

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

5 **Judgment of the Employment Tribunal in Case Nos: S/4100404/2017,  
S/4100509/2017, S/4100510/2017, S/4100511/2017, S/4100512/2017,  
S/4100513/2017, S/4100514/2017, S/4100515/2017, S/4100516/2017, S/4100517/2017  
& S/4100518/2017 Following Open Preliminary Hearing Held at Edinburgh on  
11<sup>th</sup> August 2017**

10 **Employment Judge: J G d’Inverno, QVRM, TD, VR, WS (Sitting Alone)**

15 Sergia Nicolaescu Claimant

Titina Ombas  
Bogdan-Constantin Burlacu  
Iolena Ciobanu

20 Claudiu-Bogdan Burcea

Diana-Elena Aliman

25 Stefania-Claudia Bran

Adrian-Marius Ciobanu

30 Oana-Silvia Cercel

Mihail-Bogdan Bran

35 Marius Androne

OMI Facilities Limited Respondent

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**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

45 The Judgment of the Employment Tribunal is that the claimants lack Title to Present and the Tribunal lacks Jurisdiction to Consider, in terms of the Working Time Regulations 1998, Regulation 30(2)(a) as extended by the provisions of Regulation 30(2A), or in ETZ4(WR)

terms of section 23(2) or section 23(4) of the Employment Rights Act 1996 respectively, the claimants' claims for compensation in respect of accrued but untaken paid annual leave entitlement and or, in the alternative, complaints of unlawful deduction from wages contrary to the provisions of section 13 of the Employment Rights Act 1996;

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**(Second)** That the complaints and claims of all eleven claimants are dismissed for want of Jurisdiction.

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Employment Judge: Joseph d'Inverno  
Date of Judgment: 24 August 2017  
Entered in Register: 28 August 2017  
and Copied to Parties

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## REASONS

1. This case called before the sitting Judge at Edinburgh, for Open Preliminary Hearing, at 10 am on the 11<sup>th</sup> of August 2017 and proceeded with the assistance of a Romanian Language Interpreter.

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2. The claim is one in which the eleven claimants, whose claims are presented in terms of a single initiating Application ET1, assert possession of qualifying status of employee or worker and in consequence advance claims for compensation in respect of an asserted but unpaid entitlement to annual leave in terms of The Working Time Regulations 1998 and or, in the alternative, complaints of unlawful deduction from wages, arising from such non-payment and, contrary to the provisions of section 13 of the Employment Rights Act 1996.

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3. In terms of Case Management Orders issued by Employment Judge Macleod at Closed Preliminary Hearing which proceeded on 7<sup>th</sup> June 2017 the first named claimant, Mr Sergiu Nicolaescu, was designated the lead claimant, the

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circumstances in which the asserted entitlements arise and are averred being the same in respect of all eleven claimants.

4. The respondent has entered appearance denying the claims and standing upon  
5 two preliminary challenges to the claimants' Right to Present and the Tribunal's  
Jurisdiction to Consider the claims these being:-

(a) that the claims are time barred and

10 (b) that the claimants were all self-employed and in consequence fell  
neither within the statutory definition of employee or of that of worker  
such as to constitute any right in law to paid annual leave.

5. Today's Open Preliminary Hearing was fixed to consider only the first of those  
15 challenges, namely the challenge to the jurisdiction of the Tribunal by reason of  
asserted time bar.

6. The first named claimant appeared in person and in addition as the  
representative of the remaining ten claimants. Also present, but not directly  
20 participating in the Open Preliminary Hearing, were Ms Ionela Ciobanu (the  
5<sup>th</sup> named claimant), Ms Osana-Silvia Cercel (the 7<sup>th</sup> named claimant) and Ms  
Titina Ombas (the 9<sup>th</sup> named claimant).

7. The Respondent Company OMI Facilities Limited was represented by Mr Carlin,  
25 Solicitor instructed by Mr Andrew Bains, Director of the Respondent Company.

