EMPLOYMENT TRIBUNALS (SCOTLAND)

Case Nos: 4111032/2019, 4111118/2019 & 4111210/2019 P

Preliminary Hearing held by written submission on 22 April 2020

Employment Judge A Kemp

Mr J Campbell	**Claimants**
Mr L McDonnell	
Mr D Stewart	
McGill & Co Limited (in administration)	**Respondent** **No appearance or representation**

JUDGMENT

The Employment Tribunal does not have jurisdiction to consider the claims by each claimant and each claim is dismissed.

REASONS

Introduction

1. This Preliminary Hearing took place by written submission following the Preliminary Hearing held on 23 March 2020.

2. There are three claims, which have been ordered to be considered together. Each claim is for a protective award under section 188 of the 1992 Act, referred to below, and one claim is also for an unlawful deduction from wages under Part II of the Employment Rights Act 1996.

3. Each of the claimants was invited to make written submissions following the terms of the Note of the Preliminary Hearing on 23 March 2020 and duly did so. Those submissions have each been considered. The case is not defended, and the facts as set out in each written statement have been accepted as facts for the purposes of this hearing. The Employment Judge considers that it is possible to make a decision based on what has been presented, and that it is in accordance with the terms of the Rules, set out in Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulation 2013, particularly the overriding objective in Rule 2, to do so. Account has also been taken of the Presidential Guidance issued in relation to the Covid-19 pandemic.

The facts

4. The first claimant is Mr James Campbell ("Mr Campbell"). The second claimant is Mr Derek Stewart ("Mr Stewart"). The third claimant is Mr Liam McDonnell ("Mr McDonnell").

5. The claimants were all employed by McGill & Co Limited, the respondent.

6. On 1 February 2019 a meeting of the employees of the respondent was held at which it was announced that they were ceasing to trade. All employees were made redundant on 2 February 2019. No notice of termination of employment was given to them.

7. The redundancies that affected the claimants took effect on 2 February 2019.

8. The respondent went into administration on 6 February 2019.

9. Mr Campbell completed a form dated 15 March 2019 to apply for union legal aid to make a claim following his redundancy. He signed that form on that date. On that form, it included statements as follows:

> "I understand that until the union or its solicitors tell me that they will lodge a claim in the employment tribunal on my behalf it remains my responsibility to ensure that any legal claim that I wish to pursue is registered/issued in the employment tribunal within the time limit, which for most employment tribunal claims is three months less one day from the date of the act I am complaining about, or my dismissal by my employer…….. I understand there is no automatic right to legal assistance with the union. It is provided at the discretion of the union and can be withdrawn, annulled or altered at any time."

10. He also completed a form with his union with regard to a claim for a protective award, being an award under section 188 of the Trade Union and Labour Relations (Consolidation) Act 1992.

11. On 23 August 2019 the claimant's union, Unite, wrote to him referring to its receipt of his application form that day, stating that it had been posted on 22 August 2019, and informing the claimant that they could not process the form as it had "passed the deadline date".

12. Mr Campbell did not do anything on receipt of that letter, but was later, on a date not provided in his statement, informed by a former colleague that he may still be able to make a claim.

13. Mr Campbell commenced early conciliation with ACAS on 19 September 2019, the certificate was issued that day, and his Claim Form was presented on that day. He had seven years' service with the respondent.

14. Mr Stewart commenced early conciliation on 20 September 2019. The certificate was issued on 23 September 2019 and on that same day he presented his Claim Form to the Tribunal. He had seven years' service with the respondent

15. Mr McDonnell commenced Early Conciliation on 20 September 2019, the certificate was issued on that date, and his Claim Form was presented on that date. He had seven months' service with the respondent.

16. No notice of termination was given to any of the claimants.

17. The reasons given by each claimant for not doing so are set out in their written statements.

18. Mr Campbell's explanation is that he had instructed his union to make the claim for him, and they had failed to do so.

19. Mr Stewart's explanation is that he was undergoing a divorce, and was not aware of the right to make a claim. He did so when he became aware of it.

