EMPLOYMENT TRIBUNALS

Claimants **Respondent**
Ms S Miller **v** **James Green Independent**
Miss O Needham **Living**

PRELIMINARY HEARING

Heard at: **Birmingham** **On: 9 February 2018**

Before: **Employment Judge Woffenden**

Appearances
For the Claimants: **In Person**
For the Respondent: Ms. J Grant lay representative and mother of respondent

JUDGMENT

1. The claims for unfair dismissal notice pay holiday pay and arrears of pay were not presented in time despite it being reasonably practicable to do so and are dismissed.

REASONS

(Written reasons having been requested in accordance with rule 62 (3) of the Employment Tribunal Rules of procedure 2013)

1 The claimants were employed from 15 April 2015 to provide care for the respondent, an adult man with autism and severe learning difficulties. His affairs are conducted by his mother who represents him today.

2 On 15 September 2017 the claimants presented a claim the tribunal in which they complained of unfair dismissal, holiday pay, notice pay and arrears of pay. The claim was accompanied by an Early Conciliation Certificate from ACAS issued on 31 August 2017. Section 5.1 of the claim form stated that the claimants' employment ended on 26 April 2017. Employment Judge Harding decided there should be an open preliminary hearing to determine whether the complaints were out of time and if so whether it was reasonably practicable for them to be presented in time and if not, whether they were submitted within a reasonable period thereafter ("the preliminary issue"). She also ordered the parties to prepare and

agree a single bundle of all relevant documents no later than 21 days before the preliminary hearing and to serve any witness statements on which they wished to rely in relation to the above preliminary issue no later than 14 days before the preliminary hearing. A bundle of documents had been prepared by the claimants to which I added 2 letters from Ms. Grant to the claimants dated 22 April 2017 and the copy documents which she had brought the preliminary hearing. None of the parties had prepared witness statements but I permitted them to give oral evidence. I had regard only to those documents to which the parties referred me in their oral evidence.

3 It transpired from discussion with the parties that the date on which the claimants' employment terminated was in dispute. There was no information in the bundle of documents about when the respondent usually paid the claimants their wages. It was therefore necessary for me to hear evidence about these matters and make findings of fact on them in order to determine the preliminary issue.

4 From the evidence I saw and heard I make the following findings of fact:

4.1 The claimants had no written terms of employment .They would usually be paid on the last day of each month. Miss Needham attended for work on 28 March 2017 .Ms. Miller was on annual leave that day and on 29 March 2017. Miss Needham accepted in evidence that Ms Grant had dismissed her on 28 March 2017. She did not attend for work again. When she told Ms Miller of her dismissal that prompted Ms Miller to write a letter to Ms Grant on 30 March 2017 (which she hand-delivered) in which she expressed concern that she was "subjected to being dismissed" and said she was unwell and would be seeing her GP and intended to seek further advice as she felt intimidated and bullied into leaving her job.

4.2 Ms. Grant understood this letter to be a complaint by Ms. Miller about having been dismissed by the respondent and, having taken advice herself from the organisation which administered the payroll on behalf of the respondent, decided to formalise matters as far as the claimants were concerned by writing to each of them on 22 April 2017. The letter to Ms. Miller told her it was to confirm the decision to dismiss her without notice or pay in lieu of notice and that her last day of service was 30 March 2017 and her employment ceased as of that date. She was informed of her right of appeal against the decision to dismiss her within 5 working days of receipt of the letter. The letter to Miss Needham told her it was to confirm the decision to dismiss her without notice or payment in lieu of notice and that her last day of service was 28 March 2017 and that her employment ceased as of that date. She was also informed of her right of appeal against the decision to dismiss her within 5 working days of receipt of the letter. The claimants received those letters on 26 April 2017 which they took as the date on which they were dismissed and inserted this date as the date their employment ended on the claim form.

