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EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: S/4112972/2018

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Held in Glasgow on 8 and 25 October 2018

Employment Judge: F Jane Garvie

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Mr R MacKenzie	**Claimant** **Represented by:-** **Mr John Black –** **Lay Representative**
Hoyer Petrolog UK Ltd	**Respondent** **Represented by:-** **Ms E McLafferty –** **Solicitor**

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JUDGMENT OF THE TRIBUNAL

The Judgment of the Tribunal is that under sections 48(3) and 111 of the Employment Rights Act 1996 the Tribunal does not have jurisdiction to hear the claimant's complaint which is dismissed.

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REASONS

Background

1. In his claim, (the ET1) presented on 30 July 2018 the claimant alleges that he was unfairly dismissed. He also asserts that he was making a protected disclosure, having ticked box 10 of the ET1. The ACAS Early Conciliation Certificate has a date of receipt of 20 July and a date of issue of 20 July 2018.

2. The respondent lodged a response, (the ET3) in which they deny the allegations made against them. They corrected the designation to Hoyer Petrolog UK Ltd rather than Hoyer UK Ltd as set out by the claimant in the ET1.

3. The respondent submits that the claim was submitted out of time as the claimant's effective date of termination was 19 April 2018. In the ET1 the claimant gave his date of termination as 19 April 2018.

4. The response was acknowledged by letter dated 4 September 2018.

5. Employment Judge Muriel Robison directed that there should be a 2 hour Preliminary Hearing on a date to be determined under cover of letters dated 13 September 2018.

6. Notices to that effect were issued on 14 September 2018, advising that the Preliminary Hearing would be held on 8 October 2018 and the issue for determination would be time bar.

7. The respondent requested that the Preliminary Hearing be moved from 10am to 2pm on the basis that the representative was based in Leeds. This was under cover of an e-mail of 19 September 2018. There was no reply from the claimant's representative as to any objection. Accordingly, amended Notices of Hearing were issued advising that the Preliminary Hearing would take place on 8 October 2018 but at 2pm. This was done by e-mail rather than by formal Notices to that effect.

The Preliminary Hearing

8. At the start of the Preliminary Hearing both parties had provided separate bundles.

9. The claimant gave evidence. No witnesses were called on his behalf.

5 10. The respondent called a Mr Charles Davidson who is the Unite Shop Steward at the respondent's premises where the claimant was employed.

11. The respondent did not lead evidence from any other witnesses.

Findings of Fact

12. The Tribunal found the following essential facts to have been established or
10 agreed.

13. The claimant commenced employment with the respondent on 1 April 2000. The claimant accepted that the date he gave for the effective date of termination in the ET1 was 19 April 2018. The claimant provided a statement, (C1) setting out his position. In this, while he accepted he had provided an
15 effective date of termination of 19 April 2018 on the ET1, he considered that his effective date of termination was 11 May 2018 which was the date he received written confirmation of his dismissal. He also referred to the judgment of **Gisda Cyf v Barratt** 2009 EWCA Civ 648 and to page C9 where more information was set out as to what he maintained was the effective date
20 of dismissal.

14. The claimant was invited to attend a disciplinary hearing by letter dated 10 April 2018 from the respondent, (C2). This was to be held on 19 April 2018 at the respondent's premises at Grangemouth Terminal. The claimant was absent from work on medically certified grounds. He had been unfit to attend
25 work for some time. He chose not to attend the disciplinary hearing. Instead, his union representative, Mr Charles Davidson attended on his behalf.

15. On 19 April 2018 while he was on the golf course the claimant received a telephone call from Mr Davidson on the latter's mobile phone after the

disciplinary hearing had concluded. This was a short discussion lasting about "a minute and a half". The claimant's recollection was that Mr Davidson's words to him on the telephone call were to the effect, "*Hi Rob – it looks like they are gonna sack you"*. The claimant did not remember anything else being said to him. He was not clear as this conversation had taken place some time ago. The claimant was aware that he had a "pretty conscious disconnect" as "I did not want any negatives at that time".

16. The respondent issued a letter following the meeting on 19 April 2018, (R33/35). That letter was dated 4 May 2018. It referred to confirmation of the outcome of the disciplinary hearing on 19 April 2018. The respondent also prepared a note of the disciplinary hearing held on that date, (pages R29/32).