8. The Hearing was conducted with the assistance of a Romanian Language  
Interpreter Ms Delia-Loana Georgescu to whom the oath de fidelei in  
administratiune (of fidelity in administration) was administered.

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### **Matters of Agreed Fact**

9. In the course of Case Management Discussion conducted at the outset of the Hearing parties confirmed the following material facts as agreed and binding upon the Tribunal for the purpose of the Hearing:-
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- (a) that the Effective Date of Termination of the employment of all eleven claimants was the 20<sup>th</sup> of October 2016;
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- (b) that the primary three month time period during which, as a matter of right the complaints could have been statutorily presented would have otherwise expired on 19<sup>th</sup> of January 2017;
- (c) that the claimants first made contact with ACAS for the purposes of satisfying the requirements of section 18A of the Employment Tribunals Act 1996 (on 13<sup>th</sup> January 2017);
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- (d) that the claimants received intimation of the issue by ACAS of a Certificate of Compliance in respect of the claims on 13<sup>th</sup> February 2017;
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- (e) that accordingly, by reason of the Application of the Early Conciliation Regulations the statutory time period during which the claims might have been presented as a matter of right, had been extended to a date beyond 19<sup>th</sup> January 2017;
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- (f) that the claimants first tendered their initiating Application ET1 to the Employment Tribunal (Scotland) on 12<sup>th</sup> March 2017;
- (g) that the Application was rejected in terms of Rule 10 for want of essential information (being the addresses of claimants 2 to 11 inclusive);
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5 (h) that upon Application for Reconsideration of the rejection and upon subsequent provision of the required essential information, the Application was accepted with an Effective Date of Presentation of 17<sup>th</sup> March 2017.

### The Issue

10 10. Parties confirmed and the Tribunal recorded, as the Issue requiring investigation and determination at Open Preliminary Hearing:-

15 Whether, in terms of the Working Time Regulations 1998, Regulation 30(2)(a) as extended by the provisions of Regulation 30(2A) or in terms of section 23(2) or section 23(4) of the Employment Rights Act 1996 respectively, the claimants have Title to Present and the Tribunal has Jurisdiction to Consider the claimants' claims for compensation in respect of accrued but untaken paid annual leave entitlement and or, in the alternative, complaints of unlawful deduction from wages contrary to the provisions of section 13 of the Employment Rights Act 1996, by asserted  
20 reason of time bar.

25 11. The claimant gave evidence on oath which evidence was not challenged in cross examination and was accepted by the Tribunal as credible and reliable. Both parties addressed the Tribunal in submission.

12. On the claimants' unchallenged oral evidence the Tribunal made the following additional material Findings in Fact:-

30 13. That following the termination of their employment, effective as at 20<sup>th</sup> October 2016, the lead claimant Mr Nicolaescu together with some others of the claimants consulted a solicitor and took legal advice, on behalf of all eleven claimants, both regarding their employment status and in consequence their entitlement to paid

annual leave; and in relation to enforcement of such asserted entitlement through the vehicle of Employment Tribunal proceedings.

14. In the course of taking legal advice the claimants either directly or through the  
5 medium of the lead claimant became aware of:-

(a) the existence of their right to advance a claim to such entitlement and to seek a remedy in respect of its non-payment before the Employment Tribunal.  
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(b) Of the fact that such claims were subject to an initial statutory three month time limit measured, in their case, from the Effective Date of Termination of their employment on 20<sup>th</sup> October 2016.

(c) Of a requirement, prior to the raising of proceedings before the Employment Tribunal, to engage with ACAS Scotland in compliance with the requirements of the Early Conciliation Regulations and section 18A of the Employment Rights Act 1996;  
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(d) that through the mechanism of such engagement the three month time limit could be extended,  
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(e) let it be assumed that they made contact with ACAS prior to the expiry of the initial three month period on a day and date which falls to be designated as Day A for the purposes of section 207B(4) of the Employment Rights Act 1996, and further let it be assumed that the date upon which the claimants received their Early Conciliation Certificate, that is the day and date falling to be designated as Day B in terms of section 207B(4) was a date after the date upon which the initial three month period would expire, that is in the instant case a date after 19<sup>th</sup> January 2017, that the claimants ought also reasonably to have known that by operation of section 207B(4) and in a circumstance  
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where the original time limit would have expired during the period beginning with Day A and ending one month after Day B, that the time limit for presentation of their claims would be extended to the end of that period; That is to say the claimants ought reasonably to have known that the time limit was extended to midnight on the 13<sup>th</sup> of March 2017.

