



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4100165/2022

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Held remotely by Cloud Video Platform on 14 June 2022

Employment Judge J Shepherd

10 **Dr Guthrie Blackhurst**

**Claimant
Represented by:
Mr A Crammond -
Counsel**

15 **Lanarkshire Health Board**

**Respondent
Represented by:
Ms L Gallagher -
In House
Representative**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Tribunal is that the claims for unfair dismissal (s.98 and s.103A ERA 1996) were presented outside of the relevant time limit. The claimant has not presented any claim for unpaid notice pay. The Tribunal is satisfied that it was not reasonably practicable to present the unfair dismissal claims within the relevant time limits and that the claims were presented within a reasonable further period. Time is therefore extended for presentation of those claims and they will proceed.

REASONS

Introduction and issues to be determined

- 30 1. The claimant presented a claim to the Tribunal on 23 December 2021, having undertaken ACAS early conciliation from 18 October 2021 to 28 November 2021. That claim form was rejected on 5 January 2022.
2. The claimant presented a second claim form on 11 January 2022.
3. At a case management preliminary hearing on 31 March 2022 it was
35 determined that a further preliminary hearing would be listed 'To determine

whether the claimant's claims are out of time and if so whether an extension of time should be granted in relation to all or any of them.'

4. The claims presented in both claim forms are:
 - a. Unfair dismissal pursuant to s.94 and s.98 ERA 1996;
 - 5 b. Automatic unfair dismissal for making a protected disclosure pursuant to s.103A ERA 1996; and
 - c. Detriment for making a protected disclosure pursuant to s.47B ERA 1996
5. The claimant also contends that the claim form raises a claim for unpaid notice
10 pay. The respondent does not accept this.
6. At the outset of today's hearing it was agreed that the Tribunal would not determine the question of time bar in respect of the s.47B ERA detriment claim and that this would be a matter left for the Tribunal conducting the final hearing.

15 **Relevant law**

7. S.111 ERA 1996 provides:
 - (2) *Subject to the following provisions of this section, an employment tribunal shall not consider a complaint under this section unless it is presented to the tribunal –*
 - 20 (a) *Before the end of the period of three months beginning with the effective date of termination, or*
 - (b) *Within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three*
25 *months.*

8. What is reasonably practicable is a question of fact. The test is empirical and involves no legal concept. Practical common sense is the keynote (**Wall's Meat Co Ltd v Khan [1979] ICR 52, CA**).
9. The onus of proving that presentation in time was not reasonably practicable rests on the claimant (**Porter v Bandridge Ltd 1978 ICR 943, CA**). If the claimant satisfies the Tribunal that the presentation of the complaint within time was not reasonably practicable then the Tribunal must then go on to decide whether the claim was presented "within such further period as the tribunal considers reasonable."
10. In **Palmer v Southend-on-Sea BC [1984] ICR 372, CA**, the Court of Appeal emphasised that the phrase "reasonably practicable" does not mean simply reasonable. That would be too favourable to the employee. However, nor did it mean physically possible, which would be too favourable to employers. It meant something like 'reasonably feasible'. In **Asda Stores v Kauser UKEAT/0165/07** Lady Smith explained the test as follows: "the relevant test is not simply a matter of looking at what was possible but to ask whether, on the facts of the case as found, it was reasonable to expect that which was possible to have been done."
11. In **Software Box v Gannon [2016] ICR 148** Langstaff J (President) held that the fact that a complaint was made within time and then rejected does not, as a matter of principle, preclude the consideration of whether a second claim traversing the same ground is one in which the tribunal should have jurisdiction.
12. In **Adams v British Telecommunications plc [2017] ICR 382** the claimant had lodged a claim within the relevant time limit, but with an inaccurate ACAS certificate number, causing the claim to be rejected. The claimant rectified the mistake in a second claim form that was lodged 2 days outside the time limit. Simler J, President, held that the question for the Tribunal in those circumstances was not whether the mistake the claimant had originally made with the first claim was a reasonable one, but whether the claimant's mistaken belief that they had correctly presented the first claim in time and did not

therefore need to put in a second claim was reasonable having regard to all the facts and all the circumstances.