17. The letter of 4 May 2018 was received by the claimant on or around 11 May 2018.

18. On 3 May 2018 the claimant emailed the respondent's Mr Robert Dahl at 10:18 hours, (C3). He copied that email to various individuals. He then forwarded it on the same date to a Mr Alexander Smart who is a union official, (also C3). The claimant's email to Mr Dahl and others reads as follows:-

> "Dear Mr Dyal
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> As of yet I have not received any communication from Hoyer UK of my dismissal which apparently happened on 19 April. I have communicated this several times to no avail. I instead have had 2 requests now to air my grievance with regards to my serious allegations/Gross Misconduct against Hoyer.
>
> For the record I am appealing my dismissal but need the facts in writing to construct my appeal.
>
> Furthermore I do intend to take this to court without the Union support."

19. On 3 May 2018 the claimant received an e-mail reply from Mr Smart, (again C3). It was timed at 17:13 hours and is headed, "Dissmal (sic) Letter".

20. It reads as follows:-

21. "Hi Robert

22. I note that you still have not had anything back from the company following your dismissal which happened over 2 weeks ago.

23. I am concerned that the company could be playing for time. You normally must lodge an appeal within 5 – 10 days of dismissal, and an application to an employment tribunal 3 months minus 1 day from date of dismissal. In order to protect your case I will send out to you a legal assistance pack (EMP1) and request that you complete this and return to the Edinburgh office at your earliest convenience.

24. I will then arrange for a solicitor to review the information and decide whether to go forward with your case or not."

25. The claimant then wrote a further e-mail to Mr Smart on 16 May 2018 at 21:27 hours, (C4) in which he refers to being in possession of his letter of dismissal received on 11 May which informed him that he had 7 days to appeal. He went on to indicate that he had informed his representative on 11 May that he would appeal.

26. He also indicated that "My legal team are now dealing with this, but as stated before I need you to clarify by Friday 18th May 2018 unites clear definition of duty of care in specific relation to my case at this time."

27. The reference by the claimant to his "legal team" was a reference to Mr Black. He had used that phrase as a "spur of the moment" comment when composing the email.

28. The claimant did not take legal advice from a solicitor. He did not consult the Citizens Advice Bureau. Mr Black is a lay representative.

29. There was a disciplinary appeal hearing held by the company following the claimant submitting an appeal. By letter dated 10 July 2018, (R43/46) the claimant's appeal was rejected. That letter refers to "your appeal against your

summary dismissal on 19 April 2018". This is referred to in the second paragraph on page 43 being the first page of that letter of 10 July 2018.

30. The claimant thought he had contacted Mr Black on or around 17 July 2018. He understood that ACAS were contacted on 20 July 2018. He had no explanation as to why there was a gap between the ACAS Certificate dated 20 July being provided and the claim being submitted online on 30 July 2018.

31. The claimant completed the claim online.

32. In a note entitled, "To whom it may concern" dated 30 August 2018, (R47) Mr Davidson wrote as follows:-

> "To whom it may concern;
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> Following the outcome of the disciplinary hearing of Mr Robert MacKenzie on 19th April 2018, I asked the hearing manager Mr Blair Woodburn if it would be ok to inform Robert with the outcome of the hearing verbally as he was not Present.
>
> There were no objections, to which I called from my mobile to verbally confirm the outcome to Robert that he had been dismissed from the company with immediate effect on the grounds of gross misconduct."

33. It was signed and dated by Mr Davidson on 30 August 2018.

34. As already indicated, the claimant's recollection was that the telephone call with Mr Davidson on 19 April 2018 was of very short duration. His understanding from the conversation was that Mr Davidson said words to him to the effect, "They are gonna sack you" not that he said, "You have been dismissed with immediate effect."

35. In relation to the e-mail sent to him by the union on 3 May 2018, (C3) the claimant accepted that he received that e-mail on 3 May 2018 and understood its contents.

