EMPLOYMENT TRIBUNALS

Claimant: Mr P Whelan

Respondent: Sellafield Sites Ltd

Heard at: Manchester **On:** 13 August 2019

Before: Employment Judge Holmes

REPRESENTATION:

Claimant: In person
Respondent: Miss Choudhury, Solicitor

JUDGMENT having been sent to the parties on 6 September 2019 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. The Tribunal today has been considering in this Preliminary Hearing an issue that was directed to be considered by Employment Judge Hodgson, in a previous Preliminary Hearing that he held on the 10 May 2019. He directed that this hearing be convened to consider a number of issues , amongst which were whether the claims were presented in time and if not, whether the time for their presentation could be extended. There are other issues that were directed to be dealt with in this hearing , which relate to whether the claimant's claims include a complaint of unfair dismissal , and if not, whether the claims can be amended to include such a claim. By agreement with the parties , and indeed most logically , the Employment Judge considered that the first issue to be determined was the time limit issue , as , if that does not succeed in terms of the claimant being allowed to proceed with the claims, then the other issues fall away , because there is no claim to consider or to be amended . Consequently the Tribunal has dealt with the issues in that order , and will go on to deal with the other issues , if appropriate , after the judgment that is now given.

2. The claimant is unrepresented , has attended in person , and has given evidence. He was directed to make a Witness Statement dealing with these issues which he did not do in terms , but had produced previously a document which is at page 34 of the bundle that is being produced for today's hearing , which is in many ways his explanation in relation to the submission of the claims , and why they were late. He has adopted that , and it has formed the basis of his evidence to the Tribunal . It was effectively his evidence in chief to the Tribunal as to why the claims were submitted when they were, and he has been cross examined upon that , and questioned by the Employment Judge . That , together with the documents in the bundle , has been the evidence before the Tribunal.

3. In terms of the chronology , and the issue as to whether the claims were presented in time or not, there has been no issue but that they were presented out of time to this Tribunal, this being the North-West Region of the Employment Tribunal, England and Wales, wherein the claimant successfully submitted the claim on 6 February 2019. In terms of the claims that he makes, they go back to , at the latest, 5 October 2018 , that being the last date of the claimant's employment, he having resigned in fact in September 2018, giving notice to expire on 5 October. He claims unpaid remuneration that was outstanding at the date of his termination. In relation to his final pay , 5 October 2018 would be the relevant starting date, as being the end of his employment, upon which date, the Tribunal presumes, any final payment would be due, but he also makes claims of detriment for having raised protected disclosures , and , as directed by Employment Judge Hodgson the claimant has now clarified those claims . In doing so it is apparent that many of the detriments that he alleges , and would refer to , go back in fact to 2016 , and although he has made reference to detriments in June and July of 2018 , those are probably more accurately regarded as dates of grievances and matters being raised, and not fresh detriments . Just to be clear in terms of any time limits, the very latest date from which any time limits would run would be 5 October 2018, the end of the employment . In relation to the detriment claims the time limit would , of course, apply in relation to each of those at three months from the date the detriment was suffered , which would be considerably before September or October of 2018.

4. The starting point is 5 October 2018 , and in terms of the claims being out of time, having been lodged on 6 February 2019 , when the claimant, or his union had on his behalf , embarked on early conciliation before the termination date so that there is no extension of the limitation period, submission of the claim form on 6 February 2019 was out of time by , in effect, just over one month.

5. There has been no issue but that the claims have been submitted to this Tribunal out of time, and so the Tribunal has had to consider whether it was reasonably practicable for them to have been presented within time The reasonable practicability test is that which is applicable to the claims that the claimant has made.

6. In other jurisdictions, mainly the discrimination jurisdiction, the Tribunal applies the different test because it has a discretion to extend time if it is "just and equitable" to do so. It does not, however, have that discretion in this type of claim,

both the protected disclosure detriment claims and the deduction from wages or breach of contract claims all have the same provisions in relation to extension of time, and that is that of reasonable practicability (see the statutory provisions set out in the Annexe to these Reasons) , so what the Tribunal has to find is whether it was not reasonably practicable to have presented the claims within the original time limit, and then if it so finds, it can then extend time for such period as it then thinks is reasonable. So it is effectively a two stage test that has to be applied. The burden is upon the claimant, as the person bringing the claims out of time, to satisfy the Tribunal that it was not reasonably practicable to have done so within the relevant time limit , and that is why he has given evidence today and it is upon that evidence , and the other evidence in the case upon which the Tribunal has to make this determination.

