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EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4100173/2024

Held at Aberdeen on 1 October 2024

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Employment Judge N M Hosie

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Mr David Adamczyk

**Claimant
In Person**

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Aberdeen City Council

**Respondent
Represented by,
Mr S Noor
Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is that the claim is time barred and is dismissed for want of jurisdiction.

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E.T. Z4 (WR)

REASONS

1. The claimant, David Adamczyk, submitted a claim form on 12 January 2024. He intimated complaints of unfair dismissal, race discrimination and discrimination on the ground of religion or belief. The respondent, Aberdeen City Council, admitted the dismissal but claimed that the reason was “gross misconduct” and that it was fair. Otherwise, the claim was denied in its entirety.

Time bar

2. Employment Tribunal proceedings must be started within certain time limits. In short, an unfair dismissal complaint must be presented within three months of the effective date of termination of employment; a discrimination complaint must be presented within three months of the date or dates of the acts complained of. However, a claimant must first contact ACAS and be offered early conciliation before being allowed to submit a claim. There are special provisions in S.207B of the Employment Rights Act 1996 which extend these time limits. Under s.207B(3) the time limit is ‘stopped’ when ACAS receives the early conciliation notification and will only ‘resume’ when the claimant receives the early conciliation certificate. Further, and of particular significance so far as the present case was concerned, under s.207B(4) a claimant has one month from when they first receive the certificate to submit their claim.

Present case

3. The effective date of termination of the claimant’s employment was 17 August 2023, which was the latest date from which all of his complaints could possibly start to run. He notified ACAS timeously on 30 October 2023 and thereby engaged the early conciliation procedures. ACAS issued a certificate, by email, on 11 December 2023. The claimant had one month thereafter, therefore, under s.207B(4), to submit his claim form. However, he did not

submit the claim form until 12 January 2024 which was one day late. His claim, therefore, was submitted out of time.

Preliminary hearing

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4. However, the matter does not end there as a Tribunal has a discretion to extend the time limit in certain circumstances: the so-called “escape clause”. The present case called before me by way of a preliminary hearing to consider whether or not I should exercise my discretion, extend the time limits and allow the claimant the benefit of the escape clause. So far as the unfair dismissal complaint was concerned, I had to consider whether or not it had been “reasonably practicable” to submit his claim in time. So far as the discrimination complaints were concerned, I had to consider whether or not it would be “just and equitable” to extend the time limit, which is a lesser test.

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The evidence

5. I heard evidence from the claimant at the preliminary hearing. Separate bundles of documentary productions were also submitted by the parties (“C” and “R”).

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The facts

6. Having heard the claimant’s evidence and considered the documentary productions, I was able to make the following findings in fact, relevant to the time bar issue with which I was concerned.

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7. The claimant is Polish. English is not his first language. He has been resident in the UK since 2006. He was first employed by the Council in 2015, latterly as a “CCTV Control Room Operator”. He was suspended from his employment with the Council for a number of years, as a consequence of,

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amongst other things, a Police investigation. As it transpired, he was never prosecuted.

- 5 8. The claimant has suffered from depression since 2019. He was prescribed medication which he continues to take.
- 10 9. As his father was terminally ill, the claimant returned to Poland in July 2023 and did not return to his home in Aberdeen until the end of September. This meant that he was not in Aberdeen when he was dismissed on 17 August 2023. The dismissal letter was one of the documents he submitted (C1/24-28).
- 15 10. When he returned to Aberdeen, the claimant was able to take advice from the Citizens Advice Bureau and his trade union's solicitor in early October. He was told about early conciliation and he notified ACAS timeously.
- 20 11. However, he claimed he was not aware that he only had one month to submit his claim form after the ACAS certificate was issued. He believed, mistakenly, that he had one month and one day and that 12 January 2024 was the last day.
- 25 12. He had endeavoured to contact the trade union solicitor again after the ACAS certificate was issued but was advised that the solicitor could not assist further as she had already given him advice.
- 30 13. The claimant was not working, in what turned out to be the crucial period, from 11 December 2023, when he received the ACAS certificate by email, to 12 January 2024 when he submitted his claim form..
14. He has a laptop but said that his internet access where he stays is "restricted" and that he "had issues with broadband".

15. In any event, he was able to submit his claim form, online, albeit one day late, on 12 January 2024.

Respondent's submissions

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16. The respondent's solicitor gave oral submissions at the hearing and also made written submissions which are referred to for their terms. The following is a brief summary.

- 10 17. He submitted that the exercise of the Tribunal's discretion to extend the time limit is not unfettered: "*There has to be some good cause shown*".

18. He referred, in particular, to **Schultz v. Esso Petroleum Co. Ltd** [1999] ICR 1202, in support of his submission that the claimant's mental health was not a "disabling illness": he was able to make contact with ACAS, the trade union solicitor and the CAB.
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19. There was a language barrier but it was submitted that the claimant, "*did know what he was doing*" and he knew "*before Christmas*" that he had to pursue the claim himself, as he had been unable to instruct representation.
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20. The respondent's solicitor also referred to the case of **Tanveer v. East London Bus & Coach Company Ltd** 2016 WL 01377170, in which the claim had been presented one day out of time. The EAT decided that it had been reasonably practicable to lodge the unfair dismissal claim in time but the claimant had failed to do so. He also referred to **Adedeji v. University Hospitals Birmingham NHS Foundation Trust** [2021] EWCA Civ23. In that case, the claimant had submitted a claim for race discrimination three days outside the time limit. The EAT decided that there was no good reason for him missing the applicable deadline.
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21. The respondent's solicitor submitted that there was no good reason for the claimant in the present case missing the time limit, especially when he had been given advice and, "*had done everything correctly*", until then. He submitted that there was no good reason why the claimant could not have submitted his claim form in December as he wasn't working at the time. The time limit is a strict one and there were no circumstances which hindered him submitting the claim in time.

