



**IN THE EMPLOYMENT TRIBUNAL (SCOTLAND) AT EDINBURGH**

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**Judgment of the Employment Tribunal in Case No: 4100134/2023, Issued  
Following Open Preliminary Hearing Held at Edinburgh on the Cloud Based  
Video Platform on 24<sup>th</sup> March 2023, at 11 am**

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**Employment Judge J G d'Inverno**

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**Miss B Makan**

**Claimant  
In Person**

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**BXL Limited trading as Brass Monkey  
Grange**

**Respondent  
Represented by:  
Mr M Proudler -  
Director**

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**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

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The Judgment of the Employment Tribunal is:-

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**(First)** To record the respondent's representative's concession, made in the course of the Hearing that the sum of £91.88 sought by the claimant in lieu of paid annual leave entitlement, accrued but untaken by her as at the Effective Date of Termination of her employment, 20<sup>th</sup> of the 8<sup>th</sup> 2022, is due and resting owing by the respondent to the claimant, both in contract and in terms of the Working Time Regulations 1998.

5 (Second) To record the respondent's representative's undertaking, given in the course of the Hearing, that the conceded sum of £91.88 was to be paid by the respondent to the claimant by means of bank transfer in the course of that day, 24<sup>th</sup> March 2023, which concession and undertaking the claimant is content to accept and that upon such undertaking the issue falls away.

10 (Third) Otherwise holds that, respectively in terms of section 23 of the Employment Rights Act 1996 and Regulation 30 of the Working Time Regulations 1998, that the claimant lacks Title to Present and the Tribunal lacks Jurisdiction to Consider, her complaint of Unlawful Deduction from Wages and her claims for compensation in respect of paid annual leave entitlement accrued but untaken as at the date of her last working in the business previously operated as "Number 1 The Grange" in or about the first week of June 2022.

15 (Fourth) That the claimant's complaint of Unauthorised Deduction from Wages and subsisting claim for compensation in lieu of paid annual leave entitlement, are dismissed for want of Jurisdiction.

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25 **Employment Judge: J d'Inverno**  
**Date of Judgment: 04 April 2023**  
**Entered in register: 05 April 2023**  
**and copied to parties**

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I confirm that this is my Judgment in the case of **Makan v BXL Limited** trading as **Brass Monkey Grange** and that I have signed the Judgment by **electronic signature.**

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## REASONS

### Background

- 5 1. This case called for Open Preliminary Hearing, In Person on 24<sup>th</sup> March 2023, for consideration and determination of the Preliminary Issue of challenge to the Tribunal's Jurisdiction by reason of asserted Time Bar.
2. The claimant, Miss B Makan, appeared in person. The Respondent  
10 Company which is properly designed "BXL Limited trading as 'Brass Monkey Grange', of 1 Grange Road, Edinburgh, Lothian, EH9 1UH", was represented by Mr M Proudler, its Director.
3. Each party lodged a bundle of documents, extending, for the claimant to  
15 some 14 and for the respondent, 22 pages and to some of which reference was made in the course of evidence and submission.

### The Claims

- 20 4. In her initiating Application ET1 the claimant gave notice of the following claims;
- (a) A complaint of unauthorised deduction from wages in terms of section 13 of the Employment Rights Act 1996 ERA and arising  
25 from the non-payment to her of wages due for the week ending 30<sup>th</sup> May 2022, earned when working for the previous business which traded from the premises and whose trading name was "Number 1 The Grange".
- 30 (b) A claim for compensation in lieu of accrued but untaken Paid Annual Leave entitlement, in terms of the Working Time Regulations 1998, (Holiday Pay), and said to arise from her period of employment with the previous business "Number 1 The Grange";

(c) The claimant values those claims in a combined total of £1,596.31 which, as at the date of Open Preliminary Hearing she has yet to further particularise and individually quantify;

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(d) The claimant directs both those claims against the respondent, for whom she worked upon her return from holiday in June 2022 until 20<sup>th</sup> of August 2022 on which latter date she resigned. The claimant so directs her claims on the basis that she believes that there had occurred a "Relevant Transfer" for the purposes of the Transfer of Undertakings (Protection of Employment) Regulations 2006 SI 2006/246, her understanding expressed in the course of the Hearing being that if that were so, liability in respect of wages and holiday pay would sit with the respondent;

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(e) A claim for compensation in lieu of paid annual leave entitlement, accrued but untaken as at the date of termination of her employment with the respondent on 20<sup>th</sup> August 2022, which claim arose out of her period of employment with the respondent and which the claimant directs against the respondent in an estimated amount in the region of £70-£90.

