EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Mr M Sutherland	AND	Harris Brothers Contract Furniture Limited (In Creditor's Voluntary Liquidation)

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Bristol **ON** 6 December 2019

EMPLOYMENT JUDGE J Bax

Representation

For the Claimant: **Mr Sutherland (in person)**
For the Respondent: **Did not attend**

JUDGMENT

(1) The claim for accrued but untaken holiday pay under reg. 14 and reg. 30 of the Working Time Regulations 1998 is dismissed. The claim was not presented within the relevant statutory time limit and it was reasonably practicable for it to have been.
(2) The claim for a redundancy payment is dismissed upon its withdrawal by the Claimant.

REASONS

1. This is the judgment following a Preliminary Hearing to determine whether or not the Claimant's claim for accrued but unpaid holiday was presented in time and if it was not reasonably practicable to have been presented in time, when would it have been reasonable to have presented it.

2. The Respondent did not file a response.

3. The Claimant confirmed that he had received his redundancy payment from the Redundancy Payment Service, and that he no longer pursued that claim.

The evidence

4. I heard from the Claimant and he also provided an e-mail from the administrators of the Respondent.

The facts

5. I found the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after listening to the factual and legal submissions made by the Claimant.

6. On 30 August 2016, the Claimant started working for the Respondent as an upholsterer.

7. On 14 September 2018 he was told that he was being made redundant, that day. He was promised that he would be paid his outstanding holiday pay and redundancy payment on 21 September 2019, but they were not forthcoming.

8. On 28 January 2019 the Claimant notified ACAS that he had a dispute with the Respondent and the certificate was issued on 27 February 2019.

9. On 8 April 2019 the Claimant presented his claim.

10. The Claimant's contract provided that he was to have been paid on a weekly basis, each Friday. The Claimant was therefore due to have been paid his outstanding holiday pay on 21 September 2019.

11. The Claimant said that he did not present his claim in time because he did not know that he could bring a claim.

12. From the time of his dismissal the Claimant had been in regular contact with the Respondent, who had said that it would pay him. He described this as being strung along, however he clarified that he did not speak to the Respondent about bringing a claim and that he did not think that the Respondent knew about any time limits.

13. The Claimant gave evidence that he knew that he had the right to be paid for accrued but untaken holiday from the day that he was dismissed. He also had always known that he could sue for money that he was owed, although he was not sure about how he could go about doing so and he did not realise that there was a time limit. The Claimant said that he was not

aware of the Employment Tribunal. On the balance of probability, the Claimant knew from the day that he was dismissed that he could bring a claim against the Respondent for his holiday pay. Taking into account the Claimant's age and the amount of time he had spent in a workplace, it was unlikely that the Claimant had never heard of the Employment Tribunal.

14. The Claimant did not make any enquiries as to his rights until he spoke to his mother in January 2019, who advised that he should contact ACAS immediately. I accepted that the Claimant's mother helped him generally, when dealing with problems or documents. The Claimant was unable to provide an explanation why he did not make any earlier enquires, other than that he was busy in his new job in December 2018 and January 2019.

15. When the Claimant spoke to ACAS, he could not remember whether they told him about time limits or the Employment Tribunal procedure.

16. He also had some difficulty with reading and writing, although he was able to read, which was demonstrated when he read the words of affirmation. He said that the difficulty made him reluctant to look matters up online. The Claimant accepted that he had access to the internet. Otherwise, nothing physically stopped the Claimant from presenting his claim.

17. After the Claimant had presented his claim, he heard that a liquidator had been appointed for the Respondent.

The law

18. The ground relied upon by the Claimant for suggesting that it was not reasonably practicable to have issued proceedings, within the relevant time limit, was that he did not know that he could have brought a claim.

19. Reg. 30(1)(b) of the Working Time Regulations 1998 provides that a worker may present a complaint to the Employment Tribunal that his employer has failed to make a payment under reg. 14(2) (Compensation in relation to entitlement to leave). And at reg 30(2)

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

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

(b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three or, as the case may be, six months."

