EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4103152/2023

Held in Aberdeen (by CVP) on 10 September 2024

Employment Judge B Beyzade

Mrs. S MacLennan	**Claimant** **Represented by:** **Mr Peter East,** **Lay representative &** **Claimant's father**
Cocoa Mountain Ltd	**Respondent** **Represented by:** **Mr James Findlay,** **Director**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

1. The judgment of the Tribunal is that:

1.1. the claimant's complaints of unauthorised deductions from wages (holiday pay and arrears of pay), failure to provide itemised pay statements, other payments and unfair dismissal having been withdrawn by the claimant, are dismissed under Rule 52 of the Rules contained in Schedule 1 of the *Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.*

1.2. the complaint of breach of contract was presented outwith the time limit set down in Article 7(a) of the Employment Tribunals Extension of Jurisdiction (Scotland) Order 1994. Further, that it was reasonably practicable for the claimant to have presented the complaint within the relevant time limit. In these circumstances, the Tribunal does not have

jurisdiction to hear the claimant's breach of contract complaint, and accordingly the complaint stands dismissed.

REASONS

Introduction

2. The claimant presented complaints of unauthorised deductions from wages (arrears of pay and holiday pay), other payments, failure to provide itemised pay statements, breach of contract, and the claimant indicated that she was making another type of claim (unfair dismissal). The respondent denied those complaints in their entirety.

3. Prior to this hearing, two Preliminary Hearings had taken place on 24 April 2024 and 02 October 2023 respectively. A PH Note and Orders were prepared and issued to parties following each of those hearings.

4. Employment Judge Hosie indicated at paragraphs five and six of his PH Note issued to parties on 26 April 2024 that any issues relating to time bar are reserved for determination during the Final Hearing.

5. A Final Hearing was held on 10 September 2024. This was a hearing held by Cloud Video Platform ("CVP") video hearing pursuant to Rule 46. I was satisfied that the parties were content to proceed with a CVP hearing, that it was just and equitable in all the circumstances, and that the participants in the hearing were able to see and hear the proceedings.

6. Each party had prepared and filed a File of Productions in advance of the hearing consisting of 97 (respondent's productions) and 17 pages (claimant's productions) respectively. I was invited to disregard a 50-page bundle that was previously sent to the Tribunal by the claimant and to consider the claimant's productions consisting of 17 pages instead.

7. The claimant's representative indicated that they had received the respondent's productions yesterday. He confirmed that himself and the claimant had had an adequate opportunity to review the respondent's productions. The claimant's representative advised that the claimant did not require a break or a postponement to consider the respondent's productions.

8. At the start of the hearing the claimant's representative confirmed that the claimant's complaints of unauthorised deductions from wages (holiday pay and arrears of pay), failure to provide itemised pay statements, and other payments were withdrawn.

9. I advised parties that the claimant had also ticked the box on the ET1 Form indicating that she wished to make another type of complaint that the Employment Tribunal can deal with. The claimant's representative advised that any claim for unfair dismissal was withdrawn and will not be pursued. The claimant's representative confirmed that the claimant did not seek to pursue any other complaints (other than in respect of breach of contract which the claimant's representative advised that the claimant wishes to pursue).

10. On the respondent's application and on the claimant not objecting, I dismissed those complaints on withdrawal pursuant to Rule 52 of Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.

11. Therefore, the only live complaint that the claimant brings is for breach of contract in respect of the respondent's obligation to provide the claimant with shifts reflecting her full annualised hours.

12. The List of Issues that require to be investigated in relation to the claimant's complaint of breach of contract complaint were discussed with parties in detail. At the outset of the hearing the parties were advised that the Tribunal would investigate and record the following issues as falling to be determined, both parties being in agreement with these:

Time Bar

1.1 Was the breach of contract complaint made within the time limit in Article 7 of the Employment Tribunals Extension of Jurisdiction (Scotland) Order 1994? The Tribunal will decide:

1.1.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the effective date of termination?

1.1.2 If not, was it reasonably practicable for the claim to be made to the Tribunal within the time limit?

1.1.3 If it was not reasonably practicable for the claim to be made to the Tribunal within the time limit, was it made within a reasonable period?

Breach of contract complaint

1.2 Did this claim arise or was it outstanding when the claimant's employment ended?

1.3 Did the respondent do the following:

1.3.1 Fail to offer the claimant her full annualized hours entitlement within the last 12 months of her employment? The claimant's annualised hours entitlement was 1300 hours in accordance with her contract of employment dated 13 September 2021.

1.4 Was that a breach of contract?

1.5 How much should the claimant be awarded as damages? The claimant claims £2889.90 (comprising 1300 hours – 995.8 hours = 304.20 hours x £9.50). The respondent's representative says that the amount claimed includes the claimant's 5.6 weeks holiday entitlement pro rata which will require to be deducted from the total owed.