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15. Following the 13<sup>th</sup> of February 2017, that being the date upon which the claimants received their Early Conciliation Certificate and further being “Day B” for the purposes of section 207B(4) ERA, the claimants took further legal advice on the specific issue of when the last day upon which they would be entitled to present their complaints to the Employment Tribunal would occur. On 8<sup>th</sup> March 2017 the claimants received written legal advice, in the form of an email from their solicitor, which expressly confirmed that the time limit would expire on 13<sup>th</sup> March 2017.

16. As at 13<sup>th</sup> February 2017, the date upon which the claimants received their Early Conciliation Certificate, and in terms of the legal advice which they had already received, the claimants ought reasonably to have known that the time limit for presenting their complaints to the Employment Tribunal had been extended, by the operation of early conciliation, to the 13<sup>th</sup> of March 2017.

17. As at the 8<sup>th</sup> of March 2017 the claimants had received express legal advice in terms of which they were informed and, on reliance and acceptance of that advice, they believed, and are deemed to have known, that the time limit for presentation of their complaints had been extended to midnight on the 13<sup>th</sup> of March 2017.

18. As at 13<sup>th</sup> February 2017 the claimants were in possession of all the information required for completion of their initiating Application ET1.

19. The claimants decided to delay the presentation of their complaints until 12<sup>th</sup> March 2017, that is until the day before the day upon which the extended time limit would expire.
- 5 20. Other than the fact that one of the claimants, whose grasp of English was better than the others, was for an unconfirmed portion of the time between 13<sup>th</sup> February and 12<sup>th</sup> March absent in Romania, the claimants presented no reason in evidence for the decision to so delay the presentation of their claims.
- 10 21. In the period 13<sup>th</sup> February to 12<sup>th</sup> March 2017, there was nothing which would have prevented the claimants from seeking to present their claims had they chosen to do so.
- 15 22. On 12<sup>th</sup> March 2017, the claimants electronically completed and sought to upload through the Employment Tribunals (Scotland) website, a single initiating Application ET1 in the names of all eleven claimants through the Agency of the lead claimant. The lead claimant sought to attach, part of the essential information for the purposes of Rule of Procedure 10, namely, the addresses of claimants 2 to 11 inclusive, on a separate freestanding document which the 1<sup>st</sup> named claimant sought also to upload through the Tribunal's website on 20 12<sup>th</sup> March 2017.
- 25 23. The 1<sup>st</sup> named claimant's attempts were only partially successful in that while he successfully uploaded the claim form ET1 itself, he did not successfully upload the separate document upon which he had set out the addresses of applicants 2 to 11 inclusive. That information was not received by the Employment Tribunal along with the initiating Application Form ET1.
- 30 24. The claim was administratively rejected by the Employment Tribunals (Scotland) (ET(S)). By letter dated 14<sup>th</sup> March 2017, the ET(S) wrote to the lead claimant advising him that the claim form had not been accepted because it was defective for the following reason:-



*“Under Rule 10 of the Rules of Procedure, a claim cannot be accepted unless specific information is provided by the claimant. The information you have not provided in relation to your claim holiday pay is shown below:*

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- *the address of each claimant”*

25. The letter went on to advise the lead claimant that the time for presenting the claim had not altered and of the right to apply for a reconsideration of the decision under Rule 15.

