



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4107386/20 (V)

Held by CVP on 1st July 2021

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Employment Judge Hendry

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Mr A E Reid

**Claimant
In Person**

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Post Office Limited

**Respondent
Represented by:
Mr Grant Hutchison,
Advocate**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

(One) The claimant having submitted his application to the Tribunal out of time and not having shown that it was not reasonably practicable to do so, the Tribunal has no jurisdiction to hear the claim and it is dismissed.

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(Two) The claim for disability discrimination having been submitted out of time and the Tribunal finding that it was not just and equitable to extend the time limit the Tribunal has no jurisdiction to hear the claim and it is dismissed.

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REASONS

1. The claimant in his ET1 sought findings that he had been unfairly dismissed from his employment as a driver in the respondent's supply chain. He also alleged that he had suffered disability discrimination as the respondent organisation had failed to take account of his disability which he believes had impacted on the behaviour for which he was disciplined.
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2. The respondent opposed the claims arguing that the dismissal was fair on the grounds of the claimant's conduct and that further the unfair dismissal and disability discrimination claims were lodged out of time and that the Tribunal had no jurisdiction.
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3. The respondent's agents made an application for strike out and/or a Deposit Order in their letter to the Employment Tribunal dated 19 January 2021. This matter proceeded to a preliminary hearing for case management purposes on 9 April 2021 at which the Tribunal discussed the time bar issues and provided the claimant with the statutory basis on which time bar would be considered. The case proceeded to a Preliminary Hearing on 2 July 2021.
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4. Prior to the hearing the respondents had lodged a Joint Bundle. On 30 June some additional documents were lodged for the Tribunal's assistance with consent of parties.
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5. The Tribunal had ordered the claimant to lodge within 14 days of the Note of the preliminary hearing of 9 April a written note setting out both the factual and legal basis on which his claims should proceed. He did so by email on the 13 April 2021 (JB p253/255).
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6. At the outset of the hearing Mr Grant-Hutchison indicated that whilst the respondent believed there was material to support the strike out application his position was to withdraw the application to allow the Tribunal to consider the issue of jurisdiction in a more neutral and less contentious manner. The claimant had no objection to this suggestion.
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Procedure

7. I outlined to the claimant that I would take evidence from him to allow the Tribunal to make findings in fact in relation to the proper factual background around the lodging of his claim, his state of knowledge and why they were late. I also reminded the claimant about the statutory tests the Tribunal had to apply. I indicated that I would then ask Mr Grant- Hutchison to ask the claimant some questions. To assist the claimant, I asked him about the background to his claims. He also referred to his written particulars. This allowed the Tribunal to make the following findings:

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Facts

8. The claimant is Adam Reid. He is 47 years old. He lives near Aberdeen. He has had a varied working life. He is a self-taught pianist and musician. He has played the piano in public. He also worked for Yamaha UK selling guitars, pianos and other musical instruments in the UK. He had worked as a chauffeur and also briefly as a delivery driver with Amazon.

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9. The claimant began working for the Post Office on 27 March 2017. He was dismissed for gross misconduct on the 27 August 2019. He was part of the Post Office's supply chain. He drove a van containing money, postal orders and other valuable goods supplying small rural post offices throughout the Highlands. He was referred to as a "cash carrying crew member". He enjoyed his job which allowed him to travel throughout the Highlands.

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10. At the start of his employment the claimant was given training for his role. He was then deployed as a sole worker driving to rural Post Offices. He had concerns about how closely both he and other drivers based in Aberdeen required to follow procedures and protocols about delivery and collection of goods.

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11. At the end of May 2019 one of the claimant's colleagues had a family bereavement and was given time off. The claimant was asked to cover his round as well as his own. This was an onerous undertaking requiring the

claimant to be given a larger vehicle. It more than doubled the work he had to carry out that week. He was unfamiliar with the new vehicle. The claimant voluntarily agreed to carry this work out. In the event he found it difficult and onerous to do so and he believes that this triggered the symptoms of his longstanding bipolar illness which in turn impacted on his work in the following week or so the quality of which led to his dismissal.

