Case No: 2203551/2019

EMPLOYMENT TRIBUNALS

Claimant: **Mr. Mark Robinson**

Respondent: **Department for International Trade**

Heard at: **London Central** **On: 3 March 2020**
Before: **Employment Judge Goodman**

Representation
Claimant: did not attend
Respondent: Ms. N Patel, counsel

PRELIMINARY HEARING

JUDGMENT

The claim is dismissed for want of jurisdiction.

REASONS

1. This is preliminary hearing to decide whether the tribunal has jurisdiction to hear an unfair dismissal claim presented more than three months after dismissal.

Essential Dates

2. The respondent says the claimant was dismissed from employment by letter on 17 February 2014. The claimant says this letter did not come to his attention until 20 January 2017.

3. The claimant contacted ACAS over two years later to start early conciliation, on 4 April 2019 (day A). An early conciliation certificate was issued on 4 May 2019 (day B).

4. The claimant presented his claim to the employment tribunal on 19 September 2019.

5. In the light of these dates there are four issues:

5.1 what is the effective date of termination of employment from which time

starts to run?

5.2 Was it not reasonably practicable to present a claim (by contacting ACAS for early conciliation) within three months of that date?

5.3 If not reasonably practicable, was the claim presented (contact with ACAS for early conciliation) within a reasonable time thereafter?

5.4 If he obtained an early conciliation certificate in time, was the claim presented within one month of day B?

Conduct of the Hearing

6. The parties were notified on 8 January 2010 that the tribunal would consider whether it had jurisdiction to hear the claim with reference to the time limit in section 111 of the Employment Rights Act.

7. The employer filed a response on 3 February 2020 disputing liability, asserting the claim was out of time by 4 ½ years, and putting the claimant to strict proof of the date he received notice of dismissal.

8. On 24 February 2020 the claimant sent the tribunal and the respondent a statement of eleven pages, headed “the length of time it has taken to bring this matter to the employment tribunal is due to the intentional calculated actions of the Department”, which is both a witness statement and a submission, together with a bundle of documents.

9. On the morning of the hearing, listed to start at 10 am, the claimant was not present. The respondent attended by counsel. The clerk telephoned and left a message asking the claimant to say if he was on his way. The tribunal then learned from respondent that at 19:35 the previous evening claimant had sent an email saying that he was not going to attend the hearing because he had learned that afternoon that a parent at one of his daughter’s clubs was being tested for suspected Covid-19 viral infection, the claimant himself had developed a cough and a higher than normal temperature in the last few days, and while he was certain it was just a seasonal common cold, he was going to follow NHS advice and remain home for the next two weeks. He hoped in the circumstances the tribunal would agree to reschedule his hearing.

10. I caused the clerk to send the claimant and email saying that it was proposed to hold the hearing by telephone at 11.30 am, and asking him to switch on his telephone (which had gone straight to voicemail) or notify another number where he could be reached.

11. The claimant replied by email that there was poor reception at home and he often had to walk into the village to get a signal. There was no landline. He believed the evidence submitted in his papers was a compelling argument. He was happy for the hearing to go ahead in his absence.

12. I decided not to postpone the hearing for the following reasons:

(1) it is an old case. The disputed facts go back to 2013. Even a delay of a few weeks while the case is relisted is cumulatively undesirable.

(2) On the facts set out in the documents, having at that stage read only the claimant's bundle and submissions, there was little or no information indicating why it had taken so long to present a claim, and prima facie a strong case for striking it out.

(3) The claimant's correspondence bundle showed a history of avoiding internal hearings, of not receiving correspondence even to addresses he had notified, and not receiving emails at email addresses he had supplied. This suggested that one possible explanation for the claimant's failure to attend was that he often sought to put off events and decisions that might be unwelcome.

(4) The claimant himself was not unwell; the cold was not the reason for the request; he was fit to participate in the hearing if held by telephone.

(5) Until the previous evening he had been expecting to argue the case today, and with the hour's notice of telephone hearing he would be able to get his thoughts in order and present his case.

(6) His written representation addressing the issue the tribunal had to decide, and setting out both facts and the thrust of his argument, was full and clear. It avoided explanation of what was not happening for some long periods, and what he knew at any stage about time limits, but he had written his submission knowing what the issue was.

