EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4100686/2017 Preliminary Hearing at Edinburgh on 23 June 2017

Employment Judge: M A Macleod (sitting alone)

Suhail Hamed	Claimant Represented by Mr A McLaughlin Solicitor
Circa Security Limited	Respondent Represented by Mr D Maguire Solicitor

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that the claimant presented his claims to the Employment Tribunal within the statutory time limits, and therefore that the Tribunal has jurisdiction to hear those claims. The case will now proceed to a hearing on the merits.

REASONS

1. In this case, the claimant presented a claim to the Employment Tribunal on 24 April 2017, in which he complained that he had been discriminated against on the grounds of race by the respondent, and that they had automatically unfairly dismissed him on the basis that he had asserted his legal right not to be abused at work.

2. The respondent resisted all claims, and asserted that the claimant's claim being lodged out of time, it should be dismissed.

3. A Preliminary Hearing was fixed to take place on 23 June 2017, at which this issue was the issue to be addressed.

4. The claimant attended and was represented by Mr McLaughlin. The respondent was represented by Mr Maguire.

5. The claimant gave evidence on his own account. No other witnesses were called.

6. The claimant presented a bundle of documents to the Tribunal, which was supplemented by one further document produced by the respondent.

7. Based on the evidence led and the information presented, the Tribunal was able to find the following facts admitted or proved.

Findings in Fact

8. The claimant commenced employment with the respondent on 5 April 2016, as a security guard. He was deployed as a security receptionist at the premises of FMC Technologies, in Dunfermline.

9. On Monday 5 December 2016, the claimant left the site without informing his employer. The reason why he did this is not the focus of this hearing, but the respondent's reaction was immediate. They wrote to him on that date (C7) to advise that his employment was being terminated with immediate effect on the basis that they considered his actions to amount to gross misconduct.

10. The claimant considered that this decision was wrong and unfair, and contacted the FMC Security Manager, who told him that there was nothing that they could do about his dismissal.

11. On the Thursday of that week, 8 December, the claimant took the letter of dismissal, and went to his local Citizens' Advice Bureau (CAB) to seek advice as to what action he could take to challenge the decision. The officer there advised him that someone from Fife Law Centre would contact him in order to provide him with advice and support. He did not hear from Fife Law Centre within approximately two weeks, and accordingly decided

to return to the CAB. When he went there, he was able to speak to "Megan", a solicitor from the Fife Law Centre, and to explain to her his situation.

12. As a result of this consultation, Fife Law Centre wrote to the respondent (C8) to set out the detailed background of which they had been informed, and invite them to make any proposals, financial or otherwise, to settle the matter extra-judicially. In the event that no such proposals were forthcoming, the letter confirmed that they would contact ACAS to commence early conciliation as a precursor to raising an Employment Tribunal claim without further notice. The claimant was sent a copy of that letter.

13. It is appropriate to reflect at this stage on the timing of this letter. The copy produced by the claimant's solicitor was dated 10 January 2017; however, a separate copy was produced by the respondent's solicitor, duly signed, dated 15 December 2016 (R1).

14. In addition, a copy of the mandate signed by the claimant authorising Fife Community Law Limited (the trading name of Fife Law Centre) to represent him in full was produced at R2, and that mandate was signed by the claimant on 19 December 2016.

15. In his evidence, the claimant was unable to recall when he spoke to the Law Centre, or the timing of the letters. No evidence was led from the respondent to clarify when the letter was received.

16. On 28 February 2017, the respondent having declined to enter into any negotiation to resolve the matter, the Law Centre wrote to the claimant (C9). They confirmed that they had spoken to Ms O'Lone, who had carried out an investigation on behalf of the respondent into the matters raised in their earlier letter, and set out the explanation which Ms O'Lone had given to them as to why the claimant had been dismissed.

17. The letter concluded by confirming that the Law Centre did not consider that he would be successful in pursuing a discrimination claim, having seen the

documentation provided by the respondent in support of their position, and therefore was not prepared to represent him in this case. The letter continued:

"Although the law centre is unable to assist you in this matter, you may of course still raise a claim and represent yourself or seek alternative legal representation. As you know, you do not have the required length of service to raise an unfair dismissal claim however we advised you that there is no prerequisite length of service to raise a discrimination claim.