7. In terms of that evidence and the claimant's explanation it is as follows. The claimant , whilst still employed by the respondent , was unhappy about a number of matters relating to health and safety in his profession of diving , which he had raised informally in the past , and which he then raised formally in a grievance. He remained unhappy with the respondent's response, and before the grievance was concluded decided that he should retire, in fact resigning in September of last year. He duly gave notice of that resignation to the respondents whilst the grievance process was going on. He was at that time supported by his trade union in the grievance, and indeed there is in the bundle email correspondence between him and his union advisors in the middle of September. On 17 September 2018 there was an email trail between the claimant and members of the union who were assisting him at that time.

8. In that email traffic there was discussion of whether the claimant or the union would take a Tribunal claim and indeed the name of someone who would potentially be involved in that was referred to in the email of 17 September. The claimant and the union representatives were discussing this, (this is at page 101 of the bundle) where a representative called Olly Slack had been involved , and indeed it was he who had received the early conciliation certificate , because in fact early conciliation was started on 1 August 2018 . The certificate was then issued on 1 September 2018 , and it was this union representative who had been involved in that and who had actually embarked on that process. So there was discussion about this potential claim , and the email traffic shows that Mr Slack was the person who would then take it further if the claimant was to be backed by the union.

9. In due course , however, as the claimant explained in evidence although the union did look into it , and the matter was apparently referred to their legal advisors, they told the claimant that they would not take it further themselves, but he was advised that he could do so himself and he was also, as he accepted in his evidence, advised of the relevant three-month claim time limit. He did not get any further advice at that point as to how to present a Tribunal claim, or anything further than that , but he was clearly aware of the time limit and the possibility that he could bring a claim, arising out of the matters that he was at that time complaining about. These were , of course, before the termination of his employment and so would

relate to the protected disclosure matters, because at that point of course he would not know about what was going to be paid or not paid on termination, but there was clearly that discussion, and the claimant from that point on was aware, certainly of the relevant time limit. He did not have a meeting with Mr Slack but there was this communication.

10. Thereafter, the claimant did resign and indeed took holiday, so was not in work for the rest of the notice period , and his employment ended on 5 October 2018. The claimant did not at that point do anything further about pursuing a Tribunal claim and indeed did not wish to do so. He wanted to go away, and indeed did go away in the middle of November, around about 13 or 14 November, this was to Thailand. It was for a period of some three months , and indeed was always intended to be so. So the claimant knew he would be away for that length of time and indeed wanted to, as he put it, clear his head. The claimant therefore went on holiday, but took his laptop with him, and so had internet and email access. Whilst away he decided he would bring a claim to the Tribunal, and in doing so he went on to the internet and he googled Tribunals. He came up with the Industrial Tribunals Unfair Employment Tribunal of Northern Ireland. Quite how this happened is unclear, but that is where his internet search led him , and he consequently filled out a form online, a copy of which is in the bundle at pages 37 onwards which was then sent to electronically the Industrial Tribunals of Northern Ireland.

11. In that claim form he provided his postal address and he provided his telephone numbers and indeed his email address. There is not, it would appear on the Northern Ireland claim form, the same box as appears in the England and Wales ET1 form for a preferred means of communication and so there was no tick box to indicate that email would have been the preferred means of correspondence , but there is a box in relation to "special arrangements" at box 9 where the question is asked , at 9.1, as to whether any special arrangements needed to be made for dealing with the claimant's case. It suggests , for example, any reasonable adjustment, or interpreters, but the claimant has put none. So he did not, and this is not a criticism but is a question of fact, not indicate to the Tribunal that he was not at his normal place of residence , and would not be for another two months or so at the time he submitted the claim online on 27 November 2018 . He assumed , having submitted the claim online that any communication with him from the Northern Ireland Tribunal would be online. He did not, he accepts, before googling the Tribunals, and then getting the claim form and submitting it in that way, look into any form of guidance, he did not look up anything entitled "how to bring a claim to the Tribunal" or seek to find out anything else before doing so. He effectively went on to the internet, into google, came into this website, went into this form and submitted it. He did so believing , with reference particularly to his passport which makes reference to Great Britain and Northern Ireland , that this was all part of the same jurisdiction, all part of the United Kingdom , and consequently he thought submitting it there was adequate submission , as the UK is all , effectively, one country or certainly one jurisdiction. He did not see anything amiss in the fact that his claim had gone to a Northern Ireland Industrial Tribunal, with which neither he nor his employer had any connection.

