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EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4101861/2023

10 **Preliminary Hearing held in Dundee on 28 July 2023**

Employment Judge R Mackay

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Mrs N McIntyre	**Claimant** **Represented by:** **Mr Brady, Friend**
Cygnet (DH) Ltd	**Respondent** **Represented by:** **Mr Cobb, Advocate** **Instructed by:** **Mr Creamore, Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is as follows:

1. For claims where the time limit commences with the effective date of termination of the claimant's employment it was not reasonably practicable
35 for the claimant to present her claims in time and the claims were presented within a further reasonable period.

2. To the extent that, following the hearing of evidence, the time limit for any of the claims brought by the claimant is found to commence from a date or dates earlier than the effective date of termination of the claimant's employment,

the question of time bar in respect of any such claims shall be determined following the hearing of evidence.

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REASONS

Background

1. This preliminary hearing was fixed to determine whether the claimant's claims had been presented out of time and if so whether the time limit should be extended so as to accept the claims late.

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2. The claimant brings three claims: (1) constructive unfair dismissal under Section 95(1)(c) of the Employment Rights Act 1996 (**"ERA"**); (2) a claim of suffering detriments and automatic unfair dismissal on the grounds of having made a protected disclosure under Sections 47B & 103A of ERA; and (3) a claim for breach of Regulations 2 or 24 of the Working Time Regulations 1998 ("**WTR**") in respect of not having rest breaks or compensatory rest for such breaks. The claimant alleges that the breach continued to the point of her resignation.

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3. The respondent's solicitors produced a bundle of documents which was provided to the Tribunal. In the course of the preliminary hearing, it became apparent that certain of the relevant correspondence relating to the submission of the claims was missing. The Tribunal facilitated the provision to the parties of copies.

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4. The Tribunal heard evidence from the claimant herself. She was represented by a friend, Mr Brady, whose job is support worker. He does not have legal experience. The respondent was represented by Counsel.

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5. The Tribunal found the claimant to be a credible and reliable witness. She was open and clear in her evidence. On occasion, her recollection of the sequence of events was not immediately forthcoming. It is clear that in the latter stages of the process, she relied on her friend, Mr Brady for guidance.

6. At the preliminary hearing, a dispute arose as to the correct designation of the respondent. The respondent's solicitors contend that the employing entity was Cygnet (DH) Ltd. The claimant's position is that her employer was Cygnet Healthcare Ltd. Resolution of that dispute should form part of the final hearing to follow.

Findings in Fact

7. The claimant is a qualified nurse. She held the position of Senior Staff Nurse with the respondent based at a care home in Dundee.

8. Her employment ended by way of resignation on 29 November 2022. That was the effective date of termination of her employment.

9. The day after her resignation, she was referred by the respondent to the Nursing & Midwifery Counsel (**"NMC"**). During the period thereafter, she was actively involved in dealing with the NMC referral. She was initially supported by a trade union in that matter. She was not represented by a trade union or any other skilled adviser in relation to this employment tribunal claim.

10. She considered it a priority to deal with the NMC referral as the potential removal of her registration would mean that she was not able to practise as a nurse. She took up alternative employment shortly after the termination of her employment with the respondent, again working in a nursing capacity, doing 12 hour shifts. She remains registered.

11. The claimant was aware from a friend who had raised tribunal proceedings that there was a time limit of three months in which to contact ACAS for early conciliation. She did so on 16 December 2022. The certificate was issued on 19 December 2022 by email. It was agreed by the parties that the last date for presentation of the claim was accordingly 3 March 2023.

12. The claimant prepared a claim form which was received by the Employment Tribunal on 24 February 2023. At that time the claims were also brought (it was later accepted erroneously) against a number of individuals who it was envisaged would be witnesses.

13. In each case, including the case against the respondent, the last two digits of the early conciliation certificate numbers were omitted.

14. The claim form was rejected on that basis. This was communicated to the claimant by email of 2 March 2023. The reason given for the rejection was as follows:

    "*You have not provided a valid early conciliation number for each respondent and your claim is rejected insofar as it is made against [each of the respondents].*"

15. The claimant was advised in the email of the right to apply for a reconsideration of the decision. The email stated that she must do so within 14 days and that the application must (amongst other things) explain why she believed the decision to reject the claim was wrong or rectify the identified defect and to include the claim form (amended if necessary) to rectify the defect.

16. The claimant and her representative erroneously read the letter as allowing 14 days within which to lodge an amended claim form.

17. The letter from the Tribunal did not specify whether consideration had been given to Rule 12(2ZA) which deals specifically with the approach to rejection where, as here, the early conciliation number on the claim form is not the same as the early conciliation number on the certificate. In such circumstances, Rule 12(2ZA) provides that where the judge considers that the claimant made an error in relation to an early conciliation number and it would not be in the interests of justice to reject the claim, the claim may be accepted.

