



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4103946/2023

5 **Preliminary Hearing Held in person in Edinburgh on 18 March 2024**

Employment Judge Russell Bradley

10 **Christopher Elliott**

**Claimant
In person**

15 **Joan Tranent**

**First Respondent
Represented by:
Mr W Venters - Solicitor**

25 **Heather Fleming**

**Second Respondent
Represented by:
Mr W Venters - Solicitor**

30 **Midlothian Council**

**Third Respondent
Represented by:
Mr W Venters - Solicitor**

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JUDGMENT

The judgment of the Tribunal is that it does not have jurisdiction to consider the claim of unfair (constructive) dismissal as it was not presented within the relevant ETZ4(WR)

period as required by section 111(2) and (2A) of the Employment Rights Act 1996. It was reasonably practicable for the claim to have been presented by 18 October 2023. Its presentation on 29 November was after the relevant period. It is therefore dismissed.

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REASONS

Introduction

1. By notice dated 29 December 2023 this preliminary hearing was fixed to consider two issues. First, whether there is statutory basis for the claims against the first and second respondent and, if not, whether the claims against those respondents should be struck out. Second, whether the claim was lodged in time, and if not, whether the Tribunal should exercise its discretion to hear the claim out of time. As the hearing progressed Mr Venters agreed that if the ET1 form was presented out of time and the tribunal thus did not have jurisdiction to consider the claims, there was no need to strike out the claims against the first and second respondent.

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Evidence and witnesses

2. The respondent had produced a bundle of 104 pages. It had been sent to the claimant in the course of the week prior to the hearing. The claimant had contributed material to the bundle. That material, in turn, was the claimant's "*chronology of constructive dismissal*". It was **pages 76 to 79**. **Pages 80 to 104** was the material referred to in his chronology.
3. I heard oral evidence from the claimant. He was referred to the vast majority of the material within the bundle being **pages 53 to 104**.
4. The claimant gave his evidence in an honest and candid way. I had no reason to doubt that he was telling the truth. He was genuine and sincere in what he believed he had been advised by ACAS.

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The claims and issues

5. Prior to hearing evidence, the claimant confirmed that the single claim that he made was one of unfair (constructive) dismissal. He agreed that his text (at box 8.1 of his ET1, **page 18**) "*Had to leave after punishments for asking to have a complaint investigation turned down, breach of human rights, H&S and pay*" was background information to the constructive dismissal claim. Similarly, and notwithstanding having "*ticked the box*" seeking a recommendation if there was a claim of discrimination, the claimant confirmed that he did not make one.
6. The issues for me are identified above, taken from the notice of hearing, albeit I have dealt with them in reverse order.

15 Findings in fact

7. From the discussion prior to evidence on uncontentious issues and from the evidence that I heard, I made the following findings in fact.
8. The claimant is Christopher Elliott. The third respondent is Midlothian Council. The first respondent is Joan Tranent. She is (or was) employed by the third respondent. The second respondent is Heather Fleming. She is (or was) also employed by the third respondent.
9. On or about 2 October 2017 the claimant began employment with the third respondent. In terms of a statement of particulars issued to him, he was first employed as a Lifelong Learning & Employability Worker (**pages 53 to 58**).
10. On or about 9 November 2017 the claimant raised with the respondent's Principal Teach (Outdoor Learning Service) a number of issues to do with the provision of equipment for outdoor activities (**page 82**).

11. Sometime around March 2018 the claimant raised with the respondent's Risk Manager (Chris Lawson) a number of issues to do with health and safety. On 5 March 2018 Mr Lawson emailed a senior Lifelong Learning & Employability colleague, Gael Belton, to do with those issues (**pages 5 80 and 81**). He copied the email to the second respondent. The claimant believes that the email demonstrated support for his position on the issues.
12. On or about 27 September 2022 the claimant submitted to the respondent a "**Resolution Form**". The form raised issues to do with the way he had been managed by the second respondent. The form allowed the claimant to indicate what action he requested to resolve the issues raised by him in the form.
13. On four or five occasions up to about September 2022 the claimant had contacted ACAS. He had done so informally. His principal reason for doing so was to validate his position in relation to issues that he had raised with the third respondent. On those occasions, the claimant had wished to raise the issues with the third respondent but had wanted to retain his employment with it. His intention in doing so had been with the interests of the third respondent in mind, on moral and legal grounds. It had not been his intention to be vexatious.
14. By email on 2 November 2022 the claimant gave notice to the respondent (**page 60**). He had been offered a position at the third respondent's Outdoor learning centre at Vogrie Country Park, Gorebridge. In terms of a statement of particulars issued to him, he was then employed as a Learning Assistant there. The statement noted that his start date in that position was 19 December 2022. The statement noted that his continuous service with the third respondent began on 2 October 2017. The main reason for the claimant's decision to move from his original post and for taking up the Learning Assistant was the way he felt that he had been treated in or around September 2022. He did not contact ACAS around that time.

