



## **EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case No: 4100826/2022**

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**Held in Glasgow on 5 April 2022**

**Employment Judge: J McCluskey**

10 **Mr K Cook**

**Claimant  
In Person**

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**Tesco Stores Limited**

**Respondent  
Represented by:  
Ms Finlayson  
Solicitor**

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

The Judgment of the Tribunal is that (1) the claim has been lodged out with the period of three months starting with the effective date of termination; (2) it was reasonably practicable for the claimant to lodge the claim in time; (3) the Tribunal does not have jurisdiction under section 111 of the Employment Rights Act 1996 to hear the complaint of constructive unfair dismissal.

### **REASONS**

#### **Introduction**

1. This is a claim of constructive unfair dismissal. However, the issue of whether the claimant lodged his claim in time in terms of section 111 of the Employment Rights Act 1996 ("the ERA") was to be determined as a preliminary issue at this hearing.
2. The claimant gave evidence on his own behalf. The respondent did not call any witnesses.

3. A joint bundle of documents was lodged with the Tribunal and both parties had a copy of this bundle.
4. At the outset of the hearing the claimant confirmed that his only claim against the respondent was constructive unfair dismissal.

5 **Issues**

5. The Tribunal had to determine the following issues:
  - a. Did the claimant lodge his claim within three months minus a day of his dismissal taking effect?
  - b. If not, was it reasonably practicable for him to lodge his claim within  
10 that time?
  - c. If not, did he lodge his claim within a further reasonable period?

**Findings in fact**

The Tribunal made the following findings in fact:

6. The claimant was employed by the respondent as a Warehouse Team  
15 Manager. He commenced employment with the respondent on 6 May 2019. The claimant gave written notice of his resignation from his employment on 25 September 2021. He provided four weeks' notice and his employment terminated on 22 October 2021.
7. The claimant began employment with a new employer on 25 October 2021.
- 20 8. The claimant lodged a written grievance with the respondent on 25 September 2021, which was the same date as he tendered his resignation. The grievance was about a manager.
9. The claimant's grievance was investigated by the respondent. The claimant received a written outcome of his grievance on 7 December 2021. The  
25 claimant's grievance was upheld in respect of one matter and partially upheld in respect of a second matter.

10. The claimant thought that he could not lodge a Tribunal claim whilst his grievance process was ongoing.
11. The claimant had access to a trade union representative whilst employed by the respondent. The claimant did not discuss the bringing of a claim or the time limits for doing so with any trade union representative.  
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12. The claimant had a catch up with former colleagues, with whom he had worked whilst at the respondent, on 15 January 2022. His former colleagues told him that nothing had changed with the manager against whom he had raised a grievance. The claimant felt disappointed that, according to his colleagues, the behaviours of the manager had not changed.  
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13. At some point after 15 January 2022 the claimant looked on the internet to research how to bring a Tribunal claim. He cannot recall what day he carried out his research. He saw that he required to contact Acas.
14. The claimant first contacted Acas on 23 January 2022. This is the date recorded on the Acas early conciliation certificate as the date of receipt by Acas of the early conciliation notification. Acas told the claimant that there was a three-month time limit for bringing claims in the Tribunal and that he had missed that time limit. Acas told the claimant that he could still proceed with early conciliation.  
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15. The early conciliation period ended on 27 January 2022. Acas told the claimant to lodge his ET1 as soon as possible as his claim was already outside the three months' time limit.  
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16. The claimant lodged his claim with the Tribunal on 28 January 2022.
17. The claimant works full time in his new employment and has a young family.
18. The claimant did not take any legal advice or contact the Citizen's Advice Bureau (CAB) about raising a Tribunal claim. He has heard of the CAB but did not consider speaking to them.  
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**Relevant Law**

19. Section 111 of the ERA states as follows: *(1) A complaint may be presented to an employment tribunal against an employer by any person that he was unfairly dismissed by the employer. (2) Subject to the following provisions of this section, an employment tribunal shall not consider a complaint under this section unless it is presented to the tribunal – 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.*