4.3 Miss Needham sought advice from the Job Centre immediately after her dismissal and was told to contact ACAS.ACAS advised her to talk to the respondent first and, later, to appeal against her dismissal.

4.4 Ms. Miller prepared a joint letter of appeal against dismissal for her and Miss Needham which was sent to the respondent on 26 April 2017. An appeal hearing was arranged for 11 May 2017 but neither claimant attended because they did not want to do so without a representative. The appeal hearing was re-arranged for 19 May 2017 but again neither claimant attended. Ms. Miller's evidence was that this was because there was insufficient time to prepare for the appeal hearing but she did not ask the respondent for a postponement to a later date. Both appeals were determined in the absence of the claimants and the outcome was sent to them by email on 19 May 2017.

4.5 Miss Needham's daughter is a solicitor specialising in criminal law working at a firm of solicitors in London and one of her daughter's colleagues provided advice to Miss Needham. She also had conversations with ACAS. Although Ms Miller took charge of pursuing matters with Ms. Grant Miss Needham was aware of her ability to make a claim to the employment tribunal and that there was a time limit of 3 to 4 months which she told me 'possibly' ran from the date of the appeal hearing .Her evidence was very unclear about when she received advice what advice she received and from whom. In my judgement she was simply content to let Ms. Miller take things forward rather than take any steps herself to clarify her own position.

4.6 Ms. Miller had also contacted ACAS within a few days of 30 March 2017 and she too was told to talk to the respondent first. She also spoke to Miss Needham's daughter's colleague but was given no advice about time limits for making a claim. She spoke to ACAS again within a few weeks of receiving the outcome of her appeal against dismissal which she recalled as being in late May /early June 2017. On this occasion she was told to make a claim to the employment tribunal. She was concerned that the date on which she was dismissed was unclear. She understood that there was a time limit of 3 months in which to present a claim to the employment tribunal and that having regard to the dates in Ms. Grant's letters to her and Miss Needham dated 22 April 2017 that they were getting close to that limit. She understood from the conversation she had had with ACAS that if ACAS were to be involved that would 'halt' time. However (and although it was her understanding ACAS's role was not to give advice directly) she did not make her own enquiries on line (to which she had access) or take steps to further clarify what her own position was with Miss Needham's daughter's colleague or the other solicitors she contacted at this time to see if they would act for her on a no win no fee basis.

4.7 It is evident that one of the claimants must have contacted ACAS again on 9 August 2017 to request early conciliation (the date on which the Early Conciliation Certificate from ACAS records it received a request for Early Conciliation) but Ms. Miller gave no evidence about what else she did in the period between getting the appeal outcome and 9 August 2017 (even though she admitted she was unsure about the date of dismissal and aware that there was a time limit to make a claim) or why ACAS was contacted then. She had experienced 3 bereavements (though she did not specify when or her proximity to the deceased) and been unwell and after 9 August 2017 she had started work and it took some time to fill in the claim form.

5 Claims for unpaid wages can be brought as a claim for unauthorised deduction from wages. An employment tribunal shall not consider such a complaint unless it is presented before the end of the period of three months beginning with the date of payment of the wages from which the deduction was made. 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.

6 An employment tribunal shall not consider a complaint of unfair dismissal unless it is presented before the end of the period of three months beginning with the effective date of termination. Again 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.

7 Section 207B Employment Rights Act 1996 ('ERA') extends the above time limits by not counting the period beginning with Day A (the day on which the prospective claimants contact ACAS to request Early Conciliation) and ending with Day B (the day they get the Early Conciliation Certificate) and if the relevant time limit would (if not extended by subsection 207B (4) ERA) 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.

8 Claims for notice pay are brought before the employment tribunal as a claim for breach of contract under the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 ('the Order'). An employment tribunal shall not consider such a complaint unless it is presented before the end of the period of three months beginning with the effective date of termination of the contract giving rise to the claim. Again 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. Regulation 8B of the Order operates to extend that time limit in the same way as Section 207B ERA above.

