



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr D Rybarczyk

**Respondent:** Twenty Four Seven Recruitment Ltd

**Heard:** via Cloud Video Platform in Midlands (East) Region

**On:** 7<sup>th</sup> January 2022

**Before:** Employment Judge Ayre sitting alone

**Representatives:**

**Claimant:** In person

**Respondent:** Mr S Watkin, Finance Director

**Polish interpreter :** Ms Joanna Spray

## JUDGMENT

The Tribunal does not have jurisdiction to hear the claimant's claim as it was presented out of time.

## REASONS

### Background

1. On 19<sup>th</sup> August 2021 the claimant presented a claim for holiday pay to the Tribunal. The claim followed a period of Early Conciliation which started on 30<sup>th</sup> April 2021 and ended on 11<sup>th</sup> June 2021.
2. The claimant acknowledged in the claim form that the claim was presented out of time. The time for presenting the claim following the period of Early Conciliation expired on 11<sup>th</sup> July 2021. The claim was therefore presented almost six weeks' late.

### The Proceedings

3. At the start of the hearing today the respondent indicated that it admitted owing the sum of £918.10 to the claimant. Mr Watkin also told the Tribunal that the respondent was willing to pay to the claimant the entire sum claimed by way of holiday pay. The claimant said that he is claiming £943.39 by way of holiday pay and Mr Watkin offered to pay that sum to the claimant. Mr Watkin made the offer in open tribunal and asked that it be noted.
4. In light of Mr Watkin's comments, I offered the parties time to discuss settlement. I explained to the parties that there were two options:
  - a. An adjournment to allow the parties to discuss settlement, given that the respondent was offering the holiday pay claimed by the claimant; or
  - b. Proceeding with the hearing, in which case I would need to consider whether the Tribunal has jurisdiction to hear the claim as it was presented out of time.
5. I explained these options several times and adjourned briefly to give the parties time to consider them. The respondent indicated that its preference was to try and settle. The claimant said that he wanted to proceed with the hearing. I explained to him that this may mean he receives nothing, if I were to decide that the claim was out of time, whereas the respondent was offering to pay him the full value of his claim. The claimant again indicated that he wanted the hearing to proceed.
6. We therefore went ahead with the hearing. I heard evidence from the claimant, who also referred in his evidence to some documents, which he read from. The respondent did not submit any evidence. I gave Mr Watkin the opportunity to cross-examine the claimant and to make submissions, but he declined to take up these opportunities.

### **The Issues**

7. The issues that fell to be determined at the hearing were:
  - a. Was the complaint for holiday pay presented within the time limits set out in Regulation 30(2) of the Working Time Regulations 1998 and / or Article 7 of the Employment Tribunals Extension of Jurisdiction (England & Wales) Order 1994?
  - b. If so, is the claimant entitled to any further sums by way of holiday pay and, if so, how much?

### **Findings of Fact**

8. The claimant was engaged by the respondent until 20<sup>th</sup> February 2021. He received his last pay from the respondent (which included holiday pay) on 5<sup>th</sup> March 2021. The claimant is a Polish speaker who has a very limited ability to speak English, and who requires an interpreter in order to be able to communicate effectively orally.

9. On 22<sup>nd</sup> February 2021 the claimant sent an email to Nina Stiles of the respondent in which he wrote that he believed that he was entitled to additional holiday pay. He got a prompt response from Ms Stiles (he couldn't remember the exact date but thought it was the day after he sent his email) and there was then an exchange of emails between the claimant and the respondent. This exchange ended on 5<sup>th</sup> March when the claimant sent a final email to the respondent stating that he intended to contact his trade union's solicitors.
10. The claimant was at the time a member of the GMB trade union. He contacted the trade union on 5<sup>th</sup> March and took advice from them. The GMB subsequently contacted the respondent on the claimant's behalf.
11. The trade union advised the claimant of the three month time limit for presenting claims to an Employment Tribunal, and of the need to conclude Early Conciliation through ACAS before doing so. The claimant was therefore aware of his legal rights and of the right to bring a claim in an Employment Tribunal by 5<sup>th</sup> March 2021 at the latest.
12. On 30<sup>th</sup> April 2021 the claimant contacted ACAS to begin Early Conciliation. He told ACAS that the GMB was acting on his behalf, and waited to hear from the GMB.
13. Early Conciliation lasted until 11<sup>th</sup> June. ACAS issued the Certificate on 11<sup>th</sup> June and sent it to the GMB. The GMB did not send it to the claimant or notify him that it had been issued. The GMB was aware of the need to issue proceedings within one month of the issue of the Early Conciliation Certificate, because it advised the claimant to that effect in a letter that it wrote to him on 22<sup>nd</sup> July 2021.
14. On 22<sup>nd</sup> July the GMB wrote to the claimant informing him that he was now out of time to issue proceedings in the Employment Tribunal and that it would not help him with his claim. They also provided advice in that letter on the merits of the claimant's potential claim. The claimant gave evidence that he received that letter within a week of it being written, so by 29<sup>th</sup> July 2021 at the latest.
15. The claimant subsequently contacted the GMB and met with union officials on 16<sup>th</sup> August. During that meeting the claimant said that he did not want the trade union to represent him, and that he would be contacting ACAS himself.
16. On 19<sup>th</sup> August the claimant arranged for an interpreter to call ACAS on his behalf. During that call ACAS told the interpreter that the Early Conciliation Certificate had been sent to the GMB and that the claimant was now out of time to file his claim. ACAS sent a copy of the Early Conciliation Certificate to the claimant on 19<sup>th</sup> August and the claimant presented his claim that day.

