EMPLOYMENT TRIBUNALS (SCOTLAND)

Case no 4113693/2021 (V)

Held by means of the Cloud Video Platform on 22 February 2022

Employment Judge W A Meiklejohn

Mr M Bajor — **Claimant**
In person

Dixons of Westerhope Ltd — **Respondent**
Represented by:
Mr R Campbell of Counsel

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that -

(a) the claimant's claim of unlawful deduction from wages was presented outwith the applicable time limit and was therefore out of time;

(b) it was not reasonably practicable for the claim to be presented within that time limit,

(c) it was presented within a reasonable period after that time limit, and

(d) the claim can therefore proceed.

REASONS

Introduction and nature of claim

1. This case came before me for a final hearing, conducted remotely by means of the Cloud Video Platform ("CVP"), to determine both liability and remedy. The claimant was alleging that he had suffered unlawful deduction of wages because, according to the claimant, he had been required to work for 10 minutes longer each day than he had been paid for. This was disputed by the respondent, their position being that the claimant had been paid for all time worked in accordance with his contract of employment.

2. The respondent had taken the preliminary point that the claim was time barred and an Employment Judge decided that the issue of time bar should be discussed at the final hearing. The claimant appeared in person and the respondent was represented by Mr Campbell. I advised the parties at the start of the hearing that I would deal with the time bar point first and would then, if I decided that point in the claimant's favour, deal with the merits of the case.

Relevant law

3. The right of a worker not to suffer an unlawful deduction of wages is found in section 13 of the Employment Rights Act 1996 ("ERA"). Section 23 ERA provides that the remedy for contravention of section 13 ERA is a complaint to an Employment Tribunal. So far as relevant section 23 ERA provides as follows -

(1) A worker may present a complaint to an employment tribunal -

(a) that his employer has made a deduction from his wages in contravention of section 13….

(2) Subject to subsection (4), an employment tribunal shall not consider a complaint under this section unless it is presented before the end of the period of three months beginning with -

(a) in the case of a complaint relating to a deduction by the employer, the date of payment of the wages from which the deduction was made....

(3) Where a complaint is brought under this section in respect of -

(a) a series of deductions. …

the references in subsection (2) to the deduction... .are to the last deduction ….in the series. …

(3A) Section 207B (extension of time limits to facilitate conciliation before institution of proceedings) applies for the purposes of subsection (2).

(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. …

4. Section 207B ERA provides, so far as relevant, as follows -

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

(2) In this section -

(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

(b) Day B is the day on which the complainant or applicant concerned receives.... the certificate issued under subsection (4) of that section.

(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....

(4)

(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.

5. Section 18A(1) of the Employment Tribunals Act 1996 provides as follows -

Before a person ("the prospective claimant") presents an application to institute relevant proceedings relating to any matter, the prospective claimant must provide to ACAS prescribed information, in the prescribed manner, about that matter.

Evidence

6. I heard oral evidence from the claimant. I had a bundle of documents to which I refer below by page number.

Findings in fact

7. On 22 July 2021 the claimant emailed the respondent's payroll department (83). The points he was making can be summarised as follows -

(a) His contract of employment provided for an unpaid break of 20 minutes per day.

(b) He started at 7.00am and worked 8.5 hours per day plus the 20 minutes unpaid break.

(c) That indicated he should finish at 3.50pm but he was required to stay until 4.00pm.

(d) He asked what happened with the *"missing"* 10 minutes.

8. The respondent's payroll department replied to the claimant on 22 July 2021 (82-83) providing an explanation. The claimant responded on the same date (82) in terms which indicated that he did not accept the explanation he had been given.

9. The claimant emailed the respondent's payroll department again on 26 July 2021 (82) indicating that he had been speaking with ACAS. His evidence was that he contacted ACAS because he did not get a *'fair explanation"* from the respondent, and he wanted to make sure that he was thinking about the issue *"in the correct way".* The claimant said that he knew about ACAS because he read something about *"solving problems with employers".* It was evident from the claimant's emails that his contact with ACAS took place between 22 and 26 July 2021.