18. By email from the claimant to the Employment Tribunal of the same date – 2 March 2023 - she stated that she was very confused as she had contacted ACAS on 16 December 2022 and received certificates for each respondent. She went on to write: "*From what I understand the reason the claim has been rejected is because it is believed I have no [sic] complied*".

19. She attached copies of the ACAS certificates for the respondent (and each of the other respondents at that time). She went on to state "*I can see I have omitted in error the last two digits of the reference. I apologise. This has been a human error as the email reference does not contain the full certificate number and I did not realise this.*"

20. She concluded by asking: *"Could you confirm to me could this claim carry on as has been a misunderstanding or do I have to make a further?*"

21. The claimant's email was treated by the Tribunal as an application for reconsideration of the decision to reject the claim.

22. The next communication was a letter from the Tribunal emailed to the claimant's representative, Mr Brady, on 8 March 2023.

23. In the letter, reference was made to the application for reconsideration and stated that it could not be considered because: "*you have not rectified the defect identified".* It went on to state that there was a need to submit an amended ET1 showing the correct and full EC numbers for each proposed respondent. The letter went on to question the validity of the claims against the individual respondents.

24. The letter also stipulated that the relevant time limit for presenting the claims had not altered.

25. By letter dated 13 March 2023, the claimant's representative wrote to the Employment Tribunal. The letter was headed "*Reconsideration of Reconsideration of Decision to Reject Claim*". The letter also indicated a wish to "*appeal the decision*". It went on to state that Mr Brady had "*overseen the necessary adjustments to the ET1 and [he had] also taken this opportunity to streamline the claim and to limit the number of respondents"*.

26. The revised ET1 was posted (erroneously) to the Dundee Employment Tribunal on 14 March 2023. The claimant and her representative considered that this might be more appropriate given that the claimant lived in Dundee and her place of work was in Dundee.

27. The form was returned by the Post Office on 21 March 2023. As soon as it was returned, the claimant's representative sent it to the (correct) address in Glasgow by letter of 21 March 2023. It was received by the Employment Tribunal in Glasgow on 22 March 2023.

5 28. The claimant left it to Mr Brady to deal with the sending of the revised claim forms.

29. The letter of 21 March enclosed a claim form against the respondent alone with the correct early conciliation number noted. In a covering letter, the claimant's representative used the heading "*Apologies*". He went on to state:
10 "*An attempt was made to post this correspondence by special delivery to the Dundee Employment Tribunal Service. This package was unable to be successfully delivered to that destination and both the claimant and myself post our sincere apologies for this further delay.*"

30. By letter dated 29 March 2023 from the Employment Tribunal to the
15 claimant's representative, the claim was accepted and was treated as having been delivered on 22 March 2023. The letter referred to the claimant's "*application dated 22/03/2023 for a reconsideration of the decision to reject your claim"*. The letter of 22 March 2023 did not in fact refer to reconsideration.

20 31. In relation to the delay between the Tribunal's letter of 2 March 2023 and the erroneous submission to the Dundee Employment Tribunal, the claimant stated that she was busy at work, working 12 hour shifts and it took some time to get advice from her friend Mr Brady. She has Addison's Disease which can impact on her focus. She also stated that she wished to make sure
25 that everything was right with the second form. As noted above, she and her representative also erroneously believed that they had a period of 14 days from that date within which to submit the revised form.

32. The revised claim form was served on the respondent who submitted an ET3 raising the jurisdictional point which is the subject of this preliminary hearing.

Relevant Law and Submissions

33. Following an earlier case management preliminary hearing, the Employment Judge set out the relevant law so as to assist the claimant and her representative.

5 34. During the course of his submissions, Mr Cobb accepted this to be a fair summary.

35. The Employment Judge highlighted that each of ERA and WTR have provision as to time bar to the same effect. He set out Section 111 of ERA in full as an example.

10 36. He went on to note that the burden of proof is on the claimant to prove that it was not reasonably practicable to present the claim in time: ***Porter v Bandridge Ltd [1978] IRLR 271***.

37. The question of what is reasonably practicable was explained in ***Palmer & Saunders v Southend on Sea Borough Council [1984] IRLR 119***, a 15 decision of the Court of Appeal. He went on to quote Paragraphs 34 and 35 of that decision in full noting the equivalence of reasonable practicability and reasonable feasibility.

38. He also referred to ***Asda Stores Ltd v Kauser***, ***UKEAT/0165/07***, quoting Lady Smith at Paragraph 17 where she commented that it was perhaps 20 difficult to discern how: "*reasonably feasible" adds anything to "reasonably practicable*" *since the word "practicable" means possible, and possible is a synonym for feasible. The short point seems to be that the court has been astute to underline the need to be aware that the relevant test is not simply a matter of looking at what was possible but asking whether, on the facts of the* 25 *case as found, it was reasonable to expect that which was possible to have been done*".