12. Having done so, the claimant remained on holiday. Whilst on holiday he had made no arrangements that his post be checked, notwithstanding that he would be away for three months. There were reasons for that, because the last time he tried something like that, his son had caused some damage to his garage door, so he preferred on that basis not to give him access into the house. But for one reason or another, no arrangements were made for his post to be checked, and consequently, neither the claimant, nor anybody else on his behalf , was aware of the fact that on 13 December of 2018 the Northern Ireland Office of the Industrial Tribunals and Fair Employment Tribunal wrote to the claimant pointing out that his claim form had been received but also pointing out that the Tribunal of Northern Ireland had no power to entertain his claim because he did not live or work in Northern Ireland and basically, his claim was rejected . He was referred to the Employment Tribunal Service in the England and Wales jurisdiction, but that letter was a rejection telling the claimant, first of all , that he could seek a review of it, but also making it clear that his claim was not going to proceed in Northern Ireland. That, of course, sat in the claimant's home , and he was unaware of it whilst he continued his holiday in Thailand.

13. Thereafter, the claimant next contacted the Northern Ireland Tribunal on 2 February 2019, again by email, and the complete version of that email is now available , and is inserted into the bundle at 52A . Within that email he entitled the subject "feedback on the website" , and he said that he had made an error in his submission , because he had entered the monthly salary and not weekly on the original claim form, and he asked had there been any "feedback" since he submitted his claim on 27 November. That then elicited a prompt reply from the Northern Ireland office , and on 4 February 2019 in fact the claimant was provided with a copy of a letter that had been sent to him in his absence on 13 December 2018, explaining that he had sent his claim to the wrong Tribunal.

14. Having learnt that, the claimant then, on 6 February 2019 submitted or resubmitted a claim to the Manchester Employment Tribunal, which is how these proceedings were then started and indeed on his return around about 13 or 14 February of this year he found, amongst the other small mountain of post doubtless awaiting him , the letter of 13 December 2018 from the Northern Ireland Tribunal office.

15. So those are the relevant facts the claimant relies upon, plus he has alluded to in the document at page 34 of the bundle , his health because he has suggested that he had been, as indeed is correct, off work sick since February 2017 and he also suggested at the end of this statement that if he had not been affected by sickness and medication , he would not have made the error, i.e. the error in sending the form to the wrong Tribunal. He has however, submitted no medical evidence as to the effects of any medication, or indeed his sickness upon his ability to function and as to whether or not this would have affected his decision making in late November of last year. That is an additional factor that he has mentioned.

16. In essence, what the claimant says as a lay person which the Tribunal accepts and fully understands, unfamiliar with this type of process, that he made an honest mistake, he went online, came across what appeared to him to be the correct Tribunal , being a part of the Tribunal jurisdiction of the country as a whole, he saw nothing wrong in sending this to Northern Ireland, which he realised he had done as indeed is apparent from the web page that has been printed out. He had no reason to believe that that would not be the appropriate place for his claim, and indeed, remained of that view until February 2019, when his mistake was pointed out to him. He had not thought to make any further enquiries before submitting the claim form, he had not gone on line to find out any more details, he had had no advice from anybody else, he made an innocent mistake and thereafter, not knowing how long these things took, and not being familiar with these processes, and not being a solicitor or barrister, he thought that there was no problem in not hearing anything back from the Northern Ireland Tribunal as indeed was the case. Consequently it was not until 2 February 2019, when he, as it were, chased this matter up in terms of contacting that Tribunal He considers that that was perfectly reasonable in the circumstances, given his lay status , and lack of familiarity with this process, and he therefore invites the Tribunal , although he does not put it this way, not being a lawyer, but effectively what his submissions amount to, that all of this amounts to a lack of reasonable practicability, that prevented him from presenting the claim when he should . Therefore the Tribunal should extend the time for its presentation.