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26. On 15<sup>th</sup> March, by email, timed at 19:59 hours, the lead claimant made Application for Reconsideration of the decision not to receive the ET1 and attempted to provide the missing Rule 10 information by way of email attachment. The Employment Tribunal staff were unable to open the attachment and by email dated 17<sup>th</sup> March timed at 14:29 wrote to the lead claimant advising him of the same and requesting that he provide the information in an alternative form. On 17<sup>th</sup> March 2017 the lead claimant successfully provided the missing Rule 10 information and, by decision of Judge Garvie dated 21<sup>st</sup> March 2017, the initiating Application Form ET1 was received by the Tribunal, with the date of receipt backdated to the date upon which the missing Rule 10 information had been provided, that is the 17<sup>th</sup> of March 2017.

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27. Although an Employment Judge in determining an Application for Reconsideration of rejection of an ET1 has discretionary power, in terms of Rule 5, to backdate the date of receipt to the date of first attempted presentation, the record of reconsideration and decision logged on the file records that upon consideration of matters Judge Garvie expressly determined that the date of presentation to which the Application should be backdated was 17<sup>th</sup> and not 12<sup>th</sup> March 2017. The initiating Application ET1 was accordingly “presented” on the 4<sup>th</sup> day following the expiry of the extended initial time period.

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## Summary of Submissions

28. For the respondent Mr Carlin submitted as follows:-

- 5 (a) that upon a proper construction of the relevant statutory provisions the effect of the claimants' engagement with ACAS, their making first contact in respect of the complaint on 13<sup>th</sup> January (Day A) and their receipt of the Early Conciliation Certificate on 13<sup>th</sup> February (Day B) in circumstances where the original three month time limit would otherwise have expired on 19<sup>th</sup> January, all 2017, was to extend the relevant statutory time limit to the 19<sup>th</sup> of February 2017. That is an extension of one month from the 19<sup>th</sup> of January 2017 being the date upon which it would otherwise have expired.
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- 15 (b) Under reference to the decisions of Employment Tribunal at first instance in the case of **Miss A Fergusson v Combat Stress** Case No: 4105592/16, promulgated on 6<sup>th</sup> March 2017, applying the decision of the Court of Appeal in **Dedman v British Building** (Lord Denning MR) [1974] 1 all ER CA at page 520, and let it be assumed that the claimants' solicitor had erred in advising the claimants that the time limit had been extended to 13<sup>th</sup> March 2017 as opposed to 19<sup>th</sup> February 2017, the latter being the date which upon Mr Carlin's contention was the correct date, while being a matter which while potentially giving rise to the right of recourse by the claimants against their solicitor, could not be relied upon as resulting in it being not reasonably practicable for the complaints to have been presented timeously;
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- 30 (c) Separately and in any event under reference to **Dewar and Finlay Limited v Glazier** [1973] ICR 572, that ignorance of the law "*cannot of itself justify a Tribunal in holding that in the circumstances it was not*

*practicable for the complaint to be presented within the period prescribed by the Rules”.*

29. In any event the Effective Date of Presentation of the complaints being  
5 17<sup>th</sup> March, that is a date falling some four days after 13<sup>th</sup> March, the date upon  
which the claimants had been legally advised and believed the time limit expired,
- (a) That the claims fell to be regarded as presented late, in the sense  
10 that they had not been presented within the extended primary time  
period prescribed by the Rules.
- (b) That in those circumstances, the Tribunal could only consider the  
15 complaints if it was firstly satisfied that it was not reasonably  
practicable, in the circumstances, for the complaints to have been  
presented within the extended primary period and was further  
satisfied they had in fact been presented within such further time as  
was reasonable.
- (c) That on the claimants’ own evidence there was no fact or  
20 circumstance identified which had the effect of preventing the  
claimants from presenting a claim, either prior to midnight on the  
19<sup>th</sup> of February 2017 which in Mr Carlin’s submission was the date  
upon which the extended primary period fell to be regarded as  
having expired, or even prior to the 12<sup>th</sup> of March 2017, the day  
25 upon which the claimants first attempted to present a complaint  
(unsuccessfully) and being the day before the date upon which the  
claimants had been advised and believed the primary period  
expired.
- 30 30. In these circumstances, Mr Carlin submitted the Tribunal could not be satisfied  
that it had not been reasonably practicable for the claims to be timeously  
presented and he invited the Tribunal to in turn to conclude that the claimants

lacked Title to Present and the Tribunal Jurisdiction to Consider the complaints which should accordingly be dismissed.