Claimant's submissions

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22. The claimant, who was unrepresented, reminded me that English was not his first language. He submitted that the various cases that he had considered all involved British claimants many of whom had access to solicitors.

15 Discussion and Conclusion

Discrimination complaints

Relevant law

23. As the discrimination complaints were out of time, the issue for me was whether, or not, in all the circumstances, I should exercise my discretion to extend the time limit, on the basis that it was "just and equitable" to do so (s.123(1)(b)).
24. In ***British Coai Corporation v. Keeble & Ors*** [1997] IRLR 336, the EAT suggested that Employment Tribunals would be assisted by considering the factors listed in s.33 of the Limitation Act 1980. That section deals with the exercise of discretion in civil courts in personal injury cases. However, in ***Adedeji v. University Hospitals Birmingham NHS Foundation Trust*** [2021] EWCA Civ23, the Court reviewed a number of recent cases involving the list of limitation factors cited in ***Keeble*** and said this:

5 *“The best approach for a Tribunal in considering the exercise of the discretion under s.123(1)(b) of the Equality Act is to assess all the factors in the particular case which it considers relevant to whether it is just and equitable to extend time, including in particular the length of and the reasons for the delay (note: if it checks those factors against the list in Keeble; well and good):*

10 25. The claimant is Polish and English is not his first language. I also remained mindful that he was unrepresented and had no experience of Employment Tribunal proceedings. However, he was able to take advice from the CAB and the trade union solicitor and follow the required procedures, to the extent that he was issued with an ACAS certificate. The crucial period, therefore, was the one month from 11 December 2023 when the certificate was issued until 15 12 January 2024 when he submitted his claim form. While the claimant suffers from depression I accepted the submission by the respondent’s solicitor that this was not an impediment to him submitting his claim form in time. Further, he was not working in that period and had ample opportunity to do submit his claim in time. While there was some attraction in exercising my discretion as the claim was only out of time by one day, the case law 20 makes it clear that that, in itself, does not mean that it is just and equitable to extend the time limit.

25 26. As the respondent’s solicitor submitted, the claimant was able to take advice and comply with the necessary procedures. He has access to the internet and was able to submit his claim form on line. He did not advance any 30 persuasive reason as to why he could not have submitted his claim form on or before 11 January 2024. Instead, he left it until the very last day (as he mistakenly understood it to be) before submitting his claim in time.

30 27. There was no impediment, in my view, to him submitting the claim form in time.

28. While I was mindful that I have a wide discretion to extend the time limit and the just and equitable “escape clause” is much wider than that relating to unfair dismissal claims which require a claimant who has submitted a claim form out of time to show that it was “not reasonably practicable” to comply with the normal time limit, I was also mindful of such cases as **Robertson v. Bexley Community Centre t/a Leisure Link** [2003] IRLR 434, to which I was also referred by the respondent’s solicitor. The Court of Appeal stated in that case, that when Employment Tribunals consider exercising the just and equitable discretion, under s.123(1)(b) of the Equality Act 2010:-

10 *“There is no presumption that they should do so unless they can justify a failure to exercise the discretion. Quite the reverse, a Tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time, so the exercise of the discretion is **the exception rather than the rule.**”* (my emphasis)

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29. The claimant said that was ignorant of the one month time limit but he had taken advice. He also had access to the internet where further guidance on employment tribunal procedures is readily available and there is information about time limits. I did not consider, that any error on his part in this regard was reasonable in all the circumstances.

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30. I was driven to the view, therefore, and I am bound to say with some reluctance as the claim was only one day late, that it would not be just and equitable to extend the time limit and allow the discrimination complaints to proceed. This may sound harsh but it is the law.

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31. The discrimination complaints are dismissed, therefore, for want of jurisdiction.

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Unfair dismissal complaint

32. As I recorded above, the test for the extension of the time limit for an unfair dismissal complaint is one of “reasonable practicability”. This is a stricter, more demanding test than the “just and equitable” one. It follows, therefore, that having decided that it would not be just and equitable to extend the time limit, for the reasons given, I could not conclude that it had not been reasonably practicable to submit the unfair dismissal complaint in time.

33. In *Palmer and Saunders v. Southend-on-Sea Borough Council* [1984] IRLR 119, to which I was referred by the respondent’s solicitor, the Court of Appeal suggested that the best approach is to read ‘practicable’ as ‘feasible’ and to ask: *Was it reasonably feasible to present the complaint to the Industrial Tribunal (as it then was) within the relevant three months ?* In my view, it was reasonably feasible for the claimant to do so in the present case.

34. Accordingly, the unfair dismissal complaint also falls to be dismissed, for want of jurisdiction.

**Employment Judge: N M Hosie
Date of Judgment: 17 October 2024
Entered in register: 17 October 2024
and copied to parties**