17. In terms of that second part, no issue is taken or indeed could be taken in terms of the promptness of which he then acted, as clearly within a matter of a day or two he submitted the claim to the Manchester Tribunal. So in terms of the period after 2 February 2019 , the Tribunal would have no difficulty in finding that he then acted within a reasonable time in getting the claim submitted correctly. The crucial issue, however, is to whether it was not reasonably practicable to have presented the claims when they should have been i.e. before 4 January 2019.

<u>Discussion and Findings.</u>

18. In relation to that test, Miss Choudhury who appears today for the respondents , has made reference to the test which is in the statutory provisions and indeed, to some of the case law that has considered this aspect of the test many times over. It has to be observed as often lay people find somewhat it confusing, understandably, that this test of lack of reasonable practicability is one that is not the same as a discretion. As I mentioned earlier in this judgement , the Tribunal has discretion in discrimination cases, but the reasonable practicability test is something different. It is a test which falls somewhere between the test of physical possibility at one end, i.e. has it got to be shown that it was physically impossible to present a claim in time at one extreme, to was it reasonable to present a claim in time at the other. As the case law makes it clear , it is somewhere between the two and basically the question to be asked is “was there some impediment that stopped the claim being brought when it should have been?”. That impediment can be physical, for example a postal strike or some other circumstances of a physical and technical nature, or, as the authorities make clear, it can be personal , and mental, because

there are circumstances in which ignorance can amount to an impediment. The question then is as to whether or not it can be said to be reasonable to regard it as such, and the case law makes it clear that there is a distinction to be drawn between cases where that ignorance is of the right to claim at all, and the situation where the ignorance is not of that right, but of either when, or how to make such a claim.

19. Now this is not a case in which the issue is ignorance of the time limit , which is very often the relevant issue, but it is really more an issue as to ignorance as to how to present a claim effectively, because what the claimant did, he presented a claim , but he presented it to the wrong jurisdiction so his ignorance was not of when to make it , and indeed he was still well in time when he presented it on 27 November 2018 to Northern Ireland. It was ignorance of how to do it effectively i.e. which Tribunal to send it to.

20. That seems to me however to be very much the same type of issue in relation to time limits. It is a different issue , but it is a similar one, in the sense that ignorance as to when to make a claim , and ignorance as to how to make a claim seem to me to be one and the same type of thing, and so it is against that background that I approach the matter. As the authorities make clear it is not sufficient for a claimant in these circumstances to say they were genuinely ignorant of the relevant factors, and I accept in this case the claimant clearly was and there has been no challenge to the veracity of his evidence. But the question then is as to whether that ignorance is reasonable in the circumstances (see the extract from ***Walls Meat Co. Ltd. v Khan [1979] ICR 52*** cited in ***Solus (London) Ltd v Mattews UKEAT/0395/10/JOJ*** which the Tribunal was referred to) , and it is in relation to that that the Tribunal has to examine the evidence.

21. It seems to me that there are two facets to this. The first is the initial mistake, in terms of submission to the wrong Tribunal, the claimant claims that he was ignorant of the correct Tribunal, and he made an honest and reasonable mistake in submitting it to the Northern Ireland Tribunal. In terms of that argument, whilst initially attractive, the difficulty the Tribunal has with that is this. The claimant was under no pressure at this time, he had decided to wait until he was on holiday to decide whether to make a claim, and so he took a conscious decision that he would issue any proceedings whilst on holiday. Indeed he took his laptop with him and therefore had the wherewithal to make the claim online, as he in fact did. He also therefore had the wherewithal to research the information, that is widely available, as to how to make a claim and where to make it. That guidance is available online in many forms and is easily accessible. The claimant has called himself a dinosaur in technical terms , and as a fellow traveller in that regard I would recognise that description . That nonetheless does not take away from the fact that the guidance available on the internet is substantial, and if one can google “Tribunals”, one can also google “how do I make a claim to an Employment Tribunal”. That guidance is there and the claimant had access to it if he had chosen to use it. Rather, however, he seems to have rushed the matter . Quite why is unclear, because he still had plenty of time to claim. He went straight into the first answer he got on a google search, and then went into the Northern Ireland Tribunal pages and submitted his

claim there. Having already had the benefit of some union assistance, he did not go back to them to ask any questions, he did not look further online, he made no enquiries he just simply submitted this form. That , the Tribunal considers was not a reasonable mistake to make, it is one which perhaps ten minutes more on the internet could have prevented , and he could have got at least into the English jurisdiction , because whereas submission to the Northern Ireland jurisdiction led to rejection, submission to the wrong office of the English jurisdiction would most likely simply have led to a transfer, or at least an acceptance with a query being raised. In these circumstances the claim went to the wrong place really because the claimant did not take enough care before submitting it.