39. He went on to refer to ***Marks & Spencer Plc v Williams-Ryan [2005] IRLR 562***, where the Court of Appeal set out the issues to consider when deciding the test of reasonable practicability which included (1) what the claimant knew

with regard to the time limit; (2) what knowledge the claimant should reasonably have had; and (3) whether he or she was legally represented.

40. In ***Lowri Beck Services Ltd v Brophy [2019] EWCA Civ 2490***, the Court of Appeal stated that the test of reasonable practicability should be given a liberal interpretation in favour of the employee, citing ***Williams-Ryan***. In ***Brophy***, the claimant did not have professional advice which was held to be a factor in his favour.

41. In considering the secondary issue about whether the claim was presented within a reasonable period of time after the initial time limit, the Employment Judge referred to ***Howlett Marine Services Ltd v Bowlam [2001] IRLR 201***.

42. He highlighted that he had not provided an exhaustive list of authorities and that it was not intended to limit the submissions that either party could make.

43. In addition to those authorities, ***Adams v British Telecommunications plc*** [2017] ICR 382 dealt with a situation similar to the present one in that the claim was rejected due to the omission of the last two digits of the early conciliation number. This case pre-dated the introduction of Rule 12(2ZA). The EAT held that the fact that a complaint was made in time (and rejected) did not preclude consideration of whether it was reasonably practicable to raise a second claim in time.

44. Where, as here, there is an unskilled adviser, any fault of the adviser should not be laid at the door of the claimant (***Benjamin-Cole v Great Ormond Street Hospital for Sick Children Trust*** (UK EAT/0356/09)).

45. In considering the second limb of the statutory test, whether a claim was presented within such further period as the Tribunal considers reasonable, the test is less stringent than that which applies to the first limb of the test, namely whether it was reasonably practicable to present the claim within the time limit in the first place (***University Hospitals Bristol NHS Foundation Trust v Williams*** (UKEAT/0291/12)).

46. Mr Cobb agreed to make submissions first. He adopted the pleaded case as set out in the grounds of resistance. In addition to dealing with the question of time bar, he sought to advance an argument that the claimant's whistleblowing claims were bound to fail based on the evidence (although this was taken to refer to the pleadings as no evidence was led on the substance of those claims). The Tribunal refused to entertain those submissions on the basis that the preliminary hearing had not been set down for that purpose and it would have been unreasonable to ask a lay representative to deal with the issue without notice.

47. He went on to submit that there was a secondary question of time bar (the first considering the effective date of termination as the starting point). He submitted that the claimant's claims under WTR did not extend beyond 2020 and that there may also potentially be an issue in relation to detriment claims. It was pointed out to him that the claimant's position is that the WTR failures lasted up to the date of termination of her employment and that evidence would be required to deal with that point as well as any question of detriment claims being out of time. Such issues should be dealt with in the course of the final hearing.

48. On the wider question of time bar as it focussed on the effective date of termination, Mr Cobb principally highlighted the two periods of delay between 8 and 14 March 2023 and the delay between then and the submission of the claim to the Glasgow Employment Tribunal on 22 March 2023. Although he framed those as questions of reasonable practicability, they were taken as references to the second limb of the test.

49. He accepted that the claimant was working 12 hour shifts and that there were pressures on her; he submitted however that she ought to have acted more quickly, particularly after the email of 8 March 2023.

50. As an aside, Mr Cobb questioned whether the approach of the Tribunal following the submission of the claim on 22 March 2023 was competent in that it appeared to be a reconsideration of a reconsideration. He accepted,

however, that the claimant had not, prior to the initial reconsideration, specifically requested one and Mr Cobb did not pursue that argument further.

51. On behalf of the claimant, Mr Brady referred to the issues facing the claimant at the time including dealing with the NMC and the lack of union support. She was initially dealing with the matter on her own and made a simple error in omitting the last two digits of the early conciliation numbers.

52. In relation to subsequent failures, he said that the mistakes were his and that he was not experienced in legal matters. He did not wish the claimant to be penalised for his errors. He highlighted the lack of experience that both had of the processes.

Decision

53. It was accepted that the last date for the submission of the claim form (using the effective date of termination of the claimant's employment as the starting point) was 3 March 2023. The claimant approached ACAS for early conciliation within the required period and had the benefit of a short extension of the timeframe under the early conciliation provisions.

