



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4104328/2023

Held in Glasgow on 18 December 2023

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Employment Judge: Rory McPherson

Mr M Crouch

Claimant
In Person

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Hayden Chilled Ltd

Respondent
Represented by:
Ms N Maguire -
Trainee Solicitor

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

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The decision of the Employment Tribunal is that:

1. the claimant's claim for Unfair Dismissal is dismissed, as the Tribunal does not have jurisdiction.
2. The claimant's remaining disputed claims of unpaid monies (both alleged unpaid overtime, which the respondent argues the Tribunal does not have jurisdiction and lying time) in terms of s13 Employment Rights Act 1996, together with the respondent's (also disputed) counterclaim are reserved for the Final Hearing appointed on **Monday 12 February 2024**.

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REASONS

Introduction

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Preliminary Procedure

1. The ET1 to which this claim relates, and which asserted claims of constructive unfair dismissal, notice pay, and arrears was presented on **Thursday 17 August 2023**. This followed upon referral to ACAS Early Conciliation on **Thursday, 8 June 2023**, and the issue of the certificate on Friday, **7 July**

2023. The claimant, in his ET1, identified that his employment had terminated on **Wednesday 19 April 2023.**

2. The respondent subsequently presented its ET3, which also confirmed the date of termination as **19 April 2023** resisted the claims, including stating that the claimant had presented his claim out of time. That ET3 further asserted an employer contract claim. That contract claim is resisted by the claimant.
3. On **14 November 2023**, the Tribunal wrote to the parties confirming that it proposed listing the claim for a Preliminary Hearing on **18 December 2023** on time bar and that parties should agree on a joint set of papers and ensure that evidence is brought with respect to the disputed issues with regard to time bar. On **16 November 2023**, the Tribunal confirmed that this in-person Preliminary Hearing set for 18 December 2023 will determine the preliminary issue, **Time Bar**. Parties were directed in relation to the production of documents.
4. As this Preliminary Hearing the claimant represented himself, and the respondent was represented by Ms N Maguire, trainee solicitor.
5. The respondent for this hearing provided a proposed **List of Issues** together with a **Bundle**. The bundle included documentation provided to the respondent being the relevant ET1, a second ET1 case number 4104465/2023 (together with ET3), the relevant ET3 for the current claim, a copy of the ACAS certificate, a document headed Agreed Statement of Facts and finally what was listed as ACAS correspondence between the conciliator and the respondent. It was, however, agreed after discussion at the outset that the ACAS correspondence would not be admitted and or referred to in accordance with s18 (7) of the Employment Tribunals Act 1996 (ETA 1996) and separately s18 (c).
6. Further, and at the outset of this Hearing, the respondent intimated that for the purpose of this hearing, they were restricting their argument to the question of time bar with respect to the **constructive unfair dismissal complaint**.

7. While resisting the factual basis of the complaint, the respondent conceded that the complaint of unpaid wages in respect of lying time (it is argued that there is no such outstanding payment) would have been brought in time. Further, the respondent reserved their position both on fact and on time bar
5 in respect of alleged unpaid overtime.
8. The claimant gave evidence on his own behalf. In all the circumstances there was no oral evidence from the respondent.
9. After the issue of oral judgment dismissing the claim for constructive unfair dismissal the claimant requested written reasons. This judgment sets out
10 those written reasons.

Issues for the Preliminary Hearing

10. The issue for this Preliminary Hearing was whether the complaint of unfair dismissal was presented within the statutory time limits. Dealing with this issue involves considering whether the claim was presented within the
15 primary time limit and, if not, whether it was not reasonably practicable for a complaint to be presented within the primary time limit all as set out in **s111 of the Employment Rights 1996 (ERA 1996)**.
11. That involves consideration of the provisions of section **207B** of **ERA 1996**, which, since 2014, have provided for an extension to that period where the
20 claimant undergoes early conciliation with ACAS. In effect initiating early conciliation “*stops the clock*” until the ACAS certificate is issued, and if a claimant has contacted ACAS within time, he will have at least a month from the date of the certificate to present his claim, although any extension beyond that month is limited having regard to the period before ACAS conciliation.

25 *Request for Written Reasons*

12. Subsequently and timeously following upon receipt of the written summary oral judgment a request was made by the claimant for written reasons.

13. The following evidential findings of facts are found to be relevant to the question for this Tribunal to consider as set out in the Tribunal's letter of November 2023 being the determination (only) of the preliminary issue of Time Bar in respect of the complaint of (Constructive) Unfair Dismissal.

5 **Findings in fact**

14. The claimant had been employed by the respondent as an HGV Trumper Driver since **Friday 15 May 2020**. A trumper driver is an HGV driver who, while making longer journeys, will be seen to have parked up the HGV overnight.

10 15. On **Wednesday 19 April 2023** at around 8 am in the morning, at the start of his first shift, he handed in his resignation with immediate effect to the respondent planning office. He did not offer any notice to the respondent, in effect extending the date of termination.

