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EMPLOYMENT TRIBUNALS (SCOTLAND)

Case Number: S/4113033/2018

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Held in Glasgow on 24 October 2018

Employment Judge: David Hoey

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Mr D Hay

**Claimant
In Person**

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RABC Spirit Trading Limited

**First Respondent
Not Present and
Not Represented**

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**Secretary of State for Business Energy
& Industrial Energy**

**Second Respondent
Not Present and
Not Represented**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

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(1) It was not reasonably practicable for the Claimant to have lodged his claims in respect of holiday pay and notice pay within the statutory time period and the Claimant did lodge such claims within such a period as was reasonable and these claims are therefore allowed to proceed (which in any event were lodged within time in terms of section 188(2) of the Employment Rights Act 1996).

- (2) The Claimant was dismissed by reason of redundancy and he is entitled to a redundancy payment in the gross sum of **Three Thousand, Three Hundred and Seventy Five Pounds (£3,375.00)**
- (3) The Claimant is due the gross sum of **One Thousand, One Hundred and Fifty Pounds (£1,150.00)** by way of accrued holiday pay.
- (4) The Claimant is due the gross sum of **Two Thousand, One Hundred and Forty Three Pounds and Fifteen Pence (£2,143.15)** by way of outstanding notice pay.

REASONS

1 This was a Preliminary Hearing which had been fixed to consider time bar in respect of his claims for notice pay and holiday pay together with other issues that could be dealt with to progress matters. The Claimant attended in person. There were 2 Respondents. The First Respondent (his former employer) had not lodged a Response Form (and appeared to have ceased trading). The Second Respondent (the Secretary of State for Business, Energy & Industrial Strategy) had lodged a Response Form and indicated that they wished the terms of that response to be taken into account, as they would not attend the Hearing. It was alleged that the First Respondent had become insolvent and therefore the Second Respondent was liable for the sums claimed. The Second Respondent had made certain representations within the Response Form, namely that it was not satisfied there was a relevant insolvency situation and it was for the Tribunal to assess the Claimant's entitlements.

Issues to be determined

2 The Hearing began by discussing what the issues to determined were. The Claimant confirmed that he was seeking a redundancy payment, notice pay

and holiday pay. The redundancy payment claim had been lodged within the statutory time period but the claim in respect of the other sums (as against the First Respondent) had not been lodged in time.

3 The Claimant had been dismissed on 22 April 2018. His claims for holiday
5 pay and notice pay ought to have been lodged with the Tribunal by 21 July 2018 (absent any ACAS early conciliation during that period). The claims were not lodged until 31 July 2018. Applying the normal rules, the Tribunal did not therefore have the power to consider the claims for holiday pay and notice
10 pay unless it could be shown that it was not reasonably practicable to have lodged the claims within time and that the claims were in fact lodged within such a period that was reasonable.

4 The claim for redundancy pay was lodged in time (there being a 6 month period to lodge such a claim).

5 It was agreed, given the provisions of the overriding objective contained within
15 the Employment Tribunals (Rules of Procedure) Regulations 2013, and the need to ensure matters are dealt with justly, which includes expeditiously, that the Tribunal would also decide whether the claims should be upheld and what, if any, sums should be awarded in respect of each claim.

6 It was agreed that the Tribunal would deal with the following issues:-

20 (1) Was it reasonably practicable to have lodged the claims for notice pay and holiday pay within the statutory time period?

(2) If it was not, were the claims lodged within such a period that was reasonable?

25 (3) Was there a redundancy situation in existence and was the Claimant dismissed for that reason?

(4) What was the Claimant due by way of redundancy pay, if anything?

(5) What was the Claimant due by way of notice pay and holiday pay, if anything?

7 The Claimant had produced 2 folders of papers and gave evidence orally.

Findings in fact

8 The following are findings in fact that are determined from the evidence that was presented to the Tribunal.

5 9 The Claimant had been employed by the Respondent for 10 years.

10 The Respondent ran a public house in Glasgow.

11 The Claimant was in charge of staff, managing the premises and dealt with ongoing administrative and certain financial issues (such as working out staff wages).

10 12 At the end of each week the Claimant would work out how many hours the staff worked and email the Director the relevant number of hours and payments (which would include the hours the Claimant worked). The Director would remit the relevant sums by way of tax and national insurance to HMRC and the Claimant would pay the sums due via the till each week, which
15 includes the sums to which he was entitled.