20. With effect from 6 May 2014 a prospective Claimant must obtain an early conciliation certificate from ACAS, or have a valid exemption, before issuing employment tribunal proceedings.

21. The relevant law relating to early conciliation ("EC") and EC certificates, and the jurisdiction of the Employment Tribunals to hear relevant proceedings, is as follows. Section 18 of the Employment Tribunals Act 1996 ("the ETA") defines "relevant proceedings" for these purposes. This includes in Subsection 18(1)(j) Employment Tribunal proceedings under reg. 30 of the Working Time Regulations 1998.

22. Subsection 18A(1) of the ETA provides that: "Before a person ("the prospective Claimant)" presents an application to institute relevant proceedings relating to any matter, the prospective Claimant must provide to ACAS prescribed information, in the prescribed manner, about that matter." Subsection 18A(4) ETA provides: "If - (a) during the prescribed period the conciliation officer concludes that a settlement is not possible, or (b) the prescribed period expires without a settlement having been reached, the conciliation officer shall issue a certificate to that effect, in the prescribed manner, to the prospective Claimant." Subsection 18A(8) ETA provides: "A person who is subject to the requirements in subsection (1) may not present an application to institute relevant proceedings without a certificate under subsection (4).

23. The prescriptive steps which must be taken in order to satisfy the EC requirements and to obtain an EC certificate are set out in the Schedule to the Employment Tribunals (Early Conciliation: Exemptions and Rules of Procedure) Regulations 2014 ("the EC Regulations").

24. Reg. 30B (Extension of time to facilitate conciliation before institution of proceedings) of the Working Time Regulations 1998 provides:

(1) In this regulation—

(a) Day A is the day on which the worker concerned complies with the requirement in subsection (1) of section 18A of the Employment Tribunals Act 1996 (requirement to contact ACAS before instituting proceedings) in relation to the matter in respect of which the proceedings are brought, and

(b) Day B is the day on which the worker concerned receives or, if earlier, is treated as receiving (by virtue of regulations made under subsection (11) of that section) the certificate issued under subsection (4) of that section.

(2) In working out when the time limit set by regulation 30(2)(a) expires the period beginning with the day after Day A and ending with Day B is not to be counted.

(3) If the time limit set by regulation 30(2)(a) would (if not extended by this paragraph) expire during the period beginning with Day A and ending one month after Day B, the time limit expires instead at the end of that period.

(4) The power conferred on the employment tribunal by regulation 30(2)(b) to extend the time limit set by paragraph (2)(a) of that regulation is exercisable in relation to that time limit as extended by this regulation."

25. Where the EC process applies, the limitation date should always be extended first by reg. 30B(2), and then extended further under reg. 30B(3), where the date as extended by reg. 30B(2) is within one month of the date when the Claimant receives (or is deemed to receive) the EC certificate to present the claim (Luton Borough Council v Haque 2018 ICR 1388, EAT). In other words, it is necessary to first work out the primary limitation period and then add the EC period and consider whether that that date is before or after 1 month after day B (issue of certificate). If it is before, the limitation date is one month after day B, if it is afterwards it is that date.

26. The question of whether or not it was reasonably practicable for the Claimant to have presented his claim in time is to be considered having regard to the following authorities. In Wall's Meat Co v Khan [1978] IRLR 499, Lord Denning, (quoting himself in Dedman v British Building and Engineering Appliances [1974] 1 All ER 520) stated "it is simply to ask this question: has the man just cause or excuse for not presenting his complaint within the prescribed time?" The burden of proof is on the Claimant, see Porter v Bandridge Ltd [1978] IRLR 271 CA. In addition, the Tribunal must have regard to the entire period of the time limit (Wolverhampton University v Elbeltagi [2007] All E R (D) 303 EAT).