20. Mr McDonnell's explanation is that he thought that his union were handling his claim, as he had undergone a previous situation of a redundancy. He did not contact his union within three months of 2 February 2019, and did not make a formal application for legal assistance from the union at that stage. His focus was on seeking new employment. When he contacted the union shortly before commencing early conciliation, he was informed that they thought that he was employed by another entity called Vaughan Engineering.

The Law

21. A claim may be made for a protective award of up to 90 days' pay in certain circumstances under section 188 of the Trade Union and Labour Relations (Consolidation) Act 1992 ("the Act"). There is however a time limit for making that claim which is set out in section 189 of the Act. The relevant provision is as follows:

> "(5) An employment tribunal shall not consider a complaint under this section unless it is presented to the tribunal—
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> (a) before the date on which the last of the dismissals to which the complaint relates takes effect, or
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> (b) during the period of three months beginning with that date, or
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> (c) where the tribunal is satisfied that it was not reasonably practicable for the complaint to be presented during the period of three months, within such further period as it considers reasonable.

22. There are equivalent provisions under section 23(2) of the Employment Rights Act 1996, with the period of time within which a claim must be made starting at the latest from the last in a series of deductions from wages, when payment ought to have been made, but for which it is required to be made within three months of the deduction. The same provision as to reasonable practicability as set out above also applies under section 23.

23. Before proceedings can be issued in an Employment Tribunal, prospective claimants must first contact ACAS and provide it with certain basic information to enable ACAS to explore the possibility of resolving the dispute by conciliation (Employment Tribunals Act 1996 section 18A(1)). This process is known as 'early conciliation' (EC), with the detail being provided by regulations made under that section, namely, the Employment Tribunals (Early Conciliation: Exemptions and Rules of Procedure) Regulations 2014 SI 2014/254. They provide in effect that within the period of three months from the effective date of termination of employment (for a claim under section 188, for a claim of unlawful

deduction from wages the provision is not applicable, and timebar starts with the termination of employment in fact on 2 February 2010) EC must start, doing so then extends the period of time bar during EC itself, and is then extended by a further month for the presentation of the Claim Form to the Tribunal

24. The question of what is reasonably practicable is explained in a number of authorities, usually in the context of unfair dismissal where essentially the same test applies. Initial guidance was given in ***Palmer and Saunders v Southend on Sea Borough Council [1984] IRLR 119***, a decision of the Court of Appeal in England. The following was stated:

> "34. In the end, most of the decided cases have been decisions on their own particular facts and must be regarded as such. However, we think that one can say that to construe the words "reasonably practicable" as the equivalent of "reasonable" is to take a view too favourable to the employee. On the other hand, "reasonably practicable" means more than merely what is reasonably capable physically of being done. … Perhaps to read the word "practicable" as the equivalent of "feasible", as Sir John Brightman did in Singh's case and to ask colloquially and untrammelled by too much legal logic, 'Was it reasonably feasible to present the complaint to the Industrial Tribunal within the relevant three months?' is the best approach to the correct application of the relevant subsection.
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> ……..Dependent upon the circumstances of the particular case, an Industrial Tribunal may wish to consider the manner in which and reason for which the employee was dismissed, including the extent to which, if at all, the employer's conciliatory appeals machinery has been used. It would no doubt investigate what was 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. […] Any list of possible relevant considerations, however, cannot be exhaustive, and, as we have stressed, at the end of the day

> the matter is one of fact for the Industrial Tribunal, taking all the circumstances of the given case into account."

25. In ***Asda Stores Ltd v Kauser UKEAT/0165/07***, a decision of the Employment Appeal Tribunal, Lady Smith at paragraph 17 commented that it was perhaps difficult to discern how:

> "'reasonably feasible' adds anything to 'reasonably practicable', since the word 'practicable' means possible and possible is a synonym for feasible. The short point seems to be that the court has been astute to underline the need to be aware that the relevant test is not simply a matter of looking at what was possible but asking whether, on the facts of the case as found, it was reasonable to expect that which was possible to have been done."

