EMPLOYMENT TRIBUNALS

Claimant: **Mr S Amirthalingam**

Respondent: **W M Morrison Supermarkets plc**

Heard at: **East London Hearing Centre**

On: **Monday 10 August 2020**

Before: **Employment Judge John Crosfill**

Representation

Claimant: Mr Tim Deal of Counsel

Respondent: Ms Rebecca Thomas of Counsel instructed by Squire Patton Boggs

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 October 2019 bringing a complaint of unfair dismissal. The matter had been listed for a final hearing on 27 March 2020. EJ Massarella acceded to an application by the Respondent to postpone the final hearing but to hold an Open Preliminary Hearing for the purposes of determining 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 made directions that the Claimant send the Respondent any witness statement or document he relied upon by no later than 13 March 2020.

3. The hearing of 27 March 2020 was cancelled due to the Covid pandemic. The matter was then re-listed for a hearing on 22 May 2020 which was for case management only. As it appeared that the Claimant was seeking to rely on his health as the basis for saying that it had not been reasonably practicable to submit his claim on time Employment Judge Lewis, who conducted that hearing, made an order that the Claimant disclose any medical evidence by 6 July 2020.

4. The matter was listed for an open Preliminary hearing on 10 August 2020. It had been intended that that hearing was conducted in person but that proved to be impractical. The hearing was conducted by telephone.

5. The Claimant had previously been sent a bundle of documents relevant to the issue to be determined at the preliminary hearing. Unfortunately, he had not passed that to Mr Deal who had some but not all of the documents. Ms Thomas was able to have a replacement set of documents sent by e-mail. I gave Mr Deal time to take instructions.

6. The bundle prepared by the Respondent (in accordance with the order of Employment Judge Lewis) contained 2 witness statements. It was unclear whether the first related to the proceedings at all as it appeared to be a statement of a female written in support of her father. Mr Deal told me that his client did not recognise the statement. We proceeded on the basis that the other witness statement was the Claimant's evidence. The Claimant gave evidence in support of his position and was cross examined by Ms Thomas. The Claimant speaks English as a second language. Mr Deal said that whilst a translator had not been requested the Claimant was in the presence of a friend who might explain anything he did not understand. The Claimant had attended meetings with his employer (who had offered him a translator) which were successfully conducted in the English language. Whilst the Claimant was softly spoken by repeating his answers back to him he was apparently able to understand the questions he was asked.

7. Once the evidence had concluded each party summarised their position. As we had run out of time before my next hearing I decided to reserve my decision in order to provide a fully reasoned decision in writing.

The relevant facts

8. The Claimant was employed by the Respondent as a 'Night Assistant'. He had had several periods of absence from work through ill health and had been subjected to the Respondent's absence management process and had been given a final written warning. He was invited to a meeting on 10 June 2020. This meeting was held at the end of the Claimant's night shift after he had returned to work after a period of absence.

9. I was provided with minutes of the meeting on 10 June 2019. At the conclusion of the meeting the manager conducting the meeting, Mr Browne, told the Claimant that he was being dismissed 'as of today'. He was told that a payment in lieu of 12 weeks' notice would be made to him. He was asked if he understood what had been said and

the notes record him as saying 'terminated me'. The notes further record that the Claimant was informed of his right of appeal.

10. After the meeting the Claimant was sent a letter. That set out at some length the reasons for dismissing the Claimant. After those reasons was the following paragraph:

> *'In accordance with your contract of employment you are entitled to 12 weeks' notice, together with any outstanding accrued holiday pay. You are not required to work your notice period and will be paid in lieu. Your termination date will be effective 11/6/2019'*

The letter set out the Claimant's right of appeal against that decision.

11. In June or July 2019 the Claimant was given a payment marked on his pay slip as a PILON ('pay in lieu of notice') payment of just over £4,000. In the Claimant's witness statement he denies that he got that payment although in his ET1 and his oral evidence he accepts that he had.

12. The Claimant told me in his oral evidence, and I accept, that his colleagues told him, and he believed, that an appeal was likely to succeed. He sent the Respondent a letter setting out his wish to appeal. He said:

> *'I would like to appeal against my instant dismissal from work. Following from your decision being made I am not happy, I have worked very hard for this company for a number of years and I totally understand my absence is not its best and is very high, however I have been seriously ill recently which I have provided all sick notes and hospital letters. I do not feel this hasn't [sic] been taken into account properly and would like an opportunity to get my job role back'.*

13. The Respondent offered the date of 21 August 2019 for the appeal. It appears that the Claimant asked for this to be re-scheduled and a new date of 12 September 2019 was proposed. A later letter from the Respondent refers to the Claimant having been on holiday as the reason for the postponement. The Claimant did not attend the appeal on 12 September 2019. The Respondent wrote to the Claimant asking him whether he wished to have an appeal hearing. That prompted a letter from the Claimant who complained that an invitation to an appeal meeting had arrived late and that having come to the office 'a few times' he had not been able to meet up with the HR Appeal Manager conducting the process. An appeal hearing eventually took place on 14 November 2019 but the appeal did not succeed.