12. At this time the claimant was feeling very tired. He consulted his GP who took blood tests. He was told in July that he had a vitamin D deficiency caused by an underactive thyroid gland which could explain his fatigue.

13. On the 6 June 2021 the claimant was followed by a member of the respondent's staff who checked how the claimant was carrying out his duties. The member of staff reported to the claimant's Line Manager that he was not carrying out the work in accordance with the correct protocols and the claimant was suspended.

Disciplinary Action

14. On 6 June 2019 the claimant was suspended pending an investigation into an allegation that he had broken the respondent's policies and failed to follow the correct handling processes.

15. The claimant did not fully disclose his mental health condition to the Investigating Officer who was his line manager but asked for an Occupational Health referral which was granted.

16. A telephone assessment took place with Occupational Health on 11 July 2019. The doctor reported (JB 151) ***“Mr Reid suffers from a number of medical conditions including a longstanding psychiatric condition, which has been stable for many years and for which he currently experiences no relevant symptoms.”***

17. The claimant had asked the Occupational Health providers to contact his GP about his mental illness. He did not discover until after his dismissal that they

had not done so. The report they prepared that was seen by the dismissing officer did not mention his Bipolar condition.

- 5 18. The matter proceeded to a disciplinary hearing. The claimant was dismissed summarily on the 27 August 2019 for gross misconduct.
- 10 19. The claimant was a member of the CWU Union and had the assistance of a Trade Union representative Mr Bowmaker throughout the disciplinary process. The claimant discussed possible Employment Tribunal proceedings with his representative. The claimant was aware that Employment Tribunals dealt with employment disputes such as unfair dismissal but did not know about time limits. He had not been involved in Employment Tribunal proceedings in the past nor had he any knowledge of their procedures. He did not ask his representative about time limits. He did not research the position himself although he had access to the Internet.
- 15 20. The claimant's GP certified that the claimant was fit to return to work.
- 20 21. The claimant's Trade Union representative advised him that Employment Tribunals were a "silver bullet" as a lot of work had to be done before proceeding to an Employment Tribunal. Because of this advice the claimant thought that he would need to get a lawyer before pursuing this avenue.
- 25 22. The claimant appealed the decision to dismiss him. The appeal was heard on the 25 September 2019. The appeal minutes recorded the claimant's position that he believed his health had a detrimental effect on his actions that led to the disciplinary charges (JB p83) . He also explained that he had been diagnosed with an underactive thyroid and as a result was fatigued and not able to concentrate. The outcome was to reject the appeal. This was confirmed to him in writing on the 22 October 2019.
- 30 23. Following the dismissal, the claimant continued to write to the respondent seeking to overturn the decision. The respondent confirmed to the claimant

that the appeal outcome was the respondent's final position by email on the 5 November 2019 and by letter on 23 December 2019 and 10 July 2020.

Disability

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24. The claimant was first diagnosed with mental health issues in his teenage years. He was not formally diagnosed with Bipolar Disorder until he was 27. Prior to that it was thought that he had a depressive disorder. The claimant is on medication for his Bipolar Disorder.

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25. The claimant does not know when an episode of mental illness likely to occur. In his experience it can be triggered by stress or fatigue. He believed that the additional workload of carrying out his colleague's duties triggered an episode of Bipolar Disorder which led to difficulties with his work.

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26. The claimant was reluctant to discuss Bipolar Disorder openly in front of the Investigating Officer because of fears that he would tell colleagues about his condition. He did mention mental health difficulties to him. He asked for a referral to the company's Occupational Health providers. This was done. However, some months after his dismissal he discovered that they had not contacted his GP to obtain details of his condition as he had requested.

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27. The claimant emailed the respondent on 1 November 2019 advising that he did had not disclosed his bipolar condition through fear of stigma (JB p87).

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Post Dismissal

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28. On 10 October 2020 the claimant contacted the Post Office after discovering information on their website about the way in which they treat employees with mental health problems. He hoped to persuade the Post Office to reconsider their decision. He was in contact with them periodically from October onwards.