13 The Claimant was never issued with any written particulars of employment nor any pay slips but he would receive a P60 at the end of each tax year that set out the Claimant's gross pay each year.

14 The Claimant was paid £10 gross for each hour he worked.

20 15 He would work around 30 hours per week but his hours would vary.

16 The Claimant's total earnings as contained in the P60s were as follows (with the corresponding average weekly hours calculated after the annual pay (arrived at by dividing the total pay by 10 and then by 52):-

2014 - £13,420 gross annual pay – 25.81 hours per week average

25 2015 - £11,790 gross annual pay – 22.67 hours per week average

2016 - £13,312 gross annual pay – 25.6 hours per week average

2017 - £12,480 gross annual pay – 24 hours per week average

2018 - £14,040 gross annual pay – 26.9 hours per week average

17 The Claimant's average number of weekly hours was therefore 24.996 (say
25 hours) (arrived at by totalling the 5 years' worth of average weekly hours
5 and dividing that sum by 5).

18 On 19 April 2018 the Claimant was told by the Director who managed the
Claimant, who was not present at the premises regularly, that the
establishment would close on Sunday 22 April. This was done verbally.

19 22 April 2018 was the Claimant's last date of employment.

10 20 22 April 2018 was the last day of trading and the Claimant finalised staff
wages and closed the pub at the end of the shift for the last time.

21 The Claimant had advised the staff of the closure and secured the premises
following close of business on that date.

15 22 The Claimant was closely associated with the Respondent and the Director,
and assisted in finalising a few issues around closure following the date the
business ceased to trade but he did not carry out any work following the date
the business ceased to trade on 22 April 2018.

20 23 The Claimant was paid his wages for the work he had done up to and including
22 April 2018 (which he secured via the till at the end of the final shift which
was done for the other staff too).

25 24 On 2 May 2018 the Claimant telephoned the ACAS helpline to ask about how
he secured the sums that he believed was due to him, including a redundancy
payment. He was advised that he should speak to the Director as there were
ways in which the Director could fund such payment, potentially including a
loan.

25 25 The Claimant sought the payment from the Director by speaking with him and
by sending him emails.

- 26 The Claimant telephoned the Insolvency Service helpline on 11 June 2018 and was told he needed a specific reference number, which was only available from the Director.
- 27 On 12 June 2018 the Claimant contacted the Director and received an email
5 response on 2 July 2018.
- 28 On 2 July 2018 the Claimant submitted a claim to the Insolvency Service in respect of a redundancy payment, holiday pay and notice pay.
- 29 The Claimant was advised on 30 July 2018 that his claims had been refused and that he would need to pursue his entitlement via an Employment Tribunal.
- 10 30 On 31 July 2018 the Claimant contacted ACAS and obtained an early conciliation number.
- 31 On 31 July 2018 the Claimant lodged his claims with the Employment Tribunal.
- 32 The Claimant was not aware that there was a 3 month time limit in respect of
15 the holiday pay and notice pay claims. He knew he had 6 months to claim a redundancy payment and assumed this was the same time limit for all his claims.
- 33 He had been chasing the Director for payment which failing a response that would allow him proceed against the Insolvency Payment Service.
- 20 34 He was also seeking alternative employment which meant he had limited time to pursue other options.
- 35 He attended the Citizens Advice Bureau but found this unhelpful. No discussion took place about Employment Tribunal claims or time limits. The focus was on seeking payment from the Secretary of State.
- 25 36 Even at the point the Claimant lodged his claims with the Employment Tribunal he was still unaware of the 3 month time limit and he understood that each of his claims were lodged within the statutory timescale.

37 The Claimant understood that his holiday entitlement each year was to 4 weeks. He had taken 4 weeks each year by way of holidays during his period of employment.

38 For the holiday year in which he was dismissed (the holiday year 2017/2018)
5 he had only taken 1 week's holiday. He believed he was due 3 weeks.

39 The holiday year ran from 1 May each year.

40 The Claimant was aged 52 as at the date of his dismissal.

41 The Claimant was due 9 weeks' notice as at the date of termination of his employment albeit he had been given 3 days' notice.

