



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4105595/2023

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Held via Cloud Video Platform (CVP) in Glasgow on 14 December 2023

Employment Judge P O'Donnell

Mrs Susan Willox

**Claimant
In Person**

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Merlin Mortgages

**Respondent
No appearance and
No representation**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is:

1. The claimant was dismissed by reason of redundancy and is entitled to a statutory redundancy payment of £5001.60 (Five thousand and one pounds, sixty pence).
2. The claims for holiday pay and notice pay were lodged out of time and it had been reasonably practicable for these to have been lodged within the relevant time limits. The Tribunal does not, therefore, exercise its discretion to hear these claims out of time and these claims are dismissed.

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REASONS

Introduction

1. The Claimant has brought a number of complaints relating to sums due to her on the termination of her employment.

2. The claim has not been defended but it was not thought appropriate for a judgment under Rule 21 because, on the face of the ET1, the claims for holiday pay and notice pay were lodged out of time. A hearing was, therefore, required to determine whether these claims were lodged out of time and, if so, whether there were grounds for the Tribunal to exercise its discretion to hear those claims out of time.

3. For the avoidance of doubt, the claim for redundancy pay was not lodged out of time because it has a longer time limit (6 months) than the other claims (3 months).

10 Findings in fact

4. The Tribunal made the following relevant findings in fact.

5. The claimant started working for the respondent on 12 March 2007. She was dismissed on 31 May 2023 when the business ceased trading. She was 60 years old at the date of termination. She was paid £903.07 a month gross and £883.92 a month net as at the date of termination.

6. The claimant was given no notice of her dismissal. There was no pay in lieu of notice given nor was she paid any redundancy pay or pay in lieu of untaken holidays.

7. The claimant sought advice from her local Citizens Advice Bureau in early July 2023 but cannot recall the exact date. She recalls being advised about the existence of time limits for bringing claims to the Employment Tribunal (specifically, that a claim for redundancy pay had a longer time limit than the other claims) and the need to lodge Early Conciliation with ACAS before being able to lodge a claim with the Tribunal.

8. The claimant engaged ACAS Early Conciliation on 1 September 2023; she recalls that she was prompted to do this because she was about to go on holiday and thought she should do this before she went. The Early Conciliation Certificate was issued on 13 September 2023. The ET1 was lodged on 26 September 2023 when the claimant returned from holiday.

Relevant Law

9. Section 135 of the Employment Rights Act 1996 provides that an employee is entitled to redundancy payment where they are dismissed in circumstances where they are redundant.
- 5 10. The definition of redundancy can be found in section 139 of the Employment Rights Act 1996 and includes the situation where the employer ceases to carry on the business in which the employee is employed.
11. The amount of any redundancy pay is determined by section 162 of the 1996 Act and is a number of weeks' pay depending on age and length of service.
- 10 12. An employee is entitled to notice of the termination of their employment. The amount of any such notice can be found in the contract of employment or by way of the minimum statutory notice to be found in section 86 of the Employment Rights Act 1996 which is based on length of service.
- 15 13. Where an employer does not give the correct notice of dismissal then an employee can recover damages for this breach of contract equivalent to the salary they have lost for the relevant period.
14. The Tribunal was given the power to hear breach of contract claims by the Employment Tribunals Extension of Jurisdiction (Scotland) Order 1994.
- 20 15. Section 13 of the Employment Rights Act 1996 (ERA) provides that an employer shall not make a deduction from a worker's wages unless this is authorised by statute, a provision in the worker's contract or by the previous written consent of the worker.
- 25 16. In terms of s13(3) ERA, a deduction of wages arises in circumstances where the total amount of wages paid by an employer to a worker on any occasion is less than the total amount of wages properly payable on that occasion.
17. Section 27 of the ERA defines "wages" which include any fee, bonus, commission, holiday pay or other emolument referable to a worker's employment whether payable under the contract or otherwise.

18. Regulations 13 and 13A of the Working Time Regulations make provision for workers to receive 5.6 weeks' paid holidays each year.

