



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4106430/2023

5

Held in Glasgow on 11 January 2024

Employment Judge P O'Donnell

Miss Wilma Hill

10

**Claimant
In Person**

United Biscuits (UK) Ltd t/a Pladis

15

**Respondent
Represented by:
Mr D McCrum -
Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that the claim was lodged out of time and that it had been reasonably practicable for the claim to have been lodged within the relevant time limit. The Tribunal does not, therefore, exercise its discretion to hear the claim out of time and the claim is dismissed.

REASONS

Introduction

1. The claimant has brought a claim of breach of contract relating to the calculation of an enhanced redundancy pay made to her by the respondent. In summary, she alleges that the payment should have been calculated using a pay increase awarded to employees shortly before her dismissal.
2. The respondent contends that the claim has been lodged out of time. The present hearing has been listed to determine whether the claim has been lodged out of time and, if so, whether the Tribunal exercises its discretion to hear the claim out of time.

Evidence

3. The Tribunal heard evidence only from the claimant.
4. There was an agreed bundle of documents prepared by the parties. A page reference below is a reference to a page in this bundle.

Findings in fact

- 5 5. The Tribunal made the following relevant findings in fact.
6. The claimant had been employed by the respondent from 16 August 1982 until she was made redundant on 30 September 2022.
7. The redundancy arose from the closure of the factory in which the claimant worked. Employees were first informed of this on 11 May 2021 and
10 redundancies were made in stages with the claimant being one of the last groups to be dismissed.
8. Employees were paid an enhanced redundancy pay in excess of the requirements of statutory redundancy pay. The claimant was provided with information about how her payment was calculated including what pay
15 information was used in the calculation prior to her dismissal.
9. In September 2022, employees were awarded a 4.25% pay rise. This pay rise was not used in the calculation of the redundancy payment made to the claimant and she was aware of this when the payment was made when she was dismissed.
- 20 10. The claimant did not seek any legal advice about her redundancy situation or the calculation of her redundancy pay at any time prior to, or after, her dismissal. She took no legal advice at any time prior to lodging her ET1 nor did she carry out any research into her legal rights, the Tribunal process or time limits.
- 25 11. On 3 August 2023, the claimant learned that other former employees of the respondent had pursued claims to the Employment Tribunal regarding the calculation of their redundancy pay (specifically, the fact that the September 2022 pay rise was not used in the calculation) and that this had resulted in payments to these individuals. It is not in dispute that these claims had been

the subject of out of court settlements rather than a judgment in those claimants' favour.

12. The source of the claimant's knowledge was a former colleague who also worked for the respondent and with whom the claimant now worked in her new job.
13. On 4 August 2023, the claimant emailed the respondent (p40) explaining that she had become aware of the claims by other employees and seeking a revision of her redundancy pay to include the 4.25% pay rise.
14. The respondent replied on 15 August 2023 (p48) stating that the claimant was not due any further payment. The letter confirms that there have been claims by other employees and asserts that the limitation period for such claims has now passed. The letter also states that no employee has received an additional payment as a result of those other claims which, it was said, were being defended.
15. The claimant engaged in further correspondence with the respondent throughout August and September 2023 (pp50-59) but the respondent's position remained the same. The claimant did not seek any legal advice during this period.
16. On 7 October 2023, the claimant engaged ACAS Early Conciliation. She contacted ACAS because she was getting nowhere, as she saw it, with the respondent. She was not sure how she was aware of ACAS.
17. The Early Conciliation Certificate was issued on 9 October 2023. The claimant recalls the ACAS officer mentioning that the claim may be out of time.
18. The ET1 was presented on 24 October 2023.

25 **Relevant Law**

19. The Employment Tribunals Extension of Jurisdiction (Scotland) Order 1994 provides that the Tribunal shall not consider a complaint of breach of contract unless it is presented within 3 months of the effective date of termination.

20. The Tribunal has discretion hear such a claim outwith the time limit where they consider that it was not reasonably practicable for 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.
- 5 21. 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.
- 10 22. 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).
23. 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
15 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).
- 20 24. One of the most common reasons why a claimant will not lodge their claim within the normal time limit is either ignorance of, or a mistake regarding, their legal rights and/or the application of the relevant time limit. The leading case on this is *Wall's Meat Co Ltd v Khan* [1978] IRLR 49 where, at paras 60-61, Brandon LJ stated:-
- 25 “the impediment [to a timeous claim] may be mental, namely, the state of mind of the complainant in the form of ignorance of, or mistaken belief with regard to, essential matters. Such states of mind can, however, only be regarded as impediments making it not reasonably practicable to present a complaint within the period of three months, if the ignorance on the one hand, or the
30 mistaken belief on the other, is itself reasonable.”