13. The claimant gave evidence at the hearing on her own behalf and Mr James Findlay, Director gave evidence on behalf of the respondent.

14. The claimant was represented by Mr Peter East, Lay Representative and the claimant's father, whereas the respondent were represented by Mr James Findlay. We discussed reasonable adjustments at the outset of the hearing. It was agreed that in light of dyslexia, the claimant's representative will require additional time to re-read documents and that he would ask if he needed

further time or request a break at any stage. No other reasonable adjustments were requested.

15. Both parties made oral closing submissions.

Findings of fact

16. On the documents and oral evidence presented the Tribunal makes the following essential findings of fact restricted to those necessary to determine the List of Issues:

17. The claimant was employed by the respondent as a Barista/Shop Assistant between 24 April 2021 and 13 December 2022.

18. The respondent, Cocoa Mountain Ltd, has their registered offices at Castle Street, Dornoch, Sutherland, IV25 3SN. They are in the business of manufacturing cocoa and chocolate confectionery in Durness, Scotland. The respondent had two directors including Mr James Findlay and Mr Paul Maden. The respondent traded from their premises located at 8 Balnakeil Craft Village, Durness, Sutherland, IV27 4PT.

19. The respondent operated two retail stores one of which was located in the Balnakeil Craft Village in the Scottish Highlands, which was a seasonal business catering to the tourist trade (its peak trading period was July to August, opening seasonally from April to the beginning of November). The other business was located in Dornoch where the claimant worked. Between the autumn periods of September to November sales significantly declined and in the winter months of December to February when the Highlands were at their coldest temperatures, sales were particularly low. Therefore the business did not generally trade over the winter months.

20. As the respondent's business was subject to seasonal fluctuations, the claimant's hours were annualised to be worked during the respondent's busy trading periods. Holidays were requested to be taken outside July/August and

extra shifts were expected to be worked during the April to October holiday season.

21. Although there were no set hours of work according to the claimant's written contract, the claimant worked 30-35 hours at the start of her employment.

22. The claimant's contract of employment dated 05 May 2021 (signed by the claimant on 13 September 2021) stated that the claimant did not have any set daily or weekly working hours but that the claimant was required to work not less than 1300 hours in each financial year. The financial year of the respondent ran between 01 April to 31 March of each year. The claimant was required to comply with the respondent's time recording procedures and the claimant's written terms of employment stated that the claimant would be given as much notice as is reasonably practicable of the expected hours of work allocated to her for each monthly period (subject to change in the event of any fluctuation in terms of the respondent's requirements). The claimant's hourly rate of pay was £9.50 per hour subject to any required deductions in respect of tax and national insurance.

23. The claimant worked according to a rota which was normally prepared on a weekly basis.

24. In the period from 13 December 2021 the claimant had requested to reduce her working hours to 20-25 hours per week, which was agreed by the respondent (Ms Hart had agreed this at the time). This agreement was reviewed and it had continued after a discussion had taken place between the claimant and the respondent in April 2022.

25. Although the claimant was available for fewer hours, she was asked to work four shifts per week in May 2022.

26. The claimant requested that her hours be reduced due to family commitments and health reasons in early May 2022. The respondent agreed to this request.

27. The claimant's father prepared a spreadsheet seeking to show that the respondent further reduced the claimant's hours to, on average, 11.7 hours per week thereafter (although the claimant was unable to explain how this average figure were calculated in her oral evidence).

28. The claimant's shifts were reduced to 2 shifts per week on average. New team members had to be recruited to cover the shortfall in hours and existing staff had to take on additional shifts.

29. On 15 July 2022 the claimant was advised by the respondent that her hourly pay would be £10.00 per hour. Within the same WhatsApp message the claimant was advised "…Also I'm struggling to find any cover for Melody. Freya can't and Jaen can't swap. I'll ask Kirsty tomorrow but could you work the Monday or Tuesday if possible please? Sorry."

30. Thereafter on 05 October 2022 at 7.10pm the claimant sent a WhatsApp message to James Findlay advising that she did not feel comfortable working with the store manager, Lyla Murray. The claimant stated that the store manager was nothing but a bully, the store manager said she wanted to meet with the claimant, but the claimant stated that she did not feel comfortable being on her own. The claimant indicated that Mr Findlay did not need to message her back as he was on holiday at the time. On the same day at 08.51pm Mr Findlay arranged via WhatsApp message to switch shifts between Lyla Murray and Liam Duffus to ensure that there was sufficient staff cover. Although the claimant confirmed that she was able to work by way of a message sent at 9.07pm the same day, she later called in sick and Lyla Murray was called upon to cover the claimant's shift.