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5. In the course of Case Management Discussion conducted at the outset of the Hearing, the respondent's representative conceded that a sum of £91.88 was due and resting owing, both in contract and in terms of the Working Time Regulations, to the claimant by the respondent in lieu of accrued but as yet untaken paid annual leave entitlement arising from the claimant's period of employment with the respondent and outstanding as at the termination of that employment. The respondent's representative undertook unconditionally, to make payment in satisfaction of that claim of that amount to the claimant in the course of the working day 24<sup>th</sup> March 2022. The claimant having confirmed that she was content, in the face of that concession, to accept the respondent's representative's undertaking, that issue fell away.

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**The Respondent's Position**

6. The respondent who has entered appearance resisting the claims, asserts:-

- 5 (a) That the initiating Application ET1 was first presented out of time;
- 10 (b) That the claimant is unable to demonstrate that it was not reasonably practicable for her to submit her claims timeously and or that the claim was subsequently submitted within a further reasonable period; and
- 15 (c) That the Tribunal lacks Jurisdiction to hear the claimant's complaints of unauthorised deduction from wages and claim for compensation in lieu of paid annual leave entitlement, respectively in terms of section 23(4) of the ERA and Regulation 30 of the Working Time Regulations 1998;
- 20 (d) Separately and in any event denying, let it be assumed that the Tribunal had/has Jurisdiction to consider the claims, the Respondent Company denies, that it has/would have any liability in respect of the claims, further asserting:-
- 
- 25 (i) That the Respondent Company has no connection with or to the previous tenant of the business premises at Number 1 Grange Road, Edinburgh ("the Premises");
- 30 (ii) That the Limited Liability Company which had previously traded as a restaurant known as "Number 1 The Grange" from the premises had gone into liquidation on the 6<sup>th</sup> of June 2022 with the result that its lease had been terminated.

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- (iii) That the Respondent Company had entered into a new lease for the premises with the landlord, Caledonian Heritable Limited, on the 29<sup>th</sup> of June 2022 some three weeks post the liquidation (produced at pages 1 to 14 of the respondent's bundle)
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- (iv) That the business traded from the premises by the respondent was an entirely new business of a public house;
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- (v) That there was no contract between the respondent and the company which previously traded from the premises with the trading name "Brass Monkey Grange";
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- (vi) That the two Limited Companies were unconnected both in terms of their shareholdings and or business interests;
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- (vii) That there had occurred no transfer of an economic entity, and that the Transfer of Undertakings (Protection of Employment) Regulations 2006 did not apply;
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- (viii) That the respondent was not liable for any wage arrears of an unconnected Limited Liability Company;
- (ix) That any such claims for arrears of wages, whether earned or in lieu of paid annual leave, should be directed to the Liquidator of the Company that previously operated the business

which traded as "Number 1 The Grange" from the business premises.

- 5 (x) That the respondent had entered into a Contract of Employment directly with the claimant in terms of which she was employed in the new public house business "Brass Monkey Grange" thereafter until on or about 20<sup>th</sup> August 2022.

- 10 7. It was a matter of concession on the part of the claimant and not an issue in dispute between the parties, that the initiating Application ET1 first presented on the 10<sup>th</sup> of January 2023 was presented outwith the relevant initial statutory time limit applicable to each of the claims.