36. The claimant was able to use a computer. He did not suggest that he was unable to do so.

37. Mr Davidson recalled attending the disciplinary hearing on behalf of the claimant and being informed of the outcome. He asked if he could let the claimant know of the outcome although the written decision was still to be sent to the claimant. There was no objection to his doing so from the respondent. Mr Davidson then contacted the claimant using his own mobile phone. He spoke to the claimant on his mobile phone while he was in the car park where his car was parked. His recollection was that he informed the claimant that the respondent had decided to dismiss him.

38. His recollection was that he told the claimant that the company had made a decision, it was bad news and they had dismissed the claimant. He denied that he had said something to the effect of "They are gonna sack you", thereby suggesting a future intention to do so on the part of the respondent.

39. Mr Davidson had agreed to let the claimant know because he thought that it was his job as the union official to let him know what had happened. His recollection was that he told the claimant that the allegation of gross misconduct made against the claimant was upheld.

40. As the Preliminary Hearing did not commence until 2pm rather than the originally designated time of 10am it was not possible to complete the case on 8 October 2018 due to the lateness of the hour when the evidence was completed. This was unfortunate as it transpired that the representative was not someone based in the respondent's agent's firm in Leeds but Ms McLafferty who is based in their Glasgow office and who could therefore have been available to attend at 10am

41. By letter dated 10 October 2018 the directions given on 8 October were confirmed which were that the representatives were asked to provide their closing submissions in writing and to do so by no later than 25 October, having first exchanged their submissions by 17 October with any further additional

points to be provided by 24 October. The submissions were both provided ahead of the 25 October 2018 requirement.

The Law

42. Section 111 of the Employment Rights Act 1996 states:-

5 “**111 Complaints to employment tribunal**

(1) A complaint may be presented to an employment tribunal against an employer but any person that he was unfairly dismissed by the employer.

(2) Subject to the following provisions of this section an
10 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
15 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.”

43. Section 48 of the 1996 Act deals with complaints to employment tribunals in relation to protected disclosure in terms of section 47B.

20 44. Section 48(1)A states:-

“A worker may present a complaint to an employment tribunal that he has been subjected to a detriment in contravention of section 47B.”

Section 48(3) states:-

“An employment tribunal shall not consider a complaint under this
25 section unless it is presented –

(a) before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates or, where that act or failure is part of a series of a similar act or failures, the last of them, 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."

Submissions

45. As indicated above, both parties were invited to provide written submissions and these were duly received. For ease of reference, they are incorporated below.

Claimant's written submissions

1. These submissions to the Tribunal service are in good faith and reflect Mr Mackenzie's genuine recollections supported by documentary records submitted at the Preliminary Hearing on Monday 8 October 2018. The respondent made clear their intention to dismiss Mr Mackenzie as detailed in document 13 of the respondent's bundle. The dismissal letter dated 4 May 2018 stated in the last sentence of the third last paragraph:

"Accordingly, I decided to summarily dismiss you from the company with immediate effect and that Thursday 19 April 2018 was your last date of employment with the company".

2. Mr Mackenzie accepts that his claim for unfair dismissal was submitted to the Employment Tribunal on 30 July 2018, claim reference CF3Y-S6R4 refers. This followed his notification to ACAS Early Conciliation on 20 July 2018, reference R290764/18. He cannot explain the delay in ACAS submitting his claim to the Employment Tribunal.

3. Mr Mackenzie also accepts that he could have submitted his claim earlier. He explained that he had mental health issues and had received formal medical treatment for this. This affected his ability to deal with day to day administration.

4. **Time Bar** - Mr Mackenzie does not accept that he submitted his unfair dismissal claim out with his entitled three months less one day to make such a claim. He contends that it was within the claim period as he didn't receive written notification of his dismissal until 11 May 2018 and that this was his effective date of dismissal.

5. Mr Mackenzie gave witness evidence to the court explaining that on 19 April 2018, Charles Davidson, shop steward attended his disciplinary hearing on his behalf. He recalled receiving a telephone call from Mr Davidson on the evening of his appeal that lasted no more than a minute. He recalled Mr Davidson saying words to the effect that 'it wasn't looking good and they are going to sack you.' It was never confirmed to him that he was dismissed or the grounds for this. Mr Mackenzie took this to mean it was the company's intention to dismiss him but that he hadn't been dismissed on that date.