### **Submissions for the Claimants**

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31. For the claimants, Mr Nicolaescu, while he confirmed that he understood the basis of the argument orally presented by Mr Carlin via the Tribunal and which was to the effect that the time limit had been extended to 19<sup>th</sup> February and not 13<sup>th</sup> March 2017, also stated that he did not know that and that none of the claimants knew or understood the law on the matter and therefore could not say whether that was a correct argument or not, but that they had been expressly advised by their solicitor that the date to which the time limit had been extended was in fact 13<sup>th</sup> March 2017.

15 32. He could not say whether that advice, obtained from his solicitor, was correct advice or wrong advice, but he and the other claimants had accepted it, had believed it to be true and had relied upon it.

20 33. He reiterated that in reliance upon that advice he had attempted to submit the claim form while also attempting to upload in a separate document part of the Rule 10 specified information, through the Employment Tribunals (Scotland's) website on 12<sup>th</sup> March 2017, that is within the time limit which he believed to be the correct one. While the claim form itself had been successfully uploaded the separate document containing part of the Rule 10 specific information had not been successfully uploaded.

25 34. That had resulted in the claim being rejected and it was not until after he had successfully supplied the missing information on 17<sup>th</sup> March, and upon the granting of an Application for Reconsideration of that decision, that the claim was actually successfully presented and received.

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35. Mr Nicolaescu stated that he and the other claimants had proceeded in the belief that they had until the 13<sup>th</sup> of March to present the complaints and that one factor which had contributed to their decision not to present the complaints immediately after receiving their ACAS Certificate was that one of their number, whose grasp of English was better than the others, was absent in Romania for some part of the intervening period between 13<sup>th</sup> February and 12<sup>th</sup> March. He identified no factor in submission which had had the effect of preventing the claimants from presenting the complaints, either prior to the 12<sup>th</sup> of March on which date he made his unsuccessful attempt or, for that matter, prior to the 19<sup>th</sup> of February being the date upon which Mr Carlin submitted the extended time limit expired.
36. Finally, in answer to a question put by the Tribunal, Mr Nicolaescu confirmed that as at the 13<sup>th</sup> of February 2017, that is the date upon which the claimants received their Early Conciliation Certificate, they had within their possession all the information necessary to present their complaints, had they chosen to do so at that time.

### **Consideration and Determination**

37. On the first issue of contention between the parties, namely to what date was the primary statutory period of three months extended by the claimants' engaging with ACAS in compliance with the requirements of section 18A of the Employment Rights Act 1996, I respectfully disagree with the proposition advanced by Mr Carlin which was to the effect that the primary three month time limit was extended from 19<sup>th</sup> January 2017, by one month to the 19<sup>th</sup> of February 2017.

## The Relevant Law

38. Section 207B of the Employment Rights Act 1996 is in the following terms:

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***“Extension of time limits to facilitate conciliation before institution of proceedings***

*(1) This section applies where this Act provides for it to apply for the purposes of a provision of this Act (a “relevant provision”).*

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*But it does not apply to a dispute that is (or so much of a dispute as is) a relevant dispute for the purposes of section 207A.*

*(2) In this section—*

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*(a) Day A is the day on which the complainant or applicant concerned complies with the requirement in subsection (1) of section 18A of the Employment Tribunals Act 1996 (requirement to contact ACAS before instituting proceedings) in relation to the matter in respect of which the proceedings are brought, and*

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*(b) Day B is the day on which the complainant or applicant concerned receives or, if earlier, is treated as receiving (by virtue of regulations made under subsection (11) of that section) the certificate issued under subsection (4) of that section.*

