



IN THE EMPLOYMENT TRIBUNAL (SCOTLAND) AT EDINBURGH

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**Judgment of the Employment Tribunal in Case No: 4103452/2023 Issued
Following Closed Preliminary Hearing (Case Management Discussion) Held
on the Cloud Based Video Platform on 7th March 2023 at 9.30 am**

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Employment Judge J G d'Inverno

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Mr S Wightman

**Claimant
In Person**

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Royal Mail Group Limited

**Respondent
Represented by:
Miss Meek, Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that the claimant's complaints of Unfair Dismissal and claim for payment in lieu of paid annual leave entitlement (holiday pay) are dismissed for want of Jurisdiction.

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J d'Inverno

Employment Judge

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19 March 2024

Date of Judgment

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Date sent to parties

20/03/2024

I confirm that this is my Judgment in the case of Wightman v Royal Mail Group Limited and that I have signed the Judgment by electronic signature.

REASONS

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1. This case called for Open Preliminary Hearing on the Cloud Based Video Platform on 7th March 2024 for Determination, on a prior basis of the Preliminary Issue of Jurisdiction by reason of asserted Time Bar.

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2. The claimant appeared on his own behalf, gave evidence on oath, and answered questions put in cross examination by the Tribunal. The respondents led no oral evidence but relied upon the documents within the Hearing Bundle. A Hearing Bundle extending to some 58 pages was before the Tribunal. Reference was made to some of the items within the Bundle in the course of evidence and submission. Each party addressed the Tribunal in submission, the respondent's representative firstly setting out her contention, based upon the evidence and the applicable law, that the Tribunal should determine that it lacked Jurisdiction to consider the claims. The claimant then taking the opportunity to reply and the respondent's representative afforded, but not taken, a limited right of response.

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The Issues

3. The Issues for Determination before the Tribunal were:

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(First) Whether the claimant's complaint of Unfair Dismissal and claim of payment of a lump sum of money in respect of alleged accrued but untaken holiday pay, whether under the Working Time Regulations 1998 or section 13 of the Employment Rights Act 1996 were presented out of time, respectively in terms of section 111, section 23 of the Employment Rights Act 1996 ("ERA") and of Regulation 13 of the Working Time Regulations 1998 ("The WTR"); and accordingly,

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(Second) Whether the claimant, as at the date of acceptance of his initiating Application ET1, that is 2nd November 2023, lacked Title to Present, and the Tribunal Jurisdiction to Consider, his complaints.

5 **Findings in Fact**

4. On the oral and documentary evidence placed before it, the Tribunal makes the following essential Findings in Fact, restricted to those relevant and necessary to the Determination of the Issues.

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5. The claimant was summarily dismissed by the respondent on the 9th of March 2023.

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6. The Effective Date of Termination of the claimant's employment was the 9th of March 2023. As at that date the claimant was aware of:-

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(a) His right to complain to an Employment Tribunal of Unfair Dismissal and of his right to seek payment in respect of allegedly accrued but untaken paid annual leave entitlement outstanding as at the date of his dismissal.

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(b) That these complaints were subject to a statutory 3 month time limit measured from the Effective Date of Dismissal subject to its being extended by the number of days during which the claimant was engaged with early conciliation.

7. On the 9th of March the claimant engaged with ACAS and commenced early conciliation (day A).

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8. On the 10th of March 2023 the claimant gave notice of pursuing an internal appeal against his dismissal.