29. The claimant wrote to Janene Meillor in the respondent's HR department on 5 November 2019 (JB p90) offering to get a report from his doctor and the impact on his mental health. Ms Meillor responded (JB p90): ***“Unfortunately a decision reached following an appeal is final and there is no further right of appeal. This is confirmed within our conduct code policy and in the letter you received from Kath Pitman confirming the appeal outcome ...”***
30. At the end of November, the claimant wrote again to Ms Meillor advising that he had been in contact with the Business Secretary Andrea Leadsom. He wrote again to the Post Office in December 2019 this time to the CEO. The respondent wrote to the claimant on 23 December advising that he would not receive a response to future correspondence unless he raised substantively new matters.
31. The claimant felt dejected after his appeal had been rejected. He became depressed. He nevertheless was able to obtain temporary work. He worked as a milkman between October and November. He was then employed from December to January as a driver and in the same type of role with Argos from February to March.
32. The claimant heard Alistair Campbell speaking about mental health matters and this prompted him to contact him. Mr Campbell put the claimant in contact with the charity MIND in early 2020. They suggested he contact ACAS which he did. He received further advice from them in June 2020 (JBp100). They wrote to him on the 15 June giving him advice about ACAS, employment tribunals and in particular about time limits:
- “Normally someone will have 3 months less 1 day from the day in which the discrimination occurred to make a claim to an employment tribunal. This would not include any time that someone may have spent in the early conciliation process. However, you might find it useful to enquire with the employment tribunal as they might be able to allow it. We would advise that if*

you are considering making a claim to an employment tribunal, that you seek specialist legal advice from an employment law solicitor”

- 5 33. The claimant did not contact the employment tribunal despite the advice he had received. The claimant hoped that he would be able to persuade the Post Office to reconsider their decision. He entered into correspondence with them again. He was disappointed when the Post Office refused to engage with the early conciliation process.
- 10 34. From January 2020 onward the claimant attempted to obtain legal representation. This was made more difficult because of the Covid restrictions. He contacted a number of law firms. They would ask for paperwork in relation to his dismissal. He would supply that paperwork and then he would receive a negative response from them. He did not receive any
15 advice from the law firms about time limits.
35. During lockdown in mid 2020 the claimant enrolled for three certificated courses at North East College on mental health subjects. He subsequently passed them.
- 20 36. The claimant was in contact with the Scottish Government on 30 June 2020 about his case. They wrote to him (JB p116). They indicated that he might wish to contact a solicitor, Trade Union or Citizens Advice.
- 25 37. Ms Meillor wrote to the claimant on the 10 July (JBp130). She mentioned that the claimant had been in contact with ACAS earlier in the year. The letter stated:
- 30 ***“I understand that being dismissed can be a very stressful time. As well as support from your GP, support and advice is also available from Mind UK who can be contacted on the following number; 0333 123 3393.”***
- 35 38. The letter concluded: ***“Unless you raise any substantively new matters, I will not issue any further response as all internal processes have been exhausted.”***

39. The claimant was eventually in contact with the firm Quantum Claims who advised him that his claim was out of time and that he should submit a claim immediately. The claimant submitted the claim after filling out the digital application himself on the 20 November 2020.

ACAS

40. The date of receipt of the ACAS EC notification by the claimant was 16 January 2020 (JB p9). The date of issue of the ACAS Certificate was 28 January 2020.

Witness

41. I found the claimant to be generally a credible witness who was also a mostly reliable witness with a reasonable recall of events. He saw matters understandably perhaps very much from his own perspective and was driven by a sense of injustice.

Submissions

42. The claimant's position was that it was not reasonably practicable as an ordinary person ignorant of time limits to lodge his unfair dismissal claim on time. He could not understand why he had been dismissed when he believed he was ill at the time. He thought it unjust that when he had brought the failure of the Occupational Health physician to contact his GP the matter was not reopened. In relation to his disability discrimination claim he asked the Tribunal to exercise its discretion to allow the disability claim to proceed. He thought it unjust to be dismissed for being mentally ill and suggested that if the Post Office had only been aware of his Bipolar disorder he would not have been dismissed. In response to the suggestion that the respondent would be prejudiced he suggested that the matters were all well recorded and the absence of the Investigating Officer would not be a hinderance to the respondent.