10. The claimant said that he had also done some internet research. His purpose was to find a way to challenge the respondent's decision (on the *"missing 10 minutes" issue).* He looked at the Citizens Advice website. This confirmed his view that going through ACAS was the correct way to proceed. It also gave him a general awareness of Employment Tribunals.

Early conciliation

11. The claimant contacted ACAS again on 8 August 2021 and initiated early conciliation ("EC"). He recalled that he had spoken with someone at ACAS once or twice during the EC period. He was told that an Employment Tribunal ("ET") would be the *"next step".* He was also told about *"time bar".* The claimant said he was advised that he had *"three months after the last date of deduction plus the early conciliation time".*

12. The claimant received a telephone call from ACAS on 9 September 2021 . He was told that they had not been able to resolve the matter. EC ended on that date and ACAS issued the EC certificate (3).

Legal advice

13. The claimant sought advice from Messrs Digby Brown, Solicitors, on or around 26 October 2021 . His first contact with them was on 17 November 2021 . The claimant received a letter from Digby Brown on or around 21 November 2021 . He described this as providing an *"explanation of my case".*

14. From the Digby Brown letter, the claimant understood that the time limit for submitting a claim to the ET was 13 December 2021. He said that Digby Brown had calculated this on the basis that his last date of employment was 13 August 2021 and EC had lasted for one month plus one day. It was apparent that Digby Brown had worked out that the time limit was 13 December 2021 by adding the duration of the EC period (one month plus one day) to the date which was three months less a day from the claimant's date of termination of employment.

Claim presented

15. The claimant said that he had to consider the potential compensation he might receive if his claim was successful. He decided that this would not be enough to cover legal costs and that he would have to *"defend myself".*

16. The claimant presented his ET1 claim form to the Tribunal on 11 December 2021. He did this by way of online submission.

Comments on evidence

17. The claimant confirmed at the start of the hearing that, although English was not his first language, he did not require the services of an interpreter. It was evident during the hearing that his English was good and he had no apparent difficulty in understanding and responding to questions and generally engaging in the proceedings.

18. The claimant gave his evidence in a straightforward manner. He was a credible witness.

Submissions

19. Mr Campbell submitted that, for the reasons set out in the respondent's grounds of resistance, the claim was out of time. It is convenient to record here the relevant paragraphs in the grounds of resistance -

'7. The Claimant's employment terminated (by reason of his resignation) on 13 August 2021. He received his final payments from the Respondent in

the August 2021 payroll (which for the avoidance of doubt was before 9 September 2021). ACAS Early Conciliation took place from 8 August 2021 until 9 September 2021. The effect of section 207B(3) ERA is that any period of Early Conciliation is not to be taken into account for the purpose of calculating time limits.

8. The Claimant therefore had 3 months from 9 September 2021 (being "Day B" for the purpose of section 207B)(3) ERA) in which to bring his claim. The claim was therefore required to be brought by 9 December 2021. The claim was not brought until 11 December 2021."

20. Mr Campbell referred to the claimant's email of 26 January 2022 (42) replying to an email from the respondent's solicitors (in which they asked whether (a) he accepted that his claim was out of time and (b) he was saying that it was not reasonably practicable for him to have brought the claim in time and, if so, on what basis). The claimant had stated -

"I'm based on option [opinion?] of lawyer that I asked for consultation."

21. Mr Campbell submitted that Digby Brown's advice about the time limit had been wrong. This had been an unreasonable mistake and the consequences of that lay with the claimant. Mr Campbell referred to ***Dedman v British Building & Engineering Appliances Ltd 1973 IRLR 379*** and ***Marks and Spencer pic v Williams-Ryan 2005 ICR 1293.*** There might be an issue as between the claimant and Digby Brown but that did not allow the Tribunal to hear the claim. Mr Campbell's position was that it had been reasonably practicable for the claimant to present his claim in time. Mr Campbell indicated that he did not propose to address me on whether, if it had not been reasonably practicable for the claimant to do so, he had presented his claim within such further period as was reasonable.

