



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 8000364/2023

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Held in Glasgow on 5 February 2024

Employment Judge S MacLean

10 **Mr Brandon Duffy**

**Claimant
In Person**

Dramsip Limited

**Respondent
Represented by:
Ms J Barnett -
Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that:

- 20 (a) the discrimination claims under the Equality Act 2010 having been withdrawn by the claimant are dismissed under rule 52 of schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013;
- (b) the Tribunal does not have jurisdiction:
- 25 (i) under section 111 of the Employment Rights Act 1996 to hear the complaint of unfair dismissal;
- (ii) under section 48 of the Employment Rights Act 1996 to hear the complaint of suffering a detriment due to making a disclosure; and
- (iii) under article 7 of the Employment Tribunals Extension of Jurisdiction (Scotland) Order 1994 to hear the breach of contract claim.

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REASONS

Background

1. At a case management preliminary hearing on 30 October 2023, the Tribunal ordered that a preliminary hearing be arranged to determine whether the Tribunal had jurisdiction to consider the claims under section 111 of the Employment Rights Act 1996 (the ERA) and/or section 123 of the Equality Act 2010 (the EqA).
2. The Tribunal also ordered the claimant to confirm in writing what, if any, claims were withdrawn; and to set out the factual and statutory basis of the claim of unfair dismissal given that the claimant did not have two years' continuous service.
3. In an email sent on 12 November 2023, the claimant withdrew the claims of third party harassment and personal injury. The claimant said that he was unable to set out the basis of the unfair dismissal claim because the respondent had failed to provide "pertinent information needed to address the order such as disciplinary policies and procedures; particulars around the alleged misconduct; details on who had authority to dismiss; the nature of the dismissal; communications regarding the dismissal circumstances and a copy of the claimant's contract of employment". The claimant said that relevant documents or details not yet revealed could support that it was not reasonably practicable to bring the claims sooner.

The preliminary hearing

4. At the preliminary hearing, the claimant advised that after further consideration he was withdrawing the claims brought under the EqA. Accordingly these claims were dismissed under rule 52 of schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.
5. The remaining claims were: whistleblowing; unfair dismissal; breach of contract (wrongful dismissal); and failure to provide written statement of terms and conditions of employment.

6. The claimant accepted that he did not have two years' qualifying service to bring a claim of ordinary unfair dismissal under section 98 of the ERA. He clarified that the claim was automatically unfair dismissal. The claimant advised that on reflection, he was not claiming that dismissal was for asserting a statutory right (section 104 of the ERA). He said that the claim was that he had made a protected disclosure (he advised the respondent on 30 July 2022 had he had complained to his previous employer about theft, drugs and discrimination). The claimant said that after making this protected disclosure, his employment was terminated on 30 July 2022. He was reemployed in September 2022 but claims that he continued to suffer a detriment by having to carry out duties as a cloakroom assistant rather than as a bartender. The claimant said that as a result of the respondent's conduct, he was forced to resign on 1 October 2022.
7. For the purposes of the preliminary hearing, the date of termination was taken as being 1 October 2022.
8. It was accepted that in relation to the claims before the Tribunal the statutory provisions governing time limits require the Tribunal to consider the "not reasonably practicable" formula.
9. The claims were presented to the Tribunal on 20 July 2023. Section 111(2)(b) of the ERA; section 48(3) of the ERA; and article 7 of the Employment Tribunals Extension of Jurisdiction (Scotland) Order 1994 requires the claims to be made within three months plus early conciliation extension (if appropriate) of 1 October 2022. The claims were presented out of time.
10. As the claimant did not approach ACAS between 1 October 2022 and 31 December 2022, he does not benefit from any early conciliation extension.

The issues

11. The issues to be determined by the Tribunal were:
- a. Was it reasonably practicable for the claims to be made to the Tribunal within the time limit?

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

Findings in fact

12. The claimant gave evidence and referred the Tribunal to various documents. The claimant was confident, articulate and well able of expressing himself in writing and orally. From his conduct in these proceedings, the Tribunal had no doubt about his knowledge of employment tribunal proceedings. He was familiar with employment legislation; his rights to bring claims; and what they might be; and the early conciliation requirements. Against this background, the Tribunal was unpersuaded by the claimant's evidence about his awareness and understanding of the application of time limits in relation to bringing claims to employment tribunals.
13. In relation to the issues to be determined the Tribunal found the following facts to be established or agreed.
14. In 2021, the claimant presented claims to the employment tribunal in respect of unfair dismissal and discrimination.
15. Around June 2022, the claimant was employed by Scotsman Group plc (SG) at the Social. The claimant raised a grievance. He resigned in late June 2022 alleging discrimination and harassment.
16. On 30 July 2022, the claimant worked a shift as a bartender for the respondent at premises next to the Social. The respondent was informed by an employee of SG that the claimant's employment at SG had been terminated because of gross misconduct (the July incident). At the end of the shift the respondent told the claimant that he was not being offered more shifts with the respondent. The respondent advised the claimant that in relation to the information that had been provided to the respondent by SG's employee, the claimant should take the matter up with SG. The claimant did so.
17. On conclusion of the investigation into the grievance, SG informed the respondent that the information that had been supplied on 30 July 2022 was not true. The claimant knew that the respondent had been informed of this.

