EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: S/4121231/2018

Preliminary Hearing Held at Glasgow on 7 January 2019

Employment Judge: Mr A Kemp (sitting alone)

Mr W Hassan	**Claimant** **In person**
Balfour Beatty Group Employment Limited	**Respondents** **Represented by:** **Miss L Finlayson** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Tribunal does not have jurisdiction to consider the Claim and the Claim is struck out.

REASONS

Introduction

1. The Claim made was for unfair dismissal. 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 was unrepresented. At the commencement of the hearing I explained to him the procedure that would be followed at the hearing, and he then gave evidence. Although he had a witness in waiting, after his evidence was completed it was confirmed that the matter being spoken to by that witness was not challenged, although its materiality was disputed, and the Claimant did not then call the witness. No evidence was led for the Respondents.

3. The Claimant gave evidence clearly and candidly, and I accepted what he said.

4. Following the hearing of evidence and during my consideration of the case, it appeared to me that section 97 of the Employment Rights Act 1996 may be engaged. I invited submissions on that issue from the Respondents in particular, and they produced documents including the letter of dismissal dated 5 June 2018. They accepted that notice had been paid in lieu, and not given prior to termination. That did not appear to address the terms of section 97 and a further opportunity to make representations was given to them. On 25 January 2019 a further response was received, stating as follows:

> "The termination date was 1 June 2018. The Claimant received a payment in lieu of notice payment. The effect of section 97(2) of the Employment Rights Act 1996 is limited to extending the effective date of termination only in respect of calculating the qualifying periods for sufficient service for an unfair dismissal claim and calculating the qualifying period of the basic awards. Accordingly, section 97(2) does not apply to the three month time limit to bring a claim under section 111 of the Employment Rights Act 1996. The effective date of termination for that purpose is governed by section 97(1) of the Employment Rights Act 1996."

The issues

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

(i) What was the effective date of termination?

(ii) If that was 1 June 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 time thereafter, under that same section?

The Facts

6. The Tribunal found the following facts established:

7. The Claimant was employed by the Respondents from 26 September 1977, latterly as a Senior Supervisor.

8. On 1 June 2018 he was dismissed for redundancy by oral notice given at a meeting that day.

9. The Respondents' Unit Director sent a letter to confirm the redundancy on 5 June 2018, which confirmed that the termination was on 1 June 2018, gave the Claimant pay in lieu of notice, and provided for a period of seven days in which to appeal. At that stage the Claimant did not appeal.

10. On 6 July 2018 the Claimant learnt from a former colleague that someone else may have been appointed to the role he formerly held.

11. He sought assistance at around that date from his trade union and completed a form for seeking their assistance. They did not decide to assist him, and on or about 10 July 2018 told him that there was a time limit for making a Tribunal Claim, which they said was 90 days after dismissal less one day.

12. On 18 July 2018 a meeting was held at his former employers at which his former colleagues were told that an Assistant had been appointed to the Production Manager, and that that person did some of the role that the Claimant had previously performed, but with a different job title.

13. The Claimant was informed of that the following day by one of those present.

14. He wished then to investigate that to ascertain if what he had been told was true. He spoke to others present who confirmed that it was, completing those investigations by 31 July 2018.

15. He went on holiday on 2 August 2018 to 16 August 2018, and was abroad during that period.

16. On his return the Claimant prepared a letter of appeal dated 6 September 2018. He did not expect it to be granted. He did not at that stage seek Early Conciliation through ACAS as he thought that he had to complete his appeal first.

17. He commenced Early Conciliation through ACAS on 8 October 2018, and the certificate was issued that same day.

18. The present Claim was presented to the Tribunal on 9 October 2018.

19. Also on 14 February 2018 he presented the present Claim to the Employment Tribunal.

The Law

20. Section 111 of the Employment Rights Act 1996 provides as follows:

> "**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)."

21. 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"

22. 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.

23. 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."

24. 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."

25. 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.

26. 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***

27. 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***.

Submissions

28. Mr Hassan made a brief submission in relation to the circumstances in which he found out about the recruitment of another person to do what he considered to be his job, and argued that his claim should be accepted.

29. Miss Finlayson argued that the Claimant had not shown that it was not reasonably practicable to have lodged the Claim timeously, he having taken advice, nor that he had lodged the Claim without delay on learning of facts. She sought a strike out of the claim on the basis of timebar accordingly. In her later emails, she argued that the effective date of termination remained 1 June 2018. The submission was extended by the email dated 25 January 2019 quoted above.

