Case Number: 2501625/2018

THE EMPLOYMENT TRIBUNALS

PUBLIC PRELIMINARY HEARING

Claimant: **Mr N Jeffrey**

Respondent: **Hartlepool Borough Council**

Heard at: **Teesside Justice Centre** **On:** **Thursday 10 January 2019**
Before: **Employment Judge Shore**

Representation:

Claimant: **In Person**
Respondent: **Ms S Firth, Counsel**

JUDGMENT

1. The claimant's claim of unfair dismissal was not presented to the employment tribunal within the period prescribed by section 111(2) of the Employment Rights Act 1996 (ERA) and it was reasonably practicable for the claim to be presented within the prescribed period. The tribunal therefore does not have jurisdiction to hear the claim, which is struck out pursuant to Rule 37(1)(a) of Schedule 1 of the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013 ("the 2013 Rules").

REASONS

The Claim

1. The claimant's claim was of unfair dismissal for the reason given by the respondent of redundancy. The claimant disputed the reason.
2. It is common ground that the claimant worked for the respondent from 29 September 2003 until 31 March 2018. He was employed as a Local Transport Plan Co-ordinator until 12 November 2018. That role was deleted for the stated reason of redundancy on that date. The claimant was offered a suitable alternative vacancy on a trial basis in a role as Transport Officer, which was a

fixed term contract that began on 13 November 2017. At the end of the fixed term on 31 March 2018, the fixed term contract ended and the claimant received his redundancy payment.

3. The claimant was advised by his trade union, Unison, throughout the redundancy process and received advice from the union's solicitors through his union representative.
4. The claimant was unrepresented today and drafted his own ET1.

This Hearing

5. This hearing was set up by a telephone private preliminary hearing (TPH) before Employment Judge Buchanan at North Shields on 9 January 2019 from which, a set of case management orders dated 9 January 2019 was produced and sent to the parties on the same day. Both parties confirmed that they had received a copy of the Order.
6. The substantive hearing of the claimant's claim was listed for a two-day hearing on 10 and 11 January 2019. The reason for the TPH was twofold; both parties had difficulty with the availability of witnesses for reasons that I do not need to go into here and the respondent wished to renew its application for a strike out on the grounds that the claimant's claim was out of time and that the tribunal has no jurisdiction to hear it.
7. Employment Judge Buchanan agreed to postpone the substantive hearing and substitute this Public Preliminary Hearing (PPH) for the first day of the substantive hearing that had been postponed.
8. The purpose of the PPH is to:
    8.1. Determine a preliminary matter raised by the respondent, namely the effective date of termination of the employment of the claimant from his role as local Transport Plan Co-ordinator and subject thereto, whether the claim of unfair dismissal advanced by the claimant was presented before the end of the period of three months beginning with the effective date of termination of the employment of the claimant and, if not, whether it was reasonably practicable to do so and, if not, whether the claim was advanced within such further period as was reasonable.
    8.2. If the claim survives the PPH, to conduct a private PH and relist the final hearing in the period 1 June 2019 to 31 August 2019 and to make such further case management orders as are appropriate.
9. The parties had already exchanged witness statements and produced an agreed bundle of documents for the substantive hearing.
10. Ms Firth produced a Skeleton Argument and copies of the EAT decisions in **Jones v Governing Body of Burdett Coutts School [1997] ICR 390**, **Times Newspapers v O'Regan [1977] IRLR 101** and **T Mobile (UK) Ltd v Singleton UKEAT/0410/10/ZT**. Mr Jeffrey was provided with copies on the morning of the hearing and confirmed that he had had time to read them.

Hearing and Findings of Fact

11. I began the hearing by outlining the requirements of the overriding object of the 2013 Rules as out in Rule 2 and emphasising to the claimant that, as a litigant in person, I would try and ensure that he understood the procedural and legal issues involved in the hearing and that he would be given every opportunity to participate and put his case forward.

12. I explained what the purpose of the PPH was and set out the issues that I had to determine:

    12.1. Was the date from which time stated to run or the unfair dismissal claim 12 November 2018?

    12.2. If it was, was the claim presented in time?

    12.3. If it was not presented in time, was it not reasonably practicable for the claim to have been presented in time?

    12.4. If was not reasonably practicable for the claim to have been presented in time, was it presented in such other period as I considered reasonable?

    12.5. If the claimant was successful, then I would make Orders for the relisting of the substantive hearing. If he was unsuccessful, that would be the end of the claim.

