**EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case Nos: 4102063/2019 & 4102064/2019**

**Preliminary Hearing Held at Glasgow on 7 August 2019**

**Employment Judge M Robison**

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| **Mr J Queen** | **First Claimant**<br>**Represented by**<br>**Ms L Neil**<br>**Solicitor** |
| **Mr Graeme Haddow** | **Second Claimant**<br>**Represented by**<br>**Ms L Neil**<br>**Solicitor** |
| **SSE Contracting Limited** | **Respondent**<br>**Represented by**<br>**Mr A Clark**<br>**Solicitor** |

**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

The Employment Tribunal, having decided that the claims of the first and second claimant for unfair dismissal have been lodged out of time, and not being satisfied that it was not reasonably practicable to have lodged the claims in time, has no jurisdiction to hear the claims, which are dismissed.

**REASONS**

1. This preliminary hearing was set down to determine whether the claimants' claims for unfair constructive dismissal were time barred.

2. At the outset of the hearing, Mr Clark explained that his position was that the claimants had resigned on 7 September 2018, and not 10 September 2018 as asserted initially by them; and that it was reasonably practicable for the

claimants to have lodged their claims in time, so no extension should be permitted.

3. Ms Neil now accepts that the claimant's employment terminated when they resigned on 7 September 2018, and therefore that the claims have been lodged out of time. However, she argues that it was not reasonably practicable for the claims to have been lodged in time.

4. Given that, it was appropriate to hear evidence from the claimants. Although Mr Clark had brought along a witness to confirm the date of resignation, since it is agreed, there was no need to call him.

5. The respondent lodged a file of productions and case authorities and the claimant lodged two additional documents, as well as case authorities.

**Findings in fact**

6. The first claimant commenced employment with the respondent over 20 years ago, and the second claimant had worked for the respondent for over 12 years, when they handed in their resignations.

7. The first claimant submitted a typed resignation letter dated 3 September 2018, stating that his last working day would be Friday 7 September 2018 (page R41).

8. The second claimant submitted a hand-written resignation note to his line manager, Gary Hamilton, in which he stated that he wished to terminate his employment on Friday 7 September 2018 (page R42).

9. The claimants state that they felt forced to resign because of the conduct of their line manager Gary Hamilton and the actions of the respondent, as set out in the paper apart to the ET1.

10. Prior to their resignation, the claimants were absent on sick leave for reasons related to stress, caused they said by the way that they were treated by the respondent.

11. Following their resignation, they sought advice informally. The second claimant contacted ACAS.

12. They both met with a solicitor (Ms Neil) on 23 November 2018. They both advised her that they had resigned on 10 September 2018 (in error) (C1 and C3).

13. Ms Neil asked them if they had a copy of their resignation letters.

14. They did not produce their resignation letters, although the first claimant had a copy of it on his computer and the second claimant had taken a photograph of his.

15. During the meeting on 23 November 2018, Ms Neil advised about the time limit for lodging the claim, which she stated was three months less one day from the date of resignation and therefore that the deadline was 9 December 2018. She also advised that if they contacted ACAS that would "stop the clock" for a month (C1- C4).

16. Ms Neil contacted ACAS on behalf of her clients on 7 December 2018. The EC certificate was issued on 7 January 2019.

17. The ET1 on behalf of both claimants was lodged on 7 February 2019.

**Submissions for the claimant**

18. Ms Neil referred to the relevant legislative provisions, and having conceded that the claim was out of time, she made submissions on the factors which the Tribunal should take into account when determining the questions of reasonable practicability. These include the manner and reason for the dismissal; whether conciliation was used; the reason for the failure to comply, whether it was physical, through illness or strike; whether and when the claimants knew of their right; whether there had been a misrepresentation by the respondent; and whether the failure was the fault of an advisor.

19. Relying on the decision of the Court of Appeal in case of *Marks and Spencer v Williams-Ryan* [2005] EWCA Civ 470, she submitted that section 111 should be given a liberal interpretation in favour of the claimants; and that regard should be had to whether the claimants knew about their rights and time limits, and whether, having regard to their state of knowledge, they had acted reasonably.

20. In this case, with regard to their state of knowledge and whether they had acted reasonably, the claimant's evidence was that they were suffering from stress at the time, and in addition the first claimant was in debt.

21. With regard to the manner and reason for the dismissal, in the ET1 it is asserted that both claimants became defeated and downtrodden by the treatment of their manager. They describe there the stress they were under and the second claimant confirmed in evidence that he was still under stress by the time of the meeting on 28 November 2018.

22. The file note produced by Ms Neil shows they advised her that they resigned on 10 September 2018. They confirmed in evidence that they had been asked to produce their resignation letters, but also that they had not done so. Assuming that 10 September was the correct date, the contact with ACAS was in time and the ET1 was lodged in time.