18. On 25 August 2022 the claimant approached the respondent for more work. The claimant was re-employed by the respondent in September 2022.
19. During a discussion with the respondent's general manager on 1 October 2022, the claimant's employment came to an end with immediate effect. The claimant says he resigned.
20. The claimant has a history of depression and anxiety. When he has an episode, the claimant is prescribed medication. During recent episodes the claimant has experienced symptoms of paranoia which added to his distress. Between October 2022 and December 2022, the claimant had difficulty focusing and meeting deadlines. The claimant attended his general practitioner and received medication to alleviate his symptoms and give him rest.
21. In January 2023, the claimant's focus was on making subject access requests (SARs) from SG. The SARs included investigation notes about the July incident.
22. The claimant approached ACAS for early conciliation and raised proceedings against SG and others in February 2023. Included in those proceedings was the grievance that false information had been given to the respondent and that the claimant believed that a particular employee of SG had been responsible for this.
23. In March 2023, SG sent a response that included its position about the information given to the respondent on 30 July 2022. SG said that an employee of SG had told the respondent that the claimant had stolen money from SG. It was denied that it was the named individual the claimant believed had passed this information but rather another named employee. It was also confirmed that the situation had been rectified by informing the respondent that what had been said to the respondent was not true.
24. On 21 May 2023, the claimant sent a SAR to the respondent's operations manager.

25. On 8 June 2023, the claimant approached ACAS with a view to starting early conciliation with the respondent.
26. On 16 June 2023, the respondent provided information in response to the SAR. The claimant continued to request further information.
- 5 27. On 20 July 2023, the claimant presented a claim form to the employment tribunal against the respondent.

Deliberation

28. The Tribunal asked if it was reasonably practicable for the claimant to have presented the claims of unfair dismissal, detriments because of a protected disclosure and breach of contract (wrongful dismissal) within the required period.
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29. The claimant referred the Tribunal to *Dedman v British Building and Engineering Appliances Limited* 1974 ICR 53, CA, *Wall's Meat Co Ltd v Khan* 1979 ICR 52 CA, *Palmer and another v Southend-on-Sea Borough Council* [1984] ICR 372. Ms Barnett referred to *Cygnets Behavioural Health v Britton* [2022] EAT 108.
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30. The Tribunal noted that in assessing what was reasonably practicable, was not simply a matter of looking at what was possible but to ask whether, on the facts of the cases found, it was reasonable to expect that which was possible to have been done (*Asda Stores Limited v Kauser* EAT/0165/2007).
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31. It is not just an issue of physical impracticability but whether it was reasonably feasible for the employee to present his claim in time. Where the employee missed the time limit because he is ignorant about the existence of a time limit, or is mistaken about when it expires, or is ignorant about crucial facts, the question is whether that ignorance is reasonable. If it is not, then it may have been reasonably practicable for the employee to bring the claim in time.
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32. The Tribunal considered that the claimant was familiar with the existence of employment tribunals and the types of claims that he could bring. He had been previously involved in employment tribunal proceedings. In the

Tribunal's view from that experience, the claimant had been put on enquiry as to the time limits that would apply in the employment tribunal.

- 5 33. The claimant's argument in relation to presenting the claims within the time limit was that during this period, his health was such that he was unable to do so. This evidence, which was supported by a letter from the claimant's general practitioner, was not significantly challenged by the respondent. The Tribunal therefore accepted that because of the claimant's health it was not reasonably practicable for the claimant to have been presented within the time limit.
- 10 34. The Tribunal considered that notwithstanding his health issues, the claimant was from January 2023 onwards was able to pursue various of enquires of SG including early conciliation, the raising of the proceedings against SG and some employees, involvement in preliminary hearings and making various applications to the Tribunal in connection with those proceedings.
- 15 35. The claimant's position in relation to the delay in presenting claims against the respondent between January 2023 and 20 July 2023 was that the case was unique due it involving "a coordinated effort between employers, where Holly Blue represents them in proceedings but also provided a full suite of HR services to both companies, purposely concealed facts which give rise to the claim".
- 20 36. The Tribunal was not convinced by the claimant's argument. The claimant knew on 1 October 2022 who was his employer, what he had said to the respondent about his employment with SG, why he was not offered shifts after 30 July 2022, the circumstances of being employed by the respondent in
- 25 September 2022 and the termination on 1 October 2022. He had access to the internet and was able to "Google" information in relation to the various types of claims that he could bring and engaging with ACAS.
- 30 37. The claimant knew that the respondent did not offer more shifts after 30 July 2022 having been provided information about the claimant by an employee of SG. The Tribunal accepted that the respondent initially told the claimant that any issue about the information provided was a matter for SG. The claimant

knew that the respondent had been informed by SG in August 2022 that the information was erroneous. The respondent offered further shifts to the claimant from September 2022 until the termination of his employment on 1 October 2022. The claimant's case was that he resigned. He knew why he took that decision.

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38. The claimant undoubtedly wanted more information because he wished to have more certainty as to the underlying facts. However, the claimant did not have all the information that he sought when he approached ACAS in June 2023 and when he presented the claim to the Tribunal in July 2023. Accordingly, that Tribunal considered that the further information he sought was not a factor which would have delayed the claimant bringing a claim against the respondent for unfair dismissal, suffering a detriment and breach of contract. The Tribunal did not consider that it was reasonable for the claimant to delay presenting the claim until 20 July 2023.

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39. The Tribunal concluded that while the claimant due to his debilitating illness was prevented from presenting the claim in time, the claimant could have presented the claim in February 2023 as indeed he was able to do against SG and others. At that stage the claimant had sufficient information and certainly by March 2023, when he received SG's response, it would have been reasonable for him to have presented the claims against the respondent.

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40. The Tribunal considered that even if it was not reasonably practicable for the claimant to submit the claim in time, he did not do so within such further period as was reasonable. Accordingly, the Tribunal concluded that it did not have jurisdiction to hear the complaints.

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S MacLean
Employment Judge

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15 February 2024
Date

Date sent to parties

15 February 2024