(7) The decision was made in light of the overriding objective, in particular saving cost and expense, when counsel was here with a prepared bundle and skeleton argument. I did not read it until receiving the claimant's emailed response.

(8) If he had opposed the refusal to postpone the hearing, he could have applied for reconsideration by submitting documentary evidence showing why he needed to isolate himself, such as a letter from the parent being tested, or confirmation from the organiser of the club that parents have been advised to isolate themselves. In the event he did not oppose the telephone hearing, and asked that it proceed in his absence, so this was no longer relevant.

13. The tribunal read the claim form and response, the claimant's submission and his bundle of documents. In fairness to the absent claimant, the respondent's bundle contained mainly correspondence with him and his representatives at various stages. The only internal items he may not have seen are brief notes – items 24 and 26 – about how to make contact with the claimant, and have little weight or significance.

Relevant Law

14. The Employment Rights Act 1996, section 111, prescribes a limit of 3 months from the effective date of termination of employment to present a claim to an employment tribunal, unless a claimant can show it was "not reasonably practicable" to present a claim in time. If the tribunal agrees it was not reasonably practicable, it must consider whether the claim was presented within a reasonable time thereafter.

15. What is "reasonably practicable" has often been considered. It is more than

what is strictly "practical" – more like "feasible" – **Palmer and Saunders v Southend on Sea Borough Council 1984 IRLR 119**. If the reason for not presenting in time as ignorance of the law, a tribunal must consider why the claimant held a mistaken belief or was ignorant of the law, in particular, whether he had made reasonable enquiries **– Walls Meat Co Ltd v Khan 1979 ICR 52**. The burden of proof is on the claimant.

16. Before presenting a claim, a claimant is required by section 18A of the Employment Tribunals Act 1996 to attempt early conciliation of his dispute. To assist this, time limits are extended by section 207B of the Employment Rights Act. The effect of going to ACAS is to stop the clock from day A to day B, so time does not run, and then, provided day A was within the three months of dismissal, the claimant has another month in which to present his claim.

17. The 3 months for presenting a claim runs from the "effective date of termination", which is defined in section 97(1)(b) of the Employment Rights Act as: "in relation to an employee whose contract of employment is terminated without notice, means the date on which the termination takes effect". The dismissal letter of 17 February 2014 states that his last day of service is 17 February 2014, and he was paid thirteen weeks in view of notice.

18. In **Gisda Cyf v Barratt 2010 ICR 1475**, a case where the letter of dismissal did not come to the claimant's attention until a few days after it was delivered, because she had been away from home, the Supreme Court ruled (as summarised in the headnote) that:

> "the contract of employment did not terminate until the employee actually read the letter or had had a reasonable opportunity of discovering its contents; and when considering whether the claimant has had a reasonable opportunity to discover the contents of the letter sent to her by her employer, the employment tribunal was entitled to take into account the reasonableness of her behaviour in failing to avail herself of an earlier chance to discover what it contained".

Factual Summary

19. Working from the written material, I summarise first the history leading to the claimant being dismissed, and then the history came to his attention and why he presented a claim when he did.

Events in the course of employment

20. The claimant has been employed since 1985, latterly as a higher executive officer in the Department for International trade. In 2009 he was short toured (i.e. a fixed term overseas posting was cut short) after what the claimant calls a "false accusation". After that he had no substantive role, and did project work.

21. By March 2013, the first of the emails and letters supplied by the claimant, it is clear that he was off sick with a back condition, and may have been off for some time. He told his line manager that his wife was considering taking the job in Sweden, and he asked if he could take special leave without pay. (The

emails show a sequence of missed calls with his manager about keeping in touch about his sickness absence). On 11 April 2013, still off sick, he made a formal application for special leave. On 19 April 2013 the respondent refused on grounds (1) that his absence is being managed under the sickness absence policy, and he could not be granted special leave when sick (2) the department was restructuring and there was a pool of people without substantive posts. It was necessary to find him a current role now.

22. The claimant asked if the decision could be reconsidered, but was told on 2 May 2013 that even if he was well, special leave would not be granted unless he had a permanent post to return to when it ended.

23. He returned to work on 10 June 2013. On 23 October 2013 he went sick again, and he has not worked since. On 23 August 2013 he was told that the decision was unchanged after formal review by another manager.