9. On the 10th of March 2023 the claimant received a pay slip itemising his final pay and which in fact included one day's pay overpayment.
10. On the 17th of March the claimant received a further pay slip from the respondents which dealt with the one day's overpayment.
11. No further pay was received by the claimant from the respondent beyond the 10th of March 2023.
12. ACAS issued to the claimant an Early Conciliation Certificate on the 20th of April 2023 (day B) prior to the expiry of the 3 month statutory time limit within which the claimant would be entitled to raise proceedings with the Employment Tribunal in respect of Unfair Dismissal and (b) outstanding holiday pay whether in terms of the WTR or section 13 of the ERA which time periods would respectively have expired on 8th of June and the 9th of June.
13. Those periods were extended by the period of time starting with the day after the date on which the claimant first engaged in early conciliation, namely commencing with the 10th of March and concluding on the date of issue of the Conciliation Certificate, day B, on 20th April, extending the primary statutory time limits for the purposes of sections 23(2)(a) and sections 111(2)(a) of the Employment Rights Act and Regulation 30(2)(a) to the 20th and 21st July 23 respectively.
14. The claimant received communication of the unsuccessful outcome of his internal Appeal against dismissal on the 1st of June 2023. As at the 1st of June 2023 the claimant:-
- (a) knew that he had been dismissed.
 - (b) knew that his Appeal against dismissal had been unsuccessful.
 - (c) knew that he had received his final payment in respect of wages including in respect of holiday pay from the respondents.

(d) knew that he believed that further sums were due to him in respect of accrued but untaken paid holiday entitlement.

5 (e) knew that he had the right to complain to the Employment Tribunal about both his Unfair Dismissal and to seek to claim from the respondents, before the Employment Tribunal, a sum in lieu of alleged accrued but untaken paid annual leave entitlement.

10 (f) knew of the original 3 month time limit which had begun running on the 9th and 10th of March 2023 in respect of those claims.

(g) knew that that time period fell to be extended by the number of days during which he had been engaged in early conciliation.

15 (h) knew that the period of early conciliation commenced with his contacting ACAS on the 9th of March 2023 and had ended with their issuing to him of an Early Conciliation Certificate on the 20th of April 2023.

20 (i) knew by the arithmetic addition of the days engaged in early conciliation to the initial 3 month time limit, that the time period during which he was able, of right, to present complaints to the Employment Tribunal about unfair dismissal and sums due by way of outstanding holiday pay, would respectively expire on the
25 20th and 21st July 2023 at the latest

15. The claimant submitted an initiating Application ET1 to the Employment Tribunal. On that initiating Application the claimant wrongly stated that he
30 was exempt from early conciliation.

16. By letter dated 20th July (at page 27 of the Bundle) the Tribunal wrote to the claimant advising him that his claim form had been rejected and could not be accepted because on its face he did not appear to have complied with the

requirement to contact ACAS before instituting relevant proceedings and, had indicated, rather, that he was exempt from early conciliation, whereas none of the exemptions applied to his claim.

- 5 17. The letter went on to advise the claimant; that the form was being returned to him, that he had the right to make Application in writing for reconsideration of the decision to reject his claim and, that if doing so, he must present his claim form again, amended if necessary.
- 10 18. The claimant was further advised in terms of the letter that the relevant time limit for presenting his claim had not altered.
- 15 19. After the expiry of some 6 weeks the claimant, by correspondence dated 31st August 2023, the claimant made a late Application for Reconsideration of the Tribunal's Decision of 20th July 2023 to reject his claim form.
- 20 20. By correspondence dated 13th September 2023 the Tribunal advised the claimant that his Application for Reconsideration could not be considered as he had failed to provide a complete ECC number (Early Conciliation Certificate) nor had he submitted an amended ET1.
- 25 21. Following the expiry of further period of 6 weeks the claimant, by Application dated 2nd of November 2023 made further Application for Reconsideration of the Decision to reject his claim which Application, in the context of his having provided the necessary full ECC number and appropriate amendment, was accepted and the claimant's Form ET1 treated by the Tribunal as presented as at the 2nd of November 2023.
- 30 22. By letter dated 9th November 2023 (page 31) the Tribunal advised the claimant that the effective date of presentation of his claim form was 2nd November 2023.