### **The Law**

17. The time limit for presenting claims for holiday pay under the Working Time Regulations 1998 ("**the WTR**") is set out in Regulation 30(2) which provides as follows:

*“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...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;*
- (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”.*

18. The time limit for presenting claims for breach of contract in the Employment Tribunal is contained within Article 7 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 (“**the Order**”) which states that:

*“Subject to article 8B, an employment tribunal shall not entertain a complaint in respect of an employee’s contract claim unless it is presented*

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- (a) Within the period of three months beginning with the effective date of termination of the contract giving rise to the claim, or*
- (b) Where there is no effective date of termination, within the period of three months beginning with the last day upon which the employee worked in the employment which has terminated, or*
- (c) Where the tribunal is satisfied that it was not reasonably practicable for the complaint to be presented within whichever of those periods is applicable, within such further period as the tribunal considers reasonable.”*

19. Article 8B contains provisions for the extension of the time limit to enable Early Conciliation to take place before a claim is presented.

20. Time limits are extended in both claims under the WTR and the Order to allow for Early Conciliation. In summary, the period beginning with the day after Early Conciliation starts up to and lasting until the day upon which ACAS issues the Early Conciliation Certificate does not count for the purposes of time limits, so that the clock does not run during that period. In addition, if a time limit is due to expire during the period beginning with the day ACAS receives the request for Early Conciliation, and ending one month after the Certificate is issued, then the time limit for presenting the claim expires one month after the Certificate is issued.

21. Time limits for presenting claims are a jurisdictional issue (*Rodgers v Bodfari (Transport) Ltd* 1973 325 NIRC) and if a claim is out of time, the Tribunal must not hear it. The parties cannot agree to waive a time limit, so even if a respondent does not seek to argue that a claim is out of time, the Tribunal still has no jurisdiction to hear the claim if it is in fact out of time. The Court of Appeal in *Radakovits v Abbey National plc* [2010] IRLR

307 confirmed that time limits go to jurisdiction and that jurisdiction cannot be conferred on the Tribunal by agreement or waiver, so that an employer's decision not to raise a time point will not bind the Tribunal.