22. I invited the claimant to make a submission but he did said that he did not wish to do so.

Adjournments

23. I indicated to the parties that I wanted to take some time to consider how section 207B(3) ERA operated and I adjourned the hearing to allow me to do so. When the hearing resumed, I was advised that the respondent's solicitors had been doing some research and had identified *a case* which might be relevant. Mr Campbell sought further time so that this could be provided. I adjourned the hearing again for this purpose.

24. Before doing so I explained to the claimant that I considered the issue to relate to the correct meaning of the word *"period"* in section 207B(3) ERA. Did it mean (a) literally the period starting with Day A plus one day (ie 9 August 2021) and Day B (9 September 2021) or (b) the number of days between Day A plus one day and Day B?

25. During the second adjournment I was advised that another case had been identified and I agreed to extend the adjournment so that copies of the relevant cases could be provided. The two cases were ***The Commissioners for HM Revenue & Customs v Serra Garau 2017 WL 01162351,*** a decision of the Employment Appeal Tribunal ("EAT") dated 24 March 2017 and ***Fergusson v Combat Stress 2017 WL 00956471,*** a decision of the ET in Scotland dated 6 March 2017.

Further submissions

26. Mr Campbell noted that the ET's decision in ***Fergusson*** had predated the EAT's decision in ***HMRC V Serra Garau,*** but both had come to the same conclusion. Any part of the EC period which predated the termination date did not count. The Digby Brown advice was wrong. If they (Digby Brown) had not updated themselves, the claimant's remedy was against them.

27. The claimant had nothing to add.

Discussion and disposal

28. I decided to reserve my decision and so, notwithstanding that the hearing was listed as a final hearing in respect of both liability and remedy, I did not deal

with the merits of the claim. I set out in the paragraphs which follow my decision on the time bar issue.

29. I deal firstly with the interpretation of section 207B(3) ERA. In ***Fergusson*** the Employment Judge (Walker) had provided to the parties' representatives copies of two English ET decisions - ***Chandler v Thanet District Council ET 2301782/14*** and ***Myers and Wathey v Nottingham City Council ET 2601136/15*** and ***ET 2601 137/15.***

30. The competing arguments before EJ Walker were -

    (a) As per the decisions in ***Chandler*** and ***Myers and Wathey*** the time spent in EC (ie the number of days) should simply be added to the primary time limit.

    (b) Days (of EC) before the three month time limit started to run were not taken into account at all.

31. EJ Walker disagreed with the decisions in ***Chandler*** and ***Myers and Wathey.*** She held that the nature of section 207B ERA was that of a "stop ***the*** c/oc/c" provision. She said -

> *"That….means that those specific days that fall within the period are not counted. It does not mean that an equivalent number is added to the primary time limit. To put it simplistically, a clock cannot be stopped [if] It has not yet started."*

32. In ***HMRC V Serra Garau*** two EC certificates had been issued. The first was issued while the employee was still employed and before the primary time limit started to run. The second was issued after the primary time limit expired, in circumstances where the employee contacted ACAS one day before the primary time limit expired. The EAT decided that there could not be a second EC certificate relating to the same matter. In relation to the first EC certificate, where the entire EC period was before the primary time limit started to run, the EAT said -

"....the limitation clock could not stop under the first certificate, because it had never started. "

33. Accordingly, I am satisfied that the correct interpretation of section 207 B(3) ERA is the one adopted by EJ Walker in ***Fergusson*** and by the EAT in ***HMRC v Serra Garau.*** Any part of the EC period which occurs before the applicable primary time limit starts to run does not count for the purposes of *"stop the clock".*

34. In the present case, the principal dates were as follows -

Claimant initiates EC with ACAS (Day A)	8 August 2021
Date of termination of employment	13 August 2021
EC certificate issued (Day B)	9 September 2021
ET1 presented	13 December 2021

35. The effect of the correct interpretation of section 207B(3) ERA was that the primary time limit of three months ran from 9 September 2021 . The part of the EC period which occurred before 13 August 2021 (ie between 8 and 13 August 2021) did not count.