Summary of Submissions

23. The respondent's representative submitted that the material dates in the chronology were either accepted by the claimant or, on the basis of the clear
5 documentary evidence before the Tribunal, should be found in fact to be the case.
24. On the basis of that chronology she invited the Tribunal to hold that all of the information necessary to submit timeous claims, including knowledge of his
10 right of action and relevant time limits, was available to the claimant as at the 9th/10th of March 2023, that being the Effective Date of Termination of his employment and the date upon which he commenced early conciliation proceedings. That had remained the position as at the 20th of April 2023 when ACAS issued to him the Early Conciliation Certificate equipped with
15 which he was entitled and in a position to raise his claims. That also remained the position as at the 1st of June 2023, the date upon which he received communication of the outcome of his unsuccessful internal Appeal against the decision to dismiss him.
- 20 25. Notwithstanding the above, the claimant had delayed until shortly before the expiry of the ACAS extended time limit on 20th July 2023 making any attempt to submit his claim form. No explanation was placed before the Tribunal in his evidence that went to demonstrate that it would not have been reasonably practicable for him to have submitted the form in what was a period of time in
25 excess of 4 months which elapsed since the Effective Date of Termination of his employment. The only explanation, albeit not one that would not have rendered it not reasonably practicable for him to submit, was that he had wanted to await the outcome of his internal Appeal decision which he received on the 1st of June 2023. He had without explanation to the Tribunal then allowed a further 6 weeks to elapse after that date before apparently
30 taking any action. In the event his attempt to submit an Application on or about the expiry of the extended time limit was ineffective because he had wrongly stated in the claim form that he was exempt from early conciliation when that, in fact, was not the case. The claimant had stated in evidence

that that was a mistake on his part but he had provided no explanation as to why or how such a mistake came to be made particularly in circumstances when he himself knew that he had engaged in early conciliation and was in possession of an Early Conciliation Certificate bearing the relevant number.

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26. Despite being advised in the Tribunal's rejection letter of 20th July that he had the right to make an Application for Reconsideration of the decision to reject his claim, that any such Application required to be made in writing within 14 days of the date of that letter and required to be accompanied by an amended ET1. The claimant allowed a further 6 weeks of time to expire before attempting, on the 31st of August to make a late Application for Reconsideration. He was advised by the Tribunal on the 13th of September that that Application could not be considered because he had neither submitted an amended ET1 nor provided a complete ECC number, all things that he had been advised in the letter of 20th July were required. Notwithstanding that correspondence, the claimant had again allowed a further 6 week period to expire and elapse before eventually submitting an Application in correct form which was subsequently accepted by the Tribunal as at 2nd November 2023, some 3½ months after the expiry of the initially extended statutory time limit. That additional period of time was not in the respondent's representative's submission a period of time which fell to be regarded as reasonable in the circumstances for the purposes of the exercise of the Tribunal's discretion.

27. The respondent's representative made reference to the well known authorities in which the Higher Courts have given guidance on the interpretation of the statutory term not reasonably practicable and on the matters to be taken into account by the Tribunal in determining the same.

28. On the above grounds the respondent's representative invited the Tribunal to hold firstly that the claimant, upon whom the burden of proof rested, had failed to discharge the burden and had failed to establish, on the balance of probabilities, that it was not reasonably practicable for him to have presented his claims within the extended primary statutory period. Further, and on an

esto basis let it be assumed that the Tribunal was not so persuaded, that separately and in any event by his allowing a further 3 month plus period to elapse before successfully submitting his claim, the claims could not be regarded as having been subsequently presented within a time period which was, in the circumstances reasonable. She accordingly invited the Tribunal to dismiss the claims for want of Jurisdiction.

29. In submission the claimant indicated that he had little to add but wished to reiterate all that he had said in evidence. He stated that he had thought he was getting it right and initially had thought that he had lodged his claim in time. The initial problem was due to a mistake on his part. In relation to whether he could not reasonably have lodged his claim between the 1st of June, the date upon which he had learned of the outcome of his internal Appeal and the 20th of July, the date of expiry of the time limit, he thought that there would have been reasons but he could not remember what they were.

30. In relation to the additional 3 months that it took him thereafter to eventually lodge his claims in a form that could be accepted by the Tribunal he considered that he probably could have done it sooner but again if he didn't there would have been reasons although he could not remember what those were.

The Applicable Law

Discussion and Disposal

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31. On the evidence led and the Findings in Fact made there was no doubt that the claims which were ultimately treated as accepted by the Tribunal on the 2nd of November 2023, were not presented before the end of the statutory 3 month period beginning with the Effective Date of Termination of employment but as extended by the day spent in early conciliation.