24. On 24 October 2013 he was notified of a disciplinary hearing on 31 October 2013. The charges were that he did not follow procedure in reporting sick leave, he had not followed management instructions on how to report sick leave, and finally, he had lost some documents with notes of an executive board meeting (the claimant's emailed explanations indicate that it had been lost on a train). The claimant did not attend the hearing. He said he did not get the letter because he had not been at his parents' address, which he had supplied for correspondence, and he had not been able to complete the journey to the hearing because the medication for his back made him unwell. He did not come to a rescheduled meeting on 7 November. On 22 November he was given a final written warning to lie on the file for twelve months.

25. Meanwhile on 18 November he had submitted a further application for special leave, on the basis that his wife, who was living in Sweden, was now pregnant, and he wanted to take one year off to care for her during pregnancy; he anticipated a further two years' leave after that to bring up the baby. On 27 November he said that his father had received a letter, but it had not reached him, and "I have not had regular email access".

26. On 3 December the respondent turned down the application for special leave. The reasons were that he was off sick, that the last time he had had special leave for three months, in 2010, he did not return to work when it ended but went straight to sick leave, that the recent disciplinary penalty and his record showed that he had not been reliable in following the guidelines for keeping in touch when away from work, and might not be reliable in returning to work after special leave, finally, he had been in a surplus position since 2009 and had not found a permanent role or meaningful project role, and it was necessary when taking special leave to have a permanent role to return to.

27. On 12 December 2013 the claimant was asked either to return to work or to submit medical evidence showing when he would be able to return to work. He says his father had received some more letters, but the claimant had not received them.

28. After 31 December 2013 the respondent stopped paying salary. On 17 January 2014 he was advised that as he had neither come back to work, nor submitted a prognosis on whether he will be able to return, and so had still not

followed policy or instructions on reporting sick leave, his case was being referred to decide whether he was to be dismissed or downgraded on grounds of inefficiency.

29. On 27 January 2014 he was asked to attend a dismissal meeting on 4 February. He did not attend. On 12 February the claimant said he was returning to Taiwan, and then they would be in Stockholm from the autumn. He said he had not been getting post in Stockholm before.

30. The respondent dismissed the claimant, and posted and emailed the dismissal letter on 17 February. It was addressed to the current correspondence address supplied, his father's house in Clacton.

Events after the Dismissal

31. On 4 April 2014 the claimant emailed to say that his father had received letters, but they had not been delivered when forwarded, and he was "still having problems with emails"; he thought his account had been hacked. In reply, the same day the respondent emailed the letter to him again.

32. On 7 July 2014 the claimant emailed asking for a two-year extension to his special leave, while he was resident in Stockholm. The respondent immediately again emailed him the dismissal letter, on 7 and then 21 July.

33. On 26 August, without mentioning these emails, the claimant emailed asking the rules about taking consultancy work while he was on special leave, and confirmed the Stockholm address. Copies were posted to him, registered, at that address, on 30 September 2014. On 6 November he emailed again to say that he was not doing consultancy work because there was too much travel involved.

34. On 12 April 2015 the claimant emailed to say his father had received a letter in Clacton and posted it to Stockholm, but he had not got it. He wanted to extend his special leave, and added that he hoped to be able to take voluntary severance in the next eighteen months. The respondent replied with a further copy of the dismissal letter.

35. After hearing from the claimant again in July 2015, still without reference to the dismissal, the respondent replied that he was no longer employed, and listed the dates the letters had been sent to him, by post and email.

36. Next, after an apparent 17 month silence, on 25 November 2016 the claimant sent a handwritten letter from Taiwan saying that the couple were relocating to the UK. His email remained unreliable. On 21 December 2016 he said he was now back in the UK and with a new email address. He asked for a convenient date to discuss return to work. After a telephone discussion, on 20 January the respondent emailed him the dismissal letter again, to the new email address. The claimant replied on 21 January that this was a "surprise", and the first he had heard of his "dismissal".

37. What happened now he accepted he had been dismissed? He made a freedom of information request on 14 March 2017 to find out who else had applied for special leave and got it. He got the information on 10 April 2017. He then asked to appeal against his dismissal. On 22 June 2017 he was told

that his time for appealing had expired.

38. The claimant argues that the respondent is to blame for the having lost an opportunity to appeal. Had they telephoned him, rather than posting letters and emailing, he would have realised what had happened.