Findings of fact

13. The claimant was employed by the respondent as a Consultant Physician. His
5 employment commenced on 8 December 2003. The claimant's employment
was terminated by the respondent on 27 July 2021. The claimant has
appealed his dismissal and that appeal has not yet concluded.
14. The claimant presented a claim to the Tribunal on 23 December 2021, having
undertaken ACAS early conciliation from 18 October 2021 to 28 November
10 2021. Primary limitation for the claims relating to the dismissal of the claimant
expired, accounting for extensions of time for the early conciliation process,
on 28 December 2021.
15. The ACAS early conciliation certificate named the prospective respondent as
NHS Lanarkshire. The claim form, in box 2.1 that states 'Give the name of
15 your employer or the person or organisation you are claiming against' named
the respondent as Heather Knox and gave the address as NHS Lanarkshire
HQ, Kirklands, Fallside Road, Bothwell, Lanarkshire G71 8BB.
16. The claimant's BMA representative had completed the documentation for
ACAS early conciliation on the claimant's behalf, but the claimant was
20 informed that the BMA would not assist him in the process of submitting an
ET1 and that was therefore completed by the claimant without any assistance
from the BMA or a legal representative.
17. The claimant believed that, in providing the name of the Chief Executive of
the respondent, Heather Knox, along with address of NHS Lanarkshire, he
25 had submitted the claim against the same respondent as the one named in
the ACAS certificate. The claimant believed it was important for there to be a
named contact in the claim form. As a medical professional he would never
send correspondence to an organisation without a named contact for reasons
of confidentiality.

18. By letter dated 5 January 2022 the claimant was notified that his claim form had been referred to Legal Officer Doherty who had decided that his claim could not be accepted “because you have not complied with the requirement to contact ACAS before instituting relevant proceedings. It is defective for the following reason: (i) you have provided an early conciliation number but the name of the respondent on the claim form is different to that on the early conciliation certificate...” The letter went on to state “I am therefore returning your claim form to you. If you apply for reconsideration you must present your claim form again (amended if necessary). Please note that the relevant time limit for presenting your claim has not altered. You have the right to apply for a reconsideration of this decision under Rule 13. If you want to apply you must do so in writing within 14 days of the date of this letter quoting the pre-acceptance reference number shown above. Your application must:

- explain why you believe the decision to reject your claim is wrong or rectify the identified defect; and
- include your claim form (amended, if necessary, to rectify the defect).
- say if you wish to request a hearing to consider your application”

The letter also reminded the claimant of his right to appeal the decision to the Employment Appeal Tribunal.

19. On receipt of that letter, on 6 January 2022, the claimant sent an email to the Tribunal stating “Thank you for your email. However I can confirm the respective respondent is the same in my claim form and the ACAS form – Heather Knox is the Chief Executive of NHS Lanarkshire. Would you prefer I resubmit the form without a named contact?”

20. The claimant received an automated response to that email that states “Please do not contact us asking for an update unless the matter is urgent as this may simply add further delay in processing your original correspondence. Each email is processed separately so it will also help us to deal with your correspondence if you can avoid sending numerous separate emails relating

to your case and include as much as possible in one email.” The email stated that the Tribunal would aim to respond to correspondence within 10 working days.

21. The claimant did not understand why his claim had been rejected and
5 believed the rejection to have been in error as he considered that he had
complied with the requirement to contact ACAS, and he also believed that he
had presented the claim against the respondent named in the ACAS
certificate.
22. The claimant initially heeded the advice in the Tribunal’s response not to
10 telephone or email the Tribunal further, but by 11 January 2022 the claimant
had received no substantive response to his email of 6 January 2022 and was
becoming increasingly anxious about the situation. He therefore telephoned
the Tribunal. He spoke to a member of Tribunal staff and asked whether it
was possible to make an amendment to the rejected claim. The claimant was
15 informed that it was not possible to amend it. The claimant was informed that
the correct course of action was to submit a fresh claim with the required
amendments and to send this with a covering email saying that it was an
amendment of the first ET1, and to also include that statement in the body of
the ET1 itself.
- 20 23. On the same day, 11 January 2022, the claimant submitted a new claim
stating the name of the Respondent in Box 2.1 as NHS Lanarkshire. He also
sent an email on 11 January 2022 stating “It seems you have rejected my
claim because I have not complied with a requirement to contact ACAS – I
have actually done this and the ACAS certificate is attached to your email. I
25 had also named the Respondent as the Chief Executive of the Health Board.
I will correct this so the Health Board itself is the respondent. Please accept
my apologies for this. I have resubmitted this claim (having taken telephone
advice from Emily) and I do hope you are able to look favourably on accepting
my submission as the original was submitted in time and these very minor
30 errors are now corrected.”