10 **Relevant law**

42 Section 111(2) of the Employment Rights Act 1996 states:

"Subject to the following provisions, an Employment Tribunal shall not consider a complaint under this section unless it is presented to the tribunal

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15 a) before the end of the period of three months beginning with the effective date of termination

b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period."

20 43 What is reasonably practicable is essentially a question of fact for the Tribunal to determine. The onus of proving that presenting the claim in time was not reasonably practicable rests on the Claimant. As the court said in **Porter v Bandridge** 1978 ICR 943: "That imposes a duty upon him to show precisely why it was that he did not present his complaint [in time]".

25 44 In **Palmer v Southend** 1984 IRLR 119 the Court of Appeal stated that "reasonably practicable" does not mean reasonable (on its own) but instead means "reasonably feasible".

45 On the question of ignorance of the law and ignorance of time limits for raising
a claim, the Court in Porter (by majority) said that the correct test is "not
whether the Claimant knew of his rights but whether he ought to have known
of them".

5 46 Section 135 states that:

(1) An employer shall pay a redundancy payment to any employee of
his if the employee—

(a) is dismissed by the employer by reason of redundancy, or

Section 139 states that:

10 (1) For the purposes of this Act an employee who is dismissed shall
be taken to be dismissed by reason of redundancy if the dismissal
is wholly or mainly attributable to—

(a) the fact that his employer has ceased or intends to cease—

15 (i) to carry on the business for the purposes of which the
employee was employed by him, or

(ii) to carry on that business in the place where the employee
was so employed, or

(b) the fact that the requirements of that business—

(i) for employees to carry out work of a particular kind, or

20 (ii) for employees to carry out work of a particular kind in the
place where the employee was employed by the employer,

have ceased or diminished or are expected to cease or diminish.

Section 162 states:

(1) The amount of a redundancy payment shall be calculated by—

- (a) determining the period, ending with the relevant date, during which the employee has been continuously employed,
 - (b) reckoning backwards from the end of that period the number of years of employment falling within that period, and
 - 5 (c) allowing the appropriate amount for each of those years of employment.
- (2) In subsection (1)(c) “the appropriate amount” means—
- (a) one and a half weeks’ pay for a year of employment in which the employee was not below the age of forty-one,
 - 10 (b) one week’s pay for a year of employment (not within paragraph (a)) in which he was not below the age of twenty-two, and
 - (c) half a week’s pay for each year of employment not within paragraph (a) or (b)

15 Section 86 states that:

- (1) The notice required to be given by an employer to terminate the contract of employment of a person who has been continuously employed for one month or more—
- (a) is not less than one week’s notice if his period of continuous
 - 20 employment is less than two years,
 - (b) is not less than one week’s notice for each year of continuous employment if his period of continuous employment is two years or more but less than twelve years, and
 - (c) is not less than twelve weeks’ notice if his period of
 - 25 continuous employment is twelve years or more.

Regulation 13 of the Working Time Regulations states that:

(1) Subject to paragraphs (5) and (7), a worker is entitled in each leave year to a period of leave determined in accordance with paragraph (2).

5 (2) The period of leave to which a worker is entitled under paragraph (1) is (a) in any leave year beginning on or before 23rd November 1998, three weeks

Regulation 13A states that:

10 (1) Subject to regulation 26A a worker is entitled in each leave year to a period of additional leave determined in accordance with paragraph (2).

(2) The period of additional leave to which a worker is entitled under paragraph (1) is (e) in any leave year beginning on or after 1 April 2009, 1.6 weeks.

Section 182 of the Insolvency Act 1986

15 If, on an application made to him in writing by an employee, the Secretary of State is satisfied that—

(a) the employee's employer has become insolvent,

(b) the employee's employment has been terminated, and

20 (c) on the appropriate date the employee was entitled to be paid the whole or part of any debt to which this Part applies,

the Secretary of State shall, subject to section 186, pay the employee out of the National Insurance Fund the amount to which, in the opinion of the Secretary of State, the employee is entitled in respect of the debt.