9 Claims for compensation for accrued but untaken holiday are brought under Regulation 30 (1) (b) of the Working Time Regulations 1998 ('the WTR'). An employment tribunal shall not consider such a complaint unless it is presented before the end of the period of three months beginning with the date on which payment should have been made. Again 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. Regulation 30 B of the WTR operates to extend that time limit in the same way as Section 207B ERA above.

10 However none of those extensions apply if by the time the prospective claimants contact ACAS to request early conciliation the above three month periods have already expired. It is too late.

11 What is '*reasonably practicable* 'is a question of fact for the tribunal. The burden of proof lies on the claimants.

12 The word' *practicable* 'is to be given a liberal interpretation in favour of the employee **(Dedman v British Building and Engineering Appliances Ltd [1974] 1AER 520).** May LJ described the relevant test in this way: '*We think that one can say that to construe the words "reasonably practicable" as the equivalent of "reasonable" is to take a view that is too favourable to the employee. On the other hand, "reasonably practicable" means more than merely what is reasonably capable physically of being done - different, for instance, from its construction in the context of the legislation relating to factories compare Marshall v Gotham Co Ltd[1954]AC 360,HL. In the context in which the words are used in the1978 Consolidation Act, however ineptly as we think, they mean something between these two. Perhaps to read the word "practicable as the equivalent of "feasible" as Sir John Brightman did in [Singh v Post Office [1973],CR437 NIRC] and to ask colloquially and untrammelled by too much legal logic-"was it reasonably feasible to present the complaint to the employment tribunal within the relevant 3 months?"-is the best approach to the correct application of the relevant subsection***."(Palmer and Saunders v Southend-on-Sea Borough Council [1984] ICR at 384,385).** He said the factors could not be described exhaustively but listed a number of considerations which might be investigated including the manner of, and reason for the dismissal, whether the employer's conciliatory appeals machinery have been used, the substantive cause of the claimant's failure to comply with the time limit whether there was any physical impediment preventing compliance, such as illness, or a postal strike, whether, and if so when, the claimant knew of his rights, whether the employer had misrepresented any relevant matter to the employee, whether the claimant had been advised by anyone, and the nature of any advice given, and whether there was any substantial fault on the part of the claimant or his adviser which led to the failure to present the complaint in time.

13 If ill health is given as a reason a tribunal should consider in what part of the limitation period it occurred.

14 If ignorance is given as a reason Brandon LJ said "*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 3 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 to be reasonable if it arises from the fault of the complainant in not making such enquiries 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." **(Walls' Meat Co Ltd v Khan [1978] IRLR 499).** He went on:' *With regard to ignorance operating as a similar impediment, I should have thought that, if in any particular case an employee was reasonably ignorant of either (a) his right to make a complaint of unfair dismissal at all, or (b) how to make it, or (c) that it was necessary for him to make it within a period of 3 months from the date of dismissal, an [employment] is tribunal could and should be satisfied that it was not reasonably practicable for his complaint to be presented within the period concerned.*

For this purpose I do not see any difference, provided always that the ignorance in each case is reasonable, between ignorance of (a) the existence of the right, or (b) the proper way to exercise it, or (c) the proper time within which to exercise it. In particular, so far as (c), the proper time within which to exercise the right, is concerned, I do not see it can justly be said to be reasonably practicable for a person to comply with the time limit of which he is reasonably ignorant.

While I do not, as I have said, see any difference in principle in the effect of reasonable ignorance as between the 3 cases to which I have referred, I do see a great deal of difference in practice in the ease or difficulty with which a finding that the relevant ignorance is reasonable may be made. Thus, where a person is reasonably ignorant of the existence of the right at all, he can hardly be found to have been acting unreasonably in not making enquiries as to how, and within what period, he should exercise it. By contrast, if he does know of the existence of the right, it may in many cases at least, though not necessarily all, be difficult for him to satisfy an [employment] tribunal that he behaved reasonably in not making such enquiries.