6. Mr Mackenzie also gave witness evidence that, between 19 April and 3 May 2018, he spoke with Mr Davidson several times and asked him when it would be confirmed that he was to be dismissed and the grounds for doing so, to enable him to appeal. Mr Davidson was unable to provide him with this information.

7. On 3 May 2018, Mr Mackenzie submitted an email to Mr Dyal, Hoyer UK Human Resource Manager and forwarded the same email to Mr Smart, head union representative (Claimant bundle – document 3) advising that he still didn't have confirmation of his dismissal or the grounds.

8. On 11 May 2018, Mr Mackenzie received his dismissal letter, dated 4 May 2018 from Blair Woodburn, Hoyer UK Transport Manager (Respondent Bundle – document 13). Nowhere within the letter does Mr Woodburn mention giving instruction to Mr Davidson to inform Mr Davidson that he had been dismissed for gross misconduct.

9. Mr Davidson provided a statement on 30 August 2018 (Respondent bundle – document 18). This statement is brief in content and gives very little detail of his face to face conversation with Mr Woodburn and telephone conversation with Mr Mackenzie on 19 April 2018, both concerning dismissal. The statement was provided over 4 months after these face to face and telephone discussions.

10. At Tribunal, Mr Davidson gave witness evidence on behalf of the Respondent. Mr Davidson advised that following the disciplinary hearing on 19 April 2018, he asked Mr Woodburn if he could verbally inform Mr Mackenzie of the outcome of the hearing. Mr Davidson's written statement is vague on this in that it merely states that Mr Woodburn had no objection to this happening.

11. Mr Davidson gave witness evidence that the call to Mr Mackenzie on 19 April 2018 was between one and two minutes in duration. He did not record or make a written record of what was said during the call and importantly he agreed that he did not confirm Mr Davidson's understanding of what was being said to him.

12. Mr Davidson gave witness evidence confirming that between 19 April 2018 and 3 May 2018, he and Mr Mackenzie had a several conversations about his intended dismissal. Mr Davidson was asked to read Mr Mackenzie's dismissal letter, (Respondent Bundle – document 13). He stated that he had never seen this document before.

13. Mr Davidson gave witness evidence that an employee has 7 days to appeal following receipt of his dismissal letter.

14. Mr Mackenzie's witness evidence is far more credible than that given by Mr Davidson. Why would Mr Mackenzie have held further conversations with Mr Davidson and then made email contact with Mr Smart to ask for confirmation of his dismissal if Mr Davidson had clearly explained this as the Respondent suggests. It was Mr Smart, on 16 May 2018, who informed Mr Mackenzie of his further employment rights, something Mr Davidson failed to do.

15. Mr Mackenzie believes that the circumstances of his case align with stated case Gisda Cyf v Barratt (2010) and that his effective date of termination of employment was 11 May 2018 (Claimant Bundle – document 9), this being the first opportunity he had to read his confirmed dismissal letter. His email dated 16 May to Mr Alexander (Claimant Bundle – document 4) shows that he received his letter on 11 May 2018.

16. Mr Mackenzie believes the circumstances of stated case Newcastle upon Tyne Hospitals NHS Foundation Trust (Appellant) v Haywood (Respondent) also align to his circumstances and that his effective date of termination of employment was when he received his letter on 11 May 2018.

17. Mr Mackenzie rejects the stated case submitted by the Respondent where they claim that Mr Davidson acted as a Hoyer UK representative to inform Mr Mackenzie of his dismissal. Mr Davidson had a clear role to represent Mr Mackenzie's best interests at the disciplinary hearing. To take on the additional role of dismissing an employee would be at worst a clear conflict of interest and at best unethical.

It is requested that this case is not subjected to time bar as Mr Mackenzie's claim between 11 May 2018 and 30 July 2018 would fall

within the 3 months less one day to make such a claim. Should the Tribunal find on favour of the Respondent then I request written notice of the reasons to enable an appeal.

Respondent's Written Submissions

The Preliminary Hearing on 8 October 2018 was to consider whether the Claimant's claims of unfair dismissal and automatic unfair dismissal as a result of making a protected disclosure under the whistle-blowing provisions are time barred. At the request of Employment Judge Garvie, the facts are omitted from this submission and we have instead only referred to the legal test in relation to the time bar issue.