Discussion

30. The effective date of termination is a statutory concept. The Claimant had a statutory entitlement to 12 weeks' notice under section 86 of the Act. He was informed of the termination of his employment on the ground of redundancy on 1 June 2018. As a matter of contract law the employment ended on that date.

31. Although the authority was not referred to by the Respondents in their submission, the law in this area was examined in the case of ***Duniec v Travis Perkins Trading Co Limited UKEAT/0482/13*** in which the EAT commented as follows:

> "[9] Section 86 ERA is headed 'Rights of employer and employee to minimum notice'. By sub-s (1) an employee is entitled to one week's notice for each year of continuous service up to a maximum of 12 weeks. In this case, the Claimant was entitled to five weeks' statutory notice under sub-s (1) subject to sub-s (6), which provides 'This section does not affect any right of either party to a contract of employment to treat the contract as terminable without notice by reason of the conduct of the other party.'
>
> [10] Hence, the common law defence of repudiatory breach by the employee remains open to the employer in a claim for pay in lieu of notice by way of a breach of contract claim justiciable in the ET under

the Extension of Jurisdiction Order 1994, subject to the maximum award of £30,000.

[11] Section 97 is headed 'Effective date of termination'. By s 97(1)(a), where the contract is terminated by the employer on notice, the effective date of termination is the day on which the notice expires. Under s 97(1)(b) '. . . in relation to an employee whose contract of employment is terminated without notice . . . [the EDT] means the date on which the termination takes effect': ie summary dismissal.

[12] Section 97(2) extends the EDT as calculated under sub-s (1) by adding the period of statutory notice under s 86(1) (subject to s 86(6)) to which the employee is entitled but for the purposes only of s 108(1) (qualifying period of continuous employment), s 119 (calculation of basic award) and s 227(3) (calculation of a maximum week's pay).

[13] Section 111, which deals with time limits, is not included in that list. Thus, when calculating the three-month primary time limit under s 111, s 97(2) does not allow for the addition of statutory notice entitlement under s 86. It follows that the question under s 86(6), to which Mitting J referred, is immaterial to the application of s 111.

[14] That was the effect of the ruling in ***Charman***, which has not since been questioned. I leave aside the separate suggestion in ***Charman*** that in a wrongful dismissal action damages might include the loss of the right to claim unfair dismissal as a result of the summary dismissal: see ***Harper v Virgin Net Ltd [2004] EWCA Civ 271, [2004] IRLR 390, [2005] ICR 921 (CA***). I have, of course, considered the recent Supreme Court Judgment in ***Société Générale v Geys [2012] UKSC 63, [2013] 1 All ER 1061, [2013] ICR 117***, a common law claim. However, I agree with the learned editors of Harvey on Industrial Relations and Employment Law v 1/D1 727/729 that that ruling does not affect the construction of s 97, which makes clear, see particularly

> s 97(1)(b) and (3)(b), that summary termination by the employer does not require acceptance by the employee before the contract is terminated for the purposes of s 111. It follows, in my judgment, that the Judge was not required to consider the s 86(6) exercise: the statutory notice period under s 86 is not material to calculating the primary limitation period under s 111."

32. I am bound by that authority. It supports the submission by the Respondents that the effective date of termination is not postponed by the statutory notice requirement under section 97(2) for the purposes of the time bar provisions relation to claims of unfair dismissal. I require therefore to hold that the effective date of termination is 1 June 2018.

33. I then considered whether it was reasonably practicable to have presented the Claim Form in time. The Claimant candidly accepted that he had been told by the union about time limits. It appeared to me from that that it had been reasonably practicable to have presented the Claim Form timeously. It is unfortunate for him that he did not present a Claim separately to the appeal that he later pursued.

34. In any event, it appeared to me that the Claim Form had not been presented reasonably shortly after the Claimant could have done so. The Claimant became aware of the possibility of someone else carrying out his former role on 19 July 2018. He decided to make further enquiries, but it was reasonably practicable to have presented a Claim Form at or around that time. He did not, but went on holiday. He returned on 16 August 2018, but it was not until 6 September 2018 that he submitted a letter of appeal, and that period from 16 August to 6 September 2018 was not explained. The further delay to commencing early conciliation was stated to be in relation to the appeal, but it did not explain that delay particularly as the Claimant stated that he did not consider that it would be likely to succeed.

35. The Claimant has not therefore discharged the burden on him, his Claim is out of time and the Tribunal does not have jurisdiction to consider it.

Conclusion

36. The application for strike out is therefore granted on the basis that the Tribunal does not have jurisdiction to consider the Claim.

Employment Judge: A Kemp
Date of Judgment: 29 January 2019
Entered in register: 30 January 2019
and copied to parties