EMPLOYMENT TRIBUNALS

Claimant: **Mr Marcus Campbell**

Respondent: **Tesco Maintenance Limited**

Heard at: **East London Hearing Centre**

On: **Monday 13 July 2020**

Before: **Employment Judge John Crosfill**

Representation

Claimant: In person

Respondent: Mr T Welch of Counsel instructed by Pincent Masons LLP

JUDGMENT

1. **The Claimant presented his claim of unfair dismissal after the time limit imposed by Section 111 of the Employment Rights Act 1996 had expired and the Tribunal has no jurisdiction to hear that complaint.**

2. **The Claimant's claim is accordingly struck out.**

REASONS

1. This has been a remote hearing on the papers which was not objected to by the parties. The form of remote hearing was 'A: audio fully (all remote)'. A face to face hearing was not held because it was not practicable. The documents that I was referred to are in the Tribunal file, the contents of which I have recorded.

2. The Claimant presented his ET1 on 14 November 2019 apparently bringing complaints of unfair dismissal and race and religious discrimination. In its response the Respondent suggested that the claims were all presented outside the applicable

statutory time limits. At a hearing before EJ Hallen the Claimant clarified that he did not pursue any claims other than a claim for unfair dismissal.

3. EJ Hallen set the matter down for a hearing to determine whether the Claimant had presented his claim of unfair dismissal within the time limit imposed by Section 111 of the Employment Rights Act 1996. He also made directions for the exchange of documents and witness statements to deal with the issue. That matter came before me today, 13 July 2020.

4. The hearing was conducted via the Cloud based Video Platform. The Claimant had not downloaded the bundle prior to the hearing but the Respondent's solicitors renewed the link that allowed him to do so. The Claimant used his mobile telephone for the hearing. The quality of his audio and video was excellent. Mr Welch used his computer. Both his video and audio gave some problems but by speaking slowly he was able to participate.

5. Having explained the issues, I proceeded to hear from the Claimant. His witness statement only briefly touched on why he had presented his claim on 14 November 2019 although he had set out his position in an e-mail to the Tribunal. I asked the Claimant a number of questions to clarify his position before the Claimant was asked further questions by Mr Welch. Once the evidence had concluded each party summarised their position. I decided to reserve my decision in order to provide a fully reasoned decision in writing.

The relevant facts

6. The Claimant was employed by the Respondent as a Store Technician. In about June 2019 a complaint was made about the content of messages posted by the Claimant on work Whatsapp group. A suggestion was made that the messages were of a homophobic nature. An investigation took place and the Claimant was invited to a disciplinary hearing that took place on 12 August 2019. The Claimant was accompanied by a Trade Union representative, Yvonne Ash. At the conclusion of that meeting the minutes that were produced by the Respondent show that the Claimant was told that he was being dismissed "with immediate effect". When he gave his evidence the Claimant agreed that he had been dismissed in the course of the meeting. I accept that was the case because the minutes show that both the Claimant and his Trade Union representative sought to persuade the manager to change his mind.

7. On the same day Claimant was sent a letter which confirmed that he had been dismissed. That letter stated that the dismissal took effect from 13 August 2019. The Claimant exercised his right of appeal. On 4 September 2019 Sandra Best, a Technical Training Manager, wrote to the Claimant offering him an appeal the following day. That proved to be too short notice and the appeal was ultimately heard on 10 September 2019. The Respondent has produced minutes of that meeting which are signed by all present. Once again, the Claimant was represented by Yvonne Ash. It is clear that the thrust of the Claimant's appeal was that he had been unfairly singled out as other people had posted messages which were more offensive than those that he had posted.

8. The notes of the appeal show that a decision was announced orally. When the Claimant reviewed the notes the accepted that he had told that his appeal was unsuccessful. The notes disclose that the Claimant politely thanked Sandra Best or

hearing his appeal and asked his training records the purposes of obtaining other work.