ISSUES

1. The issue before the Tribunal is:

    1.1. whether the claims of unfair dismissal and dismissal as a result of making a protected disclosure under the whistle-blowing legislation were presented in time and, if not;

    1.2. whether time should be extended.

LAW

2. **S.111 Employment Rights Act 1996** – sets out the time limits for bringing an unfair dismissal complaint (including a claim for automatic unfair dismissal due to making a protected disclosure). It is effectively three months less one day from when the last act complained of took place. In this case, the relevant date is the date of the dismissal, which we contend is 19 April 2018 for both claims.

JURISDICTION: Time Limits

Effective Date of Termination (EDT)

3. The phrase "effective date of termination" is defined in section 97(1)(b) of the Employment Rights Act 1996 as:

"…in relation to an employee whose contract of employment is terminated without notice, means the date on which the termination takes effect."

4. In cases of summary dismissal, the case of *Brown v Southall & Knight [1980] IRLR 130* established the principle that the EDT is the date on which the employee is informed of the dismissal or when they have had a reasonable opportunity of discovering that they had been dismissed.

5. In the current case, the Claimant was informed of the decision to dismiss him via his Trade Union representative on the day his summary dismissal took place (19 April 2018). This was prior to the outcome letter being sent to him. The decision that was made was communicated to the Claimant via his Trade Union representative by telephone on the same day. Mr Davidson has given sworn evidence on this point. The Claimant does not deny that Mr Davidson spoke to him on 19 April 2018 (see below). Therefore, the EDT was the date on which the Claimant was informed of the outcome via the telephone call, being 19 April 2018, and not the date that the Claimant received the letter confirming the outcome of the hearing.

6. It is accepted that if the Claimant only knew of his dismissal when the letter was received by him following 4 May 2018, then his claims would have been brought in time.

7. It is the Claimant's case that he was not told that he was dismissed on the call on 19 April 2018, rather that he was told he was 'going to' be dismissed. It is submitted that his evidence is not credible. Mr Davidson, a Trade Union representative and the Claimant's representative throughout the disciplinary process, has provided both a written statement and sworn evidence that the Claimant was informed by him, over the telephone, on 19 April 2018, that he had been summarily dismissed. The only area of conflict in his evidence to the Claimant's is therefore whether Mr Davidson told him he was

going to be dismissed, or that he had been dismissed. It is not sustainable for the Claimant to assert that Mr Davidson would have told him that he was going to be dismissed when he had just been told by the Respondent that it was their decision to summarily dismiss him. There is no reason for Mr Davidson to provide an inaccurate account of events. He has no vested interest in the proceedings, and it is contended that he is entirely credible.

8. Further, it would be highly unlikely for the Respondent to convey a decision that it was going to dismiss the Claimant. Firstly, that would suggest that a conclusion had not yet been reached but that the Respondent was prepared to 'tip off' the Claimant's Trade Union representative. Secondly, it is also predicated on the fact that no outcome has yet been reached on 19 April 2018, which is simply not true, as per Mr Davidson's evidence and as supported by the disciplinary outcome letter on 4 May 2018.

9. The Claimant's contention that the EDT is the date he opened the letter is incorrect and a misunderstanding of the law. The letter did not inform the Claimant of the outcome, rather it provided confirmation of the outcome (which the Respondent submits the Claimant already knew) and provided more detail of same, which is distinguishable from the cases relied upon by the Claimant.

10. In *Robinson v Bowskill [2014] ICR D7* the Employment Appeal Tribunal established that the fact that an employer gave notice of the dismissal to a third party rather than directly to the employee does not impact upon the EDT. The EAT confirmed that the date the solicitor communicated the dismissal outcome to the Claimant in that case was the correct EDT. That is entirely consistent with the Respondent's contentions in this case, and the Tribunal is invited to follow the EAT in that regard.

11. Therefore, the date that the Claimant became aware of the termination of his employment was 19 April 2018, whether or not this

was communicated to the Claimant directly by the Respondent on that date is irrelevant.