26. In ***Marks and Spencer plc v Williams-Ryan [2005] ICR 1293*** the Court of Appeal held that a liberal interpretation in favour of the employee should be given.

27. The burden of proof is on the claimant to prove that it was not reasonably practicable to present the complaint in time: ***Porter v Bandridge Ltd [1978] IRLR 271***.

28. Where ignorance of the right, or some form of mistake, is alleged case law has established that that must be reasonable. In ***Wall's Meat Co Ltd v Khan [1979] ICR 52***, the Court of Appeal gave this guidance on the test:

> "'It is simply to ask this question: Had the man just cause or excuse for not presenting his complaint within the prescribed time? Ignorance of his rights—or ignorance of the time limit—is not just cause or excuse unless it appears that he or his advisers could not reasonably be expected to have been aware of them. If he or his advisers could reasonably have been so expected, it was his or their fault, and he must take the consequences."

29. There is an expectation on the part of a prospective claimant of making reasonable enquiry about the rights and how to vindicate them, explained in ***Riley v Tesco Stores Ltd [1980] ICR 323.***

30. Where trade unions are engaged to assist, any failure by them may not excuse a claimant who relies on them, such as in two older cases of ***Times Newspapers Ltd v O'Regan [1977] IRLR 101***, and ***Syed v Ford Motor Co Ltd [1979] IRLR 335,*** where it was held that trade union officials were skilled advisers engaged by the claimants such that wrong advice given was deemed to be that of the claimants themselves for these purposes. The basic principle had been set out earlier in the case of ***Dedman v British Building and Engineering Appliances Ltd [1974] ICR 53,*** in which the Court of Appeal made the following comments:

> "Where a claimant says that they did not know of their rights, relevant questions would be:
> '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 be inappropriate 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'."

31. If the test of reasonable practicability is met, there is a secondary element that the claim must be presented within such further period as the Tribunal considers reasonable. Generally employees are expected to commence the claim as soon as reasonably practicable after the impediment for doing so is ended. What that period is depends on the circumstances. In ***James W Cook & Co (Wivenhoe) Ltd v Tipper [1990] IRLR 386***, employees, who were dismissed for redundancy, were told by management that they would be re-employed when work picked up again. They believed what they were told and, as a result, did not make a claim for unfair dismissal. After the time limit expired, the respondent closed the premises, and the employees then realised that there had never been any intention of

keeping it going. They made complaints to the tribunal, some after a few days, some a month later. The tribunal granted extensions of time to all of them. The Court of Appeal, however, considered that a reasonable period in the circumstances was two weeks from the time of the closure, and dismissed the claims that had been made after that time.

Discussion

32. I have sympathy for the claimants, and the circumstances they found themselves in with a sudden loss of their jobs when the respondent went into administration and ceased to trade.

33. Each claimant is entitled to a minimum period of notice under section 86 of the Act. For Mr Campbell that is seven weeks, for Mr Stewart it is five weeks, and for Mr McDonnell it is one week. That in effect postpones the effective date of termination for those periods at least for the purposes of a claim of unfair dismissal. The effective dates of termination for the claimants become – for Mr Campbell 23 March 2019, for Mr Stewart 8 March 2019 and for Mr McDonnell 8 February 2019.

34. For such claims made to have been commenced in time, early conciliation would have been required to be commenced within three months of those dates, at the latest, which is to say 23 June 2019 for Mr Campbell, 8 June 2019 for Mr Stewart and 8 May 2019 for Mr McDonnell.

35. The terms of section 189 of the Act refer however to claims being presented, to paraphrase, within three months of the last date on which the redundancy “takes effect”. All redundancies were with effect from 2 February 2019. I consider that this is the date on which the redundancy happens, rather than the effective date of termination which is a different concept. The 'date on which the first of the dismissals … takes effect' was held to be the actual date by the EAT in ***GKN Sankey Ltd v National Society of Metal Mechanics [1980] IRLR 8,*** but this was later dissented from in ***E Green & Son (Castings) Ltd v Association of Scientific, Technical and Managerial Staffs [1984] IRLR 135*** in which the reference

was there to the originally proposed date for redundancies given in consultation. These cases are therefore in a different context, as in the present case there was no consultation at all. They do however in general terms I consider support the proposition that the term used in section 189 is not intended to be the effective date of termination.