36. I disagreed with the respondent's assertion in their grounds of resistance that this meant the primary time limit expired on 9 December 2021 . In my view it expired on 8 December 2021 . I also disagreed that the portion of the EC period which did not count was 8-13 August 2021 . I considered that the primary time limit for the claimant's unlawful deduction claim ran from the date of his last payment of wages and not from his date of termination of employment. If that last payment of wages was on 20 August 2021 , that was the date from which the primary time limit ran. However, this had no material effect because it simply meant that the portion of the EC period which did not count ran from 8-20 August 2021 rather than 8-13 August 2021 .

37. It was therefore clear that when the claimant presented his ET1 on 13 December 2021 , it was out of time.

38. I next consider whether it had been reasonably practicable for the claimant to present his unlawful deduction of wages claim before the end of the three month time limit period. The claimant's position was that he had acted in line with the legal advice he had received from Digby Brown. The respondent's position was that the Digby Brown advice had been wrong, that mistake was unreasonable and the consequence was that it had been reasonably practicable for the claimant to present his claim in time.

39. My starting point was what Lord Denning said in ***Dedman -***

> *" …if a man engages skilled advisers to act for him - and they mistake the time limit and present it too late - he is out. His remedy is against them."*

40. Lord Denning returned to this theme in ***Wall's Meat Co Ltd v Khan 1* 979 *ICR 52*** where he said -

> *"/ would venture to take the simple test given by the majority in Dedman's case. …It is simply to ask this question: Had the man Just cause or excuse for not presenting his complaint within the prescribed time? Ignorance of his rights - or ignorance of the time limit - is not just cause or excuse, unless it appears that he or his advisers could not reasonably have been expected to be aware of them. If he or his advisers could reasonably have been so expected, it was his or their fault, and he must take the consequences. "*

41. In the same case, Lord Brandon addressed the same point in these terms -

> *"The performance of an act, in this case the presentation of a complaint, is not reasonably practicable if there is some impediment which reasonably prevents, or interferes with, or inhibits, such performance. The impediment may be physical, for instance the illness of the complainant or a postal strike; or the impediment may be mental, namely, the state of mind of the complainant in the form of ignorance of, or mistaken belief with regard to, essential matters. Such states of mind can, however, only be regarded as impediments making it not reasonably practicable to present a complaint within the period of three months, if the ignorance on the one hand, or the*

mistaken belief on the other, is itself reasonable. Either state of mind will, further, not be reasonable if it arises from the fault of the complainant in not making such inquiries as he should reasonably in all the circumstances have made, or from the fault of his solicitors or other professional advisers in not giving him such information as they should reasonably in all the circumstances have given him."

42. In ***Marks and Spencer v Williams-Ryan*** the Court of Appeal in England stressed the need for an ET to consider whether an employee's ignorance of the time limit was reasonable. They also quoted from the judgment of May LJ in ***Palmer and another v Southend-on- Sea Borough Council 1984 ICR 372*** –

"What, however, is abundantly clear on all the authorities is that the answer to the relevant question is pre-eminently an issue of fact for the industrial tribunal and that it is seldom that an appeal from its decision will lie."