12. It is the Respondent's position that the case of *Newcastle upon Tyne Hospitals NHS Foundation Trust v Haywood [2018] UKSC 22* which was identified by Judge Garvie, relates to termination with notice when communicated by letter. The *Haywood* case is not relevant to the present facts in that the question for this Tribunal is whether or not the Claimant was told on 19 April 2018 by Mr Davidson that he had been dismissed. It is not when the contents of the letter came to the attention of the Claimant and he had read them, or had a reasonable opportunity of doing so, as per *Haywood*. If, as the Respondent contends, he was told by Mr Davidson of the dismissal then the point of knowledge by the Claimant is not affected by the communication of the outcome letter.

Unfair Dismissal

13. The Respondent submits that this claim is out of time. The Claimant was dismissed on 19 April 2018 and did not engage in early conciliation until 20 July 2018. This was outside of the primary deadline to lodge the claim (which would have been 18 July 2018). He did not submit his claim until 30 July 2018, which was 12 days' out of time.

14. It is the Respondent's submission that the Claimant knew of the dismissal on 19 April 2018 as the result of a phone call from Mr Davidson. Accordingly, the Claimant could have initiated proceedings promptly and within the legislative timeframes thereafter.

Reasonably Practicable?

15. S.111 of the Employment Rights Act 1996 sets out a two stage test:

    15.1. was it reasonably practicable for the claim to be presented in time?

15.2. If no, and only if the answer is no, then the Tribunal will go on to consider whether the claim was presented within such 'further period as the tribunal considers reasonable….'

16. When considering whether it was reasonably practicable for a claim to be submitted in time, the Tribunal will be aware that it ought to have regard to the Court of Appeal decision in the case of *Palmer v Southend–on-Sea Borough Council (1984) IRLR 119* which gives guidance on how to approach this issue. In particular, the word 'practicable' should be replaced with 'feasible' in this context when considering if the Claimant could have lodged his claim in time.

17. In cases of unfair dismissal, the time limits are strictly enforced.

18. *RJ Dedman v British Building and Engineering Appliances Ltd [1973] IRLR 379* - The time limit is jurisdictional and not procedural.

19. *Porter v Bandridge Ltd [1978] IRLR 271* – The burden of proof is on the Claimant to establish that it was not reasonably practicable to present his claim in time.

20. *Palmer and Saunders v Southend-On-Sea Borough Council [1984] IRLR 119* - The key question was stated as: "*Was it reasonably feasible to present the complaint to the [employment] tribunal within the relevant three months?*".

21. In *Palmer* the following (non-exhaustive) considerations were referred to:

21.1. the manner of, and reason for, the dismissal;

21.2. whether the employer's conciliation machinery had been used;

21.3. the substantial cause of the Claimant's failure to comply with the time limit;

21.4. whether there was any physical impediment preventing compliance;

21.5. whether, and if so when, the Claimant knew of his rights;

21.6. whether the employer had misrepresented any relevant matter to the employee;

21.7. whether the Claimant had been advised by anyone, and the nature of the advice given;

21.8. 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.

22. Similarly, following *British Coal Corporation v Keeble [1997] IRLR 336,* the Tribunal should take into account the following issues (amongst others):

22.1. the length of and the reasons for the delay;

22.2. the extent to which the cogency of the evidence is likely to be affected by that delay;

22.3. the promptness with which the Claimant acted once he was aware of the alleged facts which gave rise to the cause of action;

22.4. the steps that the Claimant took once he knew of the possibility of taking action; and

22.5. the prejudice to the Respondent by allowing historical claims to proceed out of time.

23. It was reiterated in *DCA v Jones [2008] IRLR 128*, that the burden was on the Claimant to persuade the Tribunal to exercise its discretion. It was reconfirmed that the exercise of such discretion was exceptional.

24. *London Underground Limited v Noel [1999] IRLR 621* - The test of whether it was reasonably practicable is a stricter one than of reasonableness.

25. *Wall's Meat Company Ltd v Khan [1978] IRLR 74* - It is important to bear in mind that the question of what is or is not reasonably practicable is essentially one of fact for the Employment Tribunal to decide. The Tribunal must, however, address its mind to the question of reasonable practicability where this is the test, not simply state that it has a "discretion to extend time" and must, moreover, make a precise finding as to the nature of the complaint in question, and as to the relevant starting date of the limitation period governing it before proceeding to consider whether any extension is appropriate.