15 **The Issue**

8. The issue requiring investigation and determination by the Tribunal at Open Preliminary Hearing was accordingly whether the Tribunal was satisfied;-

20 (a) that it was not reasonably practicable for the claimant's complaint of unauthorised deduction from wages and the claimant's claim for compensation in lieu of paid annual leave entitlement (respectively in terms of section 23(4) of the ERA and Regulation 30(2)(b) of the WTR 1998) to be presented  
25"~ before the end of that initial period of three months (as extended if applicable by the operation of the Early Conciliation Provisions);

30 (b) that the claims were subsequently presented within such further period as the Tribunal considers reasonable; and thus,

(c) whether the Tribunal has Jurisdiction to consider the complaints respectively in terms of section 23(4) of the ERA and Regulation 30(2)(b) of the WTR Regs 1998.

5 9. The claimant gave evidence on affirmation regarding the reasons for her non-timeous presentation of her complaints and answered questions in cross examination put by the respondent's representative.

10. The respondent's Director gave limited evidence on affirmation.

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11. The Tribunal found both the claimant and the respondent's Director to be a credible and reliable witness.

### Findings in Fact

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12. On the documentary and oral evidence presented, including the oral evidence of the claimant which it accepted, the Tribunal made the following essential Findings in Fact, restricted to those necessary for the determination of the issue.

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13. The claimant commenced employment, on or around the 21<sup>st</sup> of March 2021, with the Limited Liability Company, whose name she did not know, but which traded as a restaurant/pub known as "Number 1 The Grange" from the premises at Number 1 Grange Road, Edinburgh" ("the Premises").

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14. In or around the end of May 2022 "Number 1 The Grange" in which business the claimant was employed, ceased trading. The claimant, who had worked in the business up to the point of its cessation of trading, received no wages for the week ending 30<sup>th</sup> of May 2022 during which she worked.

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15. It was the evidence of the respondent's representative that the Limited Liability Company which previously traded from Number 1 Grange Road as "Number 1 The Grange" was placed in liquidation on the 6<sup>th</sup> of June.



16. The business traded under the name “Number 1 The Grange” was the business of a restaurant.
17. As at the date of cessation of trading of Number 1 The Grange, there was  
5 due and resting owing to the claimant an accrued, but as yet untaken paid annual leave entitlement (yet to be fully particularised and quantified by her), which entitlement had accrued to the claimant during and arising out of her employment with “Number 1 The Grange”. The claimant neither received the wages due to her for the week ending 30<sup>th</sup> of May 2022 nor any payment in  
10 lieu of that paid annual leave entitlement.
18. Following this cessation of trading of “Number 1 The Grange” and prior to departing on holiday, the claimant had a conversation, some time in June 2022, with the respondent’s representative and Director Mr Proudler, about  
15 her working in the new public house business which he (and the Limited Company of which he was Director) intended to trade from the premises as “Brass Monkey Grange”.
19. The Respondent Company entered into a lease of the premises at Number 1  
20 Grange Road, Edinburgh, EH9 1UH on the 29<sup>th</sup> of July 2022. Following the claimant’s return from holiday and the commencement of trading by Brass Monkey Grange, the claimant began to work in that business where she remained employed until on or about the 20<sup>th</sup> August 2022.
- 25” 20. The claimant’s last working week with Brass Monkey Grange was the week ending 22<sup>nd</sup> August 2022. (at which latter time she resigned)
21. As at the date of termination of her employment the claimant had received  
30 payment due to her in respect of all wages earned during the period of her working with Brass Monkey Grange. As at the same date there was outstanding and due to the claimant, paid annual leave entitlement arising from and accrued during her period of working with Brass Monkey Grange payment in respect of which she did not receive from the respondent upon, or following the termination of her employment.

22. The respondent's representative conceded at the outset of the Hearing, and undertook to pay to the claimant forthwith and unconditionally, a sum of £91.88 in lieu of accrued but untaken holiday pay arising from her working in the business trading as Brass Monkey Grange.

23. The claimant, for her part, agreed the quantification, of that element of her claims, in the sum of £91.88 and upon acceptance of the respondent's representative's undertaking, that element of her claims fell away.

24. Following cessation of trading of the previous restaurant business "Number 1 The Grange", the claimant was unclear as to from whom she would receive her outstanding wages for the week ending 30<sup>th</sup> of May 2022 and her outstanding holiday pay relating to her period of employment in that business.