14. The Claimant says that on 13 September 2019 he approached a community organisation for advice. He was told to contact ACAS. He contacted ACAS on 16 September 2019 and an Early Conciliation Certificate was sent by post on 1 October 2019. The Claimant says that he received some help from a member of his community between 10 and 15 September 2019. I accept that the Claimant has received some assistance at the latter stages.

15. The Claimant presented his claim to the Tribunal on 14 October 2019. In section 5 in response to the question of when his employment had ended the Claimant put 'after June 2019'. In section 6 he acknowledged that he had been paid for a period of 12 weeks' notice. In section 15 he said this:

> *'It is unclear to me what was the date that my employment was terminated.*
>
> *This is because the letter telling me about my dismissal was dated 12 June and told me I was dismissed on 11 June, it also told me that I was entitled to 12 weeks notice that would be paid. I was paid this at the end of June. I therefore do not know whether my employment finished (i) when I received the letter, (ii) on the date of the letter, (iii) after the 12 weeks' notice or (iv) when I was paid for notice.*
>
> *If I require an extension of time then I ask for it and I will say that I was confused as to the date I was dismissed and have been suffering from depression, stress and anxiety plus ill health which has not allowed me to progress my claim any sooner.'*

16. The Claimant had not provided any medical records relating to the period from 11 June to 14 October 2019. The Respondent's solicitors had pointed out this to the Claimant in e-mails sent 16 and 22 July 2019 and invited the Claimant to submit any medical evidence in advance of the hearing. The Claimant did not do so.

17. In his witness statement the Claimant says that he was confused by the letter of 12 June 2019 which confirmed his dismissal. He goes on to say:

> *'At the time I received this letter I was simply not in a position to do very much about it as I became severely depressed and stressed and simply did not know what to do and could not focus on anything, I was unable to speak to people and could not leave the house. The news came at a very bad time for me as I am suffering from a variety of serious health complaints including diabetes, high blood pressure, skin problems which were particularly acute at the time. These conditions meant that I was in a very low condition and was unable to seek any professional help or even help from a local community centre.'*

18. The evidence before me was at odds with the suggestion that the Claimant was unable to understand the date of his dismissal and that he was unable to leave his house. The Claimant's letter of appeal refers to his 'instant dismissal'. The Claimant had been told that he had been dismissed both in the meeting of 10 June 2019 and in the letter of 12 June 2019. I do not accept that he had misunderstood what he had been told. From the correspondence during the appeal process it is clear that the Claimant had told the Respondent that he had attended the workplace and had been on holiday. He told me he went to Norwich it seems on family business. I have noted above that the Claimant's witness statement is inaccurate about receiving a payment in lieu of notice. I find that the statement has not been compiled with the care that should have been taken.

19. The Claimant told me in his oral evidence that he had attended his GP during this period but that he had not been given any letter or report. He was not asked by Mr Deal whether he had been given any medication or treatment for any 'severe depression'. When he was asked how his dismissal made him feel he said on more than one occasion that he was very upset and referred to his long service.

20. I am prepared to accept that the Claimant has a number of underlying health issues and that his dismissal was distressing. I am not persuaded that the Claimant

was suffering from 'severe depression' in the sense that phrase is used in clinical reports. I do not accept that the Claimant was unable to go out of the house. He was able to attend the workplace in August and went on holiday during that period. I do not accept that he was unable to contact people as he asks that his trade union representative attend any appeal meeting. He told me that he had discussed his dismissal with colleagues who were encouraging about his prospects of success on his appeal. Whether with assistance or not he was able to write a number of clear letters to his employer during this period.

The law to be applied

The Statute

21. 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

22. 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"

23. 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".

24. ***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"

25. 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."*

26. 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."*

27. 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.

A reasonable period thereafter

28. 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.**

29. 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."*

30. 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

31. Time starts running under Section 111 of the Employment Rights Act 1996 from the 'effective day of termination'. The statutory definition of the effective date of termination is found in Section 97 of the Employment Rights Act 1996.

32. Mr Deal sought to argue that absent a contractual right to make a payment in lieu of notice the contract of employment would not terminate unless or until the Claimant accepted the employer's breach. He suggested that this was consistent with ***Societe-Generale London Branch v Geys*** **[2013] IRLR 122**. This was not a matter that had been raised before and Ms Thomas and I needed to refresh our memories as to the applicable law. After a short break in the proceedings I drew attention to ***Duniec v Travis Perkins Trading Co Ltd*** **UKEAT/0482/13,** ***Rabess v London Fire and Emergency Planning Authority*** **[2017] IRLR 147** and ***Feltham Management Ltd v Feltham*** **UKEAT/0201/16**. Each of those authorities was, binding on me, and held that the elective theory accepted by the Supreme court in ***Geys*** had no application in the statutory scheme under Part X of the Employment Rights Act 1996. Whilst not conceding the point, Mr Deal did not seek to persuade me I should depart from that approach.

