EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: S/4118198/2018

Preliminary Hearing Held at Aberdeen on 26 February 2019

Employment Judge: Mr A Kemp (sitting alone)

Mr M Bocian	**Claimant** **Represented by** **Ms M Dabrowska** **Representative**
Millers of Speyside Limited	**Respondents** **Represented by:** **Miss A Neukirch** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Tribunal has jurisdiction to consider the Claim and the Claim shall proceed to a Final Hearing.

REASONS

Introduction

1. The Claim made was for unfair dismissal, for notice pay and for holiday pay. The Respondents challenged whether the Tribunal had jurisdiction having

regard to the terms of section 111(2) of the Employment Rights Act 1996, on time-bar. A Preliminary Hearing was fixed to determine that issue.

2. The Claimant is a Polish national, and his evidence was given with the assistance of a translator.

3. At the commencement of the hearing I explained the procedure that would be followed at the hearing, the tests that applied and he then gave evidence, including by reference to documents. No oral evidence was led for the Respondents, but they produced a bundle of documents and raised those in cross-examination.

4. The Claimant gave evidence in a straightforward manner, and I accepted what he said.

5. Following the hearing of evidence and during my consideration of the case, I asked for confirmation of the status of his representative. During the hearing she had indicated that she was providing interpreting services to him.

The issues

6. The issues that arose in the case were agreed to be:

(i) What was the effective date of termination?

(ii) If that was 31 March 2018, was it not reasonably practicable for the Claimant to have presented his Claim timeously under section 111(2) of the Employment Rights Act 1996?

(iii) If so, was the Claim presented within a reasonable period of time thereafter, under that same section?

(iv) In respect of the claim for notice pay, the issues were the same but the statutory basis for them was found within Regulation 7 of the Employment Tribunals (Extension of Jurisdiction) (Scotland) Order 1994.

(v) In respect of the claim for holiday pay the issues were again the same but the statutory basis for them was found within Regulation 30 of the Working Time Regulations 1998, or alternatively section 23 of the Employment Rights Act 1996.

The Facts

7. The Tribunal found the following facts established:

8. The Claimant is Mr Michal Bocian. He is a Polish national. He has a very basic command of English. His ability to understand it, and to communicate in it, is materially limited.

9. The Respondents are Millers of Speyside Limited. They process and supply meat.

10. The Claimant was employed by the Respondents from 23 June 2005.

11. In December 2017 the Respondents issued a final written warning to the Claimant.

12. A disciplinary hearing was held in respect of a further alleged incident involving the Claimant on 28 March 2018. The Respondents arranged for an interpreter to be present for that. By letter of that date, the Claimant was informed that he was dismissed with immediate effect, and summarily.

13. The letter was sent to the Claimant by post, and he received it on 31 March 2018.

14. On 3 April 2018 the Claimant wrote to the Respondents to appeal that decision to dismiss him. He did so from an address at 49B High Street, Grantown on Spey PH26 3EH. In that letter he referred to the receipt of the dismissal letter on 31 March 2018.

15. On 4 April 2018 he sent a letter of appeal in respect of the warning in December 2018.

16. Both letters had been written on his behalf by Ms Magdalena Dabrowska, whose contact details were provided in that second letter. She operates a business called Kontaktlaw in London, but was acting as an interpreter for the Claimant. She is also a native Polish speaker. She is not a solicitor.

17. A few days after sending those letters the Claimant consulted by email a Scottish solicitor named Gill Buchan, who gave him a measure of advice with regard to the possibility of a claim. He was not given advice as to timebar provisions.

18. An appeal meeting took place on 16 May 2018, with an interpreter provided for the Claimant by the Respondents. At that appeal the Claimant made reference to his pursuing a legal claim for what he alleged was mental abuse at the hands of his employer.

19. On 17 May 2018 the Respondents sent a letter to the Claimant informing him that his appeal had been unsuccessful. It was sent to the same address as the letter from the Claimant referred to above. The Claimant did not however receive that letter.

20. On 31 May 2018 the Claimant sent an email to Mr Riddell of the Respondents, who had heard his appeal, asking about the outcome. He did not receive a reply to that email.

21. The Claimant sought to contact Ms Buchan for further advice, seeking to do so by telephone and by email. She did not reply to either approach.