19. Where a worker leaves employment part way through the leave year then Regulation 14 of the 1998 Regulations provides for compensation to be paid to the worker in respect of untaken holidays in the following terms:

(1) *This regulation applies where—*

(a) *a worker's employment is terminated during the course of his leave year, and*

(b) *on the date on which the termination takes effect ('the termination date'), the proportion he has taken of the leave to which he is entitled in the leave year under [regulation 13] [and regulation 13A] differs from the proportion of the leave year which has expired.*

(2) *Where the proportion of leave taken by the worker is less than the proportion of the leave year which has expired, his employer shall make him a payment in lieu of leave in accordance with paragraph (3).*

(3) *The payment due under paragraph (2) shall be—*

(a) *such sum as may be provided for the purposes of this regulation in a relevant agreement, or*

(b) *where there are no provisions of a relevant agreement which apply, a sum equal to the amount that would be due to the worker under regulation 16 in respect of a period of leave determined according to the formula—*

(AxB)-C

where—

A is the period of leave to which the worker is entitled under [regulation 13] [and regulation 13A];

B is the proportion of the worker's leave year which expired before the termination date, and

C is the period of leave taken by the worker between the start of the leave year and the termination date.

- 5 20. Section 23(2) of the Employment Rights Act 1996 (ERA) states that the Tribunal shall not consider a complaint of deduction of wages unless it is presented within 3 months of the date of payment of the wages.
21. The Tribunal has discretion under s23(4) to hear a claim outwith the time limit set in ss23(2) where they consider that it was not reasonably practicable for
10 the claim to be presented within the 3 month time limit and it was presented within a further period that the Tribunal considers to be reasonable.
22. Similar time limit provisions apply in respect of claims of breach of contract under the 1994 Regulations with a three month time limit running from the effective date of termination and the same power to hear a claim out of time.
- 15 23. Under s207B ERA, the effect of a claim entering ACAS Early Conciliation is to pause the time limit until the date on which the Early Conciliation Certificate is issued. The time limit is then extended by the period the claim was in Early Conciliation or to one month after the Certificate is issued if the Early Conciliation ends after the normal time limit.
- 20 24. The burden of proving that it was not reasonably practicable for the claim to be lodged within the normal time limit is on the claimant (*Porter v Bandridge Ltd* [1978] IRLR 271).
- 25 25. 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 lodge the claim in time (*London International College v Sen* [1992] IRLR 292, EAT and [1993] IRLR 333, Court of Appeal and *Palmer and Saunders v Southend-on-Sea Borough Council* [1984] IRLR 119).

26. Where the Tribunal concludes that it was not reasonably practicable for a claimant to have lodged his claim in time then it must go on to consider whether it was lodged in some further period that the Tribunal considers reasonable.
- 5 27. This is a question for the Tribunal to determine in exercising its discretion (*Khan*) but it must do so reasonably and the Tribunal is not free to allow a claim to be heard no matter how late it is lodged (*Westward Circuits Ltd v Read* [1973] ICR 301).
- 10 28. In assessing the further delay, the Tribunal should take account of all relevant factors including the length of the further delay and the reason for it. It will also be relevant for the Tribunal 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
- 15 (*Northumberland County Council v Thompson* UKEAT/209/07, [2007] All ER (D) 95 (Sep)).

Decision

- 20 29. There is no question that the claimant was dismissed by reason of redundancy; her employment terminated when the respondent ceased trading and this falls squarely into the definition of redundancy.
30. She is, therefore, entitled to a statutory redundancy payment. Given her age and length of service at the effective date of termination, this is a payment of 24 weeks' wages at £208.40 a week. This amounts to £5001.16.
- 25 31. In relation to the claims for holiday pay and notice pay, the primary time limit for lodging these claims expired on 30 August 2023. There is no question that the ET1 was lodged after this date.
32. Further, the claimant does not benefit from the "stop the clock" provisions of the ACAS Early Conciliation scheme because she lodged this after the expiry of the primary time limit.

33. The sole issue for the Tribunal is, therefore, whether to exercise its discretion to hear these claims out of time.
34. In determining that issue, the first question for the Tribunal is whether it was reasonably practicable for the claimant to have lodged the claim in time. The claimant's reason for the delay in lodging her claim is simply that she has missed the deadline.
35. The claimant did not seek to argue that she was unaware of the fact that there were time limits for lodging her claims or that there was any other sort of impediment to her lodging the claims in time.
36. In these circumstances, even though the claimant had missed the time limits by a very short period of time, the Tribunal was of the view that it had been reasonably practicable for the claims to have been lodged in time. There is, therefore, no basis on which the Tribunal can exercise its discretion to hear the claims for holiday pay and notice pay out of time. These claims are hereby dismissed.

Employment Judge Peter O'Donnell
Employment Judge

15/12/23

Date

Date sent to parties

20/12/2023