24. On 12 January 2022 the Tribunal wrote to the claimant in response to his email of 6 January 2022. The Tribunal had treated that email as an application for reconsideration of the rejection under Rule 13 and confirmed that the claim should be rejected for the reasons previously given.

5 25. On 14 January 2022 the Tribunal wrote to the claimant acknowledging the presentation of the second claim form submitted on 11 January 2022.

Claimant's submissions

26. Mr Hammond produced helpful written submissions on behalf of the claimant and I do not intend to repeat them in full here. In summary, Mr Crammond
10 contended that the first claim was presented in time and that the Tribunal had jurisdiction to determine it. Alternatively he contended that it was not reasonably practicable for the claimant to have presented the second claim in time and that he had presented the second claim within a reasonable further period. He submitted that the claimant was reasonably ignorant of the fact
15 that the first claim he presented was defective and there was no reasonable need for him to consider having to present a second claim until he spoke with a member of Tribunal staff on 11 January 2022. The claimant was at all material times a party litigant, the error in the first claim was minor and the first claim was presented well within time. He did not sit on his hands when
20 the first claim was rejected and contacted the Tribunal the following day. Even as at 6 January 2022 it was not clear to the claimant there was a a defect in his first claim. He acted timeously on 11 January 2022.

27. With regard to the claim for unpaid notice pay, Mr Crammond submitted that there was reference to the claimant being summarily dismissed within the
25 particulars attached to the claimant's ET1. The claimant had also ticked the box stating 'no' in response to the question at 6.3 'If your employment has ended, did you work (or were you paid for) a period of notice?' and submitted that this suggested on a fair reading of the claim form that there was a claim for unpaid notice pay whether by breach of contract or unauthorised deduction
30 from wages.

Respondent's submissions

28. Ms Gallagher produced helpful written submissions on behalf of the respondent and I do not intend to repeat them here in full. In summary, Ms Gallagher contended that it was reasonably practicable for the complaints to be presented to the Tribunal within the relevant time limits and further that the complaints were not presented within such further period as would be considered reasonable. She submitted that the claimant was fully aware of the time limit for lodging a claim, he had trade union support throughout the disciplinary process and could have had their assistance with completion of the ET1, he could have sought legal advice or have instructed a legal adviser to prepare and submit the claim on his behalf, and indeed did so after receiving the rejection letter from the Tribunal. She submitted that the claimant could have spoken to the CAB or ACAS or the Tribunal themselves to make himself aware of the information he required in order for the claim to be accepted, and could have accessed the guidance which includes a step by step guide to completing the ET1 form and makes clear that the respondent's name should match the name on the ACAS certificate and that, if it does not, it may lead to the claim being rejected. She submitted that it should have been apparent to the claimant that he had named the wrong respondent in the ET1 and it was not reasonable for him to make this mistake.

29. Ms Gallagher also asserted that the claimant had left it late to submit his claim. She reminded the Tribunal that s.111(2) ERA 1996 imposes a harsh regime for an important policy reason, to ensure that parties know where they stand within a limited time of any dispute arising and that any prejudice (or lack of prejudice) to the respondent as a result of delay is immaterial in deciding the question of reasonable practicability.

Decision*Unpaid notice pay claim*

30. Dealing first with the question of whether a claim for unpaid notice pay is included in the claim form. The claimant did not tick the box at 8.1 of the ET1 indicating that he was owed notice pay. Mr Crammond relies upon the

sections of the particulars of the claim appended to the ET1 form that state “...I was accused of fraud and summarily dismissed” and ...”The decision conveyed to me by telephone on 27th July and by letter 12th August 2021 summarily dismissed me for alleged fraud...” along with the claimant’s answer to the question about working a period of notice at 6.3, as evidencing the claim for breach of contract or unauthorised deduction from wages in respect of unpaid notice pay.

