



## **EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case No: 8000723/2024**

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**Held in Glasgow on 26 August 2024**

**Employment Judge P O'Donnell**

10 **Mr N Burke**

**Claimant  
In Person**

15 **WSP UK Ltd**

**Respondent  
Represented by:  
Mr C Asbury -  
Solicitor**

### **JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

20 The judgment of the Employment Tribunal is that the claim was lodged out of time and the Tribunal does not exercise its discretion to hear the claim out of time. The claim is hereby dismissed for lack of jurisdiction.

### **REASONS**

#### **Introduction**

25 1. The claimant has brought a claim of unfair dismissal which is resisted by the respondent. The primary defence is that the claim was lodged out of time.

#### **Preliminary issues**

30 2. During the course of the hearing, an issue arose as to what claim was being advanced. The claimant, in his evidence, made a number of references to the respondent failing to make reasonable adjustments and that he was dismissed because he was disabled.

3. The respondent's representative raised the issue that the respondent only considered that they were facing a claim of unfair dismissal (under the

Employment Rights Act 1996) and not a claim of disability discrimination (under the Equality Act 2010). The claimant's position that he was pursuing a discrimination claim.

4. Having reviewed the ET1 claim form, the Tribunal confirmed to parties that it considered that only a claim for unfair dismissal had been raised for the following reasons:
- a. At 8.1 of the form, the box for unfair dismissal had been ticked but none of the boxes for discrimination had been. The Tribunal has to proceed on the basis that this was a choice made by the claimant when completing the form although the ticking of these boxes is not wholly determinative of what claims are being made if there is something in the narrative at the claim at 8.2 that suggests otherwise.
  - b. The claimant does describe an issue relating to the provision of a suitable chair at 8.2 of the ET1 form and describes this as a "reasonable adjustment". However, the Tribunal does not consider that the narrative, even taking into account that the claimant is a party litigant, can be read as raising a claim about a breach of the duty to make reasonable adjustments. Rather, the provision of the chair is part of a narrative describing the events leading to the claimant's dismissal for unauthorised absences rather than being an allegation that there was a breach of the duty.
  - c. Further, there is nothing at 8.2 for the ET1 form which can be read as saying that the claimant's dismissal for alleged unauthorised absences amounted to some form of disability discrimination. The claimant does not, for example, suggest any link in the delay in providing a suitable chair with the circumstances giving rise to issues with his sick notes that is said to have led to the claimant's dismissal.

### **Evidence**

5. The Tribunal heard evidence from only from the claimant.
6. Neither party relied on any documents in evidence.

**Findings in fact**

7. The Tribunal made the following relevant findings in fact.
8. The claimant was dismissed on 18 October 2023.
9. After his dismissal, the claimant fell into a depression and was prescribed a range of anti-depressants to treat this. The claimant has existing medical conditions from injuries sustained in an accident which leaves him in considerable pain and he takes a range of painkillers to help him manage this pain.
10. The claimant was unaware of his right to challenge his dismissal in the Employment Tribunal and of the time limits for doing so. He did not seek advice after his dismissal and took no steps to investigate his rights (for example, by carrying out his own research on the internet). The claimant attributes this lack of action to the effects of his medical conditions.
11. It was not until some point in January 2024 (a precise date was not given) that the claimant learned about the possibility of bringing a claim to the Tribunal. He was speaking to a friend who happens to be an employment lawyer and the friend informed him that he could bring a claim. The claimant was not speaking to his friend for the purposes of getting advice; the conversation was a social one in which they were catching up with each other and it was only when the claimant explained how he had been dismissed by the respondent that his friend advised him that he could bring a claim to the Employment Tribunal.
12. The friend explained to the claimant that there were time limits for bringing a claim and that his claim might be time barred. She said that he should contact ACAS as soon as possible.
13. The claimant contacted ACAS to engage Early Conciliation on 19 April 2024. In the intervening period he had been trying to find a lawyer who would assist him and contacted 5 or 6 firms of solicitors. He could not afford any of them.

14. The ACAS Early Conciliation Certificate was issued on 30 April 2024. The ET1 claim form was lodged on 27 May 2024.

### Submissions

- 5 15. Mr Asbury helpfully agreed to deliver his oral submissions first to allow the claimant to respond to what was being said. The Tribunal does not intend to set out the submissions from either side in detail. These have been noted and the Tribunal will refer to any point raised that requires to be specifically addressed in its decision below.

### Relevant Law

- 10 16. 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.
- 15 17. The Tribunal has discretion under s111(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.
- 20 18. 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.
- 25 19. 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).
20. 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).*

21. One of the most common reasons why a claimant will not lodge their claim  
5 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:

10 *“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.”*

22. The test for whether it was reasonable for the claimant to be aware of the time  
15 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*).