43. There was a similarity between the circumstances in which the claim in ***Fergusson*** was presented out of time and those of the present case. In ***Fergusson*** the solicitor acting for the claimant believed that the time limit expired on 10 December 2016 and submitted the ET1 on 18 November 2016. In that case the principal dates were as follows -

EC initiated (Day A)	14 July 2016
Termination date	11 August 2016
EC certificate issued (Day B)	14 August 2016
ET1 presented	18 November 2016

44. The claimant's solicitor's mistaken belief in ***Fergusson*** about when the time limit expired was based on an understanding that the operation of section 207B(3) ERA involved working out when the primary time limit would expire, in that case 10 November 2016, and then adding on the period of EC, in that case

one month. This was held to be incorrect because the portion of the EC period which pre-dated the termination date (ie between 14 July and 11 August 2016) did not count.

45. It was clear that the advice given to the claimant by Digby Brown in the present case was based on the same mistaken belief - see paragraph 14 above.

46. In ***Fergusson*** the issue turned on whether the solicitor's advice had been negligent. It was agreed in that case that if the advice was negligent, the claimant could not succeed in persuading the Tribunal that it had not been reasonably practicable to present his claim timeously. i understood that the argument for the claimant in that case to be put as follows -

(a) It could not be said that no competent solicitor would have acted in the same way. In ***Northampton County Council v Entwistle 2010 IRLR 741*** the EAT (per Underhill P) said this -

"It is perfectly possible to conceive of circumstances where the adviser's failure to give the correct advice is reasonable.... The paradigm case though not the only example of such circumstances would be where both the claimant and the adviser had been misled by the employer as to some material factual matter. "

(b) In ***Ebay (UK) Ltd v Buzzeo UKEAT/0159/13*** the EAT (per Richardson HHJ) relied on that passage to hold that -

"An adviser's failure to give the correct advice may itself be reasonable and if so, will not in itself be a bar to a finding that it was not reasonably practicable to bring the claim in time.

(c) Similarly, in ***Balfour Beatty Engineering Services v Allen UKEAT/0236/1 1*** the EAT (again per Richardson HHJ) said -

"It follows in my judgment from what Underhill P collected from the authorities with which analysis I agree that it may not be such an overarching principle that the Claimant must accept as his responsibility an error on the part of skilled advisors. If there is no negligence, then it

will not be reasonably practicable for the employee to put his claim in time."

47. EJ Walker did not accept that it was quite as simple as to say that if the claimant's solicitor was not negligent, then it would not be reasonable for the claimant to put in his claim in time. She said this -

"/ agree.... that the correct approach is firstly to consider whether the claimant's solicitor was negligent. If that is not established, I must then consider whether the solicitor's misunderstanding (as I have found it to be) about the effect of section 207B was reasonable. If so, it will not be reasonably practicable for the claimant to have presented her claim in time."

48. I considered that the same issue arose in the present case. Was Digby Brown's misunderstanding about the effect of section 207B(3) ERA reasonable? I noted that EJ Walker referred to the guidance provided by HMCTS and I referred to the relevant website. There I found the following information about the operation of EC relative to ET time limits -

"*In working out the number of days by which the time limit is extended, the period begins on the day following that on which your application for early conciliation was received by Acas and ends on the day on which you are deemed to have received the certificate. The date on which Acas received your early conciliation form will be stated in the Early Conciliation certificate. "*

49. There was some force in Mr Campbell's argument that Digby Brown should have been aware of the decision in ***HMRC V Serra Garau.*** However, the *"headline"* issue in that case was the effect of a second EC certificate rather than the question of how to calculate the time limit for presenting a claim when section 207B(3) ERA was engaged.

50. The matter I had to decide was whether, at the time they gave the claimant incorrect advice about the time limit for presenting his claim, Digby Brown exercised the degree of skill and care which is ordinarily exercised by reasonably competent members of the profession. When the same issue arose in ***Fergusson,*** it was significant that the Employment Judge and two

experienced counsel were previously unaware of the decisions in ***Ohandler*** and ***Myers and Wathey.*** While, as in ***Fergusson,*** I had no expert evidence as to what was the appropriate degree of skill and care, I considered that my own judicial knowledge was relevant.