To that extent, therefore, it may, in general, be easier for a complainant to avail himself of the "escape clause" on the ground that he was reasonably ignorant of his having a right at all, than on the ground that, knowing of the right, he was reasonably ignorant of the method by which, or the time limit within which, he ought to exercise it."

15 An employer can terminate an employee's contract of employment immediately (without notice) orally or in writing. If in writing however the date of termination is on the day the employees gets the communication in question. An employee's contract of employment cannot be terminated retrospectively.

16 The claimants and the respondent both made brief oral submissions which I have carefully considered.

17 I will set out my conclusions in relation to each claimant.

18 The effective date of termination of Miss Needham's employment was 28 March 2017. That was the date she was dismissed by Ms. Grant. As far as the claims for unfair dismissal breach of contract (notice pay) and compensation for holiday accrued but not taken on termination are concerned each should have been presented before the end of the period of three months beginning with 28 March 2017 i.e. by 27 June 2017.As far as the claim for unauthorised deduction from wages is concerned she would normally have been paid on the last day of the month but no wages were paid to her on 31 March 2017.This claim should have been presented before the end of the period of three months beginning with 31 March 2017 i.e. by 30 June 2017. There are no extensions under Section 207B

ERA or Regulation 8B of the Order or Regulation 30 B of the WTR; the request for Early Conciliation was not made to ACAS until 9 August 2017. The claims were not presented until 15 September 2017 approximately 11 weeks too late. They are all out of time.

19 The effective date of termination of Ms. Miller's employment was 26 April 2017, the date on which she received the letter dated 22 April 2017 from Ms. Grant telling her that she was dismissed. As far as the claims for unfair dismissal breach of contract (notice pay) and compensation for holiday accrued but not taken on termination are concerned each should have been presented before the end of the period of three months beginning with 26 April 2017 i.e. by 25 July 2017. As far as the claim for unauthorised deduction from wages is concerned she too would normally have been paid on the last day of the month but no wages were paid to her on 31 March 2017.This claim should have been presented before the end of the period of three months beginning with 31 March 2017 i.e. by 30 June 2017 There are no extensions under Section 207B ERA or Regulation 8B of the Order or Regulation 30 B of the WTR; the request for Early Conciliation was not made to ACAS until 9 August 2017. The claims were not presented until 15 September 2017 approximately 7 weeks too late. They are all out of time.

20 Was it reasonably practicable for the claims to have been presented in time? In my judgment neither claimant was ignorant of their right to make a claim to the tribunal .Both of them were aware that there were time limits for making claims. Both of them were aware that their ability to make a claim to the tribunal was dependent on their compliance with a time limit of about 3 or 4 months and that they were not clear about when time ran from. Both of them had access to legal advice (solicitors) and sources of information ACAS and (in Ms. Miller's case) online. Their evidence was not that they obtained inaccurate or incomplete advice or information from any source or that they had misunderstood or were misled by the advice or information they received. After they had received their letters of 22 April 2017 (which clarified the respondent's position which was that they had been dismissed) they made no proper or reasonable enquiries to establish the proper time within which to exercise their right to make a claim to the tribunal or to ensure they had understood correctly the practical application of the information provided. Any ignorance about how to exercise their rights was not reasonable. Ms. Miller's evidence about the effect of her illness bereavements and a new job was not cogent and was uncorroborated .Neither claimant gave a coherent or credible account of what they did when they did it or why. The cause or causes of their failure to comply with time limits has not been satisfactorily explained. In my judgment they simply took their own time after the conversation with ACAS in late May /early June 2017 before deciding to request ACAS Early Conciliation on 9 August 2017 and then to present their claim on 31 August 2018 by which time it was too late. The claimants have failed to discharge the burden of proof placed on them to show it was not reasonably practicable to present their claims in time.

S J Woffenden

Employment Judge Woffenden

Date: 26 February 2018