25. On the 25<sup>th</sup> of June, the claimant received a text from Danny Allan, the person known to her as the owner and operator of the previous restaurant business and the individual who had employed her. In the text message, which is copied and produced by the claimant at pages 3 and 4 of her bundle, Mr Allan said amongst other things:-

*"/Ve handed back the keys to the pub as you will clearly know Covid-19 took a huge toll financially on the business and myself personally (for staff wages). I simply couldn't afford to keep the business running hence contacting the landlord to hand the keys back - the reason I done this was to allow the new operator to transfer your employment from my company to theirs. This is called TUPE.*

*Regarding wages and holiday pay this will be paid however I'm awaiting a payment from the landlord for stock, fixtures and fittings which I should have more clarity on this Monday. I will update when I hear (I will actively chase up).*

*It's been a pleasure working with you all and I couldn't have asked for a better team.*

*Sorry to have put you all temporarily out of pocket but please be rest assured I'll do everything I can to sort this. ..."*

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26. The claimant did not know what the abbreviation "TUPE" stood for or what it was intended to convey.
- io 27. The claimant did not carry out any research on her own behalf into the meaning of TUPE, whether on the internet or otherwise.
28. On 4<sup>th</sup> of July the claimant spoke to ACAS. She did not recount in any detail the circumstances of the closure of the one business and the opening up of another, rather she told the ACAS Officer with whom she spoke that "TUPE" had occurred in her case.
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29. The claimant understood the Conciliation Officer to indicate to her that in those circumstances, that is to say if a TUPE transfer had occurred, then the new business to which her employment was to be/had been transferred would be liable to pay her arrears of wages and holiday pay.
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30. The Conciliation Officer with whom the claimant spoke told her that a three month time limit applied to the raising of her claims with the Employment Tribunal, and ran from the date upon which she should have received the payments which she was at that time claiming, namely from on or about the 30<sup>th</sup> of May 2022. She had no recollection of their discussion mentioning the extension of time limits by the application of the Early Conciliation Rules.
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- 30 31. On 3<sup>rd</sup> of August 2022 the claimant spoke to the respondent's representative and Director Mr Martin Proudler. She told Mr Proudler about her conversation with ACAS and asked if he would be paying, to her, her wages for the week ending 30<sup>th</sup> May 2022 and her outstanding holiday pay both

arising from the period of her employment in "Number 1 The Grange" with Mr Allan.

5 32. The respondent's Director told the claimant; that the respondent would not make those payments, that no TUPE transfer had occurred and that the respondent was not liable for wages due to the claimant by her previous employer.

10 33. In mid August, on or about the 17<sup>th</sup> of August, 2022 the claimant again spoke with ACAS and relayed to them what the respondent's Director had said, namely that he had asserted that no TUPE transfer had occurred and had denied that the respondent was liable to make the payments.

15 34. The claimant understood the Conciliation Officer to whom she relayed the respondent's reaction to continue to express the view that if there had been a TUPE transfer then the respondent would be liable to make the payments.

20 35. The claimant considered the two opposing points of view which had been expressed to her and decided "to believe ACAS". In so doing, she did not carry out any research of her own into the circumstances in which a TUPE transfer may be said to have occurred.

25 36. As at on or about the 17<sup>th</sup> of August 2022, after her second telephone conversation with ACAS, the claimant had determined, in her own mind,:-

(a) That a relevant transfer for the purposes of the TUPE Regulations 2006 had occurred;

30 (b) That the respondent was liable to make payment to her in respect of the monies arising from her employment with the previous business "Number 1 The Grange";