Respondent's Submissions

43. Mr Grant-Hutchison made reference to both statutory tests. He referred me
5 to the well-known authorities of ***Walls Meat Company v Khan (1978) IRLR 499***, and to ***Deadman v British Building and Engineering Appliances Ltd (1973) IRLR 379*** in relation to the test of reasonable practicability. He referred to the more recent case of ***Cullinane v Balfour Beatty Engineering Services UKEAT 0537/10***. In relation to the just and equitable test I was
10 referred to the cases Tesco ***Stores Ltd V Kayani (UKEAT-0128-16-DM)*** the case of ***Adedeji v University Hospitals Birmingham NHS Trust [2021] EWCA Civ 23***. These cases he submitted provide guidance on the exercise of discretion. There was he submitted, a public interest in maintaining time limits. The same sort of factors considered in relation to the reasonably
15 practicable test (s111) are also applicable when considering a just and equitable test (***Tesco Stores Ltd***). There were also issues in relation to the prejudice the respondents will be likely to suffer if the case is allowed to proceed. The background here he suggested is not one or two encapsulated events but a whole series of interactions. A considerable time period has
20 passed. One of the main witnesses, the line manager and Investigating Officer, has developed a medical condition which affects his memory. Another witness is in the process of leaving the country to take up residence in Spain. In these circumstances there would be real prejudice to the respondents if the claim proceeded.

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Discussion and Decision

44. The primary time limit for unfair dismissal claims is contained in s 111 (2) (a)
of the **Employment Rights Act 1996** (ERA)

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Section 111 (2) is (so far as material) as follows:

“...[A]n employment tribunal shall not consider a complaint under this section unless it is presented to the tribunal -

5 (a) before the end of the period of three months beginning with the effective date of termination, or

(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 of three months.”

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45. The principal issue here that is said to have rendered it impracticable for the claimant to bring proceedings in time was his ignorance of the time limit and whether this was reasonable. As stated by the then President Mr Justice Underhill in **Charman** at paragraph 9:
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“The starting point is that if an employee is reasonably ignorant of the relevant time limits it cannot be said to be reasonably practicable for him to comply with them. Brandon LJ said this in terms in Wall's Meat Co. Ltd v Khan [1979] ICR 52, at page 61, and the passage in question was explicitly endorsed by Lord Phillips in Williams-Ryan: see paragraph 21 (page 1300 F-H). In the present case the Claimant was unquestionably ignorant of the time limits, whether one considers his own knowledge or that of himself and his father. The question is whether that ignorance was reasonable. I accept that it would not be reasonable if he ought reasonably to have made inquiries about how to bring an employment tribunal claim, which would inevitably have put him on notice of the time limits. The question thus comes down to whether the Claimant should have made such inquiries immediately following his dismissal.”

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And later

“It has repeatedly been emphasised that the question of reasonable practicability is a question of fact (subject to one point about the effect of third party advice, which does not arise here - see Northamptonshire County Council v Entwhistle [2010] IRLR 740)”

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46. In the **Charman** case a claimant awaited the end of a grievance process before considering legal recourse and his ignorance the time limit (and that of his father) were held by the Tribunal on the facts (and upheld by the EAT) to demonstrate that it was not reasonably practicable to raise the claim on time. The claimant here is not in the same position. He had advice from his Trade Union representative and even acknowledges speaking to him about Employment Tribunal claims. It is a mystery why the claimant did not contact his Trade Union after his dismissal to ask them to act for him or at least to enquire about the process. He took no steps to research the position for himself despite having the means and ability so to do.

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47. It was interesting to note that despite feeling depressed after his dismissal the claimant was not incapacitated. During the disciplinary process he was adjudged fit to work by his GP. In fairness he did not argue that he was incapacitated at any point through illness. He obtained work quickly after his dismissal and continued to correspond with his former employers seeking to reopen his case.

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48. The claimant was in contact with the charity MIND who advised him that he might have a claim. This seems to have prompted him to contact ACAS and entering into Early Conciliation in early 2020. I must say I find it surprising that ACAS did not tell him that his claim was by that time considerably out of time but it was another significant milestone in the history of the case that should have prompted him to check whether time limits were in operation especially as he took no action following the unsuccessful period of Early Conciliation.

