Case Number: 2301495/2019

THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON SOUTH**

BEFORE: **EMPLOYMENT JUDGE MORTON**

BETWEEN:

Mr Kathiravetpillai Ramananathan **Claimant**

AND

WM Morrison Supermarkets PLC **Respondent**

ON: **1 October 2019**

Appearances:

For the Claimant: **Mr T Deal (Counsel)**

For the Respondent: **Mr T Welch (Counsel)**

JUDGMENT

1. It is the Tribunal's judgment that the Claimant did not present his claim to the tribunal within the statutory time limit in s111(2)(a) Employment Rights Act 1996 ("ERA") when it would have been reasonably practicable for him to have done so.

2. The Tribunal therefore has no jurisdiction to hear his claim of unfair dismissal which is hereby dismissed.

Written reasons prepared in response to a request by the Claimant at the hearing

1. The Claimant presented a claim of unfair dismissal to the Tribunal on 14 March 2019. He had been summarily dismissed from his employment with the Respondent on 27 October 2018. He commenced early conciliation with ACAS on 7 March 2019 and was issued with an early conciliation certificate on the same day. He had however commenced early conciliation substantially outside the statutory three month time limit set out in s111(2)(a) ERA.

2. The case was automatically listed for one day full merits hearing. Prior to the hearing the Claimant did not ask the tribunal for an interpreter. However he brought with him on the day of the hearing Ms Thayabaran, with a view to asking her to interpret for him. He also had a representative, Mr Dean, who had agreed to represent him pro bono (for which the Tribunal is very grateful). I explained to the Claimant that only a court appointed interpreter could perform the function of interpreting at a tribunal hearing.

3. It was evident that as the Claimant thought that he needed an interpreter (although he had not requested one) I was bound to consider whether a fair hearing could take place if the Claimant did not have an interpreter, or whether I should adjourn the case so that an interpreter could be found.

4. I was then reminded that there was an issue as to whether the Tribunal had jurisdiction to hear the claim at all because the Claimant had presented his claim outside the statutory time limit. It decided that although I would not be able to deal fairly with the substantive unfair dismissal case without an interpreter, it might be possible to deal fairly with the time limit/jurisdiction issue as the Claimant had already provided a statement addressing the question of why he had not presented his claim sooner than he did. Both Counsel agreed to consider that possibility. Given that the Claimant had prepared a statement my decision would depend on whether the issue could be fairly decided without the Claimant giving any oral evidence in cross examination. If the Claimant was to give oral evidence I would have to adjourn the case to allow an interpreter to be found.

5. There were therefore three questions I had to consider at the hearing. The first question was whether I could deal justly with the time limit point without hearing any oral evidence from the Claimant. If that were the case I would be able to continue without an official interpreter.

6. If I decided that I could deal with the time limit question the other two that would arise were:
    a. had it been reasonably practicable for the Claimant to present his claim within the statutory time limit in s111(2)(a)?
    b. If not, had he presented it within such further period as was reasonable (s111(2)(b) ERA)?

The relevant law

7. The relevant law is set out in section 111 Employment Rights Act 1996 which provides as follows:

(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.

I also had regard to Rule 2 of the Employment Tribunal Rules, which provides as follows:

2. The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable—

(a) ensuring that the parties are on an equal footing;

(b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;

(c) avoiding unnecessary formality and seeking flexibility in the proceedings;

(d) avoiding delay, so far as compatible with proper consideration of the issues; and

(e) saving expense.

A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal.

Whether to continue with the hearing

8. It was clear to me that the Claimant did speak and understand sufficient English to participate in the hearing so as to understand the proceedings with the help of his representative. The Respondent was content to continue without cross examining the Claimant. The consequence of that was that the Claimant's evidence, which was set out in a written statement that he had prepared for the hearing, would be unchallenged. Mr Deal however objected to my continuing without an adjournment because he said that the Claimant wished to put forward additional reasons for not having presented his claim sooner than he did. If I continued to deal with the time limit point straight away I could only do so if I refused to allow the Claimant to do this. I also noted that he had failed to address the second limb of the test in s 111 (2) (b) ERA in

much detail his statement.

9. I noted that as well as making a statement in connection with the late filing of his claim, the Claimant had also addressed the issue of the lateness of his claim in the claim form itself. Mr Deal suggested it was part of the Claimant's case that there had been particular reasons communicated to him at the time of the disciplinary hearing for not presenting his claim sooner, which ought to be added to the statement he had made. But the Claimant had had assistance when he prepared the written statement, albeit not, he said, from a legal representative. If what Mr Deal said was correct, it was unclear to me why those reasons were not put forward at an earlier stage – either in the claim form itself or in the prepared statement.