22. The Claimant did not have the financial resources to instruct a solicitor to advise him on a fee-paying basis in any event.

23. Ms Dabrowska contacted ACAS in either late June or early July 2018 (it was not possible to be more accurate than that) and understood from the conversation that the Claimant required to await the decision on the appeal before proceeding. She informed the Claimant of that comment at or about the time of the call.

24. The Claimant commenced Early Conciliation on 15 August 2018.

25. The Claim Form was presented on 3 September 2018.

The Law

26. Section 111 of the Employment Rights Act 1996 provides as follows, in respect of the claim for unfair dismissal:

> "**111 Complaints to employment tribunal**
>
> (1) A complaint may be presented to an employment tribunal against an employer by any person that he was unfairly dismissed by the employer.
>
> (2) 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.
>
> (2A) Section 207A(3) (extension because of mediation in certain European cross-border disputes) and section 207B (extension of time limits to facilitate conciliation before institution of proceedings) apply for the purposes of subsection (2)(a)."

27. What is the effective date of termination is set out in section 97 of the Act, the material terms of which are as follows:

> "**97 Effective date of termination**
>
> (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,
>
> (b) in relation to an employee whose contract of employment is terminated without notice, means the date on which the termination takes effect, and
>
> (c) in relation to an employee who is employed under a limited-term contract which terminates by virtue of the limiting event without being renewed under the same contract, means the date on which the termination takes effect.
>
> (2) Where—
>
> (a) the contract of employment is terminated by the employer, and
>
> (b) the notice required by section 86 to be given by an employer would, if duly given on the material date, expire on a date later than the effective date of termination (as defined by subsection (1)),
>
> for the purposes of sections 108(1), 119(1) and 227(3) the later date is the effective date of termination.
>
> (3) In subsection (2)(b) 'the material date' means—
>
> (a) the date when notice of termination was given by the employer, or
>
> (b) where no notice was given, the date when the contract of employment was terminated by the employer"

28. The provision for jurisdiction of a claim for breach of contract, for notice pay, is found within Regulation 7 of the Employment Tribunals (Extension of Jurisdiction) (Scotland) Order 1994 which states:

"**7 Time within which proceedings may be brought**

[Subject to article 8A and 8B, an employment tribunal] shall not entertain a complaint in respect of an employee's contract claim unless it is presented—

(a) within the period of three months beginning with the effective date of termination of the contract giving rise to the claim, or

(b) where there is no effective date of termination, within the period of three months beginning with the last day upon which the employee worked in the employment which has terminated, or

(ba) where the period within which a complaint must be presented in accordance with paragraph (a) or (b) is extended by regulation 15 of the Employment Act 2002 (Dispute Resolution) Regulations 2004, the period within which the complaint must be presented shall be the extended period rather than the period in paragraph (a) or (b).]

(c) where the tribunal is satisfied that it was not reasonably practicable for the complaint to be presented within whichever of those periods is applicable, within such further period as the tribunal considers reasonable."

29. The claim for holiday pay arises under the Working Time Regulations 1998, Regulation 30 of which provides:

"**30 Remedies**

(1) A worker may present a complaint to an employment tribunal that his employer—

(a) has refused to permit him to exercise any right he has under—

[(i) regulation 10(1) or (2), 11(1), (2) or (3), 12(1) or (4), 13 or 13A;]

(ii) regulation 24, in so far as it applies where regulation 10(1), 11(1) or (2) or 12(1) is modified or excluded;

[(iii) regulation 24A, in so far as it applies where regulation 10(1), 11(1) or (2) or 12(1) is excluded; or

(iv) regulation 25(3), 27A(4)(b) or 27(2); or]

(b) has failed to pay him the whole or any part of any amount due to him under regulation 14(2) or 16(1).

(2) [Subject to regulations 30A and 30B an employment tribunal] shall not consider a complaint under this regulation unless it is presented—

(a) before the end of the period of three months (or, in a case to which regulation 38(2) applies, six months) beginning with the date on which it is alleged that the exercise of the right should have been permitted (or in the case of a rest period or leave extending over more than one day, the date on which it should have been permitted to begin) or, as the case may be, the payment should have been made;

(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 or, as the case may be, six months."