**Submissions**

20. Both parties made oral submissions. The respondent's representative, Ms Finlayson, also provided short written submissions to the Tribunal and a copy was provided to the claimant. The claimant was given an opportunity to consider these written submissions in advance of making his own submissions. A summary of the parties' submissions follows:

*Submissions for respondent*

21. Ms Finlayson submitted that the claimant had not shown why it was not reasonably practicable for him to have brought his claim on time. The claimant said that he hadn't considered a Tribunal claim until the catch up with former colleagues on 15 January 2022. That does not mean, however, that he could not have investigated how to bring a Tribunal claim, and the timescales for doing so, before that date. The claimant could then have acted swiftly after 15 January 2022. But the claimant had not acted swiftly after 15 January 2022. He did not contact Acas until 23 January 2022. He had gone to Acas thirteen weeks after his employment had terminated. The claimant had access to the internet. He is articulate and intelligent. He has heard of the Citizen's Advice Bureau and said that he could have gone to a trade union representative for advice. He did not do any of those things. He could have obtained advice in

order to lodge his claim in time. It was reasonably practicable for the claimant to have lodged his claim in time but he had not done so. With regard to the second limb of the statutory test, following the issue of the Acas early conciliation certificate the claimant had waited until the following day before lodging his ET1. He could have done so the same day. The further period he took to lodge his claim is not a reasonable period. His claim should not be allowed to proceed.

22. In her written submissions Ms Finlayson referred to the case of **Porter v Bandridge Ltd [1978] ICR 943 CA** and submitted that the burden rests squarely on the claimant to persuade the Tribunal that it was 'not reasonably practicable' to bring a claim in time. She also referred to the case of **Marks & Spencer Plc v Williams-Ryan [2005] EWCA Civ 470** and submitted that where a claimant pleads ignorance of time limits the Tribunal must determine whether that ignorance is reasonable. Ms Finlayson submitted that the claimant has not shown why, in the circumstances, it was not reasonably practicable for him to bring his claim within the three-month time limit. In respect of the second limb of the test, and whether the claims were presented within such further period as the Tribunal considers reasonable, Ms Finlayson referred to **John Lewis Partnership v Charman UKEAT/0079/11/ZT** (unreported) where the EAT stated that the question is whether the claimant acted with reasonable expedition after learning of the time limit. She submitted that the onus of proving 'reasonable expedition' is on the claimant and that he had not done so.

*Submissions for claimant*

23. The claimant submitted that the timing of the grievance investigation and the outcome which was received on 7 December 2021 had an impact on the timescales for him bringing a Tribunal claim. He wanted to wait until the outcome of the grievance he had raised before making any decisions. Given the outcome of his grievance, much of which had been upheld, the claimant hoped that would result in a change of character by the manager involved.

When he met with his former colleagues on 15 January 2022, he was told that had not happened. He decided he wanted to help his colleagues as best he could by bringing a Tribunal claim. The claimant conceded that he could have acted more swiftly in bringing his Tribunal claim if he had done his due diligence and looked into timescales at an earlier stage. Once he decided to bring a claim he had done this as quickly as he could, after 15 January 2022, given that he was working full time and had a young family.

### **Discussion and decision**

*Did the claimant lodge his claim within three months minus one day of his dismissal taking effect?*

24. The claimant's employment terminated on 22 October 2021. The last day for the claimant to lodge his ET1 with the Tribunal was 21 January 2022. The extension of time provisions set out in section 207(B)(3) ERA, which 'stop the clock' during Acas early conciliation, do not apply as Acas early conciliation did not commence until 23 January 2022. This is two days after the end of the statutory limitation period on 21 January 2022. The claim was not lodged within three months minus one day of his dismissal taking effect. The claim was not, therefore, lodged within the prescribed time period.