- 5 15. In January 2023 the claimant was interviewed for a post with the Royal Air Force (RAF). Later that month, the RAF advised the claimant that he was a “*preferred candidate*”. Any appointment was subject to being “*security cleared*”.
- 10 16. By letter dated 17 April 2023 the claimant gave notice of resignation from his employment with the third respondent (**page 72**). He advised that; his last day of employment would be 15 May 2023; and he intended to use some of his accrued annual leave between those two dates. His letter then said, “*Thank you for the opportunity to experience Vogrie; I now move on to a golden opportunity back with the RAF in Edinburgh. Good luck and best wishes.*”
- 15 17. The claimant’s effective date of termination was 15 May 2023.
- 20 18. On 27 July the claimant presented an ET1 form. In it he said that he did not have an ACAS early conciliation certificate number. He knew at that time that the form said, “*Nearly everyone should have this number before they fill in a claim form. You can find it on your Acas certificate. For help and advice, call Acas on 0300 123 1100 or visit www.acas.org.uk.*”
- 25 19. By letter dated 1 August the tribunal wrote to the claimant. It said (amongst other things) “*I have received your claim form and have referred it to Employment Judge Kearns who has decided that your claim cannot 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 indicated that you are exempt from early conciliation but none of the exemptions apply to your claim. 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.***” The bold text was shown bold in the letter.
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20. Over the period 3 to 4 August the claimant moved house to his current address.
- 5 21. On 7 August the claimant started early conciliation in relation to all three respondents.
22. For the last two weeks of August the claimant was abroad on holiday.
- 10 23. On 18 September ACAS issued to the claimant three certificates corresponding to the respondents (**pages 73 to 75**).
24. On 2 and 13 October there was an exchange of correspondence between the claimant and the tribunal office. In the letter of 13 October, the
15 tribunal said, *"The claimant is asked to resubmit their ET1 with reference to the correct Respondents."*
25. On 29 November, the claimant emailed the tribunal. He said, *"I have managed to access my AT1 and completed a new form with the
20 adjustments requested. Please let me know if this meets your requirements, showing my revised address having moved to EH19 3QR recently. Apologies for the delay in completing this task, lots going on in my new job, moving house and family illness."* The reference to family illness was to his partner. He had spent some time caring for her.
- 25 26. On 6 December the tribunal wrote to the claimant. It said, *"I refer to your application dated 29 November for a reconsideration of the decision to reject your claim. Employment Judge Hoey has reconsidered the decision without a hearing and has decided that your claim can be
30 accepted. The claim will be treated as presented as at 29 November 2023."*

27. On or about 21 December an ET3 and Grounds of Resistance was lodged for all three respondents (**pages 27 to 38**).
28. By 27 July 2023 the claimant was aware of his right to claim constructive dismissal. He was at that time unaware of the requirement to engage early conciliation prior to presenting the claim. By 1 August, he was aware of that requirement. By about 7 August, having contacted ACAS the claimant was aware of the primary time limit for presenting an ET1 being “3 months minus a day” from 15 May, his effective date of termination. By about 7 August he was also aware from his discussions with ACAS of the need to present his claim within one month of receiving the certificates. The claimant believes that he adhered to the timescales discussed with ACAS.
29. The primary time limit was extended by one month from the date of issue of the early conciliation certificates. It was therefore extended to 18 October 2023.

Submissions

30. Both parties made oral submissions. Mr Venters agreed to lead. To the extent necessary and relevant I comment on the submissions below. I mean no disservice to either party by not repeating or summarising their submissions here.

The statutory framework

31. Section 111(2) of the Employment Rights Act 1996 provides that “*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—(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 months.” Subsection 2A provides, “Section 207B (extension of time limits to facilitate conciliation before institution of proceedings) applies for the purposes of subsection (2)(a).”

- 5 32. The relevant provision which caveats section 111(2) is section 207B of that Act. Subsections (2) to (5) of 207B of the Act provide, *“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 or, if earlier, is treated as receiving (by virtue of regulations made under subsection (11) of that section) the certificate issued under subsection (4) of that section.(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) If a time limit set by a relevant provision would (if not extended by this subsection) expire during the period beginning with Day A and ending one month after Day B, the time limit expires instead at the end of that period. (5) Where an employment tribunal has power under this Act to extend a time limit set by a relevant provision, the power is exercisable in relation to the time limit as extended by this section.”*
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- 25 33. Section 97 of the 1996 Act read short for present purposes provides, *“(1) Subject to the following provisions of this section, in this Part “the effective date of termination” —(a) in relation to an employee whose contract of employment is terminated by notice, whether given by his employer or by the employee, means the date on which the notice expires.”* The Part of the Act is of course Part X which deals with unfair dismissal.
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34. Section 210(5) of the Act provides that *“A person's employment during any period shall, unless the contrary is shown, be presumed to have been continuous.”*