33. 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 - ***J Sainsbury Ltd v Savage*** **1981 ICR 1, CA**.

34. I find that the dismissal was communicated to the Claimant on 10 June 2019 orally at the meeting. That is the effective date of termination of the contract. To benefit from any extension of time by reason of the early conciliation process the Claimant needed to contact ACAS no later than 9 September 2019.

35. The first issue for me was whether in all the circumstances it was not reasonably practicable for the Claimant to have presented his claim in time. It seems that in an abundance of caution the Respondent referred to that dismissal taking effect on 11 June 2019 in the letter of 12 June 2019. As a matter of law that could not change the date of the dismissal but the Claimant might have reasonably believed that that was the date of his dismissal.

36. I am entirely satisfied that the Claimant understood he had been dismissed. His letter of appeal refers to his dismissal and wanting to get his role back. He plainly understood at the time he had been dismissed. I reject entirely the suggestion that the Claimant was confused by the reference to pay in lieu of notice in the letter of 12 June 2019.

37. The Respondent and the Tribunal had understood that the Claimant's primary position was that it had not been reasonably practicable to bring a claim because of his health. For that reason, directions had been made for medical evidence to be supplied. My findings above are firstly that the Claimant's witness statement is not a reliable guide to his health at the time. It contains assertions he accepts are incorrect about an ability to leave the house. His assertions about suffering from 'severe depression' are not supported by medical evidence. He has had advice from Mr Deal since the hearing on 22 May 2019. There was no application to adduce further medical

evidence. I can only proceed on the evidence I have and I am not satisfied that the Claimant's 'severe depression' was anything more than being understandably upset at having been dismissed.

38. I accept that the Claimant has diabetes. He has not provided any evidence why that would have impacted on his abilities to present his claim on time. I accept that the Claimant has a skin condition. That said during the meeting on 10 June 2019 he reported an improvement in that condition. Again, I do not find that there is sufficient evidence that that had any significant impact on his ability to present his claim on time.

39. In reaching those conclusions I am bolstered by my finding that the Claimant was able to write reasonably clear and articulate letters to the Respondent. If he had help with those letters then that would not undermine my conclusions as he could have sought the same help when taking steps to present a complaint.

40. Mr Deal painted the Claimant as a person who struggled with language and the Tribunal process. I accept that there are some language difficulties but note that the Claimant was able to work for the Respondent since 2009 and that he did not take up the offer of a translator at the dismissal or appeal meetings. Having looked at the Claimant's letters to his employers and his e-mails in these proceedings whether with assistance or not the Claimant is able to conduct sensible correspondence.

41. In his closing submissions Mr Deal sought to suggest that the Claimant had a reasonable ignorance of his right to present an unfair dismissal claim and that he was reasonably ignorant of the time limit. Dealing with the first point the Claimant did not actually say that he was ignorant of the right to bring an unfair dismissal claim. If he had said that it may have been challenged by the Respondent. It would be surprising if the Claimant having worked for the Respondent for many years was unaware of the right to claim unfair dismissal. I do not consider it is open to me to find that the Claimant did not learn of the right to claim unfair dismissal until after the time limit expired.

42. The Claimant clearly placed a lot of hope on his appeal succeeding but he did not say that he believed time would not run during the appeal process. Indeed, he issued his claim before that process ended.

43. I have not accepted that the Claimant misunderstood the effect of the dismissal letter. Had I accepted that I would have considered whether that amounted to 'reasonable ignorance'. I would not have found that it did. The letter was quite clear that there was a dismissal effective no later than 11 June 2019. Any other construction of the letter was entirely unreasonable.

44. I do not accept that the Claimant's health or language skills were any bar to him seeking advice on how and when to present a claim. In short, I consider that it was reasonably practical for the Claimant to have presented his claim on time. That conclusion means that the claim was presented out of time.

45. Had I accepted that the Claimant was unable to present his claim by 9 September 2019 I would have needed to ask whether the claim was presented in a reasonable time thereafter. The Claimant says that he had advice from a friend in the community from 10 September 2019 and from an advice centre from 13 September

2019. The Claimant did not tell me what the advice was. He does not suggest that his advisors were misled by the letter of 12 June 2019. There is no explanation why the Claimant took a further month to submit his claim. In the circumstances I would not have found that the Claimant presented his claim within a reasonable period after the original limitation period expired.

46. 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 nor that it was presented a reasonable time thereafter.

47. 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: 12 August 2020