25. The test for whether it was reasonable for the claimant to be aware of the time limit is an objective one and the Tribunal should consider whether a claimant ought to have known of the correct application of the time limit (see *Porter, Khan, Avon County Council v Haywood-Hicks* [1978] IRLR 118).
- 5 26. Ignorance or mistake “*will, further, not be reasonable if it arises from the fault of the complainant in not making such inquiries as he should reasonably in all the circumstances have made*” (as per Brandon LJ in *Khan*).
27. Where the Tribunal concludes that it was not reasonably practicable for the claimant to have lodged her claim in time then it must go on to consider
10 whether it was lodged in some further period that the Tribunal considers reasonable.
28. 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).
15
29. 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)
20 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, [2007] All ER (D) 95 (Sep)).

Decision

- 25 30. There is no question that the present claim has been lodged out of time; the claimant’s effective date of termination was 30 September 2022 and so the normal three month time limit expired on 29 December 2022; the ET1 was presented on 24 October 2023, a considerable time after the time limit expired.

31. The claimant does not benefit from the “stop the clock” provisions relating to ACAS Early Conciliation as she did not commence this process within the normal time limit that expired on 29 December 2023.
32. The sole issue in this case is, therefore, whether the Tribunal exercises its discretion to hear the claim out of time.
33. In considering whether to exercise its discretion, the first question for the Tribunal is whether it was not reasonably practicable for the claim to be lodged in time.
34. The only impediment to the claim being lodged in time was the claimant’s ignorance of the fact that she could pursue the present claim. However, this is not a case where the claimant was ignorant of essential facts giving rise to her claim. Rather, the claimant was aware of all the relevant facts at the end of her employment; she knew how her redundancy pay had been calculated; she knew that there was a pay rise being awarded prior to her redundancy; she knew this pay rise was not used to calculate her redundancy pay.
35. The claimant, therefore, had all the relevant facts in her possession and the reason why she did not bring the present claim within the time limit is that she was ignorant of the fact that there may have been a basis to bring a claim to the Tribunal.
36. However, the Tribunal considers that this ignorance was not reasonable. The claimant had taken no advice in relation to her redundancy and the calculation of her redundancy pay. Neither had she carried out any research of her own into her legal rights and remedies. Had she done so then she may well have received advice, or uncovered information about her rights, similar to that received by her former colleagues which led them to pursue their claims. There was no impediment to the claimant seeking advice or carrying out her own research at any stage. Indeed, even once she learned of the other claims, the claimant took no advice or carried out any research in relation to her potential claim or time limits.

37. The only change in circumstances which prompted the claimant to lodge the claim in question is learning that others pursued a claim which appeared to have been successful. The Tribunal pauses to note that these claims have not been “successful” in the sense that the Tribunal has issued a judgment in the favour of the other claimants but, rather, that a settlement has been reached between those parties.
38. The Tribunal does not consider that the claimant was, in any way, impeded from pursuing the present claim because she was unaware that others had pursued a similar claim or that those claims had resulted in a settlement. These are not essential or crucial facts which affect the question of whether the claimant has the basis to pursue a claim. The Tribunal has set out those facts above and they were all in the claimant’s knowledge at the moment the time limit started to run.
39. The reason why the claimant was ignorant of the potential to bring the present claim is that she took no steps to investigate that and seek advice on her rights.
40. The fact that the claimant learned, at a later date, that others pursued a claim arising from the same facts as her case does not mean that it was not reasonably practicable for her to lodge her claim in time.
41. In all these circumstances, the Tribunal considers that it was reasonably practicable for the claimant to have lodged her claim in time and for that reason it does not exercise its discretion to hear the claim out of time.
42. Although it is not necessary, the Tribunal will, for the sake of completeness, go on to address the second element of the test, that is, whether the claim was lodged in a further period which it considers to be reasonable.
43. The Tribunal does not consider that the claim was lodged in a reasonable further period. The claim was lodged 10 months after the expiry of the normal time limit which is a considerable period of time.
44. Even looking at the period from when the claimant learned of the other claims, the claimant did not engage Early Conciliation for a further two months and

then delayed lodging her ET1 for a further three weeks. The claimant, in her submissions, explained that she was waiting for a response from the respondent to various correspondence she had sent. However, the respondent's position that they were not prepared to revise the claimant's redundancy pay was made clear in their correspondence of 15 August 2023 and so the claimant was aware of this more than two months before she lodged her claim.

5

10

45. Further, the respondent raised the issue of the claim being out of time in their letter of 15 August and so the claimant was on notice that this was an issue. However, despite this, she still took another two months to lodge her claim.

46. Indeed, even once she had completed Early Conciliation, the claimant delayed for a further two weeks before presenting her ET1 and gave no explanation for this delay.

15

47. The Tribunal considers that, when looked at as a whole, the claimant did not act soon enough to lodge her claim once she became aware of the other claims and, more importantly, that there was an issue with time limits. In these circumstances, the further delay was not reasonable.

20

48. The claim is, therefore, dismissed on the basis that it has been lodged out of time and the Tribunal declines to exercise its discretion to hear the claim out of time.

Employment Judge Peter O'Donnell
Employment Judge

25

15/1/24
Date

Date sent to parties

16 January 2024

30