22. The principle that a Tribunal cannot hear a claim that is out of time applies even where the respondent admits that the claim has merit. In Bewick v SGA Forecourts Ltd ET Case No.2501693/2014 the respondent admitted that it owed holiday pay to the claimant. The claimant presented her claim nine days' late however. The Tribunal concluded that it was reasonably practicable for her to have presented her claim in time, and that it therefore did not have jurisdiction to hear the claim.
23. In cases, such as this one, in which a question arises as to whether it was reasonably practicable for the claimant to present his claim on time, there are three general principles that fall to be considered –
  - a. The question of reasonable practicability should be interpreted liberally in favour of the claimant;
  - b. It is a question of fact as to whether it was reasonably practicable for the claimant to present his claim on time; and
  - c. It is for the claimant to prove that it was not reasonably practicable for him to present his claim on time.
24. In Palmer and another v Southend-on-Sea Borough Council [1984] ICR 372, the Court of Appeal concluded that 'reasonable practicable' does not mean 'reasonable' or 'physically possible', but rather 'reasonably feasible'.
25. It is a well established principle that where a claim is presented late due to the negligence or other fault of a professional advisor, a Tribunal is unlikely to find that it was not reasonably practicable for the claim to have been presented on time, and the delay will normally be a matter for the claimant to raise with the advisor. In Dedman v British Building and Engineering Appliances Ltd [1974] ICR 53, CA, Lord Denning held that: "If a man engages skilled advisers to act for him – and they mistake the time limit and present [the claim] too late – he is out. His remedy is against them."
26. The 'Dedman principle' applies not just to legal advisors such as solicitors and barristers, but also to trade union representatives who are presumed to be aware of the time limits for presenting claims and to understand the importance of filing claims on time. The EAT held, in Times Newspapers Ltd v O'Regan [1977] IRLR 101, that a claimant who was aware of her rights and of the time limits, could not claim that it was not reasonably practicable to present her claim in time where a union official incorrectly advised her that time limits did not run whilst negotiations about possible reinstatement were ongoing.
27. In Friend v Institution of Professional managers and Specialists [1999] IRLR 173, QBD, the High Court held that where a claimant relies upon the advice of a trade union and his claim is out of time as a result, the claimant's remedy lies in a claim of negligence against the union.
28. Where a claimant is able to establish that it was not reasonably practicable for him to submit his claim on time, the Tribunal must then go on to

consider whether the claim was presented within such further period as was reasonable in the circumstances.

### **Conclusions**

29. Time limits for presenting claims to an Employment Tribunal exist for a public policy reason – namely that employment related disputes should be resolved promptly, and that there should be finality of litigation. Whilst Tribunals do have discretion to extend time limits, there is no presumption that an extension of time will be granted, and extensions should be the exception rather than the rule.
30. The claimant gave evidence that he was aware of his rights and of the existence of the three month time limit before the expiry of that limit. He was able to contact ACAS and start Early Conciliation before the expiry of the primary time limit, as his engagement with the respondent terminated on 20<sup>th</sup> February 2021 and he contacted ACAS by 30<sup>th</sup> April 2021.
31. The claimant sought advice from his trade union, the GMB, shortly after his engagement with the respondent came to an end, and well within the time limit for presenting a claim. The trade union then conducted negotiations on his behalf with the employer. They advised the claimant of the time limits for bringing claims in an Employment Tribunal and also advised the claimant on the merits of his claim. Although the claimant began Early Conciliation himself, he then had no further involvement in it, having provided the GMB's details to ACAS and having told ACAS that the GMB was acting on his behalf. It appears that both the claimant and ACAS
32. It is clear from the evidence before me that:
  - a. The claimant was aware of his rights and of the time limits, before they expired;
  - b. The claimant engaged his trade union to provide him with advice in relation to his claim;
  - c. The claimant expected, quite reasonably, that his trade union would progress the claim on his behalf, having provided ACAS with their details; and
  - d. The GMB did advise the claimant, both on the merits of the claim and on time limits.
33. The fault in this case lies in my view with the GMB, at least initially, as it did not forward the Early Conciliation Certificate to the claimant, or even tell him that the Certificate had been issued.
34. I have sympathy for the claimant in this situation, and it may very well be that he has a remedy against the GMB. Having said that, however, given the circumstances, it cannot in my view be said that it was not reasonably practicable for the claim to be presented on time. Where a trade union advises a member on both the merits of the claim and on time limits, and

conducts negotiations on its behalf, and the member relies upon the union, the union has taken on the role of professional advisor.

35. Given that the trade union was acting on the claimant's behalf, and was aware of the time limits for presenting claims, it would in my view have been reasonably practicable for the claim to have been presented on time.
36. I also find that the claim was not presented as soon as was reasonably possible after the claimant found out that the time limit had expired. He was informed of this in a letter dated 22<sup>nd</sup> July, which he received by 29<sup>th</sup> July at the latest. He did not however present his claim until some three weeks later, on 19<sup>th</sup> August. There was a gap of more than two weeks between the claimant receiving the GMB's letter and meeting with them on 16<sup>th</sup> August.
37. In these circumstances, it cannot be said that the claim was presented as soon as reasonably possible. The claim is therefore out of time and the Tribunal does not have jurisdiction to hear it. The claim is dismissed.

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Employment Judge Ayre

10<sup>th</sup> January 2022

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JUDGMENT SENT TO THE PARTIES ON

11 January 2022

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FOR THE TRIBUNAL OFFICE