31. Lyla Murray sent an email to Paul Maden and James Findlay on 07 October 2022 at 11.50am requesting that disciplinary action be taken against the claimant as her performance had not been up to standard all year. The email set out detailed particulars of the concerns relating to the claimant (pages 66 and 67 of the respondent's file of productions).

32. Records relating to the claimant's attendance are at page 71 of the respondent's file of productions relating to the period between April and October 2022. During July 2022 the claimant was off sick from work on four occasions, in August 2022 the claimant had been presented with a fit note for the first 3.5 weeks of August and she returned to work on 24 August 2022 (the claimant was on the rota to work 4 days per week, but based on her 2 day normal working week she had missed 5 shifts), and in October 2022 the claimant was sick on 07, 08 and 15 October. The claimant came into work for one hour on 17 October 2022 and then left, and she did not show up for work or call in sick on 18 October 2022.

33. The claimant presented a grievance on 08 October 2022 about several issues including in relation to the behaviour of her line manager (Lyla Murray). She stated that she would have no future contact with Lyla Murray as she was untrustworthy, a liar and a bully towards staff members especially the claimant. The claimant advised that unless a meeting was arranged she would have no future contact with Lyla Murray.

34. On 15 October 2022 the claimant sent a further message to James Findlay asking what would happen that day as she would not be working alongside Lyla Murray with her grievance outstanding. The claimant advised that she had walked out of work until something was sorted. The claimant further stated that she had not quit, and she had walked out (and that Lyla Murray was telling everyone she had quit for some reason). The claimant sent follow up messages on 18 October 2022 and 23 October 2022.

35. On 31 October 2022 at 2.22pm Paul Maden sent an email to the claimant informing her that they were taking appropriate action. It was noted that the claimant had made several serious allegations against Lyla Murray particularly relating to theft and fraud and the claimant was asked to provide evidence. The claimant sent an email in response later that day at 3.40pm setting out further information.

36. Mr Findlay was away from work in November 2022 due to health issues of a family member. He also had other personal and family issues at around that time.

37. Paul Maden sent an email to the claimant on 20 November 2022 apologising for the length of time it had taken to respond to her complaint, advising that after having undertaken an investigation they had actioned a number of recommendations. The claimant was offered a counselling meeting with her manager to help move forwards in a positive manner. The claimant was asked to confirm if there were any grievance that remained unaddressed and to make best endeavours to co-operate with Lyla Murray.

38. The claimant resigned from her employment with the respondent on 13 December 2022 (with immediate effect).

39. Although after the claimant's resignation, a meeting took place on 15 December 2022 to discuss the claimant's grievance, the claimant felt that the issues raised by the claimant had not been resolved.

40. The claimant did not return to work thereafter.

41. Between 01 May 2022 and 13 December 2022, the claimant was in employment for 226 days but she had only worked for 47 days.

42. A payslip was provided dated 31 December 2022 detailing the claimant's earnings in the relevant pay period as £735.00 gross (year to date earnings £4,503.75 gross). Further monthly payslips were provided in relation to the period between January 2022 and November 2022. Emails were sent to James Findlay on a monthly basis recording team members' hours including the claimant's working hours (copies of which are at pages 61-65 of the respondent's productions).

43. The claimant started new employment on 19 December 2022 earning £600.00 per month.

44. A period of time thereafter, the claimant asked her father to assist her with making an Employment Tribunal claim. The claimant's father started ACAS Early Conciliation on the claimant's behalf.

45. The claimant states that she was sitting next to her father when he was undertaking both the ACAS Early Conciliation and making the Employment Tribunal claim on her behalf.

46. The claimant's father started ACAS Early Conciliation (on behalf of the claimant) on 10 March 2023. The ACAS Early Conciliation Certificate was issued on 21 April 2023. The claimant advised that her father had probably mentioned Tribunal time limits to her multiple times, but she could not recall the details.

47. The claimant's father commenced the claimant's claim in the Employment Tribunal (on the claimant's behalf) on 06 June 2023.

48. The claimant stated at section 15 of her ET1 Form:
"Please accept my apologies for the slight delay in sending this. I underwent an operation / procedure that took significantly longer to recover from than expected. I can provide further detail if required"

49. The claimant's Nursing Discharge Letter dated 13 May 2023 indicated that the claimant received care at a private medical clinic on 13 May 2023 and that she was discharged the same day. The claimant had treatment for "hysteroscopy, smear and EB". The claimant was treated with analgesia as required, told to eat/drink as normal or able, and to mobilise regularly to prevent DVTs. In terms of follow up, the claimant was provided with an advice sheet and contract numbers she could call if there were any issues.

