



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4100534/2024

Hearing Held by CVP on 26 April 2024

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Employment Judge O'Donnell

15 **Mr J Mckinsley**

**Claimant
In Person**

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Advanced Roofing Edinburgh LTD

**Respondent
Represented by:
Mr Fyfe, Director**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

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

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REASONS

Introduction

1. The claimant has brought complaints of unfair dismissal and redundancy pay. The respondent resists these claims. In particular, they say that the Tribunal does not have the power to hear the claims because they have been lodged out of time.

Evidence

2. The Tribunal heard evidence from only the claimant. The respondent did not cross-examine him.
3. Neither party relied on any documents other than the claim form (ET1) and response (ET3).

Findings in fact

4. The Tribunal made the following relevant findings in fact.
5. The claimant was dismissed on 14 July 2023. About a week after his dismissal, he contacted a Citizens Advice Bureau for advice about this and they referred him to ACAS.
6. The claimant contacted ACAS who told him that he needed a lawyer. Neither the CAB or ACAS mentioned the Employment Tribunal or the issue of time limits when the claimant first contacted them.
7. The claimant then sought to secure the services of a lawyer. He describes contacting “every” lawyer in Glasgow and Edinburgh but being unable to secure the services of a lawyer. The reason for this is that they were all looking for him to pay money upfront and he could not afford this.
8. At the same time, the claimant’s mother and father had been in hospital. They were admitted at different times and returned home at different times.

9. On or around 25 January 2024, the claimant contacted ACAS to explain he could not secure a lawyer. The person he spoke to said that he could represent himself and, for the first time, mentioned the Employment Tribunal including the issue of time limits.
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10. The claimant commenced ACAS Early Conciliation on 25 January 2024 with the certificate being issued on 26 January 2024.
- 10 11. The claim form (ET1) was lodged on 26 January 2024.

Relevant Law

12. Section 111(2)(a) of the Employment Rights Act 1996 (ERA) states that the Tribunal shall not consider a complaint of unfair dismissal unless it is presented within 3 months of the effective date of termination. A similar provision regarding time limits exists for claims of statutory redundancy pay where the time limit is 6 months from the date of termination.
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13. The Tribunal has discretion under 111(2)(b) to hear a claim outwith the time limit set in s111(2)(a) 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. The same discretion exists for claims of redundancy pay.
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14. 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.
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15. 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 Bاندridge Ltd* [1978] IRLR 271).
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16. 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).
17. 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, 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 :-
- “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 mistaken belief on the other, is itself reasonable.”*
18. 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).
19. 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*).
20. Another very common reason for the time limit being missed is a mistake made by an adviser. If that is the reason then, as a general rule, the claimant does not get the benefit of the escape clause (*Dedman v British Building and Engineering Appliances Ltd* [1973] IRLR 379). However, there

are a number of conditions for that general rule to apply; the adviser must be a professional or skilled adviser (they do not need to be a qualified lawyer); the adviser must themselves have been at fault in the advice which they gave; the wrong advice must have been the substantial cause of the time limit being missed.

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21. The issue of ignorance or mistake by the claimant as to the application of the time limit can overlap with that of mistake by the professional adviser where a claimant asserts that the adviser did not inform them of the time limit. The principle in *Dedman* applies in such cases to deprive the claimant of the escape clause and the position is summed by Lord Denning in *Khan*:-

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"I would venture to take the simple test given by the majority in [Dedman]. It is simply to ask this question: had the man just cause or excuse for not presenting his claim within the prescribed time? Ignorance of his rights — or ignorance of the time limits — is not just cause or excuse, unless it appears that he or his advisers could not reasonably be expected to have been aware of them. If he or his advisers could reasonably have been so expected, it was his or their fault, and he must take the consequences."

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22. Where the Tribunal concludes that it was not reasonably practicable for the 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.

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23. 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).

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24. 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 (*Northumberland County Council v Thompson* UKEAT/209/07, [2007] All ER (D) 95 (Sep)).

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Decision

25. There is no question that the claims have been presented out of time. The time limits expired on 13 October 2023 (unfair dismissal) and 13 January 2024 (redundancy pay). The ET1 was presented after these dates.

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26. Further, the claimant does not benefit from the extension of time under s207B ERA because Early Conciliation was not commenced until after the expiry of the normal time limit.

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27. The sole issue for the Tribunal is whether it exercises its discretion to hear the claims out of time. For the reasons set out below, the Tribunal does not consider that this is a case in which it is prepared to exercise its discretion.

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28. From the evidence presented by the claimant, the Tribunal considers that the primary reason why his claim was presented late was that he was unaware of his right to bring the claim to the Tribunal and the time limit for doing so until on or around 25 January 2024.

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29. This was exacerbated by the issues in his personal life and his fruitless search for legal representation but these were not the direct cause of the delay. The Tribunal draws this conclusion from the comment made by the claimant in his evidence that, if he had known of the time limit, he would have made sure the claim was lodged in time.

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30. The Tribunal does not consider that the claimant's ignorance of his rights were reasonable. He sought advice about his rights from both a Citizens Advice Bureau and ACAS who would be expected to be aware of the issue of time limits. Indeed, the Tribunal considers that it is highly surprising that

neither of these bodies mentioned the Employment Tribunal or time limits when the claimant first contacted them; the short and strict time limits for bringing claims to the Tribunal, as well as the consequences which follow if the time limit is missed, are well known to those who advise on or practice in the field of employment law.

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31. Applying the tests set out in *Khan* and *Dedman* (above), the Tribunal considers that any ignorance or error in relation to the issue of time limits is not one which was reasonable for either the claimant or those who advised him. The consequences of that is, therefore, something which must be borne by the claimant.

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32. Further, the Tribunal does consider that the claimant himself must bear some responsibility directly. He took a very long time before returning to ACAS for further advice. The Tribunal appreciates that he was seeking legal representation during this time but it would have been apparent to a reasonable claimant at a much earlier date that he was going to struggle to secure this. The claimant's evidence was that the position was the same for each lawyer he approached; they wanted money upfront and he did not have it. This pattern would have been evident relatively early on but the claimant did not go back to ACAS until January 2024 more than 6 months after his dismissal.

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33. The Tribunal accepts that there were issues in the claimant's personal life and it empathises with him in this but it was not his evidence that this occupied his time to the exclusion of all else. Indeed, his evidence was that he was able to contact "every" lawyer in Glasgow and Edinburgh for assistance during this period. If he could do that then he could have contacted ACAS, another adviser or even carried out his own research into his legal rights at an earlier date.

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34. For all these reasons, the Tribunal considers that it was reasonably practicable for the claimant to have lodged his claim within the statutory time limit and so it does not exercise its discretion to hear the claim out of time.

35. The claim is, therefore, dismissed as the Tribunal does not have the jurisdiction to hear it.

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Employment Judge: P O'Donnell
Date of Judgment: 26 April 2024
Entered in register: 29 April 2024
and copied to parties

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