lodge a claim."*

14. In that 4 July text Mr Foley did not specifically advise the claimant that his tribunal claim was now out of time, even though the 28 April 2023 deadline had passed.

15. The claimant submitted his claim on 13 July 2023 on his own, without union input. He did so because he felt let down by his trade union and he decided he had to take matters into his own hands.

16. In all the circumstances, he did not present his claim within the statutory time limit, as extended by the Acas early conciliation Rules, of 28 April 2023.

## Submissions

### *For the claimant*

17. The claimant explained that he had initially instructed Mr Foley to act on his behalf and as soon he received the early conciliation certificate, he emailed it to him. He believed that Mr Foley was acting on his behalf and instructing Thompsons solicitors. Mr Foley had gone from telling him that had 'a case' to ignoring his messages and having no communication with him.

*For the respondent*

- 5 18. Mr Lappin submitted that whether the claim had been brought under the Working Time Regulations or the Employment Rights Act, it had to be presented within the statutory three-month time limit as extended by the Acas early conciliation rules.
- 10 19. Mr Lappin asserted that the primary time limit for submitting the claim under the Working Time Regulations was 7 February 2023 and under the Employment Rights Act was 15 March 2023, both of which could be extended in terms of the Acas Early conciliation Rules. The early conciliation certificate had been issued on 28 March 2023 and the deadline for presenting a claim under either statutory provision had been one month later.
20. Ultimately the claim had not been submitted until 13 July 2023, which was two and a half months later than the deadline and eight months after the termination of the claimant's engagement with the respondent.
- 15 21. After the termination of his engagement with the respondent, the claimant had the benefit of trade union advice in connection with his holiday pay claim. It was significant that the claimant's union representative was a full time employed regional organiser with Unite the Union, which has significant resources.
- 20 22. In Mr Lappin's submission, the claimant appeared to have been initially advised correctly but it was unclear if he had ever been advised about a time limit applying to his claim. It was unclear whether the claimant had sent the early conciliation certificate to Mr Foley on receipt. He speculated that perhaps he thought that the union would receive it as well. It would have been  
25 reasonable for the claimant to tell Unite about it on receipt, but the evidence suggested he did not tell them until the start of June, by which time the deadline had passed.
- 30 23. Alternatively, if the Tribunal accepted the claimant's evidence that he *had* told his union representative about the issue of the Early conciliation certificate as soon as it was issued any fault had been on the part of the union in which

case *Dedman v British Building & Engineering Appliances Limited [1973] IRLR 379* was authority for the principle that any omission by the union was deemed to have been the responsibility of the claimant.

24. In this particular case however, it was immaterial whether the fault lay at the door of the trade union or the claimant. Reference was made to two authorities, namely *Marks & Spencer v Williams [2005] ICR 1293* and *London International College Limited v Sen [1993] IRLR 333*.

25. Ultimately there was no basis upon which the Tribunal could find that it had not been reasonably practicable for the claimant to present his claim in time. Alternatively, even if it was not reasonably practicable for him to have presented it in time he had not presented it within a reasonable further period.

#### Discussion and decision

26. In *Marks & Spencer plc v Williams [2005] ECWA Civ 470*, the Court of Appeal set out a number of legal principles that should be applied when determining the issue of reasonable practicability -

- In the first place the statutory provision (in that case section 111 (2) of the Employment Rights Act 1996, which deals with unfair dismissal claims) should be given a liberal interpretation of the employee.
- Regard should also be had to what, if anything, the employee knew about the right to complain to a tribunal and of the time limit for doing so.
- Regard should also be had to what knowledge the employee should have had, had they acted reasonably in the circumstances. Knowledge of the right to make a claim does not, as a matter of law, mean that ignorance of the time limits will never be reasonable. It merely makes it more difficult for the employee to prove that their ignorance was reasonable.

- Where a claimant retains a solicitor and fails to meet the time limit because of the solicitor's negligence, the claimant cannot argue that it was not reasonably practicable for him to submit the claim in time.

- 5 27. The case law in respect of "advisors at fault" has distinguished the reasonable practicability of presenting a claim within the time limit when the claim is represented by a "skilled advisor" from other circumstances. Skilled advisors have been held to include solicitors, employment consultants and CAB advisors, while unskilled advisors have been held to include those without legal training or qualifications.
- 10 28. In ***Remploy Limited v Brain UKEAT/0465/10***, the EAT held that the question of reasonable practicability should not however hinge on the nature of the relationship between the advisor and the claimant. If the absence of a duty of care is to be weighed in the balance it should be considered as part of the factual matrix rather than elevated into a principle. That case emphasised
- 15 that the question of reasonable practicability was essentially one of fact for the Tribunal and the correct approach for the Tribunal was to return to the words of the statute.
- 20 29. ***Dedman v British Building & Engineering Appliances Limited [1973] IRLR 379*** established the principle that where a claimant's skilled advisors are at fault for failing to submit their claim in time, the Tribunal will usually consider that it was reasonably practicable for the claim to be presented in time. Both ***Dedman*** and ***Capital Foods Retail Limited v Corrigan [1993] IRLR 430*** established the principle that a claimant's solicitor must demonstrate that they had taken all the steps they should reasonably have
- 25 taken in the circumstances to see that the application was presented in time. If that has not been established the Tribunal should not find that it was not reasonably practicable to present the claim in time. A similar approach was adopted by the EAT in ***Ashcroft v Haberdashers' Aske's Boys School UKEAT/0151/07***, which dealt with an adviser who was an employment
- 30 consultant.

30. In these particular circumstances, the Tribunal concludes that Mr Foley, a full time employed regional organiser with Unite, a trade union with significant resources, was a skilled advisor whose conduct should be viewed in the same way as a solicitor or employment consultant.
- 5 31. It was clear from the claimant's evidence that he had instructed him to arrange for the presentation of his claim for holiday pay. He did so in circumstances where, because of his conversations with Mr Foyle in December 2022 and on 2 March 2023, he was entitled to believe that Mr Foley was taking steps to present his claim with the assistance of the union's solicitors and would act  
10 upon receipt of the early conciliation certificate when that was sent to him.
32. Any claim ought to have been presented within one month of the date of the early conciliation certificate issued on 28 March 2023, which meant the deadline was 28 April 2023. On the evidence before the Tribunal, it cannot be said that the claimant's union took all reasonable steps that they could  
15 have taken in order to ensure the application was presented on time.
33. In these circumstances the Tribunal has every sympathy for the claimant. However, it must conclude that as he instructed his trade union, in good time prior to expiry of the statutory time limit, to arrange for presentation of his claim that it was reasonably practicable for him to have presented his claim in time.
- 20 34. In the circumstances, it follows that there is no requirement on the part of the Tribunal to consider whether the claimant presented his claim within a reasonable time after expiry of the statutory time limit.

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35. For the reasons set out above, the claimant's claim is dismissed.

**Employment Judge: R King**  
**Date of Judgment: 19 October 2023**  
**Entered in register: 19 October 2023**  
**and copied to parties**

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