50. The claimant's GP provided a letter dated 05 September 2024 stating that the purpose of the letter was to summarise medical events the claimant had experienced in 2022 and 2023. The letter refers to the claimant requiring hospital admission on 29 November 2022. In addition the letter states that the

symptoms described in the letter affected the claimant's ability to carry out activities of daily living and that the claimant was issued with a MED3 Certificate which confirmed that she was unfit for work between 22 July 2022 and 17 August 2022.

Observations

51. On the documents and oral evidence presented the Tribunal makes the following essential observations on the evidence restricted to those necessary to determine the List of Issues:

52. The Tribunal was able to make a number of findings of fact from documents including correspondences to which it was referred.

53. The Tribunal made its findings of fact on the balance of probabilities.

54. The claimant firstly gave evidence in respect of the issue of time bar. The claimant was not able to explain why she had not been able to contact ACAS to start Early Conciliation earlier (or why she did not instruct her father to do so on her behalf). There was a fairly substantial unexplained period of time between the date the claimant resigned from her employment (13 December 2022) and the date that ACAS were contacted (10 March 2022).

55. The claimant explained that she was able to give her father instructions around 10 March 2022 to commence ACAS Early Conciliation. Although she believed her father advised her about limitation periods multiple times, she could not provide any further details.

56. The claimant explained that she had health problems after ACAS Early Conciliation had been started. The only medical evidence provided by the claimant in relation to that time period related to 13 May 2023 (when the claimant was discharged from a private clinic on the same date). No details were provided in that document about the claimant's condition or capabilities after 13 May 2023. It was not clear when the claimant said she became unable

to present her claim or to give instructions to her father to enable him to present her claim (on the claimant's behalf). The claimant was unable to provide any details relating to this matter in her oral evidence.

57. The claimant explained that she was not fit after the ACAS Certificate had been obtained to provide any evidence relating to her claim due to ill health. There was no medical evidence before the Tribunal in support of this. In response to a question from the Tribunal about why the claimant had not obtained a letter from her GP relating to her unfitness to provide evidence, the claimant stated that she had honestly not thought about obtaining this.

58. The claimant was asked to explain why it had taken a further 17 days to present her claim between 21 May 2023 and 06 June 2023. The claimant's father responded on the claimant's behalf at that point stating the reasons were "probably the same". I advised the claimant's father that he must allow the claimant to answer questions directly (and he must not answer questions on the claimant's behalf).

59. The claimant thereafter said that her husband or father could not present the claim on her behalf earlier due to lack of evidence from the claimant. It was put to the claimant that she did not require evidence to present her claim, she simply needed to provide details of her claim to her father or husband, and the claimant was asked why these details could not be submitted within a Claim Form on her behalf, in response to which the claimant stated, "I am not too sure." The claimant confirmed that she did not seek advice from a Citizens' Advice Bureau or a Law Centre and no explanation was provided in respect of why the claimant had not sought any such advice.

60. The Tribunal considered the documents to which it was referred including but not limited to the medical evidence, the claimant's contract, relevant correspondences, records of hours worked, and any other documents to which parties referred.

61. In respect of the claimant's grievance, I noted that the claimant's ET1 Form stated, "I raised a grievance about several issues including the behaviour of my manager and her allocation / changes to my work hours but after 3 months this grievance was not heard so I resigned." However there was no reference to the issue of the claimant's allocation/changes to her work hours in her grievance dated 08 October 2022. The claimant stated in her oral evidence that this was an error.

62. I was invited by the claimant to have regard to the written evidence provided by her witness on her behalf at page 17 of the claimant's file of productions. I was advised that this was confirmatory evidence. There was no satisfactory reason provided in respect of the claimant's witness's non-attendance at the Final Hearing. I advised parties that I would read the written statement and I will give it such weight as appropriate bearing in mind that she was not present to give oral evidence. I found the written statement was of limited utility in any event given the List of Issues in relation to the claimant's complaint.

63. I considered that on the whole, Mr Findlay's evidence was consistent with the documentation to which the Tribunal was referred. Where there was a dispute of fact, the Tribunal preferred the evidence of Mr Findlay which set out the position most clearly and consistently.

The Law

64. To those facts, the Tribunal applied the law:

65. Section 3 of the Employment Tribunals Act 1996 and Article 3 of the Employment Tribunals Extension of Jurisdiction (Scotland) Order 1994 ("the 1994 Order") provide jurisdiction for Tribunals to consider claims brought by employees, for damages for breach of contract.

66. Article 7 of the 1994 Order states that an Employment Tribunal shall not entertain a complaint in respect of breach of an employee's contract unless it is presented within the period of three months beginning with the effective date of termination of the contract giving rise to the claim. Article 7(c) of the

1994 Order states that where a Tribunal is satisfied that it was not reasonably practicable for the complaint to be presented within that time, then a complaint can be presented within such further period as the Tribunal considers reasonable.