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32. The statutory test to be met in respect of each of the claims and, in the case of the claim for holiday pay whether regarded as a Working Time Regulations

claim or a section 13 Unlawful Deduction from Wages claims is the same, namely;

5 (a) *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 3 months. The EAT has made clear that the term not reasonably practicable is to be interpreted in the same way across all 3 statutory regimes.*

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(b) That test, incorporated in section 111(2) of the ERA and in the other provisions, should be given a liberal interpretation in favour of the employee (**Marks and Spencer Plc v Williams-Ryan**) [2005] IRLR 562 CA.

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33. The term reasonably practicable falls to be interpreted as meaning reasonably feasible, that is to say the questions to be asked is "*Was it reasonably feasible to present the complaint to the Employment Tribunal within the relevant time limit*" (**Palmer and Saunders v Southend on Sea Borough Council** [1984] IRLR 119 CA. The answer to that question incorporates an issue of fact to be determined by the Tribunal on the evidence in each case. As Lady Smith put it in the **Asda Stores** case in 2007 "*On the facts was it reasonable to expect that which is possible to have been done*".

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34. The onus of proof in satisfying the Tribunal that it was not reasonable practicable sits with the claimant.

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35. In the present circumstances the claimant was fully aware of his rights and had at his disposal all of the information and means to make his complaint from the very beginning of the primary statutory period, namely the effective date of his summary dismissal on 9th of March. He chose to await the outcome of his internal Appeal against dismissal before progressing matters. That was something that he was entitled to do and no doubt made practical

sense in the circumstances, provided he was otherwise ready to make his claim. Having received the internal Appeal outcome on the 1st of June, however, he appears to have taken no steps to present his complaint until on or about shortly before the date of expiry of the time limit. No explanation was put before the Tribunal as to why that was the case other than when he submitted his claim on or about the 20th of July that he thought that he had got everything right when he stated on his claim form that he was exempt from the requirements of early conciliation. Accepting that that in fact was not the case, something which led to the rejection by the Tribunal of his claim on the 20th of July 2023, the claimant stated that that was a mistake on his part. He, however, provided no explanation as to how such a mistake occurred such as would allow the Tribunal to understand whether an element existed which would have rendered it not reasonably practicable for him to submit a correctly completed form within the time limit. On the evidence presented the Tribunal is unable to be satisfied that it was not reasonably practicable for the claimant to present his complaints in the ACAS conciliation extended original time limit. Separately, and in any event, even had the Tribunal been able to be so satisfied it would not have held that the claim had thereafter been presented in such further time as was reasonable.

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36. In writing to the claimant on the 20th of July 23 the Tribunal advised him of a number of things including his right to make an Application for Reconsideration of the rejection decision in writing within 14 days and further, **of the fact that the time limits for presenting his claim were unaltered by the rejection.** (The emphasis appears in the Tribunal's communication). The Tribunal also informed the claimant in the same letter of the matters that would require to be addressed by him in making an Application.

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37. The claimant delayed for a further period of 6 weeks until 31st of August 2023 before attempting to make such an Application. In doing so he did not include the complete appropriate Early Conciliation Certificate number nor did he attach/provide an amended ET1. He was accordingly advised on the 13th of September by the Tribunal that his Application for Reconsideration could not be considered until he addressed those matters. He again delayed doing

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so for a further and second period of 6 weeks, only ultimately submitting an Application for Reconsideration together with an amended ET1 etc on the 2nd of November 2023. In these circumstances and absent any explanation for why such substantial subsequent delays occurred after the expiry of the time limit, the Tribunal would not have considered that the Applications were
5 subsequently made within a reasonable period of time.

38. For the above reasons the Tribunal does not consider that its discretion to extend time has been awakened under any of the applicable statutory
10 provisions and the claims are dismissed for want of Jurisdiction.

Joseph d'Inverno

Employment Judge

19 March 2024

Date of Judgment

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Date sent to parties

20/03/2024

**I confirm that this is my Judgment in the case of Wightman v Royal Mail
25 Group Limited and that I have signed the Judgment by electronic signature.**