Section 183 states that:

(1) An employer has become insolvent for the purposes of this Part
(b) where the employer is a company, if (but only if) subsection (3)
is satisfied

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(3) This subsection is satisfied in the case of an employer which is a
company—

(a) if a winding up order has been made, or a resolution for
voluntary winding up has been passed, with respect to the
company,

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(aa) if the company is in administration for the purposes of the
Insolvency Act 1986,

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(b) if a receiver or (in England and Wales only) a manager of the
company's undertaking has been duly appointed, or (in
England and Wales only) possession has been taken, by or
on behalf of the holders of any debentures secured by a
floating charge, of any property of the company comprised in
or subject to the charge, or

(c) if a voluntary arrangement proposed in the case of the
company for the purposes of Part I of the Insolvency Act 1986
has been approved under that Part of that Act.

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Section 184 states that:

(1) This Part applies to the following debts—

(a) any arrears of pay in respect of one or more (but not more
than eight) weeks,

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(b) any amount which the employer is liable to pay the employee
for the period of notice required by section 86(1) or (2) or for
any failure of the employer to give the period of notice
required by section 86(1),

(c) any holiday pay—

(i) in respect of a period or periods of holiday not exceeding six weeks in all, and

(ii) to which the employee became entitled during the twelve months ending with the appropriate date,

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(3) In subsection (1)(c) “holiday pay”, in relation to an employee, means—

(a) pay in respect of a holiday actually taken by the employee, or

(b) any accrued holiday pay which, under the employee’s contract of employment, would in the ordinary course have become payable to him in respect of the period of a holiday if his employment with the employer had continued until he became entitled to a holiday.

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Section 185 states that:

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In this Part “the appropriate date”—

(a) in relation to arrears of pay (not being remuneration under a protective award made under section 189 of the Trade Union and Labour Relations (Consolidation) Act 1992) and to holiday pay, means the date on which the employer became insolvent,

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(c) in relation to any other debt to which this Part applies, means whichever is the later of—

(i) the date on which the employer became insolvent, and

(ii) the date of the termination of the employee’s employment.

Section 188 states that:

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(1) A person who has applied for a payment under section 182 may present a complaint to an employment tribunal—

- (a) that the Secretary of State has failed to make any such payment, or
 - (b) that any such payment made by him is less than the amount which should have been paid.
- 5 (2) An employment tribunal shall not consider a complaint under subsection (1) unless it is presented—
 - (a) before the end of the period of three months beginning with the date on which the decision of the Secretary of State on the application was communicated to the applicant, or
 - 10 (b) within such further period as the tribunal considers reasonable in a case where it is not reasonably practicable for the complaint to be presented before the end of that period of three months.
- (3) Where an employment tribunal finds that the Secretary of State
15 ought to make a payment under section 182, the tribunal shall—
 - (a) make a declaration to that effect, and
 - (b) declare the amount of any such payment which it finds the Secretary of State ought to make.

Submissions

20 47 The Claimant argued that it was not reasonably practicable to have lodged his claims for holiday pay and notice pay within the statutory timescale as he was unaware of such a timescale and he had proceeded on the basis that the time limit was the same for a redundancy payment. He acted as quickly as he could have once he was told the Insolvency Service would not settle the sums
25 he was due.

48 He argued that the business had closed (and remained closed) and he was therefore dismissed by reason of redundancy and he should be paid this. He

also sought payment of the holidays to which he believed he was due (which he said was 3 weeks, since he had taken 1 week and believed he was legally entitled to 4 weeks). He also sought 9 weeks less 3 days by way of notice pay.

5 49 The Second Respondent had indicated within the ET3 that although it would not be present the terms of the pleadings should be taken into account in deciding the outstanding issues. The Second Respondent submitted that it was for the Tribunal to determine whether or not a redundancy situation existed (and whether the Claimant was dismissed for that reason). The
10 Tribunal has taken into account the submissions made on behalf of the Second Respondent.

Discussion and decision

50 The first question is whether it was reasonable practicable to have lodged his claim for holiday pay and notice pay within the statutory timescale.

15 51 The Claimant was not aware of the statutory timescale for those 2 claims. He was aware that there was a 6 month time limit in respect of the redundancy payment but did not consider there to be a different time limit for the other claims. Even at the point the Claimant lodged his claims with the Employment Tribunal he was still unaware of the 3 month time limit. At the expiry of the
20 statutory time limit the Claimant was still waiting to hear whether or not the Insolvency Service would meet the claims.