*As we discussed during our meeting, generally speaking a claim must be raised **within** three months of the last alleged discriminatory act taking place. You advised us that you felt that your dismissal on 5 December 3026 was discriminatory, therefore a claim would have to be raised by 4 March 2017. this said, it is mandatory that any potential claim is first registered with ACAS for Early Conciliation. The Early Conciliation period 'stops the clock', i.e. pauses your tribunal deadline while the process is ongoing. When the Early Conciliation process comes to an end you will be issued a certificate, and from the date of issue, you then have one month to submit your claim to the Employment Tribunals office from the date that the Early Conciliation certificate is issued to you. We strongly suggest that if you do wish to proceed with a claim, you contact ACAS before the 4 March deadline. We enclose the ACAS information booklet about Early Conciliation and their contact details."*

18. The claimant notified ACAS of the prospective claim on 2 March 2017, and the Early Conciliation Certificate was issued on 2 April 2017. The certificate was not produced by the parties, but was available to the sitting Employment Judge on the Tribunal's administrative file, and was read out to the parties during the course of the Preliminary Hearing.

19. The claimant received the Early Conciliation Certificate on 2 April 2017, a Sunday, by email. In his evidence before the Tribunal, the claimant was asked, under cross examination, what he was told by ACAS in that email on 2 April about timescales within which he was required to present his claim,

and his response was that in the email it said he had "so many days" to lodge his claim, but he was "not entirely sure". He was told that the period for presenting the claim was nearly at an end, so he contacted a new solicitor (McLaughlin & Co) and arranged to see them as soon as possible. He consulted with them at a meeting on Wednesday or Thursday that week (either 5 or 6 April).

20. The claim was presented on the claimant's behalf on 24 April 2017. The reason for the delay was unclear to the claimant, though he accepted from his solicitor that there may have been time needed for an application to be made for legal aid.

Submissions

21. For the claimant, Mr McLaughlin submitted that it is just and equitable to permit the claim to proceed even though it was lodged late. He referred to an Employment Tribunal decision from North Shields dated 7 March 2017 in the case of **Nicholson v Boots Management Services Ltd 2501282/2016**, in the course of which, at paragraph 2.7, the Tribunal referred to the EAT decision in **British Coal v Keeble [1997] IRLR 336**, which requires the Tribunal to consider all the circumstances of the case, and in particular:

    a. The length of and reasons for the delay;

    b. The extent to which the cogency of the evidence is likely to be affected by any delay;

    c. The extent to which the party sued had cooperated with any requests for information;

    d. The promptness with which the claimant acted once he or she knew of the facts giving rise to the cause of action; and

    e. The steps taken by the claimant to obtain appropriate professional advice once he or she knew of the possibility of taking action.

22. He then submitted that the length of the delay was fairly modest, and the reasons for the delay have been set out by the evidence. He emphasized

that the claimant received a letter dated 28 February telling him about early conciliation and the time limits, which presented him with quite a problem, partly because the deadlines were not clearly laid out in that letter.

23. The cogency of the evidence has been minimally affected by any delay. There is no criticism of the respondent for failing to respond to any requests for information.

24. Mr McLaughlin then submitted that the claimant acted promptly as soon as he was dismissed, going to ACAS to arrange conciliation, and seeking the advice of solicitors.

25. With regard to the claim in respect of unfair dismissal, Mr McLaughlin argued that it was not reasonably practicable for the claimant to have presented that claim within three months. Practicability, he said, has to take account of finance, and it was necessary for the claimant to apply for legal aid before presenting the claim to the Tribunal, and he did raise the claim as soon as "reasonably practical".

26. For the respondent, Mr Maguire submitted that the claim is 20 days late. It should have been presented by 4 April at the latest, but it was presented on 24 April. This was not a "day here or there" but a very substantial delay where the time limits have been frozen by early conciliation. During the extended time limit he should have been taking steps to determine what he should have been doing at the end of the conciliation period.

27. The claimant said that he was not aware of the time limits until he consulted McLaughlin & Co. Mr Maguire submitted that it would be extremely surprising if ACAS did not raise the time limits with him, as would any employment adviser if they were aware of the background. The claimant received a letter from the Law Centre but also received an email from ACAS, and it must have been at the forefront of the ACAS conciliator's mind that the time scale was very tight. If he saw McLaughlin & Co on 5 April that was one day out of time, but it was not an excuse to say that he delayed further in order to apply for legal aid.