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*(3) In working out when a time limit set by a relevant provision expires the period beginning with the day after Day A and ending with Day B is not to be counted.*

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*(4) If a time limit set by a relevant provision would (if not extended by this subsection) expire during the period beginning with Day A*

*and ending one month after Day B, the time limit expires instead at the end of that period.*

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*(5) Where an employment tribunal has power under this Act to extend a time limit set by a relevant provision, the power is exercisable in relation to the time limit as extended by this section.”*

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39. In my view the terms of section 207B(4), above, make clear that circumstances such as apply in the instant case that is circumstances in which the Effective Date of Termination of Employment was 20<sup>th</sup> October 2016 and the statutory time limit of three months would otherwise have expired on 19<sup>th</sup> January 2017 and in which Day A, the date upon which the claimants first made contact with ACAS in connection with the proceedings is the 13<sup>th</sup> of January 2017 and Day B, that is the date upon which the claimants receive their Early Conciliation Certificate is 13<sup>th</sup> of February 2017, then the primary statutory time limit is extended to the end of the period which ends one month after Day B, that is to the 13<sup>th</sup> of March 2017.

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40. If that be the correct construction of the sub-section, and I consider that it is because it is literally what is set out therein, then it follows that the legal advice sought and received by the claimants from their solicitors and which was to the effect that the time limit in respect of their claims was extended to the 13<sup>th</sup> of March 2017, was in fact correct.

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41. The relevant statutory saving provisions, for example section 23(4), set out the circumstances in which a Tribunal may consider a complaint of these types, notwithstanding their late presentation and is in the following terms:-

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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."*

5 42. In this case, no question of the claimants being in ignorance of the law  
arises. Rather the circumstance presented to the Tribunal is one in which,  
in the full knowledge of their rights and the extended time limit the  
claimants delayed, until the penultimate day, 12<sup>th</sup> March 2017 before  
attempting to present their Application, but that their attempt was  
unfortunately unsuccessful. There was nothing identified in the evidence  
10 before me which could have, or on the balance of probabilities, would have  
prevented the claimants from attempting to present their Application at any  
time in the period intervening between date B, 13<sup>th</sup> February 2017, and  
12<sup>th</sup> March 2017. In the event the difficulties which they encountered in  
attempting to present an Application which was compliant with the Rules  
15 were difficulties which it took them until the 17<sup>th</sup> of March, that is a period  
of five days, to resolve. Thus, let it be assumed that those difficulties were  
difficulties which they were always to have encountered, had they  
attempted to first present their Application at any time on or prior to the 8<sup>th</sup>  
of March 2017 they would in all probability have achieved its timeous  
20 presentation notwithstanding the difficulties which they encountered.  
Regardless of such postulation which can amount to no more than  
speculation, the material fact remains that there is no evidence before me  
upon which I would be entitled to hold that the reason for their lack of  
success was, for example some technical fault in the Tribunal's website  
25 and thus a matter wholly outwith their control. That is to say nothing which  
goes to satisfy the test that was not reasonably practicable, by which is  
meant reasonably feasible, to timeously present the complaints.

30 43. While parties are, of course, entitled to wait until the penultimate or last  
day and hour of a statutory time period before attempting to submit an  
Application, if they choose to do so upon an assumption that no difficulties  
with the process of presentation which they elect to adopt will be



encountered, they run the risk, in the event that difficulties are encountered, that their claims may not be presented in time.

5 44. On the evidence presented and in circumstances where there is no factor in play which could have effectively prevented them from presenting the claims earlier if they chose to do so, I cannot be satisfied that it was not reasonably practicable in the sense of being not reasonably feasible, for the claims to be presented within the extended primary statutory period that is by midnight on 13<sup>th</sup> March 2017.

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45. I accordingly determine that the claimants lack Title to Present and the Tribunal lacks Jurisdiction to Consider their complaints which are dismissed.

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20 Employment Judge: Joseph d'Inverno  
Date of Judgment: 24 August 2017  
Entered in Register: 28 August 2017  
and Copied to Parties