51. Based on that knowledge, I believe that the commonly held view amongst solicitors is that *"stop the clock"* under section 207B(3) ERA operates by adding to the primary time limit the period of EC. In the majority of cases, where EC is initiated after employment has ended, this will provide the correct answer. The issue in ***Fergusson*** and in the present case only arises when EC is initiated before employment has ended and/or before time has started to run for the purpose of a time limit. Only in those circumstances can the clock not be stopped because it has not started.

52. I identified a number of factors which pointed towards Digby Brown having been negligent in their advice to the claimant -

    (a) Unlike the position at the time ***Fergusson*** was decided, there is a decision of the EAT which indicates the correct interpretation of section 207B(3) ERA.

    (b) At the time Digby Brown provided their advice to the claimant, more than four years had passed since that EAT decision.

    (c) The respondent's solicitors were alert to the issue, as reflected in their grounds of resistance.

53. I also identified a number of factors which pointed to Digby Brown not having failed to exercise the appropriate degree of skill and care -

    (a) The section 207B(3) ERA point was not the *"headline"* issue addressed by the EAT in ***HMRC V Serra Garau.*** Commentary on that case which is available online focusses on the issue of the second EC certificate.

    (b) How *"stop the clock"* operates under section 207B(3) ERA is a matter of common misunderstanding. Applying the HMCTS guidance literally would, in the present case, have produced the wrong result.

(c) The word *"period"* in section 207B(3) ERA is capable of more than one interpretation, confirmed by the fact that the Tribunals in *Chandler and Myers and Wathey* reached a different conclusion from the Tribunal in *Fergusson* and applied the same interpretation as Digby Brown's advice was based on.

54. Not without hesitation, I decided that Digby Brown's advice to the claimant, while wrong, was not negligent. I considered that the factors which pointed away from negligence outweighed those which pointed towards it.

55. The impediment which prevented the claimant from presenting his claim in time was Digby Brown's error in calculation of the time limit. I had to decide whether that error, reflected in their advice to the claimant, was reasonable. I reminded myself of what Lord Brandon said in *Walt's Meat* (see paragraph 40 above). I came to the view, again not without hesitation, that the error which resulted in the wrong advice was reasonable.

56. I reminded myself that I had decided to adjourn the hearing because I wanted to take some time to consider how section 207B(3) ERA operated. As set out in paragraph 24 above, I believed that there were two possible interpretations of the word *"period" and* I needed to come to a view on which of these I believed to be correct. Given my own hesitation, I found that Digby Brown's error was reasonable.

57. That error led the claimant to believe that he had until 13 December 2021 to present his ET1 claim form. He complied with the time limit as he understood it to be. In these circumstances, I found that it had not been reasonably practicable for the claimant to present his claim in time.

58. I move on to consider whether the claimant's claim was presented within such further period as was reasonable. The delay was three days based on my view of when the primary time limit expired (and two days based on the view of the respondent's solicitors). It was therefore a delay of short duration. While that counted in the claimant's favour, what seemed to me to be the most important element was that the claimant presented his claim prior to the date which he

reasonably understood to be the time limit. I noted that in ***Fergusson*** a delay of four days was found to be reasonable.

59. I decided that the claimant had presented his claim within a reasonable period after the expiry of the primary time limit. Accordingly that claim could proceed.

Further procedure

60. As my decision relates only to the time bar issue, the case will now require to be listed for a final hearing before any Employment Judge, sitting alone. I consider that one day should be sufficient to cover both liability and remedy. The final hearing will be held by means of CVP, unless either party expresses a contrary view. In that event an Employment Judge will require to determine the format of the final hearing.

Employment Judge: **W Meiklejohn**
Date of Judgment: **04 March 2022**
Entered in register: **10 March 2022**
and copied to parties

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