52 The Tribunal is satisfied that it was not reasonably practicable for the Claimant to have lodged his claims within the statutory timescale. He was focussed upon seeking payment of his redundancy entitlement and assumed the other sums would be included as part of this claim. He did not seek advice as he
25 assumed the Insolvency Service would meet the liabilities due. At no stage was there any suggestion made to the Claimant that the time limit for the holiday pay and notice pay claims was different to that pertaining to the redundancy sums.

53 He did approach the Citizens Advice Bureau but there was no discussion as to Employment Tribunal claims as the focus was in respect of payment by the Secretary of State.

54 The Claimant was also awaiting a response from his former Director and took
5 all such steps as were reasonable to act promptly to secure payment. He did not do nothing but instead proactively sought payment both from the Director and from the Secretary of State.

55 In all the circumstances it was not therefore reasonably practicable, in the sense of being reasonably feasible, for the Claimant to have lodged his claims
10 for notice pay and holiday pay within the statutory timescale.

56 The next question is whether the Claimant lodged such claims within such period as was reasonable. The Claimant lodged his claim the day after he was told that the Secretary of State would not meet his claims. He therefore lodged his claims within a reasonable period of time.

15 57 The next question is whether or not there was a redundancy situation. The Respondent ceased to trade on 22 April 2018. No further work was done and the business ended. The business did not trade thereafter. The Tribunal is satisfied that the statutory definition of a redundancy situation existed.

58 The reason why the Claimant was dismissed was because his position was
20 redundant. The Respondent's requirements for any employees (including those carrying out the work the Claimant did) had ceased. The Claimant is therefore entitled to a redundancy payment.

Claims in time in any event

59 While this hearing had been fixed because the Claimant's claims in respect
25 of holiday pay and notice pay had been lodged outwith the statutory time period, the Tribunal brings to the Claimant's attention section 188 of the Employment Rights Act 1996 set out above which introduces the right of the Claimant to challenge the Secretary of State's failure to make payment of

sums due under section 182 and 184 (namely notice pay and accrued holiday pay). The Claimant had made such an application.

60 The Claimant is given 3 months from the date the Secretary of State's
5 decision is communicated to the Claimant to challenge the decision (see
section 188(2)(a)).

61 That would mean that in fact (and in law) each of the Claimant's claims were
lodged within time and the Tribunal therefore has the power to consider what
sums are due to the Claimant.

Sums due to the Claimant

10 **A week's pay**

62 The Claimant had applied a broad brush to the hours that he worked arguing
that he worked 30 hours a week. He accepted, however, that his earnings
varied. Given the lack of clarity as to precisely what the Claimant earned, the
15 fairest way to assess the Claimant's weekly rate of pay is to use the P60s that
set out the sums in respect of which tax had been paid on behalf of the
Claimant (and take an average). This is calculated using the average figures
as set out above. Applying those figures, the Claimant's weekly gross rate of
pay is £250 (25 hours a week x £10 an hour).

Redundancy payment

20 63 The Claimant's redundancy payment is calculated as follows:

Age at date of termination - 52

Gross weekly pay - £250

Complete year's service - 9

Multiplier – 1.5

25 Calculation - $1.5 \times 9 \times £250 = £3,375$.

Notice pay

64 Having worked 9 complete years with the Respondent, the Claimant is entitled
to 9 weeks' notice less the notice he actually received, namely 3 days. 9
week's pay amounts to £2,250 (9 x £250). A day's pay amounts to a week's
pay (£250) x 52 divided by 365 giving a day's pay of £35.62. 3 day's pay (since
5 he was given 3 days' notice) is £106.85. The outstanding notice pay due to
the Claimant is therefore £2,143.15 (£2,250 - £106.85).

Accrued holiday pay

65 The Claimant is legally entitled to 5.6 weeks each year (irrespective of the fact
he believed he was only entitled to 4 weeks per year). He had already taken
10 one week's leave during the leave year. 4.6 weeks leave is outstanding as at
the date of termination. He is therefore due £1,150 (4.6 x £250).

Summary

66 The Tribunal declares that the following sums are due to the Claimant: a
redundancy payment of £3,375, notice pay of £2,143.15 and holiday pay of
15 £1,150.

20 **Employment Judge: David Hoey**
Date of Judgment: 08 November 2018
Entered in register: 11 November 2018
and copied to parties

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