26. Ignorance of his rights and the time limit is not just cause or excuse unless it appears that he could not reasonably be expected to be aware of them.

27. In *Wall's Meat*, Brandon LJ stated:

"*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...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 three 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 be reasonable if is arises from the fault of the complainant in not making such inquiries 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.*"

28. And also in _Wall's Meat_, Lord Denning stated:

> *"I would venture to take the simple test given by the majority in [Dedman]. It is simply to ask this question: had the man just cause or excuse for not presenting his claim within the prescribed time? Ignorance of his rights - or ignorance of the time limits - is not just cause or excuse, unless it appears that he or his advisers could not reasonably be expected to have been aware of them. If he or his advisers could reasonably have been so expected, it was his or their fault, and he must take the consequences."*

29. Following Lord Phillips MR in _Marks & Spencer v Williams Ryan [2005] ICR 1293 at paragraph 1299_:

> *"it has repeatedly been held that, when deciding whether it was reasonably practicable for an employee to make a complaint to an Employment Tribunal, regard should be had to what, if anything, the employee knew about the right to complain to the employment tribunal and the time limit for making such a complaint…It is necessary to consider not merely what the employee knew, but what knowledge the employee should have had had he or she acted reasonably in all the circumstances."*

30. The Respondent submits that the Claimant was aware of the timescales for bringing his claim. The Claimant's evidence was that an email was sent by the Trade Union to him specifying the exact timescales for bringing a claim on 16 May 2018. It is the Respondent's position that the Claimant must have read the email from the Trade Union which contained the time scales. The Claimant's assertion at the Hearing that he had not read the email is not credible, and in any event, it is the Respondent's position that if the Claimant had chosen not to read that email, that was not a reasonable approach to have taken and the Claimant should accordingly be treated as having had the opportunity and ability to acquire the knowledge in relation to the timescales.

31. Even in the event the Claimant asserts he did not know of his right to bring a claim, or of the relevant time limits (which is denied), he ought to have known. He could have sought support from his Trade Union (who represented him) or the Citizen's Advice Bureau if he had been unclear at all about the statutory time limits in place in relation to Employment Tribunal claims. His representative, Mr Black, is clearly capable in navigating matters of the Employment Tribunal and therefore, the Claimant had resources at his disposal to equip himself with the necessary knowledge.

32. It is submitted on behalf of the Respondent that it was reasonably practicable for the Claimant to have submitted his claim in time but he failed to do so. Although he had been off sick, he was then certified as fit to attend a disciplinary hearing by occupational health. Therefore it is the Respondent's position he was well enough to submit a claim which is a relatively easy process and could have been done online via a computer (which the Claimant asserted in cross examination he was well enough to use during the period of his illness) or with the assistance of the Trade Union.

33. The Respondent submits that his period of illness was not a good reason for the delay, that the Claimant ought to have known about the timescales for raising a claim and that he was represented by his Trade Union who he could have asked about any uncertainties he had in relation to that. The reality is that the Claimant is relying upon his argument that he knew of the dismissal at the point of receiving the outcome letter – and that was the reason for the delay. Whilst the Respondent's submissions on that issue are clear, it is then inconsistent for the Claimant to assert that the reason for delay was his ill health. That is simply inaccurate and must be considered on the facts before this Tribunal. Namely, that the Claimant has failed to adduce any evidence to support that contention, beyond his own assertion. That is not sufficient and in our respectful submission, should not be accepted.

34. If the Tribunal finds that it was not reasonably practicable for the Claimant to bring his claim within 3 months (which we do not accept) it is submitted that he did not bring it within a reasonable period thereafter.

5 35. Allowing an extension of time would be contrary to the overriding objective. The timescales for raising claims are there to give certainty to the parties.

36. Accordingly, the Respondent respectfully submits that the Tribunal does not have jurisdiction to hear these claims and that they should be
10 struck out.

Observations on the witnesses

46. The claimant was adamant that he only heard from Mr Davidson words to the effect of "They're gonna sack you" which he took to mean a future intention
15 on the part of the respondent to do so.

47. It was not suggested that the claimant was unaware of the disciplinary hearing taking place on 19 April 2018. He did not express surprise at being contacted by Mr Davidson.