13. Ms Firth suggested that it may assist me in my deliberations to read two documents; paragraphs 1 to 5 of the claimant's witness statement dated 30 November 2018, which was at pages D1 to D2 of the bundle, and an email dated 27 September 2018 from the claimant to a trade union officer, Stephen Williams, which appeared at page C224 of the bundle. Mr Jeffrey had no objection to me reading the documents. He had brought his copy of the bundle with him.

14. In his witness statement, the claimant said that his employment was ended on 31 March 2018 due to compulsory redundancy. His post as Local Transport Plan Co-ordinator was made redundant on 22 October 2017. He had appealed his redundancy without success on 3 October 2017. His union intervened and he was offered a fixed term post as Transport Officer from 13 November 2017, which he accepted on a trial basis. He remained in the post until the expiry of the fixed term on 31 March 2018.

15. After the unsuccessful appeal, he says he received advice from his trade union that a legal merits assessment could only be sought once a dismissal had taken effect and that the union could only take forward and support a claim if it received legal advice that a claim would have reasonable prospects of success.

16. The claimant noted that an actual dismissal did not occur until 31 March 2018. He says that his union solicitors advised that due to his acceptance of alternative employment, he had "negated any potential opportunity to submit an external grievance claim." I took this to mean a tribunal application.

17. In the email of 27 September 2018, the claimant had told his union official that the tribunal had accepted his claim "despite Thompsons' insistence that he was 'out of time' with his appeal relating to [his] LTP Co-ordinator post."

18. He then set out 10 bullet points, which included a summary of advice he had received from the CAB and that his issue was with the redundancy from the Co-ordinator post, not the termination of the fixed term contract.
19. Having read the documents, I told the claimant that the CAB advice did not look to be correct. Ms Firth referred me back to the witness statement that showed that the CAB advice was obtained after the issue of proceedings and the relevant advice for the purpose of this hearing was that from the union and its solicitors.
20. Mr Jeffrey confirmed that Ms Firth's analysis of the chronology was correct.
21. Ms Firth relied on her thorough skeleton. It set out what were largely agreed facts and chronology and submitted that the claimant's effective date of termination was 12 November 2017, the date that his Co-ordinator post ended.

22. In support of that submission, she quoted section 138(1) of the ERA:

> ***138 No dismissal in cases of renewal of contract or re-engagement.***
>
> *(1) Where —*
>
> *(a)an employee's contract of employment is renewed, or he is re-engaged under a new contract of employment in pursuance of an offer (whether in writing or not) made before the end of his employment under the previous contract, and*
>
> *(b)the renewal or re-engagement takes effect either immediately on, or after an interval of not more than four weeks after, the end of that employment,*
>
> *the employee shall not be regarded for the purposes of this Part as dismissed by his employer by reason of the ending of his employment under the previous contract.*

23. It was submitted that the EAT decision in **Jones v Governing Body of Burdett Coutts School [1997] ICR 390** is authority for the principle that section 138(1), as it now is, only applies for the statutory redundancy scheme and does not prevent an employee who has been re-employed from bringing an unfair dismissal claim.
24. Ms Firth's submissions were:
    - 24.1. The claimant only complains of the unfairness of the dismissal from the permanent post, not the fixed-term post;
    - 24.2. The purpose of section 138(1) is to reverse the usual position that dismissal takes place at the end of the previous contract, and;
    - 24.3. Section 138(1) does not apply to unfair dismissal; the position is not reversed and the claimant was dismissed from his permanent contract when it came to an end on 12 November 2017.
25. She cited the well-known principle in the case of **Dedman v British Building and Engineering Appliances Ltd [1974] ICR 53** that if a claimant goes to a skilled advisor and they make a mistake, he must abide by that mistake. His remedy is against the advisors.
26. **Times Newspapers v O'Regan [1977] IRLR 101** was cited as authority that trade union representatives are classed as 'advisors' in this context and **T Mobile (UK) Ltd v Singleton UKEAT/0410/10/ZT** is authority for the principle that the **Dedman**

principle applies where the claimant relies on 'one-off' advice and submits the claim themselves.