67. The burden rests on the claimant to persuade a Tribunal that it was 'not reasonably practicable' to bring a claim in time *(*Porter v Bandridge Ltd [1978] ICR 943, Court of Appeal of England and Wales) at 948).

68. The Tribunal will often focus on the 'practical' hurdles faced by the claimant, rather than any subjective difficulties such as a lack of knowledge of the law or an ongoing relationship with the employer. In the case of *Dedman v British Building and Engineering Appliances [1973] IRLR 379*, per Scarman LJ who held that practicability does not always mean "knowledge". Where a claimant states a lack of knowledge as to the time limits, Scarman LJ found that the Tribunal should ask *([1974] ICR at 64*): *"What were his opportunities for finding out that he had rights? Did he take them? If not, why not? Was he misled or deceived? Should there prove to be an acceptable explanation of his continuing ignorance of the existence of his rights, it would be inappropriate to disregard it, relying on the maxim "ignorance of the law is no excuse". The word "practicable" is there to moderate the severity of the maxim and to require an examination of the circumstances of his ignorance'.*"

69. Once the claimant knows of their right, the Tribunal should determine whether they took reasonable steps to ascertain how to enforce that right (Trevelyans (Birmingham) Ltd v Norton 1991 ICR 488, Employment Appeal Tribunal [“EAT”]).

70. The Court of Appeal of England and Wales considered the correct approach to the test of reasonable practicability (Lowri Beck Services Ltd v Brophy [2019] EWCA Civ 2490). Lord Justice Underhill summarised the essential points as follows:

a. The test should be given "a liberal interpretation in favour of the employee" (Marks and Spencer plc v Williams-Ryan [2005] EWCA Civ 479, which reaffirms the older case law going back to Dedman v British Building & Engineering Appliances Ltd [1974] ICR 53);

b. The statutory language is not to be taken as referring only to physical impracticability and for that reason might be paraphrased as whether it was "reasonably feasible" for the claimant to present his or her claim in time: see Palmer and Saunders v Southend-on-Sea Borough Council [1984] IRLR 119….

c. If an employee misses the time limit because he or she is 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. If it is, then it will [not] have been reasonably practicable

d. If the employee retains a skilled adviser, any unreasonable ignorance or mistake on the part of the adviser is attributed to the employee (Dedman)…

e. The test of reasonable practicability is one of fact and not law (Palmer)."

71. 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 of England and Wales and Palmer and Saunders v Southend-on-Sea Borough Council [1984] IRLR 119).

72. In Schultz v Esso Petroleum Co Ltd 1999 ICR 1202, Court of Appeal of England and Wales, Lord Justice Potter (in an appeal concerning the interpretation of an application of section 111(2)(*b*) of the *Employment Rights Act 1996* and article 7(*c*) of the *Employment Tribunals (Extension of Jurisdiction) (England and Wales) Order 1994* (S.I. 1994 No. 1623), and in particular the phrase "reasonably practicable" appearing therein) held that:

"I consider the approach of the industrial tribunal was flawed for two reasons. First, I consider that, as I have stated, it runs counter to the observations of May L.J.

quoted above. Second, in accepting that the absence of disabling illness after 11 September 1996 was ipso facto decisive of the overall question, the industrial tribunal failed to have regard to the fact that, whenever a question arises as to whether a particular step or action was reasonably practicable or feasible, the injection of the qualification of reasonableness requires the answer to be given against the background of the surrounding circumstances and the aim to be achieved. In a case of this kind the surrounding circumstances will always include whether or not, as here, the claimant was hoping to avoid litigation by pursuing alternative remedies. In that context the end to be achieved is not so much the immediate issue of proceedings as issue of proceedings with some time to spare before the end of the limitation period. That being so, in assessing whether or not something could or should have been done within the limitation period, while looking at the period as a whole, attention will in the ordinary way focus upon the closing rather than the early stages. This seems to me to be so whether the test to be applied is that of simple reasonableness or, as here, reasonable practicability.

Thus, while I accept Mr. Wynter's general proposition that, in all cases where illness is relied on, the tribunal must bear in mind and assess its effects in relation to the overall limitation period of three months, I do not accept the thrust of his third submission, that a period of disabling illness should be given similar weight in whatever part of the period of limitation it falls. Plainly the approach should vary according to whether it falls in the earlier weeks or the far more critical later weeks leading up to the expiry of the period of limitation. Put in terms of the test to be applied, it may make all the difference between practicability and reasonable practicability in relation to the period as a whole. In my view that was the position in this unusual case. The way in which the industrial tribunal expressed its decision indicates to me that it had its focus wrong and, in the light of the primary findings of fact which it made, misdirected itself, in its approach to the question of reasonable practicability."