27. In Palmer and Saunders v Southend-on-Sea BC [1984] IRLR 119, the headnote suggests: "*As the authorities also make clear, the answer to that question is pre-eminently an issue of fact for the Industrial Tribunal taking all the circumstances of the given case into account, and it is seldom that an appeal from its decision will lie. Dependent upon the circumstances of the particular case, in determining whether or not it was reasonably*

practicable to present the complaint in time, an Industrial Tribunal may wish to consider 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. It may be relevant for the Tribunal to investigate whether, at the time of dismissal, and if not when thereafter, the employee knew that he had the right to complain of unfair dismissal; in some cases the Tribunal may have to consider whether there was any misrepresentation about any relevant matter by the employer to the employee. It will frequently be necessary for the Tribunal to know whether the employee was being advised at any material time and, if so, by whom; the extent of the advisor's knowledge of the facts of the employee's case; and of the nature of any advice which they may have given him. It will probably be relevant in most cases for the Industrial Tribunal to ask itself whether there was any substantial failure on the part of the employee or his adviser which led to the failure to comply with the time limit. The Industrial Tribunal may also wish to consider the manner in which and the reason for which the employee was dismissed, including the extent to which, if at all, the employer's conciliatory appeals machinery had been used. Contrary to the argument advanced on behalf of the appellants in the present case and the obiter dictum of Kilner Brown J in Crown Agents for Overseas Governments and Administrations v Lawal [1978] IRLR542, however, the mere fact that an employee was pursuing an appeal through the internal machinery does not mean that it was not reasonably practicable for the unfair dismissal application to be made in time. The views expressed by the EAT in Bodha v Hampshire Area Health Authority on this point were preferred to those expressed in Lawal [1978] IRLR 542"

28. To this end the Tribunal should consider: (1) the substantial cause of the Claimant's failure to comply with the time limit; (2) whether there was any physical impediment preventing compliance, such as illness, or a postal strike; (3) whether, and if so when, the Claimant knew of his rights; (4) whether the employer had misrepresented any relevant matter to the employee; and (5) whether the Claimant had been advised by anyone, and the nature of any advice given; and 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.

29. In addition, in Palmer and Saunders v Southend-on-Sea BC, and following its general review of the authorities, the Court of Appeal (per May LJ) concluded that "reasonably practicable" does not mean reasonable (which would be too favourable to employees), and does not mean physically possible (which would be too favourable to employers) but means something like "reasonably feasible".

30. Subsequently in London Underground Ltd v Noel [1999] IRLR 621, Judge LJ stated at paragraph 24 "*The power to disapply the statutory period is therefore very restricted. In particular it is not available to be exercised, for example, "in all the circumstances", nor when it is "just and reasonable", nor even where the Tribunal "considers that there is a good reason" for doing so. As Browne Wilkinson J (as he then was) observed: "The statutory test remains one of practicability … the statutory test is not satisfied just because it was reasonable not to do what could be done" (Bodha v Hampshire Area Health Authority [1982] ICR 200 at p 204).”*

31. Underhill P, as he then was, considered the period after the expiry of the primary time limit in Cullinane v Balfour Beattie Engineering Services Ltd UKEAT/0537/10 (in the context of the time limit under section 139 of the Trade Union & Labour Relations (Consolidation) Act 1992, which is the same test as in section 111 of the Act) at paragraph 16: “*The question at “stage 2” is what period - that is, between the expiry of the primary time limit and the eventual presentation of the claim - is reasonable. That is not the same as asking whether the Claimant acted reasonably; still less is it equivalent to the question whether it would be just and equitable to extend time. It requires an objective consideration of the factors causing the delay and what period should reasonably be allowed in those circumstances for proceedings to be instituted - having regard, certainly, to the strong public interest in claims in this field being brought promptly, and against a background where the primary time limit is three months.*”

32. A Claimant’s complete ignorance of his or her right to claim may make it not reasonably practicable to present a claim in time, but the Claimant’s ignorance must itself be reasonable. As Lord Scarman commented in Dedman v British Building and Engineering Appliances Ltd [1974] 1 All ER 520*, CA*:

“*…does total ignorance of his rights inevitably mean that it is impracticable for him to present his complaint in time? In my opinion, no. It would be necessary to pay regard to his circumstances and the course of events. What were his opportunities for finding out that he had rights? Did he take them? If not, why not? Was he misled or deceived? Should there prove to be an acceptable explanation of his continuing ignorance of the existence of his rights, it would not be appropriate to disregard it, relying on the maxim “ignorance of the law is no excuse.” The word “practicable” is there to moderate the severity of the maxim and to require an examination of the circumstances of his ignorance. But what, if, as here, a complainant knows he has rights, but does not know that there is a time limit? Ordinarily, I would not expect him to be able to rely on such ignorance as making it impracticable to present his complaint in time. Unless he can show a specific and acceptable explanation for not acting within four weeks, he will be out of court.*”

33. In Porter v Bandridge Ltd [1978] IRLR 271 CA, the majority of the Court of Appeal, having referred to Lord Scarman's comments in Dedman, ruled that the correct test is not whether the Claimant knew of his or her rights but whether he or she *ought to have known of them*.

Appropriate limitation period

34. The date on which payment should have been made was on 21 September 2018 and therefore the primary limitation period would have ended on 20 December 2018.

35. ACAS were notified of the dispute on 28 January 2019, which was after limitation had expired. Accordingly, referral to ACAS did not stop the clock and the claim was presented 3 months 18 days out of time.

Was it reasonably practicable to present the claims of unfair dismissal and breach of contract in time?

What was the substantial cause of the Claimant's failure to comply with the time limit?

36. The Claimant knew that he was owed money for untaken holiday and knew that he could sue the Respondent for it. He did not know how to go about recovering that money.

Was there was any physical impediment preventing compliance,

37. The Claimant had some difficulty reading and writing but was by no means unable to read and it only went as far as making him more reluctant to look things up online. There was otherwise no physical impediment preventing him from complying with the time limit.

Whether, and if so when, the Claimant knew of his rights

38. The Claimant knew that he had the right to be paid the money from the day that he was dismissed, and he also knew that he could sue for that money.

Did the Respondent misrepresent any relevant matter to the employee?

39. The Respondent did not make any representation to the Claimant about time limits or presenting the claim. The Respondent did say that the Claimant would be paid, but that is different from advising him on what to do. I was not satisfied that the Respondent had misrepresented any relevant matter to the Claimant.

Had the Claimant had been advised by anyone, and the nature of any advice given; and 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?

40. The Claimant took advice from his mother, who generally tended to help him, a month after the time limit had expired and it was surprising that the Claimant had not discussed it with her sooner. The Claimant was aware, from the date of his dismissal, that he could sue for the money, but chose not to make enquires with anyone before January 2019. I noted that he was busy at work during December and January, however from 14 September 2018, he had opportunities to speak to his mother and other people about what he should have done, and he could have made enquiries with organisations such as the Citizen's Advice Bureau.

41. This was a case in which the Claimant knew he was owed money for untaken holiday and that he could sue for that money. It was not therefore a case in which he did not know that he could have brought a claim at all. The Claimant was put on inquiry that he had rights and could have brought a claim, however he made no effort to discover what he should have done until about a month after the time limit had expired. Taking all of the circumstances into account, this was a situation in which it was reasonably practicable for the Claimant to have made enquiries about what he should have done, within the time limit. The Claimant ought, therefore, to have been aware that there was a time limit applicable to his claim.

Conclusion

42. Taking into account the above matters, and that the power to extend time was very restricted, the Claimant, had failed to establish that it was not reasonably practicable to have presented his claim in time. Accordingly, the Tribunal did not have jurisdiction to hear the claim for accrued but untaken holiday pay.

Employment Judge J Bax

Dated: 11 December 2019

Judgment sent to parties: 17 December 2019

FOR THE TRIBUNAL OFFICE