- (c) That her claim and right to raise proceedings in the Employment Tribunal to recover those sums lay, in her mind, against the respondent;
- 5 (d) She had decided to take matters forward and to raise a claim in the Employment Tribunal against the respondent;
- (e) She was aware that a three month time limit, running respectively from the date of the deduction from her wages and  
10 from the date on which her right to receive compensation for her accrued but untaken annual leave entitlement should have been permitted, was running for the raising of her claims, in each case from on or about 30<sup>th</sup> May 2022.
- 15 37. The 17<sup>th</sup> of August 2022 and the period up to and including the 29<sup>th</sup> of August 2022 were a date and a period which fell within the initial applicable statutory time limit applying to the first presentation of the claimant's claim. Had the claimant initiated her formal engagement with ACAS for early conciliation purposes at any point between the 17<sup>th</sup> and the 29<sup>th</sup> of August 2022, the time  
20 period within which she would have been entitled to first present her complaints could have been extended, by reason of the operation of the Early Conciliation Provisions, by up to a further 28 days, that is until the 26<sup>th</sup> of September 2022.
- 25" 38. Following the 17<sup>th</sup> of August 2022?the claimant did not seek advice from any other source as to the potential extension of her time limit. Nor did the claimant carry out any research on her own behalf, for example on the internet to which she had access throughout.
- 30 39. The claimant had examinations at the beginning and at the end of August 2022 and at the beginning of December and, later in December just prior to the Christmas and New Year stand down that same year. During that period the claimant also required to work to help support herself during her studies.

- 5 40. On 22<sup>nd</sup> November 2022, ACAS issued to the claimant the Conciliation Certificate which requires to accompany the initiating Application ET1 on first presentation. In the vacation period between Christmas and New Year the claimant drafted her initiating Application ET1. The process took the claimant, back to back, about two days' worth of working time.
- io 41. The claimant first presented her initiating Application ET1 on 10<sup>th</sup> January 2023. At the beginning and end of August 2023 and at the beginning of December and just prior to the Christmas break, the claimant had examinations which she focused upon. Throughout the period from 17<sup>th</sup> August to 10<sup>th</sup> of January, with the exception of the Christmas and New Year break, the claimant was also "busy" working and pursuing her studies. She did not give priority to the issue of raising her proceedings until the Christmas break. Including in the period after 22<sup>nd</sup> November when her ACAS Certificate was issued to her, she did not focus on the claim giving priority to other matters in that period.
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- 20 42. The claimant was aware, on the 17<sup>th</sup> of August 2022, that the time limit applying to the raising of her claims was due to expire at or about the end of August, unless she took steps to progress matters. The claimant was aware as at the end of August 2022 that the three month time limit applicable to the raising of her claims had expired. When she presented her complaints to the Employment Tribunal on the 10<sup>th</sup> of January 2023 she was expecting them to be rejected because of time bar.

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### **The Applicable Law**

- 30 43. The statutory provisions regulating the Tribunal's Jurisdiction to hear complaints of unauthorised deduction from wages and claims for compensation in lieu of accrued but untaken paid annual leave entitlement are to be found respectively in section 23(4) of the Employment Rights Act 1996 and Regulation 30(2)(b) of the Working Time Regulations 1998. Those provisions are in the following terms:-

**ERA****“23 Complaints to employment tribunals.**

- 5 (1) A worker may present a complaint to an employment tribunal —
- (a) that his employer has made a deduction from his wages in  
contravention of section 13 (including a deduction made in  
contravention of that section as it applies by virtue of section  
10 18(2)),
- (b) that his employer has received from him a payment in  
contravention of section 15 (including a payment received in  
contravention of that section as it applies by virtue of section  
15 20(1)),
- (c) that his employer has recovered from his wages by means of one  
or more deductions falling within section 18(1) an amount or  
aggregate amount exceeding the limit applying to the deduction  
or deductions under that provision, or  
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- (d) that his employer has received from him in pursuance of one or  
more demands for payment made (in accordance with section  
20) on a particular pay day, a payment or payments of an amount  
or aggregate amount exceeding the limit applying to the demand  
or demands under section 21(1).  
2?
- (2) Subject to subsection (4), an [F]employment tribunal shall not consider  
a complaint under this section unless it is presented before the end of the  
30 period of three months beginning with—
- (a) in the case of a complaint relating to a deduction by the  
employer, the date of payment of the wages from which the  
deduction was made, or

(b) in the case of a complaint relating to a payment received by the employer, the date when the payment was received.