36. Each of the Claims was not accordingly commenced timeously. Even if, however, the effective date of termination were to be regarded as the date for the purposes of section 189, they were each still out of time.

37. All the claims were commenced, with early conciliation and then presenting the Claim Form, outside the primary time limit. That means that if their claims are to be within the jurisdiction of the Tribunal such that it can be considered they require to establish that it was not reasonably practicable to have presented the Claim Forms in each case in time.

38. I regret to have to come to the conclusion, in light of the terms of their written statements, and having regard to the law that I am required to apply, that they are not within the jurisdiction of the Tribunal.

39. For Mr Campbell he refers to the role of the union he is a member of, but there are two difficulties with his argument. The first is that the terms of the form he signed make it very clear that the responsibility for checking about presenting a claim, and issuing it in time, remains with him. It also makes clear that there is no right to union legal assistance. There is no explanation given by him for why he did not check with union officials as to what had been done, or would be done, and when. The second difficulty is that although the form is dated 15 March 2019, the letter from his union says that it was received on 23 August 2019, having been posted the day before.

40. His Claim is materially out of time. I do not consider that any ignorance of the right to make a claim, and the time-limits that apply, can be said to be reasonable in the circumstances. In any event, even had he been able to establish reasonable practicability, he delayed from his receipt of the union

letter to 19 September 2019 before commencing the process. When the claim was already out of time, that requires very quick actions indeed. A delay of about four weeks is simply too long to meet the statutory test. Early conciliation and the other steps ought to have been commenced within a few days of the letter, if not on the day of its receipt. In fact it took about four weeks for Mr Campbell to do so. The only explanation for that is that a former colleague told him about his ability to do so, but he could have made steps to find that out himself. For all these reasons I consider that he has not met the statutory tests, and his Claim is outwith the jurisdiction of the Tribunal.

41. For Mr Stewart he refers to a divorce, his own circumstances of moving back in with his mother, and that no one at the respondent or otherwise told him of his right to make a claim, but again I do not consider that that is sufficient to prove that it was not reasonably practicable to have commenced the claim in time. As the authorities referred to above make clear any actual ignorance of the right to make a claim must be reasonable. There are many ways in which someone can inform himself about potential rights in the circumstances of a sudden cessation of trading by an employer. That includes sources such as the Citizens Advice Bureau, solicitors who may provide legal advice and assistance under the legal aid scheme, checking at libraries, and using online facilities. There were about 400 employees affected, and discussion with former colleagues could also be expected to take place. I do not consider that Mr Stewart has met the statutory test accordingly.

42. For Mr McDonnell he also seeks to rely on the role of his union, including in relation to an earlier redundancy with another employer, and a question as to whether the union knew that he was employed by the respondent, but there is insufficient detail about his own steps. He does say that his focus was on finding new employment, which is entirely understandable, but as indicated above the requirement is for any ignorance to be reasonable. Mr McDonnell says that he had been through a similar situation before when his union had helped him. His union is also Unite. Their procedures, I infer, are the same as for Mr Campbell, with a form for

applying for legal assistance to complete in the same terms. I do not consider it reasonable for someone in Mr McDonnell's position not to make an application for assistance to his union if he thought that they might assist him, or at least make enquiry of them as to what to do. I do not consider that Mr McDonnell has met the statutory test accordingly.

43. The test of reasonably practicability is not a simple one, or an easy one to meet. It is more strict than that test that applies for other employment law claims, particularly in the field of discrimination law. It is however the test that I require to apply, particularly as it is a matter that goes to the jurisdiction of the Tribunal.

Conclusion

44. Regretfully I require to dismiss the Claims of each of the claimants as they are not within the jurisdiction of the Employment Tribunal in light of the terms of section 189 of the Act.

Employment Judge: **Alexander Kemp**
Date of Judgment: **23 April 2020**
Date sent to parties: **23 April 2020**