30. Such a claim may also be made as an unlawful deduction from wages under section 23 of the Employment Rights Act 1996, which provides:

"**23 Complaints to employment tribunals**

(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 (including a deduction made in contravention of that section as it applies by virtue of section 18(2)),….

(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, or

(b) in the case of a complaint relating to a payment received by the employer, the date when the payment was received.

……..

(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."

31. Before proceedings can be issued in an Employment Tribunal, prospective Claimants must first contact ACAS and provide it with certain basic information to enable ACAS to explore the possibility of resolving the dispute by conciliation (Employment Tribunals Act 1996 section 18A(1)). This process is known as 'early conciliation' (EC), with the detail being provided by regulations made under that section, namely, the Employment Tribunals (Early Conciliation: Exemptions and Rules of Procedure) Regulations 2014 SI 2014/254. They provide in effect that within the period of three months from the effective date of termination of employment EC must start, doing so then extends the period of time bar during EC itself, and is then extended by a further month for the presentation of the Claim Form to the Tribunal. If not, then a Tribunal cannot consider a claim unless it was not reasonably practicable to have done so in time, and then if EC starts, and the Claim is presented, within a reasonable period of time.

32. The question of what is reasonably practicable is explained in a number of authorities, particularly ***Palmer and Saunders v Southend on Sea Borough Council [1984] IRLR 119***, a decision of the Court of Appeal in England. The following guidance is given:

"34. In the end, most of the decided cases have been decisions on their own particular facts and must be regarded as such. However, we think that one can say that to construe the words "reasonably practicable" as the equivalent of "reasonable" is to take a view too favourable to the employee. On the other hand, "reasonably practicable" means more than merely what is reasonably capable physically of being done. … Perhaps to read the word "practicable" as the equivalent of "feasible", as Sir John Brightman did in Singh's case and to ask colloquially and untrammelled by too much legal logic, 'Was it reasonably feasible to present the

> complaint to the Industrial Tribunal within the relevant three months?' is the best approach to the correct application of the relevant subsection.
>
> 35. 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. Dependent upon the circumstances of the particular case, an Industrial Tribunal may wish to consider the manner in which and reason for which the employee was dismissed, including the extent to which, if at all, the employer's conciliatory appeals machinery has been used. It would no doubt investigate what was the substantial cause of the employee's failure to comply with the statutory time limit, whether he had been physically prevented from complying with the limitation period for instance by illness or a postal strike or something similar. […] Any list of possible relevant considerations, however, cannot be exhaustive, and, as we have stressed, at the end of the day the matter is one of fact for the Industrial Tribunal, taking all the circumstances of the given case into account."

33. In ***Asda Stores Ltd v Kauser UKEAT/0165/07***, a decision of the Employment Appeal Tribunal, Lady Smith at paragraph 17 commented that it was perhaps difficult to discern how:

> "'reasonably feasible' adds anything to 'reasonably practicable', since the word 'practicable' means possible and possible is a synonym for feasible. The short point seems to be that the court has been astute to underline the need to be aware that the relevant test is not simply a matter of looking at what was possible but asking whether, on the facts of the case as found, it was reasonable to expect that which was possible to have been done."

34. In ***Schultz v Esso Petroleum Company [1999] IRLR 488*** the Court of Appeal stated that the approach to what was reasonably practicable should vary according to whether it falls in the earlier weeks or the far more critical later weeks leading up to the expiry of the period of limitation.

35. In ***Northamptonshire County Council v Entwistle [2010] IRLR 741*** there was a full summary of the authorities concerning the "not reasonably practicable" test, with particular reference to the position where a skilled adviser has been used by the Claimant. Just because a solicitor had been acting for the Claimant does not mean that the argument as to reasonable practicability cannot be made. It is a question of fact and circumstance. There may be occasions where despite the fact of or ability to take advice from a solicitor, it remained not reasonably practicable to have presented the Claim in time. That was considered for example in ***Ebay (UK) Ltd v Buzzeo UKEAT/0159/13***.

36. ***Marks and Spencer plc v Williams-Ryan [2005] IRLR 562*** set out the issues to consider when deciding the test of reasonable practicability, which included (i) what the Claimant knew with regard to the time-limit (ii) what knowledge the Claimant should reasonably have had and (ii) whether he was legally represented

37. The burden of proof is on the claimant to prove that it was not reasonably practicable to present the complaint in time: ***Porter v Bandridge Ltd [1978] IRLR 271***.