15 16. On **Monday 8 May 2023**, following the termination of his employment the claimant secured alternate employment.

17. On **Thursday 8 June 2023**, as the claimant was aware of his rights to assert claims, including a claim for constructive unfair dismissal, the claimant contacted ACAS to commence ACAS's early conciliation to commence that process.

20 18. On **Friday 7 July 2023**, ACAS issued the relevant certificate.

19. On **Thursday 17 August 2023**, the current claim ET1 was submitted online and recorded as received on that date. While the Tribunal intimated to the claimant that it was rejected, the Tribunal subsequently confirmed on 5 September 2023 that a Tribunal Judge had reconsidered that decision, had
25 decided that the claim could be accepted, and the claim was treated as presented on **17 August 2023**.

20. On **23 August 2023**, a duplicate ET1 was presented. A separate number was allocated to that: **4104465/2023**. In this duplicate claim, the claimant's former home was provided. The Tribunal intimated this duplicate claim to the

respondent on 30 August, setting out that it had been noted that this claim appeared to be submitted outwith the period within which such claims should normally be brought. Subsequently, the claimant agreed to withdraw the duplicate claim, and it was dismissed.

5 21. It was the claimant's belief at this hearing that the duplicate claim (4104465/2023) had been submitted before the current claim (4104328/2023) which is the subject of this Preliminary Hearing. The claimant did not, however, provide any documentation indicating that the claimant had previously raised in writing that belief to the respondent and or the Tribunal
10 such a belief.

22. The claimant was aware that there was a time limit for presenting his claim. While the claimant considered that the calculation of the expiry of that time limit, taking into account Early Conciliation, was complex, he did not make enquiries to ensure that he presented his claim within time.

15 **Submissions**

23. Following the evidential element of the hearing, the claimant argued that the complaint should not be rejected.

24. It is not considered necessary to set out the respondent's submission in detail beyond noting that the respondent argues that the claim was not presented in
20 time and the claimant had not demonstrated that it had not been reasonably practicable to present the claim in time.

Evidence

25. The claimant gave oral evidence. The Tribunal was unable to accept the accuracy of the honest but inaccurate recall of the claimant in relation to the
25 presentation of the duplicate claim (4104465/2023). In particular, the Tribunal concludes that the claimant is mistaken in his belief that the duplicate claim identified as presented on 23 August 2023 was presented before the current claim, which was presented on 17 August 2023.

Relevant Law

Unfair Dismissal

5 *Time Limit and Jurisdiction*

26. I consider that it is helpful to set out the terms of **s 111** of **ERA 1996**:

s111 Complaints to employment tribunal.

10 (1) *A complaint may be presented to an employment tribunal against an employer by any person that he was unfairly dismissed by the employer*

(2) *Subject to the following provisions of this section, an employment tribunal **shall not consider a complaint** under this section **unless** it is presented to the tribunal*

15 (a) ***before the end of the period of three months beginning with the effective date of termination, or***

(b) *within such further 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 of three months.***

20 (2A) *Section 207B (extension of time limits to facilitate conciliation before institution of proceedings) applies for the purposes of subsection (2)(a).*

25 (3) *Where a dismissal is with notice, an employment tribunal shall consider a complaint under this section if it is presented after the notice is given but before the effective date of termination.”*

27. As above, provisions of section **207B** of ERA 1996, since 2014, provide for an extension to that period where the claimant undergoes early conciliation

with ACAS. In effect, initiating early conciliation “*stops the clock*” until the ACAS certificate is issued and if a claimant has contacted ACAS within time to accommodate the EC procedure. Once that procedure is complete, however, the clock effectively starts ticking again.

- 5 28. The burden of proving that it was not reasonably practicable to present a claim in time is a high threshold and rests firmly on a claimant as set out in **Porter v Bandridge Ltd** [1978] ICR 943 (**Porter**). An employee must satisfy the Tribunal not only that she/he did not know his rights throughout the period preceding the complaint and there was no reason why she/he should know
10 but also that there was *no* reason why she/he should make inquiries.
29. In **Avon County Council v Haywood Hicks** [1978] IRLR 118 (**Avon**), the EAT overruled a Tribunal which had allowed a claim out of time on the basis that the claimant was, in fact, unaware of the time limit and at para 6 commented that “*this was a case where the employee out to have known of
15 his right even if he did not actually do so.*”
30. Something is “*reasonably practicable*” if it is “*reasonably feasible*” by reference to the Court of Appeal **Palmer v Southend-on-Sea Borough Council** [1984] ICR 372 (**Palmer**).
- 20 31. In **Northamptonshire County Council v Entwhistle** [2010] IRLR 740 (**Entwhistle**), the EAT reviewed existing authorities, including **Marks & Spencer Plc v Williams-Ryan** [2005] EWCA Civ 470 (**Williams-Ryan**) which the respondent referred to in their submission. In **Entwhistle**, Underhill J noted in para 3 Lord Denning's description that a (claimant) could not claim to be in reasonable ignorance if he had consulted a skilled adviser, even if that
25 adviser had failed to advise correctly, describing “*By exercising reasonable diligence the complaint could and should have been presented in time*” and Brandon LJ identified that where an employee has knowledge of his or her rights, there is an obligation on them to seek information or advice about the enforcement of those rights.
- 30 32. The Court of Appeal in **Lowri Beck Services v Brophy** [2019] EWCA Civ 2490 (**Brophy**) identified the test should be given a “*liberal interpretation in*