39. In July 2017 he told the respondent he was consulting his trade union and MP. He tells the tribunal the trade union advised him to contact his MP. On the papers, he probably did not contact either until much later. His trade union (PCS) wrote to the respondent seeking to reopen the dismissal in November 2017 and they replied promptly saying it was all too late. His MP wrote on his behalf on 15 December 2017. The Secretary of State replied to his MP on 19 March 2018, setting out the reasons why he did not get special leave, that he had been dismissed, that he had been sent the letter several times but not appealed, and it was now too late.

40. The claimant asked his MP to take it further, though it is not clear when he did this. The MP met the respondent's HR team on 16 October 2018, and the claimant saw the HR team on 18 January 2019.

41. It is not known what happened between then and 4 April 2019, when he contacted ACAS for early conciliation. It must be presumed that the claimant now understood the respondent was not going to reverse the dismissal decision.

42. Nor is it known exactly why he did not present a claim when he got the early conciliation certificate, dated 4 May 2019. On the (September 2019) claim form itself he says (and there is no indication of the date of what follows):

> "I contacted my MP again, he agreed to contact ACAS on my behalf. When I received a reply I was abroad, and when I spoke to ACAS the phone line was very poor and I could hardly hear the lady I was speaking to. I thought she said I had a month to put my complaint to an employment tribunal once ACAS had contacted the respondent. I spoke last week to the lady about my case… She told me I should have submitted my case within one month of receiving the ACAS certificate. I sincerely hope this misunderstanding will not affect my case".

Submissions

43. In summary, the claimant argues that the respondent is to blame for not telephoning him about the fact of dismissal, or about an appeal, instead writing and emailing when they must have known this was unreliable, for stalling attempts by his MP to seek to overturn the dismissal, and generally, on the merits of his claim, that the refusal of special leave was unfair and should have been granted.

44. The respondent submits that the effective date of termination was 17 February 2014, when the dismissal letter was emailed, or not long thereafter, and at the very latest by September 2014. It is argued that this is when the claimant received and read the dismissal letter, or had a reasonable chance to do so. Alternatively, the effective date of termination was 20 or 21 January 2017, when he says he became aware of his dismissal. If so, he should have presented a claim by 19 or 20 April 2017.

45. Counsel seems not to have had the dates of the early conciliation certificate,

Discussion and Conclusion

46. Although the claimant has not attended the tribunal, it seems from the papers that he is literate and intelligent, he is or was a trade union member, and he has and has had, access to the internet. Other than a bad back in 2013, and his cold in the last few days, he has not been ill.

47. In the light of that, it is extraordinary that having been to ACAS within three months of 18 January 2019, when he must finally have accepted he had reached the end of the road with attempts to persuade the respondent to reverse the decision, and having got a certificate dated 4 May 2019, he did not then present a claim within one month. He explains he may have misheard because the phone line was poor, but that does not explain why he could not use the ACAS website to check the position, or why he did not ring back with a better line. The website is carefully drafted to explain in ordinary language what must be done.

48. On this ground alone the claimant is out of time and has not shown that it was not reasonably practicable to present in time. He was almost certainly aware at least by July 2017, that the tribunal had time limits. He had had access to his MP and his trade union, either of whom could have given, and probably did give him, advice on time limits. It would be very unusual for a trade union representative to suggest an approach to the MP rather than ACAS and a tribunal. It suggests he was in fact being told in 2017 that this was now his only hope, because time for a tribunal claim had expired.

49. If he was not told about time limits in 2017, it was reasonable to explore the ETS website, gov.uk, or the ACAS website to find out. He was able, in 2019, to make contact with ACAS. Very large numbers of litigants in person, some with poor written English, manage to file claims within one month of getting their early conciliation certificates. These factors all show he could reasonably have presented the claim within the currency of the ACAS certificate.

50. For completeness, and in case I am wrong about early conciliation, I move back in time to consider whether he went to ACAS within three months of becoming aware of the dismissal, and whether it was not reasonably practicable to do so.

51. I start with the effective date of termination. There are two features of this case suggesting that he probably did get the dismissal letter in February 2014 but decided to act as if he had not.