5 (3) Where a complaint is brought under this section in respect of—

(a) a series of deductions or payments, or

10 (b) a number of payments falling within subsection (1)(d) and made in pursuance of demands for payment subject to the same limit under section 21(1) but received by the employer on different dates,

15 the references in subsection (2) to the deduction or payment are to the last deduction or payment in the series or to the last of the payments so received.

(3A) Section 207B (extension of time limits to facilitate conciliation before institution of proceedings) applies for the purposes of subsection (2).

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(4) Where the employment tribunal is satisfied that it was not reasonably practicable for a complaint under this section to be presented before the end of the relevant period of three months, the tribunal may consider the complaint if it is presented within such further period as the tribunal considers reasonable.

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(4A) An employment tribunal is not (despite subsections (3) and (4)) to consider so much of a complaint brought under this section as relates to a deduction where the date of payment of the wages from which the deduction was made was before the period of two years ending with the date of presentation of the complaint.

(4B) Subsection (4A) does not apply so far as a complaint relates to a deduction from wages that are of a kind mentioned in section 27(1)(b) to (j).



5 (5) No complaint shall be presented under this section in respect of any deduction made in contravention of section 86 of the Trade Union and Labour Relations (Consolidation) Act 1992 (deduction of political fund contribution where certificate of exemption or objection has been given).”

### WTR 1998

#### 10 “Remedies

30.—(1) A worker may present a complaint to an employment tribunal that his employer—

15 (a) has refused to permit him to exercise any right he has under—

(i) regulation 10(1) or (2), 11(1), (2) or (3), 12(1) or (4), 13 or 13A;

20 (ii) regulation 24, in so far as it applies where regulation 10(1), 11(1) or (2) or 12(1) is modified or excluded;

(iii) regulation 24A, in so far as it applies where regulation 10(1), 11(1) or (2) or 12(1) is excluded; or

25 (iv) regulation 25(3), 27A(4)(b) or 27(2); or

(b) has failed to pay him the whole or any part of any amount due to him under regulation 14(2) or 16(1).

30 (2) Subject to regulation 30B, an employment tribunal shall not consider a complaint under this regulation unless it is presented —

(a) before the end of the period of three months (or, in a case to which regulation 38(2) applies, six months) beginning with the

date on which it is alleged that the exercise of the right should have been permitted (or in the case of a rest period or leave extending over more than one day, the date on which it should have been permitted to begin) or, as the case may be, the payment should have been made;

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(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 or, as the case may be, six months.

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(2A) Where the period within which a complaint must be presented in accordance with paragraph (2) is extended by regulation 15 of the Employment Act 2002 (Dispute Resolution) Regulations 2004, the period within which the complaint must be presented shall be the extended period rather than the period in paragraph (2).

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(3) Where an employment tribunal finds a complaint under paragraph (1)(a) well-founded, the tribunal—

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(a) shall make a declaration to that effect, and

(b) may make an award of compensation to be paid by the employer to the worker.

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(4) The amount of the compensation shall be such as the tribunal considers just and equitable in all the circumstances having regard to—

(a) the employer's default in refusing to permit the worker to exercise his right, and

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(b) any loss sustained by the worker which is attributable to the matters complained of.

(5) Where on a complaint under paragraph (1)(b) an employment tribunal finds that an employer has failed to pay a worker in accordance with regulation 14(2) or 16(1), it shall order the employer to pay to the worker the amount which it finds to be due to him.”

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44. Since the introduction of these provisions, both in current legislation and in its statutory predecessors, the Higher Courts have provided guidance to Employment Tribunals as to the interpretation of their wording and the approach to be taken in their application.