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

74. Whether the claim was presented within a further reasonable period requires an assessment of the factual circumstances by the Tribunal, to determine whether the claim was submitted within a reasonable time after the original time limit expired (University Hospitals Bristol NHS Foundation Trust v Williams UKEAT/0291/12).

75. 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).

76. 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)).

77. Under Article 8B of the 1994 Order, 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.

78. Subject to any issues relating to time bar, in terms of the 1994 Order, a Tribunal can award an employee damages where the employment contract is breached, subject to certain conditions, including that employment has ended and that the sum ordered is less than £25,000 (amongst other restrictions, which do not apply in this case).

Submissions

79. At the conclusion of the evidence, both parties made oral submissions, which the Tribunal found informative. They are referred to where relevant.

Discussion and decision

80. On the basis of the findings made the Tribunal disposes of the issues identified at the outset of the hearing as follows:

Time Bar – Breach of Contract claim

81. Employment Judge Hosie in his Preliminary Hearing Note that was issued following the Preliminary Hearing on 24 April 2024 (issued to parties on 26 April 2024) recorded that the claimant's claim was submitted out of time. It was further recorded that the claimant's representative had explained at that hearing that the claimant had underwent an operation in hospital and reference was made to paragraph 15 of the ET1 Form. Employment Judge Hosie explained that the Tribunal had a discretion to allow out of time claims to proceed if it is satisfied that it had not been reasonably practicable ("feasible") to submit the claim in time and further that this could only be determined after hearing evidence from the claimant. The time bar point was therefore reserved for determination at the Final Hearing.

82. The Tribunal finds that the claim for breach of contract was not presented within the relevant time limit under Article 7(a) of the 1994 Order. The claimant's employment terminated on 13 December 2022. The effective date of termination was not in dispute and it was supported by the documents before the Tribunal. A claim for breach of contract must be lodged within three months of the effective date of termination, unless the parties have contacted ACAS within that three-month period, whose notification operates to extend the time limit.

83. The claimant was therefore required to lodge her breach of contract complaint, or at least to have contacted ACAS, by 12 March 2023, the parties being in agreement with this date (expiry date of the primary limitation period).

84. The claimant contacted ACAS to start Early Conciliation on 10 March 2023 and the ACAS Early Conciliation Certificate was issued on 21 April 2023. As the ACAS Early Conciliation Certificate was issued on 21 April 2023, the time limit to bring a claim was extended by one month. Therefore, the last day to issue the claimant's claim was on 21 May 2023, the parties also being in agreement in respect of this date.

85. The claimant did not present her claim until 06 June 2023.

86. Thus I find that the claimant's claim was presented out of time. However, I have a certain discretion to allow claims which are made out of time. This relates to circumstances where it was not reasonably practicable for the claim to have been lodged in time.

87. By reference to the guidance provided by Underhill LJ set out above, I am obliged to give the test "a liberal interpretation in favour of the employee." Further, the test relates not only to physical impracticability, but I require to consider whether it was reasonably feasible that the claim could have been presented in time. This includes where an employee misses the time limit because he or she is ignorant about the existence of a time limit or mistaken about when it expires in their case.

88. In such circumstances, the question is whether that ignorance or mistake is reasonable. This is a case where the claimant states that they missed the time limit because they were ignorant about the existence of the time limit (albeit she accepted that her father had informed her about time limits multiple times, but she could not remember the details) and due to medical incapability. The Tribunal must question whether ignorance of the time limit was reasonable, taking account of any enquiries which the claimant or any person on their behalf should have made.

89. Whilst I appreciate that the claimant was relying on her father to initiate and to conclude the ACAS proceedings and thereafter to make her Tribunal claim on her behalf, the claimant states that she was sitting next to her father when he was undertaking both ACAS Early Conciliation and making the Employment Tribunal claim.

90. The claimant advised that no contact was made with a Citizens' Advice Bureau or a Law Centre to obtain information about time limits. The claimant was unable to proffer any reason why in respect thereof. The claimant also could not recall any details in relation whether the claimant or her father obtained any information from the ACAS website about time limits (although she stated her father had mentioned time limits multiple times). To the extent

there was any ignorance about time limits, it was not clear why the claimant or her father did not seek legal advice or undertake any research online to inform themselves about time limits.

91. Given the circumstances and the information that may have been available to the claimant or her father by conducting online research (via the ACAS website, Citizens' Advice Bureau website or otherwise) or by contacting a legal adviser, and their apparent failure to avail themselves of those opportunities, and there being no good or sufficient justification in respect thereof, I conclude that any stated ignorance of the time limit could not be said to be reasonable.

92. I further noted that the claimant did not state on her ET1 Form that she was ignorant about the time limit that applied to her claim.