52. One is the difficulty of communication he claims. Although he supplied correspondence addresses in England and Sweden from time to time, either to the respondent or his father or both, no post ever seems to have reached him, nor, if the difficulty was real, did he ever think to ask his father to open his post and read it to him. Although he was able to communicate with the respondent by email, they could never reach him by email, even when they replied the same day to the same email address. He suggested at one point his account had been hacked some years earlier when posted to Cuba. If that

was the reason, he would either have changed his password or set up another email account – that is what other people do.

53. The other feature, as becomes clear from the claim form (it is stated as the measure of damages for a prospective tribunal award), as well as the correspondence, is that he had a motive to stay employed as long as he could, paid or not, because he wanted to apply for voluntary severance under a scheme which he understood was coming in the future.

54. If it is right that he did not get correspondence while he was in Taiwan in 2015, it is very odd that he did not receive copies emailed on 4 April and 7 July 2015, when his email had been working earlier on those days. It is very odd that he says he did not receive it in Stockholm in September 2015, when the respondent posted it to the address he had notified. The lack of any contact from then until November 2016 is also very odd if he thought he had not had an answer on his request for special leave. One reason why might be if he decided it was best to act as if he had not received one when he had.

55. Applying the guidance in **Gisda Cyf,** if he had not in fact got the dismissal letter on some date in 2014 or 2015, he should have got it on making reasonable enquiries, and it would have been reasonable to make enquiries and set up other channels if there as a problem. These would have included asking his father to read his letters to him on the phone if they were not getting through, or asking him to scan or photograph them for him, and getting a reliable email address. There would have been other important letters he would have wanted to know about (for example, HMRC may have wanted to refund tax, and they will not email) which would have merited making such arrangements.

56. Giving the claimant some benefit of the doubt on missing correspondence and emails, I find that the effective date of termination was September 2015.

57. Working from that date, there is no indication from the claimant, other than a continued breakdown in communication with his father or by email, why it was not reasonably practicable to present a claim. He could have made contact with ACAS and presented a claim online, without being in the UK.

58. If I am wrong about that, and time does run from 21 January 2017, when it is clear from his email of that date that he did know of the dismissal, I consider whether it was not reasonably practicable to go to ACAS in the next three months and present a claim once he had a certificate.

59. In the two years from then until the time he did go to ACAS, he was in the UK, he had reliable access to the internet, he knew he had been dismissed. Most people would know from media reports that unfair dismissal claims are decided by employment tribunals, and most people would have searched online to find out more. Unlike most people, he was a trade union member, and in July did consult his representative. There is no reason shown why he could not contact him before. Any competent trade union representative – and public sector unions are in general large and well resourced - would have told him about time limits and making a claim, even if he was by then (as he may have been, it is not stated) out of benefit by the union's rules. So would his MP, given that MPs and their caseworkers are often consulted about employment disputes by those without access to union advice. Even without

advice the claimant himself knew from June 2017 that he could not appeal, because the respondent said he was out of time, and could without difficulty have researched and found out that his only option was to bring a tribunal claim, and that there was a time limit.

60. If he hoped the MP would somehow persuade the respondent to overturn the decision, and that was why he did not present a claim, it was not reasonable that this prevented him claiming, or made it not feasible and not practicable. Most people would by now be aware of time limits, or ought to have been aware, and would have known or found out about ACAS, early conciliation, and employment tribunals and how to present claims.

61. Even if it was not reasonably practicable to present a claim before he heard about the appeal in June 2017, it was not reasonable to delay thereafter. Clearly he was engaged and active, telling his employer he was contacting the union and his MP, but he seems not to have contacted them until many weeks later, let alone considered ACAS and a claim.

62. So even if 21 January 2017 is the effective date of termination, the claimant has not established that it was not reasonably practicable to have presented a claim in time, rather than two years later, and even if he could establish some reasonable uncertainty until he heard about an appeal, it was not reasonable to wait so long after that..

63. I conclude that the claim was late, it is not shown that it was not reasonably practicable to have presented it in time, whichever of the contested dates is held to be the effective date of termination, in any case even when he did go to ACAS he was out of time and has not shown it was not reasonably practicable to act in time. The tribunal does not have jurisdiction to hear it. It is therefore dismissed.

Employment Judge Goodman

Date 03 March 2020

JUDGMENT SENT TO THE PARTIES ON

05/03/2020

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FOR THE TRIBUNAL OFFICE