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31. Whilst use of the term ‘summarily dismissed’ clearly describes a dismissal without notice or pay in lieu of notice, the use of that term alone in the sections Mr Crammond relied upon is not sufficient to set out a claim that the respondent was acting in breach of the contract in dismissing the claimant without notice. Something more would be required to set out such a claim. Nor does the claim form set out any particulars of the claimant having been paid less than the total amount of wages properly payable by the respondent to the claimant sufficient to make out a claim for unlawful deduction from wages. The Tribunal therefore concludes that there is no claim currently before the Tribunal for unpaid notice pay, whether as a claim for breach of contract or unauthorised deduction from wages.
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Time bar

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32. The Tribunal rejects Mr Crammond’s submission that the first claim form was properly presented within time and that the Tribunal has jurisdiction to consider that claim. That claim was rejected by the Tribunal on 5 January 2022. The Tribunal treated the claimant’s email of 6 January 2022 as an application for reconsideration of the rejection in accordance with Rule 13. That application for reconsideration was refused for the same reasons given for the original rejection, namely that the name of the respondent on the claim form was different to that on the early conciliation certificate. The claimant did not appeal the rejection of his claim. As the claim was rejected, the Tribunal does not have jurisdiction to consider that claim.
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33. The Tribunal accepts Mr Crammond's submission that it was not reasonably practicable for the claimant to have presented the second claim form within the relevant time limit.
34. The claimant reasonably believed, having presented the first claim and received an automated response from the Tribunal, that he had correctly presented his claim within the relevant time limits. Whilst the name given on the claim form, Heather Knox, was different to that given on the ACAS certificate of NHS Lanarkshire, it was reasonable for the claimant to believe that in providing the name of the Chief Executive as a named contact, and the address for NHS Lanarkshire, he was still bringing the claim against NHS Lanarkshire who he had named in the ACAS certificate.
35. When the claimant received the communication from the Tribunal on 5 January 2022 stating that his claim had been rejected because he had not complied with the requirement to contact ACAS before instituting relevant proceedings and that the name of the respondent was different on the claim form to that on the early conciliation certificate, he was confused because he considered he had complied with the early conciliation process and lodged a claim against the respondent named in the ACAS certificate.
36. By the time the claimant was informed that his claim had been rejected on 5 January 2022 the time limit for bringing the claim had already expired. The claimant acted swiftly and reasonably in trying to rectify matters by emailing the Tribunal on 6 January 2022 seeking to explain that Heather Knox was the Chief Executive of NHS Lanarkshire and asking whether he should resubmit the form without a named contact.
37. In light of the automated response from the Tribunal set out above in response to that email, it was reasonable for the claimant to initially await hearing from the Tribunal before taking any further steps. Once 5 days had passed without a substantive response he then made telephone contact with the Tribunal and, having spoken with a member of staff, acted swiftly in submitting a fresh claim on the same day with the defect in the name of the respondent rectified.

38. The question for the Tribunal to determine was not whether the mistake the claimant had made in the first claim was a reasonable one but whether his mistaken belief that he had correctly presented the first claim on time and did not therefore need to put in a second claim was reasonable having regard to all the facts and all the circumstances. The Tribunal finds that the claimant's error was genuine and unintentional. He was unaware of the importance of the error he had made.
39. Whilst the claimant had left it quite late to present his initial claim, he did not leave it until the last day and believed that submitting the claim 5 days before the expiry of the time limit would be sufficient to deal with any difficulties. This was a reasonable approach, particularly in light of the fact that there was an appeal process against the claimant's dismissal still ongoing. There is a three month limitation period, extended by the ACAS conciliation period, and the claimant is entitled to have the whole of that period to present the claim.
40. Having considered all of these matters and having accepted that the claimant was labouring under a misunderstanding about the correctness of his first claim at all times until he presented his second claim, the Tribunal accepts that the misunderstanding was genuine and reasonable in the circumstances. That was the impediment to the claimant presenting the second claim in time. The Tribunal therefore finds that it was not reasonably practicable for the claimant to have presented the second claim in time.
41. The claimant acted reasonably, promptly and within a reasonable further period in presenting the second claim on 11 January 2022 and accordingly time should be, and is extended, in respect of the unfair dismissal claims under s.98 and s.103A ERA 1996.
42. The Tribunal conducting the final hearing will consider any arguments as to time bar with regard to the s.47B detriment claim.

Further procedure

43. The matter will now be set down for a further preliminary hearing to clarify the issues to be determined, list a final hearing and to set out directions for

preparation for the final hearing. The parties helpfully provided their dates to avoid so that it could be listed for their convenience and the Tribunal will therefore list a 1 hour telephone case management preliminary hearing on **26 July 2022**.

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Employment Judge: Jude Shepherd
Date of Judgment: 22 June 2022
Entered in register: 22 June 2022
and copied to parties

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