48. Mr Davidson was also very clear that he did tell the claimant of his dismissal
20 and that was the outcome of the disciplinary hearing. It seemed logical to the Tribunal that having been there on the claimant's behalf and knowing the respondent's decision that he wanted to let the claimant know of the outcome. It did not seem probable that he would have spoken in such a way as to leave the claimant with the impression that a decision was still to be made. It does
25 not fit with his recollection that he knew he had bad news to impart to the claimant.

Deliberation and Determination

49. While the Tribunal could understand that the claimant did not want to hear bad news which his dismissal undoubtedly must have been, he later contacted the respondent by email on 3 May 2018. He also forwarded that email to one of Mr Davidson's colleagues, a Mr Smart.

50. The terms of the claimant's email are important where he wrote, "As of yet I have not received any communication from Hoyer UK of my dismissal which apparently happened on 19th April."

51. The Tribunal concluded, on the balance of probabilities, that Mr Davidson's version of the conversation should be preferred.

52. It did not make sense that, having offered to speak to the claimant and checked the respondent had no objection to his doing so, Mr Davidson would not have set out the bad news to the claimant.

53. It may be that the claimant chose to hear what was said to him in such a way as to be in denial that he had been dismissed at the disciplinary hearing on 19 April 2018. That is a perhaps understandable immediate reaction.

54. It does not sit comfortably, however, with the terms of his subsequent email of 3 April 2018 where he specifically wrote,

55. "As of yet I have not received any communication from Hoyer UK of my dismissal which apparently" (Tribunal's emphasis) "happened on 19th April".

56. In reaching its decision the Tribunal gave careful consideration to all that was said by the representatives in their written submissions.

57. It concluded that the respondent's submission was to be preferred where they submit that the letter of 4 May 2018 gave confirmation of the decision which had already been taken and given orally to Mr Davidson who had attended the disciplinary hearing on 19 April on the claimant's behalf.

58. They did so on the basis that the judgment in **Robinson** (a decision of the Employment Appeal Tribunal) established that the fact an employer gave notice of dismissal to a third party, here the claimant's union representative, rather than to the claimant direct does not impact on the effective date of termination.

59. The Tribunal concluded that, while it notes the claimant maintains his misunderstanding was that the respondent had a future intention to dismiss him this does not fit with Mr Davidson's recollection that he told the claimant of the bad news which was of the claimant's immediate dismissal.

60. The claimant's version does fit with his later emailing the respondent on 3 May 2018 and making reference to "my dismissal which apparently happened on 19th April." That supports that the claimant did know he had been dismissed on that date.

61. The Tribunal further concluded that the present circumstances can be distinguished from **Gisda Cyf** and **Haywood**, (see above).

62. The respondent further points out that the claimant did not suggest he was unaware of the time limits. The email to him from Mr Smart of 16 May 2018 set out the time scales.

63. In these circumstances, the Tribunal concluded that the claimant knew of the time scale for submitting a claim and there was nothing to prevent him doing so.

64. The claimant went ahead with his appeal against dismissal which was heard in his absence. He contacted Mr Black at some point which was not entirely clear.

65. The claimant knew that an approach was made to ACAS but that approach was made beyond the time limit, the Certificate having been received and issued by them on 20 July 2018.

66. There was no explanation before the Tribunal as to why there was then a gap of 10 days from the date of issuing of that Certificate to the ET1 being submitted online on 30 July 2018.

67. The Tribunal concluded that it could not find that it was not reasonably practicable for the complaint to have been submitted in time. Indeed, in the claimant's written submission, (paragraph 3) it was accepted that he could have submitted the ET1 earlier. That supports the contention by the respondent that it was reasonably practicable for the claim (the ET1) to have been submitted timeously.

68. The Tribunal did note that there was no explanation as to why it took the respondent until 4 May 2018 to issue the letter confirming the claimant's dismissal to him. However, that does not alter the Tribunal's conclusion that it was reasonably practicable for the ET1 to have been presented in time.

69. It therefore follows, applying the law to the above findings of fact, that this Tribunal does not have jurisdiction to consider the claim and it is therefore dismissed.

Employment Judge: F Jane Garvie
Date of Judgment: 12 November 2018
Entered in register: 13 November 2018
and copied to parties

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