10. The Claimant was in effect asking to include new evidence on the time limit issue, but he was doing so at the last minute, without explaining why he could not have included the new information earlier. Whilst I bear in mind that the Claimant had not had legal representation throughout, it was quite clear that from the moment he presented his claim he was aware that he had missed the time limit. If he had important points to make concerning the nature of the advice he received, whether from ACAS, union representatives or solicitors I did not understand why all of these points were not referred to in the claim form or at the very least in the witness statement prepared for the hearing. The Claimant was certainly capable of making some clear submissions as to the reason for the delay in submitting the claim because he described his discussion with ACAS in detail in his statement.

11. I had to balance the Claimant's wish to adjourn the hearing to allow an interpreter to be found and additional oral evidence to be given, against the prejudice to the Respondent if I decided not to deal with the time limit point at the hearing. That prejudice would consist in the Respondent inevitably having to return for another day in the Tribunal, potentially some months in the future, whilst if I determined the issue there was a chance that that might be avoided.

12. From the Claimant's perspective, if I decided the time limit point on the basis of the papers, I would deprive him of the chance to give greater context to his reasons for not having presented his claim in a timely way. If I decided the point in his favour that would make no difference to him – his claim could still proceed. If I decided the point against him his claim would fall away in its entirety.

13. The question was whether I should in the interests of justice allow the Claimant to give greater context to his evidence about time limits, when he had already presented a coherent and detailed set of reasons for not presenting his claim sooner than he did. Mr Deal submitted that it would not be in the interests of justice to proceed without oral evidence and that that additional evidence would be vital. He said that I should take account of the Claimant's limited command of English. He said that the Respondent's Grounds of Resistance referred to the fact that the Claimant had had a union representative with him at the hearing, which I understood to mean that Mr Deal thought that what transpired between the Claimant and his union

representative ought to be tested in evidence. But that raises a similar point to the one I have made in paragraph 9. The Claimant had already produced a statement about the time limit issue. That did not make any points about what had or had not been said to him by his union representative at the disciplinary hearing. If there had been a point to make, it seemed to me that he should have included that in his statement. Mr Deal did not say that the statement in the Grounds of Resistance, that there was a union representative present at the disciplinary hearing, was disputed.

14. On balance, and with some hesitation, I considered that it would not be in the interests of justice to adjourn the hearing so that the Claimant could give additional oral evidence about the time limit question. I accepted the Respondent's submission that the Claimant had had ample opportunity to present his arguments and he had indeed done so. At the hearing he was in effect asking for an additional bite of the cherry. I did not think it was in the interests of justice to agree to that in the circumstances, given that that would have meant an adjournment. I therefore decided to determine the time limit point on the basis of the Claimant's written statement, the documents and any submissions the parties wished to make.

Whether it had been reasonably practicable to present the claim in time

15. On the second question I needed to decide I heard helpful submissions from both Counsel. I was referred to the recognised authorities on this issue (*Dedman v British Building and Engineering Appliances Ltd [1973] IRLR 379, Bodha v Hampshire AHA [1982] I.C.R. 200, [1982] 1 WLUK 677, Palmer v Southend on Sea BC [1984] 1 W.L.R. 1129, [1984] 1 WLUK 1099* and *Marks & Spencer PLC v Williams Ryan [2005] ICR 1293)* and I myself asked the parties to consider the relevance of *John Lewis Partnership v Charman [2011] 3 WLUK 795*.

16. In particular there was some discussion of *Williams Ryan* and the principles it sets out. In this case the Claimant says that he was ignorant of the time limit – an assertion the makes in paragraph 8 of the witness statement he prepared for the purpose of addressing the time limit issue. That evidence is unchallenged. But the Respondent asserts that the matter does not begin and end with the Claimant's ignorance – that ignorance must be reasonable. To quote from paragraph 21 of Williams Ryan:

> **"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 of the time limit for making such a complaint. Ignorance of either does not necessarily render it not reasonably practicable to bring a complaint in time. 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".**

17. In light of that the key question in this case is whether it was reasonable for the Claimant to be, as he says he was, ignorant of the relevant time limits. The Claimant says this in his witness statement:

> **"I did not know whilst I was awaiting my appeal that there was a time limit that I needed to comply with, although I intended to submit my claim as soon as possible after the appeal decision if necessary.**
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> **In fact I had spoken to the ACAS representative in early January and he had told me that I should call after the appeal decision had been made and if necessary I could then proceed to the employment tribunal with my claim if my appeal had not been successful.**
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> **Whilst waiting for the outcome of my appeal a friend of mine warned me that there were strict time limits in the employment tribunal and I should make sure that I was not going to be out of time. I immediately phoned ACAS and asked for further advice on this matter. I told them that I had phoned earlier and that I had been told that I should await the outcome of the internal appeal before proceedings further.**
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> **Upon hearing what I had said I was advised that I should have my early conciliation certificate immediately and one was issued straightaway. Having then spoken to ACAS I then prepared my claim and lodged it as soon as possible. I did this within a week as I needed help to complete the form.**