*If not, was it reasonably practicable for him to lodge his claim within that time?*

25. The Tribunal has to consider whether time should be extended under section 111(2)(b) of the ERA. This is a two-stage test. The first stage of the test requires the Tribunal to be satisfied that it was not reasonably practicable for the claim to be presented timeously.

26. The burden of proof rests with the claimant to establish that time should be extended. As the Tribunal understands it, the claimant's position is that he did not realise that there was a time limit for lodging his ET1 claim form with the Tribunal until he spoke to Acas on 23 January 2022 to commence the early conciliation process.

27. The question of whether it was reasonably practicable for the claimant to lodge his claim within the statutory time limit is a question of fact. The claimant carried out research on the internet about lodging a Tribunal claim after his former colleagues told him on 15 January 2022 that the conduct of the manager against whom he had raised a grievance had not changed. This research was carried out at some point after 15 January 2022 and before 23 January 2022, when he contacted Acas. The claimant could not recall the date on which he had carried out his internet research but said he was busy after 15 January 2022 as he was working full time and had a young family. He explained that this was why he had not contacted Acas until 23 January 2022.
28. The claimant said his internet research had been about the process for bringing a Tribunal claim and that he had not read on the internet about time limits for lodging his claim. He said that he only became aware of time limits when Acas told him on 23 January 2022 that he had missed the time limit for lodging his claim. He said that Acas had told him that the early conciliation process could still be carried out but that there would be a different process after that for lodging his claim with the Tribunal.
29. The Tribunal found it surprising that having carried out research on the internet about bringing a Tribunal claim, the claimant would not have read about time limits for bringing his claim, as part of his research.
30. The Tribunal also noted the claimant's evidence that he thought he could not lodge a Tribunal claim whilst his grievance process was ongoing. This indicated to the Tribunal that during the grievance process, which started on 25 September 2021 and concluded on 7 December 2021, the claimant had given some thought to the possibility of bringing a Tribunal claim. Yet during the grievance process and subsequently, right up until some point after 15 January 2022, he had not carried out any 'due diligence' about lodging a claim. He had not made any enquiry with his trade union representative about lodging a claim whilst still employed by the respondent. He had not made any

enquiry with the CAB at any time about lodging a claim. He had not made any enquiry by way of internet research until some point after 15 January 2022.

31. The Tribunal noted the claimant's explanation in relation to the time period from 15 January 2022 to 23 January 2022. The claimant said that he was working full-time and had a young family, He had been unable to contact Acas before 23 January 2022. Again, the Tribunal noted that the claimant had not made any enquiry about lodging a claim or the timescales for doing so prior to this period. He had left it all until very late, given that he had handed in his notice on 25 September 2021.
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32. The Tribunal also noted the claimant's concession, very fairly in the Tribunal's view, that he could have acted more swiftly in bringing his Tribunal claim if he had done his 'due diligence' and looked into timescales at an earlier stage.
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33. In reaching its decision the Tribunal is mindful that the burden rests on the claimant to persuade the Tribunal that it was 'not reasonably practicable' to bring a claim in time (*Porter v Bandridge*). The Tribunal is also mindful that where a claimant pleads ignorance of time limits the Tribunal must determine whether that ignorance is reasonable (*Marks & Spencer Plc v Williams-Ryan*).
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34. On this basis, and for the reasons given above, the Tribunal is satisfied that it was reasonably practicable for the claimant to have brought his claim within the relevant time limit and that the claimant's ignorance of time limits is not reasonable.
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35. Having reached that conclusion, it was unnecessary for the Tribunal to go on to consider the second stage of the test in section 111(2)(b) of the ERA, whether the claimant lodged his claim within a further reasonable period.



36. The effect of this conclusion is that the Tribunal has no jurisdiction to consider the complaint of constructive unfair dismissal.

Employment Judge: Jacqueline McCluskey

Date of Judgment: 19 April 2022

5 Entered in register: 21 April 2022  
and copied to parties