28. It would involve the respondent in considerable prejudice if the claim is allowed to proceed, he said, and it would not be just and equitable to allow the claimant's claim in late

29. Mr Maguire also submitted that the unfair dismissal claim should be dismissed on the basis of time bar as well. It was reasonably practicable for the claimant to present his claim within three months when the early conciliation period is added to that period.

The Relevant Law

30. Section 111(2) of the ERA provides:

> *"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."*

31. What is reasonably practicable is essentially a question of fact and the onus of proving that presentation in time was not reasonably practicable rests on the claimant. "That imposes a duty upon him to show precisely why it was that he did not present his complaint." (**Porter v Bandridge Ltd [1978] ICR 943**).

32. The best-known authority in this area is that of **Palmer & Saunders v Southend-on-Sea Borough Council 1984 IRLR 119**. The Court of Appeal concluded that "reasonably practicable" did not mean reasonable but "reasonably feasible". On the question of ignorance of the law, of the right to make a complaint to an Employment Tribunal and of the time limits in place for doing so, the case of **Porter (supra)** ruled, by a majority, that the

correct test is not "whether the claimant knew of his or her rights, but whether he or she ought to have known of them." On ignorance of time limits, the case of **Trevelyans (Birmingham) Ltd v Norton EAT 175/90** states that when a claimant is aware of their right to make a claim to an employment tribunal, they should then seek advice as to how they should go about advancing that claim, and should therefore be aware of the time limits having sought that advice.

33. Section 123(1) provides that:

"Proceedings on a complaint within section 120 may not be brought after the end of –

i. the period of three months starting with the date of the act to which the complaint relates, or

ii. such other period as the employment tribunal thinks just and equitable."

34. The Tribunal had regard to the authorities to which the parties referred on the interpretation of "just and equitable" and the extent to which it would be appropriate to exercise its discretion under this section.

35. In addition, the Tribunal considered **Robertson v Bexley Community Centre t/a Leisure Link [2003] IRLR 434**, in which the court confirmed that it is of importance to note that time limits are exercised strictly in employment and industrial cases. "When tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse. A tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time. So, the exercise of discretion is the exception rather than the rule."

36. I also considered **British Coal Corporation v Keeble [1997] IRLR 336**, which is authority for the proposition that the Tribunal should consider the prejudice which each party would suffer in the event that the claim be excluded or, as appropriate, permitted to proceed.

Discussion and Decision

37. The first task for the Tribunal is to determine whether the claim was in fact lodged out of time. The parties have proceeded on the basis that it was, but it is necessary to review the facts, in light of the involvement of early conciliation at this stage, in order to ensure that it is established where the time limit fell.

38. Under section 207A(3) of ERA, it is provided that 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. Section 207A(2) defines the meaning of Day A and Day B:

"(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 N 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."

39. Finally, subsection (4) states that if a time limit set by a relevant provision would, if not extended by that 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.

40. Here, Day A is 2 March 2017. Day B is 2 April 2017.

41. If that period had not extended the time limit, the time limit would have expired on 4 March 2017, the claimant having been dismissed on 5 December 2016.

42. The time limit would therefore have expired during the period beginning on 2 March 2017 (Day A) and ending on 2 May 2017, one month after Day B.

43. In those circumstances, the time limit is extended to the date one month after Day B, which in this case would be 2 May 2017.

44. Although this was not a matter canvassed before me, it is a jurisdictional issue, and therefore I require to address this before considering whether or not the time limit should be extended. In this case, it is clear, in my judgment, that the claim was lodged within one month of Day B, and therefore, it has been lodged in time.

45. It is therefore unnecessary for the Tribunal to consider whether or not it was not reasonably practicable, or just and equitable, for the claim to be allowed to proceed, as it has not been presented out of time.

46. Accordingly, I am satisfied that the Tribunal has jurisdiction to hear both claims, as they were presented in time, and the case will now proceed to a hearing on the merits.

Employment Judge: Murdo A. MacLeod

Date of Judgment: 27 June 2017

Entered in register and copied to parties: 27 June 2017