23. Relying on *University Hospitals Bristol NHS Foundation Trust v Williams*, UKEAT/0291/12, *Marks and Spencer v Williams-Ryan*, *John Lewis Partnership v Charman* UKEAT/0079/11 and *Remploy Ltd v Brain* UKEAT/0465, she argued that the Tribunal should not assume that just because the claimants were able to cope with certain difficulties, that meant that it was reasonably practicable for them to lodge their claim in time. Here the claimants' ignorance of their rights was reasonable, given that these were the only jobs which the claimants had in their adult life and had no prior need to explore their rights or time limits since they had not anticipated finding themselves in this situation. They obtained legal advice but they did not fully understand the importance of time limits, nor appreciate that if they had misinformed their solicitor of the date that would be critical.

24. The Tribunal should take account of the following to conclude that it was not reasonably practicable for them to have lodged their claims in time: the circumstances of the claimants' life; the lack of clarity over time limits; the lack of understanding of the significance of having misinformed their solicitor about the date; their inexperience of such matters; their ill health; their treatment by

their employers which resulted in them not being able to speak up; all of which contributed to the situation.

**Submissions for the respondent**

25. The claimants having accepted that the effective date of termination was 7 September 2018, and therefore the claims were in principle out of time, Mr Clark's primary submission was that it was plainly reasonably practicable to lodge the claims in time. This is a question of fact for the Tribunal, but the onus is on the claimant to establish it (*Porter v Bandridge* 1978 ICR 943).

26. Mr Clark relied on *Walls Meat v Khan* 1979 ICR 52 and *Reed in Partnership v Fraine* UKEAT/0520/10 in support of his submission that while ignorance or mistaken belief is a relevant factor for the Tribunal to take into account, that ignorance must be reasonable.

27. Here the claimants gave evidence that they had made a mistake about the date of resignation. Yet both confirmed that they had retained a copy of the resignation letters sent to the respondent, and that they were asked to produce them by their solicitor. In this case, both claimants had taken steps to enquire about their legal rights and had been advised about time limits. Having retained copies of the resignation letters, if they were unsure they should have checked. Mr Clark therefore submitted that it was not a reasonable mistake for them to have made.

28. The fact that a claimant engages skilled advisers is not sufficient excuse to satisfy the test; the solicitor is under a duty to take all reasonable steps to ensure that the claim is lodged in time (*Dedman v British Building and Engineering Appliances Ltd* 1973 IRLR 379).

29. This is not one of those cases where the claimants can rely on ill-health because no medical reports have been lodged. While the claimants gave evidence that they were suffering from stress, in *Asda Stores v Kauser* UKEAT/0165/07, the EAT stated that mere stress as opposed to illness or incapacity is unlikely to be sufficient as an excuse. Here there is no medical evidence to suggest that they were suffering from anything in excess of stress.

30. The claimants have failure to discharge the onus on them; they had a duty to undertake the proper enquiries; they had knowledge of the resignation letters; the failure was not due to physical impairments; the claimants were not misled by the respondent; they engaged skilled advisers and were given proper advice; their solicitor proceeded on the basis of a false assumption and in the circumstances the mistake was not reasonable.

31. Mr Clark's secondary submission is that even if it was not reasonably practicable, then the claimants did not lodge their claims within a reasonable period after it became reasonably practicable.

32. It is accepted that the date of resignation was 7 September 2018. Contact with ACAS should take place within the relevant time limit, and the extension of time only operates where ACAS were contacted within the time limit. In this case the ACAS process was not commenced within the three month period, and therefore section 207B is not in play, and there is no extension of time limits (*Romero v Nottingham City Council* UKEAT/0303/17 and ACAS guidance). This means that the claim has been lodged 63 days, that is around two months, out of time.

33. In this case there was further opportunity for the claimants' solicitor to obtain the resignation letters and the relevant background and any documentary evidence; including after contacting ACAS, between the certificate being issued on 7 January 2019 and lodging the Tribunal claim on what was calculated to be the last day. It was open to claimant and claimant's representative to contact ACAS before 7 December and to the end of the conciliation period, and to submit claims between 7 December and 7 February; the conciliation period can be ended at any time. The claimants therefore lodged the claim some two months after the expiry of the time limit; which was not a reasonable period.

**The relevant law**

34. The law relating to time limits in respect of unfair dismissal is contained in the Employment Rights Act 1996. Section s111(2) states that an employment tribunal shall not consider a complaint unless it is presented before the end of

the period of three months beginning with the effective date of termination or 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.

35. Where the claim is lodged out of time, the tribunal must consider whether it was not reasonably practicable for the claimant to present the claim in time, the burden of proof lying with the claimant. If the claimant succeeds in showing that it was not reasonably practicable to present the claim in time, then the tribunal must be satisfied that the time within which the claim was in fact presented was reasonable. This is a question of fact for the Tribunal (*Walls Meat Co Ltd v Khan* 1979 ICR 52).