9. The Claimant contacted ACAS for the purposes of early conciliation on 14 November 2019. An early conciliation certificate was produced on the same day and the Claimant issued his claim at the employment tribunal. In the narrative on his ET1 the Claimant says "I am sorry for the late claim in responding to my dismissal from Tesco Maintenance". He had identified the date of his dismissal as 13 August 2019.

10. The Claimant told me and I accept that he has dyslexia which gives him some difficulty in reading and understanding documents. He told me and I accept that he has absolutely no experience of the Employment Tribunal system. It was put to him by Mr Welch that he could have consulted a solicitor. He told me, and I accept, that such a step would be beyond his financial means.

11. The Claimant explained that he had learnt of the need to contact ACAS by looking at the Internet using the Google search engine and YouTube.

The law to be applied

The Statute

12. The material parts of the Section 111 of the **Employment Rights Act 1996** are as follows:

> *111 Complaints to employment tribunal.*
>
> *(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.*
>
> *(2A) Section 207A(3) (extension because of mediation in certain European cross-border disputes) and section 207B (extension of time limits to facilitate conciliation before institution of proceedings) apply] for the purposes of subsection (2)(a).*

A two-stage test

13. Where a claim is presented outside the period of 3 months it is necessary to ask firstly whether it was not reasonably practicable to present the claim in time and, only if it was not, go on to consider whether it was presented in a reasonable time thereafter. The two questions should not be conflated. There is no general discretion to extend time and the burden of proof rests squarely on the Claimant to establish that both limbs of the test are satisfied.

The meaning of "reasonably practicable"

14. The expression "reasonably practicable" does not mean that the employee can simply say that his/her actions were reasonable and escape the time limit. On the other hand, an employee does not have to do everything possible to bring the claim. In ***Palmer and Saunders v Southend-On-Sea Borough Council*** **[1984] IRLR 119** it was said that reasonably practicable should be treated as meaning "reasonably feasible".

15. ***Schultz v Esso Petroleum Ltd*** **[1999] IRLR 488** is authority for the proposition that whenever a question arises as to whether a particular step or action was reasonably practicable or feasible, the injection of the qualification of reasonableness requires the answer to be given against the background of the surrounding circumstances and the aim to be achieved.

"Reasonable ignorance"

16. When Mr Welch made his submissions he used the expression reasonable ignorance which upset the Claimant who thought it was a direct reference to his dyslexia. I explained to him that it was a phrase which had been used in several decisions of the Court of Appeal not in a critical way but to mean an absence of knowledge ought to be ignorant of some fact or law. I hope, with that explanation, Mr Campbell does not take offence from me using the same phrase.

17. The question of whether it is open to an employee ignorant of her rights to rely upon that ignorance as a reason why it was not reasonably practicable to present a claim in time has been the subject of a number of decisions of the higher courts. In ***Dedman v British Building and Engineering Appliances Ltd*** **[1973] IRLR 379** Scarman LJ said the following:

> *"Does the fact that a complainant knows he has rights under the Act inevitably mean that it is practicable for him in the circumstances to present his complaint within the time limit? Clearly no: he may be prevented by illness or absence, or by some physical obstacle, or by some untoward and unexpected turn of events.*
>
> *Contrariwise, 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."*

18. In ***Wall's Meat Co Ltd v Khan*** **[1978] IRLR 499** Brandon LJ dealt with the issue of ignorance of rights as follows:

> *"The impediment may be physical, for instance the illness of the complainant or a postal strike; or the impediment may be mental, namely, the state of mind of the complainant in the form of ignorance of, or mistaken belief with regard to, essential matters. Such states of mind can, however, only be regarded as impediments making it not reasonably practicable to present a complaint within the period of three months, if the ignorance on the one hand, or the mistaken belief on the other, is itself reasonable."*

19. In those and in subsequent cases it has been held that the question of whether bringing proceedings in time was not reasonably practicable turns, not on what was known to the employee, but upon what the employee ought to have known ***Porter v Bandridge Ltd*** **[1978] ICR 943,** ***Avon County Council v Haywood-Hicks*** **[1978] IRLR 118**. A further proposition can also be gleaned from those authorities. Where an employee is aware that a right to bring a claim exists it will be considerably harder to show that they ought not have taken steps to ascertain the time limit within which such claims should be presented.