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45. In **Palmer and Saunders v Southend on Sea Borough Council** [1984] IRLR 119 CA, the Court of Appeal stated:-

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*“The meaning of the words ‘reasonably practicable ... lies somewhere between reasonable on the one hand and reasonably physically capable of being done on the other. The best approach is to read “practicable” as the equivalent of “feasible” and to ask “was it reasonably feasible to present the complaint to the Employment Tribunal within the relevant three months?”*

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46. In **Palmer and Saunders v Southend on Sea Borough Council** [1984] IRLR 119 CA, the Court of Appeal gave the following guidance. Whether it was reasonably practicable for a complaint to be presented in time is pre-eminently an issue of fact for the Employment Tribunal, taking all the circumstances of the case into account and it is seldom that an appeal from its decision will lie. Depending upon the circumstances of the particular case, an Employment Tribunal may wish to consider the substantial cause of the employee’s failure to comply with the statutory limit; whether he/she had been physically prevented from complying with the limitation period, for instance by illness or a postal strike or something similar. It may be relevant for the Tribunal to investigate whether, at the time of dismissal, and if not when thereafter, the employee knew that he/she had the right to complain of the particular matter; in some cases the Tribunal may have to consider whether there was any misrepresentation about any relevant matter by the employer

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to the employee. It will frequently be necessary for the Tribunal to know whether the employee was being advised at any material time and, if so, by whom; of the extent of the advisor's knowledge of the facts of the employee's case; and of the nature of any advice which they may have given him/her. It will probably be relevant in most cases for the Employment Tribunal to ask itself whether there was any substantial failure on the part of the employee or his advisor which led to the failure to comply with the time limit.

### Discussion and Determination

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47. This case is one in which the initiating Application ET1 was first presented on 10<sup>th</sup> January 2023, some 7 months after the facts giving rise to the claimant's right to present a claim occurred, and some 4 months after the expiry of the applicable 3 month time limits. The claimant did not formally engage with ACAS for the purposes of early conciliation until the 8<sup>th</sup> of November 2022 that is after the expiry of the statutory time limit and thus, the Early Conciliation Regulations did not operate to extend the time limit.
48. In these circumstances, the onus of proof sits with the claimant to satisfy the Tribunal, on the balance of probabilities, that it was not reasonably practicable for her claims to have been presented within the initial 3 month time limit and, that they were subsequently presented within such further period as the Tribunal considers reasonable in the circumstances.
49. The claimant gave her evidence truthfully and without ambiguity in full accordance with the affirmation made by her, which evidence the Tribunal accepted as both credible and reliable.
50. On the Findings in Fact made, the case is one in which the claimant, within the initial 3 month time limit, that is prior to at or about the end of August 2022,-

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- (a) Was aware of her right to raise proceedings before the Employment Tribunal and of the facts giving rise to them
- (b) From 17<sup>th</sup> August 2022, at the latest, that she had decided to direct her claim against the respondent as opposed to the owner and operator of the previous business from her employment in which the claims arose
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- (c) That the respondent disputed liability and the basis upon which she sought to direct it towards the respondent, namely that there had occurred a relevant transfer for the purposes of the TUPE Regulations 2006
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- (d) Was aware (from 4<sup>th</sup> August 2022 at the latest if not sooner) of the 3 month statutory time limit attaching to the raising of her complaints
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- (e) (From the 4<sup>th</sup> of August at the latest) that the time limit would expire at or about the end of August 2022, if no steps were taken by her to progress matters
- (f) That the 3 month time limit in fact expired at the end of August 2022, she having taken no steps in the interim to progress matters
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- (g) That thereafter, the claimant did not make formal contact with ACAS for the purposes of early conciliation until 8<sup>th</sup> of November that is after the passage of 2 months following the expiry of the time limit
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- (h) That the ACAS Conciliation Certificate, necessary to the presenting of her claim to the Employment Tribunal, was issued to the claimant on the 22<sup>nd</sup> of November 2022

- (i) That the claimant first presented her complaints to the Employment Tribunal, after the expiry of a further 6 weeks, on 10<sup>th</sup> January 2023.

5 51. The claimant brought focus onto the preparation of her Claim Form in the Christmas and New Year holiday period 2022/2023.

io 52. The process of preparing and submitting her initiating Application ET1 took the claimant, in her estimate, a back to back total of 2 working days' worth of time.

15 53. The claimant confirmed in evidence that there was nothing in the relevant period which had physically prevented her from complying with the time limit. Nor was she prevented from acting by reason of ignorance of some essential fact. She was aware of the time limit and in general terms that in the event that she took no steps to progress matters, it would expire at or about the end of August.