23. 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  
20 the circumstances have made”* (as per Brandon LJ in *Khan*).

24. 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.

25 25. 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*).

26. In assessing the further delay, the Tribunal should take account of all relevant  
30 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  
5 (Northumberland County Council v Thompson UKEAT/209/07, [2007] All ER (D) 95 (Sep)).

### Decision

27. There was no question in this case that the ET1 was lodged out of time. The normal time limit expired on 17 January 2024 and the ET1 was not lodged  
10 until over four months later. Further, the claimant does not benefit from the extension of time for ACAS Early Conciliation as he engaged this process after the expiry of the normal time limit.
28. The real crux of the case is whether the Tribunal exercises its discretion to hear the claim out of time. For the reasons set out below, the Tribunal is not  
15 prepared to exercise its discretion under s111(1)(b) ERA.
29. The claimant's explanation for the delay in lodging the claim is a combination of ignorance of his rights and the effect of his medical conditions.
30. In terms of the claimant's lack of knowledge about his rights, the Tribunal does not consider that this was reasonable given that the claimant did nothing after  
20 his dismissal to investigate this. It is within judicial knowledge that even a cursory internet search will provide people with access to a range of reputable sources of information (for example, ACAS, government, trade union, Citizens Advice and law firm websites) about employment rights, the Tribunal and time limits. In these circumstances, it is not difficult for claimants to find out what  
25 options they have to seek a legal remedy when dismissed and a lack of knowledge about such matters is not reasonable.
31. In any event, any lack of knowledge fell away from January 2024 onwards as the claimant had then received informal advice from his friend and was aware of his rights. However, he still took another three months to engage Early

Conciliation and another month after the Certificate was issued to lodge his ET1 claim form.

- 5 32. There was no explanation for this delay other than the fact that the claimant was trying to find a lawyer to represent him. However, there was nothing to stop the claimant from taking the necessary actions (that is, engaging Early Conciliation and lodging the ET1) in order to avoid delay whilst still seeking a representative. In particular, Early Conciliation involves either a phone call or a simple online form that does not require any particular legal expertise. The claimant was subsequently able to complete and submit the ET1 form himself.
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33. In terms of the second reason for the delay, the Tribunal does not doubt that the claimant was unwell after his dismissal and has the greatest of sympathy for the claimant. However, there was no evidence that claimant was, in any way or at any time, impeded by his health conditions from researching his rights, seeking advice or taking any other action to progress the claim.
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34. Certainly, by January 2024, the claimant was engaging in social activities and there was no evidence that his health impeded him at all after this point given that he describes being able to contact lawyers to seek assistance.
35. In all these circumstances, the Tribunal considers that it was reasonable practicable for the claim to have been lodged in time. The claimant has not presented sufficient evidence that he was impeded from doing so; any lack of knowledge about his rights was not reasonable and there was insufficient evidence that his medical conditions prevented him from taking the necessary steps to pursue his claim.
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- 25 36. Even if the Tribunal had been persuaded that it had not been reasonably practicable for the claim to have been lodged in time then it would have found that the claim had not been lodged within such further period as the Tribunal considered to be reasonable.
- 30 37. Any impediment arising from the claimant's lack of knowledge had fallen away in January 2024 when he spoke to his friend; he was advised of his right to

bring a claim, the issue of time bar and the need to action without delay. Given that this informal advice was given either before or shortly after the normal time limit expired, the claimant could have taken steps to progress his claim without significant delay.

5 38. However, he did not do so and waited a further three months to engage Early Conciliation. There is no explanation for this other than the claimant trying to find a lawyer. For the reasons set out above, the Tribunal does not consider that this is a reasonable explanation for this delay.

10 39. Even then, the claimant delayed for approximately a month after receiving the Early Conciliation Certificate before lodging his ET1 and there was no explanation given for this at all.

15 40. The Tribunal does not consider that the claimant's health provides any reasonable explanation for the delay given that he was able to contact lawyers, engage with ACAS and lodge his ET1 during this period. This indicates that the claimant was not impeded from dealing with the case and any delay during this period cannot be explained by his health.

20 41. The Tribunal considers that the four month delay in lodging the claim from when the claimant became aware of his right to do so is not reasonable and so would not be prepared to conclude that the claim had been lodged with a reasonable further period.

42. The claim has, therefore, been presented out of time and the Tribunal is not, for the reasons set out above, prepared to exercise its discretion to hear the claim out of time. The claim is hereby dismissed for lack of jurisdiction.

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**Employment Judge: P O'Donnell**  
**Date of Judgment: 03 September 2024**  
**Entered in register: 04 September 2024**  
**and copied to parties**

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