Causation and "reasonable practicable"

20. In ***Palmer v Southend-On-Sea Borough Council*** **[1984] IRLR 119** following a review of the earlier authorities including ***Dedman*** and ***Wall's Meat*** May LJ concluded that the question of whether a step was or was not reasonably practicable would include the advice given, or available, but that was a material consideration which would have to be taken into account along with all of the other circumstances.

21. In ***Northamptonshire County Council v Entwhistle*** **[2010] IRLR 740** after an extensive review of the authorities the then President of the EAT said that the question posed under Section 111(2) of the Employment Rights Act 1996 *"is not one of causation as such"*. In that case an earlier error by the employer has led to a negligent assumption by the Solicitor retained by the Claimant. The EAT overturned the decision of the Employment Judge that it was not reasonably practicable to bring the claim in time.

A reasonable period thereafter

22. The question of whether an employee has presented their claim within a reasonable time of the original time limit is a question to be determined objectively by the employment tribunal taking into account all material matters see ***Westward Circuits Ltd v Read*** **[1973] ICR 301, NIRC.**

23. In ***Cullinane v Balfour Beatty Engineering Services Ltd*** **UKEAT/0537/10** the then president of the EAT said:

> *"Ms Hart pointed out that the question which arises under the second stage in s 139(1)(b) is couched simply in terms of what further period the tribunal would regard as "reasonable", and not, like the question under the first stage, in terms of reasonable practicability. She submitted that it followed that the "Dedman principle" – namely that for the purpose of the test of reasonable practicability an employee is affixed with the conduct of his advisers (see, for the most recent review of the case law, Entwhistle v Northamptonshire County Council (2010) UKEAT/0540/09/ZT, [2010] IRLR 740) – does not fall to be applied. She pointed out that that principle is a consequence of the ultimate test being one of practicability (not even, be it noted, when the test was first formulated, reasonable practicability), and that the consideration of what*

further period was "reasonable" did not require so strict an approach. She made it clear that she was not saying that the fact that a Claimant had been let down by his advisers was decisive of the question of reasonableness at the second stage, but she submitted that it must be a relevant consideration.

[16] I accept the validity of the formal distinction advanced by Ms Hart, but I do not believe that it makes any real difference in practice as regards the question of the relevance of the culpability of the Claimant's legal advisers. 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. If a period is, on that basis, objectively unreasonable, I do not see how the fact that the delay was caused by the Claimant's advisers rather than by himself can make any difference to that conclusion."

24. What I take from these authorities is that, in assessing whether proceedings have been brought within a reasonable period after the expiry of the original time limit, it is necessary to have regard to all relevant matters including, where appropriate, the factors that made it not reasonably practicable to present the claim in time. Whether they remained operative may be an important matter.

Discussion and Conclusions

25. Time starts running under Section 111 of the Employment Rights Act 1996 from the 'effective day of termination'. Where a dismissal is without notice then the effective date of termination will be the date on which the decision to dismiss is communicated to the employee. Unless there are clear contractual provisions to the contrary then the existence of a contractual appeals process will not alter the date of the dismissal unless the appeal is successful - dismissal — ***J Sainsbury Ltd v Savage*** **1981 ICR 1,CA**. Whether the Claimant knew of this is a relevant consideration which I take into account below.

26. In this case the Claimant was summarily dismissed orally at the conclusion of the meeting on 12 August 2019. That is the effective date of termination of the contract. The fact that the Respondent wrote later extending the date of the dismissal is incapable of altering the dismissal that had already taken place. In fact, it makes no difference to my reasoning whether the date of termination was 12 or 13 August 2019.