38. Pursuit of an internal appeal does not delay the effective date of termination – ***J Sainsbury Ltd v Savage [1981] ICR 1,*** and is not in itself sufficient to justify a finding as to reasonable practicability – ***Bodha v Hampshire Area Health Authority [1982] ICR 200***. It can however be a factor to weigh in the balance, such as occurred in ***John Lewis Partnership v Charman EAT 0079/11*** where the Claimant was young and inexperienced, relied on his parents for advice, and was initially ignorant of the right to claim unfair dismissal. The Tribunal held that the test of reasonable practicability was satisfied and the EAT held that it had been entitled so to find.

Submissions for Claimant

39. Ms Dabrowska argued that the Claimant had been in the UK for 12 years but had not been educated to the level expected to handle court proceedings. He had a limited knowledge of English and had been searching for help from an interpreting company. He had contacted a solicitor but she did not take the case on. He did not have the finances to afford legal advice. ACAS had advised to wait for the decision on appeal. He had not received a written contract of employment or disciplinary procedure. The Respondents had been aware of her own contact details.

40. The Claimant's understanding had been that the dismissal was not effective until the appeal was determined. He had not received the written outcome of the appeal. He had not received a reply to his own email of 31 May 2018. Legal issues are very difficult for those in a foreign company. He had done all that he reasonably could.

Submissions for Respondents

41. Miss Neukirch noted that the letter of dismissal had been received on 31 March 2018 and that that was the effective date of termination. In order to be within the time limits, early conciliation required to commence by 30 June 2018. It was clearly out of time. The onus was on the Claimant under reference to the case of ***Porter v Bandridge.***

42. She added that she struggled to believe that ACAS would have given the advice that was claimed. They are well versed in issues of timebar. The Claimant had attended the appeal meeting and in that had mentioned making a legal claim. It was up to the Claimant to make reasonable enquiries. The Scottish solicitor had indicated that he may have a claim. He had carried out some internet research. The date of the contact with ACAS was unclear, and if after 30 June 2018 was in any event out of time.

43. Nothing had been provided to explain why it took so long. The delay until early conciliation itself started was also unreasonable. Reference was also made to ***Nolan v Balfour Beatty Engineering Services UKEAT/0109/11/SM.***

44. She concluded by arguing that it should have been obvious that steps should have been taken earlier.

Discussion

45. The effective date of termination was 31 March 2018, as was acknowledged in the Claimant's own letter of appeal against the decision to dismiss him. He received the dismissal letter on that date. That letter clearly stated that it was with immediate effect.

46. I then considered whether it was reasonably practicable to have presented the Claim Form in time. There were two competing arguments presented on this. Miss Neukirch made a strong submission that it had been reasonably practicable to present the Claim timeously, and she conducted a careful cross examination where the relevant points were put to the Claimant. Her argument was that it was reasonably practicable for him to have commenced Early Conciliation timeously, by which is meant within the primary period which expired on 30 June 2018 by which date Early Conciliation was to be commenced, including the argument that there was the facility for advice. The secondary period was that from 1 July 2018 to 15 August 2018 on which latter date the Early Conciliation did in fact commence.

47. The issue has not been an easy one to decide. I have however come to the conclusion, not without hesitation, that the Claimant has established that it was not reasonably practicable to have presented the Claim in the sense of commencing early conciliation within the primary time limit ie by 30 June 2018.

48. The reasons for that are firstly that he is a Polish national whose command of English is at best limited. He required a translator for the disciplinary hearing and the appeal hearing, and the Respondents arranged that on each occasion. He had a translator for the present proceedings. He described his own command of English as “5 out of 10”. He was an operative working in a meat processing factory. His knowledge of what were for him foreign legal procedures was, I considered, very limited.

49. Secondly, whilst he did seek advice from a Scottish solicitor, and had initial advice shortly after the dismissal, latterly his attempts to secure advice failed. The solicitor concerned did not reply to him. In any event he was not able to afford legal representation, and that probably explains the lack of response further from her. I do not consider that having initial advice from a solicitor means by itself that it was reasonably practicable to have presented the claim timeously. It is a factor, but as referred to above the position in the latter stages of the primary period for timebar purposes is the more significant, and at that point he did not have legal advice from a qualified solicitor, despite an attempt that was made.