Discussion and decision

5 35. The respondent's primary position was that given the factual basis on which the claimant relied as a breach of contract (all of which had occurred by November 2022) the relevant effective date of termination from which time began to run was 18 December 2022 following the ending of the first contract. Mr Venters referred to the decision of the Court of Appeal in ***Fitzgerald v University of Kent At Canterbury*** [2004] I.C.R. 737. In that case (also concerning whether an ET1 was presented in time albeit prior to the introduction of early conciliation) the relevant dates were; (i) 2 March 2001, being the date of acceptance by the claimant of early retirement, expressed as taking effect as from (ii) 28 February 2001; and (iii) 1 June 2001 being the date of presentation of her ET1. If the effective date of termination was 28 February, her claim was out of time. That was the decision of the tribunal and the EAT. The Court of Appeal allowed her appeal. Put shortly the Court decided that the effective date of termination of employment was a statutory construct which depended on what had happened between the parties over time and not on what they might agree to treat as having happened (see paragraph 20). That being so, her effective date of termination was not earlier than 2 March 2001, with the consequence that her complaint was presented in time. Mr Venters agreed that this argument was not pled and was, in effect, new to these proceedings.

25 36. I do not agree that ***Fitzgerald*** is relevant here. On the respondents' pleaded case "*The Claimant started employment with Respondent 3 on 2 October 2017 as a Communities and Lifelong Learning Worker until 19 December 2022 when he was successful in applying for another post as a Learning Assistant with Respondent 3 at Vogrie outdoor nursery He held this post until 15 May 2023 when he resigned by letter dated 17 April 2023.*" On their pleaded case there was no termination of employment in November or December 2022. Indeed the claimant's email of 2 November 2022 gave notice to the effect that he had been

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5 offered the Vogrie role but did not expressly record notice of resignation from the employment with the third respondent. That is unsurprising given that that role was also with the third respondent. The claimant is entitled to the statutory presumption which is derived from section 210(5) of the 1996 Act. He has that continuity. The contrary has not been shown.

10 37. The claimant's effective date of termination was 15 May 2023. His (first) ET1 presented on 27 July was not accepted and returned to him on 1 August. This was because he had not complied with the requirement to start early conciliation before presenting it. On 7 August he had started early conciliation (Day A). Certificates were issued on 18 September (Day B). In this case, section 207B(4) applies because the time limit set by section 111 (14 August) expired during the period between Day A and 15 Day B. That being so, the time limit expired one month after Day B, thus on 18 October. The ET1 was treated as presented on 29 November 2023. It was thus not presented within the extended time limit.

20 38. I agree with Mr Venters that (i) the onus of proving that presentation within the time limit was not reasonably practicable rests on the claimant; (ii) the authority for that proposition is the decision in the Court of Appeal in the case of **Porter v Bandridge Ltd** 1978 ICR 943; and that (iii) the claimant has not discharged that onus. In particular he has not shown that he was unaware of the relevant time limit and that that error was a 25 reasonable one.

30 39. In my view it was reasonably practicable for the claimant to have presented his ET1 in time, that is, by 18 October. He was aware of his right of claim at latest on 27 July when he first presented his ET1. By 1 August he was aware of what he required to do in order to be able to re-present his claim in time. By 18 September he could have presented it and done so in time. He was aware of the "3 month minus a day" rule. He was told about the month's extension by ACAS albeit it appears that he did not understand it. At paragraph 12 of his judgment in the Court of

Appeal in the case of **Lowri Beck Services Ltd v Brophy** [2019] EWCA Civ 2490 Lord Justice Underhill set out the essential (five) points for its purposes about the correct approach to the test of reasonable practicability. The second was that the statutory language is not to be taken as referring only to physical impracticability and for that reason might be paraphrased as whether it was “*reasonably feasible*” for the claimant to present his or her claim in time. The third was that if an employee misses the time limit because he or she is ignorant about the existence of a time limit, or mistaken about when it expires in their case, the question is whether that ignorance or mistake is reasonable. In my view even if I accepted that the claimant was not aware of the existence of the time limit (18 October), that mistake was not reasonable. He knew from his recent discussions with ACAS about time limits generally. He knew or in my view it was reasonable for him to have known or at least found out the time limits for presenting his claim following receipt of his early conciliation certificates. The letter of 1 August referred to time limits. From that date he knew that there were time limits. He could with reasonable diligence have ascertained the effect of early conciliation on them, and thus identified the last day for timely presentation of his claim. I took account of the claimant’s evidence on the issues of moving house, family illness, a new job and a holiday. But none of them provide a reasonable excuse for not presenting his ET1 by 18 October.

40. It was unnecessary to decide if the claim against the first and second respondent should be struck out. If I had decided that question, I would have struck the claim out against both. The claimant was employed by the third respondent. It was his only employer. There was no factual or statutory basis to maintain a claim of unfair dismissal against either of the first or second respondent.

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41. Accordingly my judgment is that the employment tribunal does not have jurisdiction to consider the claim and it is therefore dismissed.

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EJ Bradley

Employment Judge

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25 March 2024

Date

15 **Date sent to parties**

26/03/2024