27. To benefit from any extension of time from the ACAS early conciliation procedure the Claimant needed to contact ACAS 'within 3-months' of 12 August 2019. That is by 11 November 2019 at the latest. He did not do so until 14 November 2019 and so his claim was presented late (as he recognised at the time).

28. The issue for me was whether it was not reasonably practicable to present the claim in time. The Claimant has at various stages sought to rely on the following matters:

28.1. He has said that he was distracted by looking for work; and

28.2. He has pointed towards his lack of legal knowledge and experience with the Tribunal system.

28.3. He tells me that he is dyslexic.

28.4. He believes that his ET1 was presented in time because it was presented within 3 months of the date of the appeal.

29. Dealing with the Claimant's final point I have set out above that the Claimant's belief that the time limit ran from the appeal hearing is wrong as a matter of law. I accept that before me the Claimant had convinced himself that that was the case. However, I do not accept that he believed that at any time before he presented his ET1. His ET1 contains an apology for the claim being late. It follows that the Claimant believed at that time that his claim was being presented outside of the statutory time limit as he then believed it to be.

30. It follows from my finding above that the Claimant's incorrect belief that the time ran from the appeal did not impair him from presenting his claim in time because that error did not occur to him until, as he says, he went back through all of the e-mails. As any 'ignorance' arose only after the time limit had expired I do not need to decide whether it was reasonable for the Claimant to believe that the time limit ran from the appeal.

31. This is not a case where the Claimant can say that because he waited to see what the outcome of the appeal was before bringing his claim it was not reasonably practical to bring the claim earlier. The appeal process was completed by 10 September 2019. That left the Claimant just over 2 months to consider his position and to present his claim.

32. I have sympathy with the fact that the Claimant was depressed and was looking for work. I would accept that illness might make it not reasonably practical to present a claim in time. Had the Claimant provided medical evidence of the nature and scope of his depression or set out details of it in his witness statement then my decision might have been different. I must act on the evidence before me. Depression was mentioned only in passing and I cannot infer from that that it was not reasonably practical to have presented the claim in time. Depressive illnesses range from mild to severe and the Claimant did not indicate where his condition lay in that range. I note that the Claimant was looking for work, which is admirable. The fact that he felt well enough to work would suggest that he was not incapacitated by his depression to the extent that he could not present his claim on time.

33. In his evidence the Claimant said that he learned about contacting ACAS from an internet search. He accepted he was able to do this. He was aware of the fact that there was a time limit because he referred to it in his ET1.

34. I accept that the Claimant did not have any advice or assistance. Many litigants in the Employment Tribunal do not. I accept that dyslexia would mean that researching these matters would take longer than it might take another person. As I have identified above the Claimant had 2 months to do any research after his appeal was rejected. Even with dyslexia the Claimant had plenty of time to do any research. When he did the research he was able to discover that he needed to contact ACAS and that there was a time limit of 3 months to bring a claim. The Claimant could, had he wanted, have asked his trade union representative about the process of presenting a complaint to the employment tribunal.

35. Whilst I accept that undertaking research whilst adjusting to the loss of employment is arduous those facts exist in many cases. Nothing the Claimant told me explains why the ET1 could not have been submitted 3 days earlier. If he could do it on 14 November 2019 why not on 11 November 2019?

36. I had explained to the Claimant that the test of 'reasonable practicality' is not one that gives me any discretion. I am bound to apply the test as it has been understood by the higher courts. The most recent Law Commission report recommends substituting a more flexible test but as yet the law is unchanged. I fully accept that the Claimant will feel aggrieved by this decision. There would be no prejudice to the Respondent if the case proceeded. However, I cannot say that it was not reasonably practical for the Claimant to have presented his claim in time. It follows that I do not have to address the second question of whether it was presented in a reasonable time thereafter.

37. The Tribunal has no jurisdiction to entertain the claim of unfair dismissal and, as that is the only claim being pursued, then the claim should be struck out.

Employment Judge John Crosfill
Date: 13 July 2020