22. At that hurdle , the Tribunal would find that the claimant's ignorance at that point was not reasonable, but if that was wrong, then there is a second element and that is this: having submitted that claim the claimant did not follow it up, he did not do so for over ten weeks. The Tribunal appreciates that as a lay person, unfamiliar with these practices and procedures, he would not necessarily know what would happen next but as a claimant, and a person expected to conduct his affairs in a reasonably diligent manner , there is an obligation on him having brought a claim to pursue it, and indeed to be diligent in it. At the very least one would expect someone who has presented a claim online , and then heard nothing at all , to have chased it up in a shorter period than ten weeks. One appreciates that there was the intervening holiday period , and that might be a time which one might say accounts for some of the delay, but the claimant left it until 2 February 2019 to follow up. Indeed, it is noted then that what he did then, it was not to query why he had not heard anything, the reason he contacted the Tribunal at all was he realised he had made an error in his submission about the salary being monthly not weekly. He then goes on to ask if there has been any feedback, but this is not actually a chasing email about any response, it is actually prompted by the realisation of an error. That is a long time to basically leave the claim in abeyance, in circumstances where the claimant is out of the country, has left his home unattended, knows he is not going to get anything in the post , and is relying entirely on some form of online feedback from the Tribunal.

23. Whilst appreciating that he had submitted the claim online, and therefore might expect a response online , as that his was only means of communication, not having received anything back from the Tribunal (other than a bare acknowledgment it seems when he submitted the claim on 27 November 2018) the Tribunal considers it was unreasonable of him as a reasonably diligent person in charge of his own affairs, simply to leave it as late as he did. Even if he had made an initial reasonable mistake in submitting the claim to the wrong Tribunal in the first place, the Tribunal cannot find that his delay thereafter in chasing the matter up , and then learning that he had submitted the claim to the wrong Tribunal some six weeks after the Tribunal had told him on 13 December 2018 , then he was not acting reasonably at that time.

24. It thus follows that the claimant's ignorance , which is totally accepted, was not reasonable in the circumstances , and consequently the Tribunal very much following the questions asked in the ***Solus (London) Ltd v Mattews UKEAT/0395/10/JOJ*** case which was referred to by Miss Choudhury , but very

similar issues did arise in that case in terms of the approach to be taken that , the Tribunal does find in this case that it was reasonably practicable for the claims to be presented in time, there is no basis for extending the time for presentation and therefore must be dismissed.

25. The Tribunal would add this. Time limits are jurisdictional. It matters not whether the respondent raises them or not. The Tribunal has to consider them, and apply the law. Whilst the claimant may feel aggrieved at this outcome, it has nothing to do with the respondent.

Employment Judge Holmes

18 October 2019

REASONS SENT TO THE PARTIES ON

22 October 2019

FOR THE TRIBUNAL OFFICE

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ANNEXE

THE RELEVANT STATUTORY PROVISIONS

Deductions from wages claims.

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*

(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.

47B Protected disclosures

(1) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.

(1A) A worker ("W") has the right not to be subjected to any detriment by any act, or any deliberate failure to act, done—

> *(a) by another worker of W's employer in the course of that other worker's employment, or*
>
> *(b) by an agent of W's employer with the employer's authority,*

on the ground that W has made a protected disclosure.

48 Complaints to employment tribunals

(1A) A worker may present a complaint to an employment tribunal that he has been subjected to a detriment in contravention of section 47B.]

(3) An employment tribunal shall not consider a complaint under this 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 similar acts 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.

(4) For the purposes of subsection (3)—

(a) where an act extends over a period, the "date of the act" means the last day of that period, and

(b) a deliberate failure to act shall be treated as done when it was decided on;

and, in the absence of evidence establishing the contrary, an employer, a temporary work agency or a hirer shall be taken to decide on a failure to act when he does an act inconsistent with doing the failed act or, if he has done no such inconsistent act, when the period expires within which he might reasonably have been expected do the failed act if it was to be done.