20 54. By way of explanation the claimant indicated that she had examinations at the beginning and the end of the month of August and at the beginning of the month of December and later in December just before the start of the Christmas and New Year break. She had considered it necessary, and had taken a conscious decision at those particular times, to focus upon those examinations. During the periods in between she had been busy including, in particular, working to help support herself in her studies. That had resulted in her not giving priority to the progressing of her claims until the Christmas and New Year holiday period which she did across a period of about 2 days and thereafter eventually presented her complaints to the Employment Tribunal on the 10<sup>th</sup> of January 2023.

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55. The 17<sup>th</sup> of August was a date which occurred at or about the middle of the last month of the statutory time limit. As at that date the claimant was in possession of all the facts necessary for the completion of her Claim Form which, when she ultimately completed took her a period of 2 days' worth of

time. She had also decided as at that date that she would direct her claim against the respondent and further that the respondent had denied and would deny liability and the basis upon which it would do so. Had the claimant made formal contact with ACAS for the purposes of initiating early conciliation at any point between the 17<sup>th</sup> August 2022 and the expiry of the time limit at the end of that month the time limit could have been extended by up to a further 28 days by the operation of the Early Conciliation Regulations extending into a month on which she did not have exams.

56. On the evidence presented, including in particular the frankness with which the claimant explained the position, the Tribunal cannot be satisfied that it was not reasonably practicable for the claimant to have presented her claims within the initial 3 month time limit, in the remainder of the month of August 2022, and or by making formal contact with ACAS for early conciliation purposes, during the month of September 2022 in what would have been the extended statutory time limit. The claimant did not have examinations in the month of September upon which she required to focus at the expense of preparing and submitting her initiating Application.

57. Likewise, the claimant did not have examinations in the month of October but took no steps to progress matters until the 8<sup>th</sup> of November when she formally made contact with ACAS. Following the issue by ACAS of the Early Conciliation Certificate, on the 22<sup>nd</sup> of November 2022 a further 10 weeks expired before the initiating Application was first presented.

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58. Other than her focus upon her examinations, on the four particular instances identified, and her working throughout the period to help support herself in her studies, the claimant frankly explained that it came down to the fact that across the 6/7<sup>th</sup> month period in question she was “busy” and had given priority to matters other than that of progressing her claim.

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59. Separately and in any event, on the Findings in Fact which it has made and let it be assumed that the Tribunal had held that it had not been reasonably practicable for the claimant to present her claims within the initial statutory

period, which it has not, the Tribunal could not be satisfied on the evidence presented that the claim subsequently presented on the 10<sup>th</sup> of January 2023 had been presented within such further period as was reasonable.

5 60. In the circumstances the Tribunal concludes that the claimant lacks Title to Present and the Tribunal lacks Jurisdiction to Consider, her complaint of Unauthorised Deduction from Wages and her claim in respect of outstanding holiday pay arising from the period of her employment with Number 1 The Grange. The claims accordingly fall to be dismissed for want of jurisdiction.

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61. Lest it be of any comfort to the claimant in the circumstances, and while the question of the liability of the respondent on the merits of the claim was not a matter before the Tribunal for determination at the Open Preliminary Hearing, if it be the case, as stated by the respondent's representative that the claimant's previous employer Limited Liability Company was placed in  
15 liquidation as was asserted, on or about the 6<sup>th</sup> of June 2022, it is unlikely that liability for payment of the sums claimed would have transferred to the Respondent Company. The claimant's claims in respect of her outstanding wages and holiday pay would fall, in those circumstances, to be directed to  
20 the Liquidator of that Company. In circumstances of insolvency the sums claimed, or some portion of them, may be recoverable, via the Liquidator, from the Secretary of State's fund. The claimant may wish to consider whether it would be in her interests to make contact with the Liquidator and take advice on the submission of a claim in the liquidation.

**Employment Judge: J d'Inverno**  
**Date of Judgment: 04 April 2023**  
**Entered in register: 05 April 2023**  
**and copied to parties**



**I confirm that this is my Judgment in the case of Makan v BXL Limited trading as Brass Monkey Grange and that I have signed the Judgment by electronic signature.**