27. The question is not just whether the claimant knew of his rights, but whether he ought to have been aware of them.

28. It was submitted that the advice from the union after the failed appeal was incorrect by suggesting that the deletion of the permanent post did not constitute a dismissal. The claimant relied on that advice. The claimant was aware of his rights on 12 November 2018 and should had taken steps to ascertain his position and take appropriate action. It was reasonably practicable to have submitted the claim in time and, even if it wasn't, the delay was unreasonable before the proceedings were actually presented.

29. Ms Firth acknowledged that it is a difficult situation for the claimant. What he should have done is either bring a claim whilst employed or resign and claim constructive unfair dismissal. He did neither.

30. If I were to find that the EDT was 31 March 2018, that would create a difficult position. If a claimant took a suitable alternative position and was dismissed 5 years later, could they go back and contest the redundancy dismissal?

31. Section 138 regards the status quo as being that the end of the first contract is the EDT, or there would be no need for the statutory position to be reversed in that section.

32. The claimant only complains of the unfairness of the substantive post. His case has nothing to do with the end of the fixed term post. Both parties confirmed that the fixed term post was initially offered on a trial basis.

33. Mr Jeffery took issue with paragraph 2 of Ms Firth's Skeleton. His case is that the reason for dismissal was a prejudiced redundancy process. He had not been paid redundancy pay at the end of his substantive post on 12 November 2017. He had been placed on garden leave from 23 October 2017 to 12 November 2017.

34. On the issue of whether it was reasonably practicable to have presented the claim in time, he made 4 points:

    34.1. He was still employed by the respondent;

    34.2. Issuing proceedings may have caused conflict;

    34.3. He did not think it appropriate to make a claim at the time, and

    34.4. One of his senior managers in the fixed-term role had been a senior manager in his substantive role.

35. He confirmed that his union had been involved since July 2015 and had advised him through the redundancy procedure. He was aggrieved by the redundancy decision and sought advice from the union, who sought advice from its solicitors. The solicitors had come back with the advice, which was delivered by the union representative after the appeal on 3 October 2017. He also confirmed that he was informed about the 3-month time limit towards the end of October 2017 or beginning of November 2017.

Decision

36. I have some empathy for the situation that Mr Jeffrey finds himself in, but I find that the submissions on the law contained in sections 95, 111(2) and 138(1) of the ERA and the case law that I have summarised above made by Ms Firth are entirely correct.

37. I am sorry to say that the claimant has almost entirely failed to meet any of the requirements of Employment Judge Garnon's Order insofar as setting out the basis of his claims of having made a PID.

38. It is clear to me that in this case, the EDT for an unfair dismissal case arising from the deletion of the claimant's Co-ordinator role was on 12 November 2017 for the legal reasons set out by Ms Firth and on the facts of the case as confirmed by Mr Jeffrey.

39. The primary limitation date, therefore was 11 February 2018. Mr Jeffrey initiated ACAS Early Conciliation (EC) on 24 June 2018 and obtained an EC certificate on 24 July 2018. His ET was presented on 21 August 2018. He accepted at the hearing that if his EDT was 12 November 2017, then his ET1 was presented out of time. I make that finding here.

40. The next issue, therefore, is whether it was reasonably practicable for the claimant to have started ACAS EC and presented his claim in time. I find that it was reasonably practicable for him to have done so. On his own admission, he was advised by a trade union at all times. I find that the trade union is an 'advisor' within the meaning of **Dedman** on the authority of **Times Newspapers v O'Regan [1977] IRLR 101**. He also had advice from his union's solicitors. If what he says about the contents of that advice is correct, it may have been incorrect advice. **Dedman** makes it clear that in those circumstances, his remedy may be against the advisors. I am in no position to determine whether or not the claimant was advised negligently by his union and/or their solicitors given the limited information before me.

41. The claimant was aware of his issues with the deletion of his substantive post from early 2017. He was aware of a time limit for proceedings by early November 2017 at the very latest. The claimant's four stated reasons for not issuing proceedings or starting ACAS EC by 11 February 2108 do not, in my view, constitute facts that made it not reasonably practicable for him to have issued proceedings on time. He had already shown that he was prepared to stand up for his rights whilst still in employment and he must have been aware of many colleagues who will have brought Equal Pay and other claims whilst maintaining employment status with the respondent.

42. I therefore grant the respondent's application for a strike out on the basis that the tribunal does not have jurisdiction to hear the claimant's claim because it was brought out of time.

43. Ms Firth confirmed that the respondent would not be pursuing the claimant for costs.

EMPLOYMENT JUDGE SHORE

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON
10 January 2019

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