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49. While I sympathise with the claimant trying to find legal representation in the midst of the Corona Virus Pandemic he had since his dismissal some time before the Pandemic started to secure legal representation which he believed he needed following the discussion he had with his Trade Union representative. He accepted that once he had raised the case, he was again in contact with his Trade Union who advised him that they would help. They then put him in contact with solicitors who ultimately declined to act. It seems that the claimant was very focussed on getting the Post Office to acknowledge their failings as the claimant saw it rather than to take legal proceedings which he knew were available. For his benefit I would observe that it seems that at least by the appeal stage if not before the managers were aware of the claimant's mental health difficulties which were also mentioned in the Occupational Health report but appear to have rejected these as either a reason for the breach of procedures or sufficient mitigation.
50. It was not reasonable in my view for the claimant not to have looked into the matter and checked the time limits with his Trade Union representative. I am driven to the conclusion that his ignorance was in effect not reasonable and the application for the unfair dismissal claim to proceed must fail at the first hurdle as he is unable to show that it was not reasonably practicable to comply with the original time limit.
51. The question of reasonable practicability is a question of fact and depends on the facts and circumstances of any individual case and whilst anyone would have sympathy for the difficulties the claimant was experiencing matters there appears to have been no real bar to prevent him raising his claim on time.

Disability Discrimination

52. Section 123 of the Equality Act, 2010 is in the following terms:

“123 Time limits

(1) ...Proceedings on a complaint [of discrimination in employment] may not be brought after the end of— (a) the period of 3 months

starting with the date of the act to which the complaint relates, or (b) such other period as the employment tribunal thinks just and equitable...”

5 53. In relation to the matter of disability discrimination. That claim probably arose
at the point he was dismissed. As discussed earlier the claimant took no
action at that point about the matter although believing that the way he had
been treated was wrong. If that was in doubt his discussions with MIND
through Alistair Campbell had alerted him to the possibility of a claim for
10 discrimination. Once more he did not research further into his rights. He did
not contact his Trade Union. He did not clarify the next steps he could take
one the ACAS process was concluded.

15 54. The leading case that provides guidance to the approach a Tribunal should
take is that of **Robertson v Bexley Community Centre** [2003] EWCA Civ
576. In which Lord Justice Auld in the English Court of Appeal stated:

20 ***24. The Tribunal, when considering the exercise of its discretion, has a wide ambit within which to reach a decision. If authority is needed for that proposition, it is to be found in Daniel and Homerton Hospital Trust (unreported, 9th July 1999, CA) in the judgment of Gibson LJ at page 3, where he said:***

25 ***"The discretion of the tribunal under section 68(6) is a wide one. This court will not interfere with the exercise of discretion unless we can see that the tribunal erred in principle or was otherwise plainly wrong."***

30 ***25. It is also of importance to note that the time limits are exercised strictly in employment and industrial cases. When tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can justify 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 discretion is the exception rather than the rule.

55. In the present case it was argued that there would be a real prejudice to the
5 respondent of allowing the proceedings to continue given that the claimant's
line manager and Investigating officer has been diagnosed with a condition
affecting his memory and the another witness, the appeal manager, is due to
emigrate to Spain. I do not put much weight on the latter situation as the
witness could give evidence from Spain (provided she was prepared to
10 cooperate in doing so and there is no indication she would be difficult about
the matter). I put a little more weight problems caused by the claimant's line
manager becoming unwell but remain unconvinced that this would cause real
prejudice given that the misconduct complained about was witnessed by
another manager and the dismissal carried out by someone else and as the
15 claimant suggested the whole process was recorded in some detail.

56. In the whole circumstances however I do not regard the exercise of discretion
would be appropriate given the claimant's repeated failure to acquaint himself
with the necessary time limits and the long delay in proceeding with the claim
20 against a background where he appears to have been perfectly able to take
such action had he chosen to do so, had received advice about Employment
Tribunals prior to dismissal and encouraged to take advice on several
occasions thereafter.

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Judge J Hendry

Employment Judge

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8th of July 2021

Date of Judgment

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8th of July 2021

Date sent to parties