93. At section 15 of the claimant's claim form, the clamant states "Please accept my apologies for the slight delay in sending this." The respondent's representative submitted that this was an indication that the claimant was aware that the claim was late and it was not clear why the claimant could not have informed herself about time limits and presented the claim earlier.

94. The claimant further states at section 15 of her Claim Form, "I underwent an operation / procedure that took significantly longer to recover from than expected. I can provide further detail if required."

95. In the claimant's file of productions there were two medical documents to which I was referred. The first document was a letter from Dr Nicol dated 05 September 2024, the content of which is set out above. Although the letter states that its purpose is to summarise briefly the medical events relating to the claimant's menorrhagia in 2022 and 2023, the letter principally relates to the claimant's hospital admission on 29 November 2022 and the claimant not being fit for work between 22 July 2022 and 17 August 2022. The claimant stated in her oral evidence that she returned to work shortly after her hospital admission on 29 November 2022. The letter does not provide any specific

detail in relation to the claimant's health between 21 April 2023 and 06 June 2023 (or from 13 December 2022 onwards). The claimant's representative acknowledged that a further letter could have been obtained in relation to this matter and any post operative recovery.

96. Notwithstanding the claimant's evidence that she was treated at a private hospital on 13 May 2023, the claimant's GP's letter purported to comment on the claimant's health in respect of 2022 and 2023. In the circumstances, it was not clear why the letter from the claimant's GP did not provide a description of the claimant's health relating to the said dates, and further, it did not specify that the claimant was unable to bring a claim until 06 June 2023 (or that she had any difficulties in doing so).

97. I was also referred to the Nursing Discharge letter dated 13 May 2023. That document indicated that the claimant was admitted to hospital on 13 May 2023 when she underwent a hysteroscopy, smear and EB, and she was discharged later that day (on 13 May 2023). Although the claimant was given follow up advice, and analgesia as required, there was no further review or appointment details on the letter. It was also indicated that the claimant had full mobility and continence, and there were no details given about the period of recovery or any ongoing issues that may prevent or hinder the claimant from making a Tribunal Claim.

98. Although the claimant stated in her oral evidence that she did not feel able to present her claim before the expiry of the time limit, the claimant did not (in her oral evidence) provide any further details about her health prior to or after the procedure that she underwent (or any details about any further treatment or her recovery) on 13 May 2023. The claimant's father ultimately issued the claim on the claimant's behalf. The claimant did not provide any good or satisfactory reason to explain why she was unable to give her father (who had been supporting her with the ACAS Early Conciliation process) any relevant details that were required to start her breach of contract claim on her behalf within the relevant time limit.

99. On the evidence before the Tribunal and considering all the circumstances including the claimant's medical evidence, her oral evidence, all the documents before me, and the details of the hospital procedure on 13 May 2023 (and taking account that this took place towards the latter part of the expiry of the time limit), I was not satisfied that it was not reasonably practicable for the claimant to present her claim within the time limit.

100. The test is a two stage one: if I find that it was not reasonably practicable to have lodged the claim in time, then I must find that the claimant lodged the claim within a reasonable period after it became reasonably practicable, for the extension to be permitted. In the circumstances of this case, I did not require to consider that second stage.

101. In light of the above matters, and having considered all the evidence before me, I am not satisfied that it was not reasonably practicable for the claimant to have presented her claim in time.

102. If I am wrong to so conclude, and if it was not reasonably practicable for the claimant to present her claim within the time limit set out at Article 7(a) of the 1994 Order, I would not have been satisfied that the claim was presented within such further period as the Tribunal considers reasonable. Neither the claimant's medical evidence nor the claimant's oral evidence (or any of the other documents before me) provided any details in respect of the claimant's health and any impediment in terms of her ability to bring a Tribunal claim between 21 May 2024 and 05 June 2023. The claim was presented over three weeks after the hospital procedure on 13 May 2023 (the claimant was discharged on the same day) and I have taken account of all the circumstances including the absence of any details of post operative recovery period (or details of any difficulties in terms of the claimant's ability to bring a claim) within the claimant's oral evidence and the medical evidence. The delay in bringing the claim after 21 May 2024 was not insubstantial and the evidence before me does not provide any or any sufficient justification for the further period taken (to 06 June 2023). In all the circumstances I do not

consider that the further period to 06 June 2023 to present the claimant's claim was reasonable.

103. In these circumstances, the claim for breach of contract being lodged out of time and the Tribunal not exercising its discretion to hear that claim out of time, the Tribunal does not have the jurisdiction to hear the claimant's claim.