54. A claim form was presented in time, received by the Tribunal on 24 February 2023. The only deficiency was the omission of two digits from the early conciliation numbers. Whilst Rule 12(2ZA) might have been applied so as to allow the claim in the interests of justice, it was rejected. The communication of the rejection was received by the claimant on 2 March 2023. Having received notification of that rejection, it would still have been possible for the claimant to have presented a revised claim in time. She did not do so. Instead, she provided copies of the relevant certificates and posed the question as to whether she was required to submit fresh claims. It is evident from her response to the Employment Tribunal that there was a degree of confusion on her part. She also misread the communication as allowing for a 14 day period in which to submit any revised claim forms.

55. Considering ***Adams v British Telecommunications Plc***, the Tribunal was not satisfied that the submission of that timeous (albeit invalid claim) should

result in a finding that it was necessarily reasonably practicable for the claim to have been presented in time.

56. Instead, looking at the sequence of events, the Tribunal considered whether it was reasonably practicable for the claimant to have resubmitted her (valid) claim within the original time limit. The letter from the Employment Tribunal rejecting the claim made clear that the original time limits still applied.

57. It is also clear that the claimant acted promptly in seeking to address the issues raised. Whilst it would have been possible for her to resubmit the correct claim in time, having written to the Employment Tribunal providing copies of the actual certificates and questioning whether there was a need to submit fresh claims on 2 March, the Tribunal considered the actions of the claimant to be reasonable in the circumstances, particularly given her lack of legal or other skilled advice and her genuine confusion as to the position. The response from the Tribunal did not come until 8 March 2023 (by which time the time limit had expired).

58. The claimant's error was a minor technical one for which Rule 12(2ZA) was introduced to remove unnecessary injustice. Having regard to the actions of the claimant, her state of knowledge, her lack of professional representation, her efforts to seek clarity from the Tribunal in circumstances where she did not fully understand that position, and in the absence of a response from the Tribunal before the expiry of the time limit, it was not reasonably practicable for her to have presented the revised claim in time. It was reasonable to await a reply from the Tribunal in the circumstances, or to put it another way, it was reasonable for the claimant not to have done what was possible in the circumstances.

59. The Tribunal went on to consider whether the claim was presented within a reasonable period of time thereafter. Having received the response on 8 March 2023 (treated as a reconsideration), the claimant, through her representative, initially sought to lodge the corrected claim form with the Dundee Employment Tribunal. That step was taken out of ignorance and the Tribunal considered it to be explained by the absence of professional advice.

It was done with good intentions having regard to location of the claimant and her place of work.

60. Leaving aside the error in seeking to lodge the claim at the wrong office, the Tribunal considered the period between 8 and 14 June 2023 was of itself reasonable. It noted that Mr Brady had also contacted the Glasgow Tribunal on 13 March seeking reconsideration and an appeal. It had regard to the less stringent test which applies and had regard to the claimant's explanations of dealing with the NMC, her efforts to gain advice from Mr Brady, her working 12 hour shifts, her health, and her erroneous belief that she had 14 days within which to submit a corrected form. By this stage, Mr Brady was actively involved in assisting the claimant and took responsibility for the communications with the Employment Tribunal. Whilst it may have been possible to act more quickly, the Tribunal was satisfied that the period was reasonable in the circumstances.

61. The claimant again relied on her lay representative to resubmit the form after it was returned by the post office. They did not become aware of the return of the form from the Dundee Employment Tribunal until 21 March 2023. The claimant's representative resent the form to the correct address in Glasgow by letter that same day. The Tribunal was satisfied that the claimant, through her representative, acted with sufficient speed having been made aware of the return of the form submitted to the Dundee Employment Tribunal. It also considered whether looking at the period as a whole from 3 March to 22 March 2023, the claim was raised within a reasonable period of time. On balance, it was satisfied that it was. It was particularly mindful of the fact that from the time of the initial rejection onwards, the claimant relied heavily on a lay representative who was not legally qualified. As Mr Brady stated, the claimant should not suffer as a result of his failures, and that is consistent with the approach in Benjamin-Cole. At no stage of the process was there any wilful intent to delay on the part of the claimant or her representative. At each stage, there was genuine ignorance or misunderstanding and having regard to the circumstances, the Tribunal was satisfied that the presentation

of the valid claim form was made within a reasonable period of time after the initial time limit.

62. This decision relates to the claims which rely on the claimant's effective date of termination as being the relevant starting point. This includes her claims for constructive unfair dismissal and automatically unfair dismissal. As noted above, a factual dispute exists as to whether any earlier whistleblowing detriments or the claim under WTR ought to be considered with reference to an earlier date or dates. That question shall be resolved in the context of the final hearing which had already been fixed.

63. As noted, the final hearing will also require to determine the correct employing entity.

Employment Judge: **R MacKay**
Date of judgment: **31 August 2023**
Date sent to parties: **01 September 2023**