18. It is clear from that passage that the Claimant knew he had the right to make a claim. The Respondent did not challenge his assertion that he was unaware that there was a time limit for doing so, but it does challenge the reasonableness of that assertion in all the circumstances. The Claimant says that when he spoke to ACAS in early January he had been told that he should call after the appeal decision had been made and if necessary he could then proceed to the employment tribunal. The statement does not give any further details about the call or what facts the Claimant gave to ACAS. It does not state whether or not he had help making the call, given his restricted ability to communicate on complex matters in English. (I have taken the Claimant's restricted fluency in English into consideration in reaching my decision). The statement does not explain why the Claimant waited until January to speak to ACAS, when he had been dismissed on 27 October. I acknowledge that there was a delay in dealing with the Claimant's appeal and that the Respondent then took two over months to issue the Claimant with an outcome, but that does not explain why the Claimant waited from October to January to enquire about making a claim or the time limits for doing so. That being the case, I do not think Mr Deal's submission that had the Claimant received the outcome of the appeal sooner his claim would have been submitted in time is relevant to the question – which is whether the Claimant's ignorance of the time limit was reasonable in the circumstances.

19. Mr Welch referred me to the well-known test in *Palmer* to the effect that if an employee is pursuing an internal appeal that does not, of itself, mean that it is not reasonably practicable for the employee to submit a claim within the applicable time limit, even if this means submitting the claim before the appeal has been decided. *Charman*, he said was distinguishable because the Claimant in that case was unquestionably ignorant and he had been able to provide the Tribunal with evidence that supported his case that it could not be said that he should have known about his rights and the time limit for

enforcing them.

20. The Claimant's position was distinguishable from that on a number of grounds, said Mr Welch including the following:
    a. He was accompanied by an union representative at the disciplinary hearing which resulted in his dismissal – the decision to dismiss was moreover communicated to him orally at the hearing;
    b. It would therefore have been reasonable for the Claimant to ask his Union representative then and there what he could do about bringing a claim;
    c. He said in the meeting itself that he intended to consult a solicitor after the hearing – so he was plainly aware that he had or might have some legal rights and he knew that a solicitor might give him relevant advice.

21. I have borne in mind that those are assertions that were not tested in oral evidence, but the fact of the Claimant having been accompanied at a disciplinary hearing by a union representative would be clearly documented and Mr Deal did not say on the Claimant's behalf that any of these statements was disputed. Mr Welch submitted that these factors point to the conclusion that the Claimant's ignorance of the time limits was not reasonable in the circumstances of this case, where he knew he potentially had legal rights and had to hand immediately after his dismissal a person – his union representative – who could have advised him at the point at which he was dismissed. If that representative had given the wrong advice that would not mean that it had not been reasonably practicable to present the claim in time – if a skilled adviser is at fault that does not help a Claimant who has missed a time limit.

22. Furthermore if the Claimant indicated at the hearing that he intended to consult a solicitor then he must have known how to obtain legal advice and the question arises as to why he did not do so sooner than three months after he had been told he had been dismissed. Even if he had been misled by ACAS – and I have insufficient evidence of what was said when he contacted ACAS to conclude that that was the case, he has not explained why he did not contact ACAS sooner than he did.

23. On these facts I find, again not without some hesitation, that it would have been reasonably practicable on the test of 'reasonable feasibility' set out in the authorities, for the Claimant to have submitted his claim within the primary time limit as extended by the ACAS conciliation procedure. His ignorance of the time limit, based on the factors on which he relies, was not in all the circumstances reasonable.

24. On the question of whether, even if it had not been reasonably practicable for the claim to be submitted in time, it was submitted within such further period as was reasonable, the Claimant provided limited evidence to explain the fact that it took a further week once he had had clear advice from ACAS on 7 March 2019, to submit the claim. He said in his statement that he needed help completing the form, but he did not explain why it took a week to obtain that help. If a Claimant is aware that he has already missed a time limit, he must

act as quickly as possible. If there is a delay – even of only a week - that needs to be explained and it is not enough to say, without more, that a week was needed to obtain the help required, or simply to assert, as the Claimant did, that he did not believe that he could have acted any sooner. He needs to show why that is the case. So even if I am wrong in my conclusion that it was reasonably practicable for the Claimant to submit his claim within the statutory time limit, the Claimant did not show that he submitted his claim within such further period as was reasonable in all the circumstances of this case.

25. It follows that the Tribunal does not have jurisdiction to hear that Claimant's claim which is therefore dismissed.

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Employment Judge Morton
Date: 9 December 2019