Breach of contract claim

104. In the event that I am wrong to so conclude, and that the relevant time limit should be extended in accordance with Article 7(c) of the 1994 Order (and in the alternative), I considered the claimant's breach of contract complaint based on the evidence that I heard and the documents to which I was referred during the hearing. The breach of contract claim would have been outstanding at the termination of the claimant's employment.

105. Clause three of the claimant's statement of terms of employment stated that the claimant did not have any set daily or weekly working hours but that the claimant was required to work no less than 1300 hours in each financial year. This meant that the respondent were able to offer the claimant different working hours each day or each week. This was particularly important to the respondent as the respondent's business was seasonal and the busy season during each year (July and August being the busiest months), so during those months they could offer their employees more hours. During quieter periods they could offer their employees less work or no work. Each week a rota was prepared setting out the claimant's and other employees' weekly working hours.

106. Mr Findlay stated that the respondent's financial year ran from 01 April to 31 March each year. His evidence in relation to this matter was not disputed.

107. The claimant stated that she initially worked full time hours of 30-35 hours per week. However these were reduced following the claimant's request to 25

hours per week. The claimant's weekly working pattern was not fixed, but this was arranged in accordance with the claimant's availability for work.

108. The claimant's representative's letter to the Tribunal (at page 13 of the claimant's file of productions) stated that her hours between April 2022 to 13 December 2022 were on average 11.7 hours per week (although the claimant requested to work between 20 to 25 hours per week during that time). The claimant was unable to explain how this average figure had been calculated in her oral evidence.

109. The claimant's availability to work was restricted and her working hours had been changed by agreement.

110. The claimant's representative pointed out that clause 4.1 required the claimant to be paid in equal instalments on or about the last working day of the month. It was not clear what this meant in the context of an annualised hours agreement where the respondent determined the daily and weekly working hours. In practice, the claimant was paid for the shifts that she worked. The claimant did not dispute this arrangement during the course of her employment and she continued to work for the respondent on that basis.

111. The claimant was unable to work on a number of occasions during her employment. The claimant's sickness absence records which were prepared based on the respondent's rotas are at pages 69-72 of the respondent's file of productions. The claimant was not able to work during part of 15 July 2022, on 23, 25 or 29 July 2022 and for the first 3.5 weeks of August 2022 (up to 24 August 2022), which were dates within the respondent's peak season due to sickness absence. The company did not operate a company sick pay scheme.

112. The claimant had left work early on 03 May 2022, 10 June 2022 and on 15 July 2022.

113. The claimant had advised Mr Findlay on 05 October 2022 that she was unable to work with Lyla Murray. Mr Findlay advised the claimant that she would be

rostered to work with another employee named Liam Duffus on 06 October 2022 and her manager was off work due to sickness absence that day.

114. The claimant also walked out of work on 17 October 2022 shortly after she arrived at her shift at 1pm. She indicated that this was because she was not satisfied with the environment and the hygiene of the workplace.

115. It is clear that the claimant on a number of occasions during her employment was not ready, willing and able to work. This meant that the respondent was unable to offer her a number of shifts.

116. The claimant's line manager highlighted several issues on 07 October 2022 in her email in which she enquired in relation to taking disciplinary action against the claimant and stated that she had concerns relating to the claimant's performance.

117. The claimant did not raise any issues in terms of not being offered sufficient hours either in her grievance dated 08 October 2022 or in her further information supplied relating to her grievance on 31 October 2022. Had she raised this matter, Mr Findlay submitted that he may have been able to offer her additional hours at the business including at other sites.

118. The claimant did not accept the respondent's offer of a mediation meeting in the respondent's email dated 20 November 2022 between the claimant and the claimant's manager (whom she had complained about in her grievance). If she had accepted this offer, Mr Findlay submitted that this may have enabled the relevant parties to be able to work together and the claimant to continue to work her shifts.

119. The claimant resigned from her employment on 13 December 2022 (without notice). She therefore resigned part-way through the financial year. This meant that the respondent was not afforded the opportunity to offer the claimant further work to make up any shortfall in terms of any shifts she may have been able to work.

120. In those circumstances and having considered all the evidence before me, even if I had decided to extend time in terms of Article 7(c) of the 1994 Order, I would not have found that the respondent failed to provide the claimant with the claimant's annualised hours entitlement or that the respondent were in breach of contract by failing to offer the claimant her full annualised hours entitlement. Accordingly, I would have concluded that the claimant's claim was not well founded and I would have dismissed the claim in any event.

Conclusion

121. The claimant's claim for breach of contract stands dismissed.

Employment Judge: B Beyzade
Date of Judgment: 3 December 2024
Date Sent to Parties: 4 December 2024

I confirm that this is my Judgment and Reasons in the case of 4103152/2023 Mrs S MacLennan v Cocoa Mountain Ltd and that I have signed the Judgment and Reasons by electronic signature.