36. The Court of Appeal in the case of *Palmer and Saunders v Southend-on-Sea Borough Council* [1984] IRLR 119 considered the meaning of the phrase "not reasonably practicable". In that case Lord Justice May said that "we think that one can say that to construe the words "reasonably practicable" as the equivalent of "reasonable" is to take a view that is too favourable to the employee. On the other hand, "reasonably practicable" means more than merely what is reasonably capable physically of being done.... the words...mean something between these two. Perhaps to read the word "practicable" as the equivalent of "feasible" as Sir John Brightman did in [*Singh v Post Office* [1973] ICR 437, NIRC] and to ask colloquially and untrammelled by too much legal logic— "was it reasonably feasible to present the complaint to the [employment] tribunal within the relevant three months?"—is the best approach to the correct application of the relevant subsection."

**Tribunal decision**

37. This case is unusual in that it is not typical of the reasons advanced to support an argument that it was "not reasonably practicable" to lodge a claim in time. That is because, properly speaking, this is not an "ignorance of the law/rights" type case, and nor is it a case where the failure to lodge the claim could clearly be said to be the fault of the legal adviser.

38. The crux of this case is that the claimants sought legal advice in good time before the three-month time limit was up, but they mistakenly gave their solicitor the wrong date of resignation. Whatever happened in the meeting, the claimants accepted that they had been asked for copies of the letters of resignation which would have rectified the error. These letters were not produced to the solicitor, although the claimants confirmed in evidence that they do have copies of them.

39. Ms Neil acted on the basis that the date given to her was correct, and she acted entirely properly in contacting ACAS, albeit on the last day, in what she understood to be within the time limit for lodging the claim. While there would have been time to undertake further preparation of the case and to press the claimants for documentary evidence, having asked the claimant for copies these were not forthcoming. She gave advice about time limits and it is clear that she gave the correct advice on the basis of the information that she had been given and the file notes were lodged to show that.

40. It may be that it would have been less risky to have acted before the last day for lodging claim, to avoid the risk of last minute difficulties or errors like this, and indeed Ms Neil may reflect on her practice in the future, but the fact remains that she acted on instructions and information from her clients.

41. It is not correct to say that the claimants were ignorant of their rights, so that there was no need to analyse whether any “ignorance” of their rights was reasonable. The claimants instructed a solicitor within the three month time limit period. They were told in clear and specific terms, as noted in the file note (and it is understood confirmed in subsequent letters, although these were not lodged) about the time limit.

42. It is clear therefore from the evidence that the claimant simply had made a genuine mistake and simply had not appreciated the significant of that mistake, despite the clear advice they were given.

43. Mr Clark argued that their mistake was not a reasonable one for them to make. Ms Neil put the mistake down to the facts and circumstances of the termination of their employment, the fact that they were absent on sick leave, suffering

they said from stress, prior to their resignation, as a result of the employers actions, that the stress was ongoing and that the claimants found themselves for the first time in their working life looking for a new job.

44. Although no medical evidence was lodged I was prepared to accept that the claimants were suffering from stress, even when it came to the meeting with their solicitor. Mr Clarke relied on case law which indicates that suffering from stress will not be sufficient to render the lodging of a claim in time not reasonably practicable.

45. In any event, notwithstanding the stress, the claimants were in a position to instruct a solicitor, their solicitor explained the time limit to them, and as I understand it in subsequent letters. They did have the copies of the resignation letters; they were asked for copies of those letters; but they did not supply them. The claimants met with a solicitor on 23 November. The time limit was 6 December. There was ample time between 23 November and 6 December for the claimants' representative to contact ACAS and to lodge a claim. The claim form which was lodged was in skeleton form in any event.

46. I could not say that it was not reasonably to have lodged the claim in time, given a solicitor had been instructed. While the claimants made a mistake there was time too to rectify that, but the claimants failed to do so. I agreed with Mr Clark that the mistake, at least after the meeting when their solicitor had clearly explained about time limits, was not a reasonable one to have made, especially when they had retained copies of the resignation letters.

47. In such circumstances there is no requirement to consider Mr Clark's secondary submission regarding the reasonableness of the time taken to lodge the claim. This is because the question to be considered is whether the claims were lodged within a reasonable time of it becoming reasonably practicable to do so (and not from the date of the time limit). Here I have found that it was reasonably practicable for the claimants to have lodged their claims in time.

48. This is an unfortunate case where I accept that the claimants simply made a mistake and presumably did not appreciate that their mistake would be so costly. However, in the employment tribunal time limits are strictly applied for

claimants because they determine the question whether the tribunal has jurisdiction to hear a claim or not.

49. Unfortunately, this conclusion means that the tribunal does not have jurisdiction to hear the claims, which must be dismissed.

**Employment Judge: M Robison**
**Date of Judgment: 15 August 2019**
**Date sent to parties: 16 August 2019**