favour of the employee”; as in **Palmer v Southend-on-Sea Borough Council** [1984] ICR 372 (**Palmer**), something is “*reasonably practicable*” if it is “*reasonably feasible*”; if an employee misses the time limit because they are ignorant about the existence of a time limit, or mistaken about when it expires in their case, the question is whether that ignorance or mistake is reasonable, but it is important to note that in assessing whether ignorance or mistake are reasonable it is necessary to take into account any enquiries which the claimant or their adviser should have made; if the employee retains a skilled adviser, any unreasonable ignorance or mistake on the part of the adviser is attributed to the employee; and the test of reasonable practicability is one of fact and not law.

33. In **Asda Stores Ltd v Kauser** [2007] EAT/0165/07 Lady Smith at para 17 described that the “*relevant test is not simply a matter of looking at what was possible but to ask whether, on the facts of the case as found, it was reasonable to expect that which was possible to have been done*”.

Discussion and Decision

34. The claimant notified the respondent of the termination of his employment. There is no dubiety as to the date of termination.

35. The claimant understood that was the date of termination, as reflected in his ET1. There is no issue of notice having been provided, impacting on the effective date of termination. The claimant resigned. There was a clear reason why the claimant ought to have made inquiries in relation to time limits from that notification.

36. The claimant was, in any event, aware of his rights and was able to contact ACAS for the purpose of Early Conciliation, a necessary step prior to the issue of such claims. The claimant did not adduce any evidence upon which the Tribunal may conclude that it was not reasonably practicable to present the claim in time.

37. The claimant is mistaken in his belief at this hearing that claim 4104465/2023 was presented before this current claim 4104328/2023. Claim 4104465/2023

was presented on 23 August 2023 as identified on the ET1 provided to the respondent. While the duplicate claim 4104465/2023 recorded the claimant's former address, the claimant did not provide any contemporaneous documentary evidence in support of his mistaken belief at this hearing, such as an email from the claimant to the Tribunal setting out such a concern that 4104465/2023 had not been presented on 23 August 2023 and had been presented prior to the current claim 4104328/2023.

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38. Given the date the current claim form was presented, **Thursday 17 August 2023**, and from the dates of early conciliation, any complaint about something that happened before **Thursday 20 April 2023**, is potentially brought out of time, so the Tribunal may not have jurisdiction to deal with it. That is to say, the claim for unfair dismissal was not presented with a 3-month less one-day time limit (allowing for the operation of ACAS early conciliation (EC)).

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39. In relation to the claimant's claim of **Unfair Dismissal**, it would have been reasonably practicable for the claimant to have submitted his claim within the primary time limit. The Tribunal is satisfied that it was reasonable to expect that which was possible, namely the presentation of a claim within the 3 months less one-day time limit (allowing for the operation of ACAS early conciliation) of the date of termination on **Wednesday 19 April 2023**.

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20 40. The Tribunal recognises that the claimant, an HGV tramper driver, may spend periods of time away from his home. The claimant, however, knew of his right to approach ACAS and indeed did so, commencing EC on Thursday 8 June 2023, after he resigned on Wednesday, 19 April 2023. There was no evidence that it was not reasonably feasible, due to his working arrangements, to present a claim until 17 August 2023. There was no requirement to delay the presentation of the claim following the issue of the EC certificate on Friday, 7 July 2023, and while he had the benefit of the extension period to do so, he delayed beyond the same. The claimant described that he considered that the calculation of the expiry of the time limit, taking into account EC, was complex; he ought, in those circumstances, to have made sufficient enquiries to ensure that his claim was presented in time.

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41. No evidence was adduced that suggested it was not reasonably practical to have presented until **17 August 2023**. It is not accepted that there was any good reason for the claimant's delay. To the extent that the claimant relies on his mistaken belief that the duplicate claim was presented before this claim, that underlines that it would have been reasonably practicable to have presented his claim in time. In all the circumstances it was reasonable to expect that which was possible, the presentation of the claim in time, to have been done.
42. In the circumstances, the Tribunal does not have jurisdiction to consider the claimant's complaint of unfair dismissal and this claim is therefore dismissed.

R McPherson

Employment Judge

8 January 2024
Date

Date sent to parties

11 January 2024