50. Thirdly, whilst he did have assistance from Ms Dabrowska her role appeared to be that of an interpreter, and someone who assisted him in writing letters. She was also in London, and that affected the ability to take advice from her.

51. Fourthly, although the doubt expressed by Miss Neukirch as to what ACAS had said was entirely understandable, I accepted the evidence of the Claimant as to what had been reported to him. It was his understanding that awaiting a written decision was required, and although that was not correct in law I do not consider that his position was so unreasonable that of itself it leads to the conclusion that he has not discharged the onus on him. I accepted that he did not receive the letter with the appeal outcome. He did seek to follow that up by email to the Respondents on 31 May 2018. He received no reply to that. That issue was then the subject of an enquiry made on his behalf by Ms Dabrowska with ACAS. Precisely what was said, and

when that was, was not clear, in that it was not established whether the call, the detail of which was then passed on to him, was in late June 2018, within the primary period, or early July 2018 which was outwith it, but the message given to the Claimant by Ms Dabrowska was to the effect of waiting for the written appeal.

52. The concern that I initially held with regard to the advice said to have come from ACAS was alleviated to a significant extent by the facts of the case of ***DHL Supply Chain Ltd v Fazackerley EAT 0019/18*** in which the Claimant was dismissed on 15 March 2017 but the appeal not heard until 22 June 2017. Following the intimation of the outcome of the appeal the Claimant took advice and the Claim was presented on 19 July 2017. The Claimant stated that a few days after he had been dismissed he contacted ACAS and was advised to exhaust the internal appeal process before considering action such as a Tribunal claim. The Judge held that it was reasonable for him to act as he did, with the ACAS advice "tipping the balance", and the EAT did not hold that that was perverse such that the decision was sustained.

53. In the present case the Respondents did deal with the appeal, and sent a letter of decision out without undue delay, but I accepted the evidence of the Claimant that he did not receive that letter and that was supported by his email of 31 May 2018 asking for that decision in writing. The factual situation is not therefore the same as in ***DHL*** but the essential nature of the advice said to have been given by ACAS is very similar indeed. I took into account the absence of clear evidence of the date of the call, with the period in evidence straddling the end of the primary period. I considered however that the issue was one relevant for consideration, and that if the call was made in the secondary period it was relevant to the issue of reasonableness.

54. Fifthly, whilst he did conduct some internet research himself, the ability to do so for a Polish national with a limited command of English is itself limited.

55. In light of the statutory test, and the authorities set out above, I concluded that the Claimant had established that it had not been reasonably practicable for him to have presented his Claim within the primary time period. Given the situation as I have outlined it I do not consider that it can fairly be concluded that he ought reasonably to have known of the time limits that apply, and acted earlier than he did so. I did consider the case of ***Nolan***, founded on by the Respondents, but its facts were very different and included a finding that the Judge did not believe part of the Claimant's evidence, such that the Claimant who knew how the time limit for presenting a claim had expired took 11 weeks to present the Claim.

56. I then considered whether the Claim Form had been presented within a further reasonable period of time, during the secondary period, under the statute. The Claimant's evidence was to the effect that he did the best that he reasonably could. I have concluded, not without hesitation again, that his evidence on that should be accepted. I accepted his evidence as being honest and reliable, and it appeared to me that his limited command of English, his belief that he required to await receipt of a written decision on his appeal which he sought, and the difficulties he experienced in seeking legal advice, together with the ACAS advice as reported to him, were the fundamental reasons for his failure to commence early conciliation any earlier than he did.

57. I took into account also that Ms Dabrowska stated in evidence that she was not a solicitor, and that from the case law above even if there is some contact with a solicitor that does not mean that an argument as to reasonable practicability, or reasonableness, cannot be made successfully.

Conclusion

32. The Tribunal does have jurisdiction to consider the Claim, and it shall proceed to a Final Hearing.

Employment Judge: **Alexander Kemp**
Date of Judgment: **01 March 2019**
Entered in register: **01 March 2019**
and copied to parties