EMPLOYMENT TRIBUNALS

Claimant: **Mr R. Rampersad**

Respondent: **Essex Partnership University NHS Foundation Trust**

Heard at: **East London Hearing Centre**

On: **29 July 2020**

Before: **Employment Judge Massarella**

Representation
Claimant: Miss E. Grace (Counsel)
Respondent: Miss V. Brown (Counsel)

JUDGMENT

The judgment of the Tribunal is that: -

1. **the Tribunal lacks jurisdiction to hear the Claimant's claim of unfair dismissal, because it was presented out of time, in circumstances where it was reasonably practicable for it to be presented in time. It is struck out.**

REASONS

This has been a remote hearing, which has not been objected to by the parties. The form of remote hearing was V: Video (CVP). A face to face hearing was not held because it was not practicable and all case management issues could be determined in a remote hearing. The documents that I was referred to are those held on the Tribunal file. The orders made are described at the end of this summary.

The hearing

1. By an ET1 presented on 24 September 2019, after an ACAS early conciliation period between 21 and 23 September 2019, the Claimant complained of unfair

dismissal, race and disability discrimination. The Claimant gave the effective date of termination as 27 August 2019 on his ET1; the Respondent in its ET3 gave it as 13 February 2019.

2. At this preliminary hearing a number of case management orders were made which are contained in a separate summary. This Judgment deals solely with the question of whether the Tribunal has jurisdiction to hear the Claimant's claim of unfair dismissal, having regard to the relevant time limits.

3. I heard evidence from the Claimant, and from Ms Julie White of the Respondent's HR department.

4. Both Counsel provided helpful skeleton arguments, and supplemented them orally; I refer to their submissions in context below.

The law to be applied

The effective date of termination

5. S.97 Employment Rights Act 1996 ('ERA') defines the effective date of termination ('EDT'), as follows:

> **(a) in relation to an employee whose contract of employment is terminated by notice, whether given by his employer or by the employee, means the date on which the notice expires,**
>
> **(b) in relation to an employee whose contract of employment is terminated without notice, means the date on which the termination takes effect […]**

6. The Court of Appeal in *Stapp v Shaftesbury Society* [1982] IRLR 326 held that, where the date of dismissal is unclear from the dismissal letter, the preferred meaning should be the one that works against the interests of the party who provided the wording (i.e. it should be construed '*contra proferentem*').

7. The EAT in *Adams v GKN Sankey Ltd* [1980] IRLR 416 held that, where a contract is terminated with notice, and the notice of dismissal refers to 'payment in lieu of notice', there are two possible interpretations: that the employee was dismissed with notice, but given a payment in lieu of working out that notice; or the employee was dismissed immediately, with payment in lieu of the notice of which he or she has been deprived (with the payment thus representing the equivalent of damages for wrongful dismissal). If the former is that case, the EDT falls at the end of the notice period, in accordance with s.97(1)(b).

8. In *Lee v Ariston Domestic Appliances Ltd* EAT 51/89 Wood J held that if there is no indication of when notice will run from or when it will expire in a dismissal letter, then it is more likely that the dismissal letter is a notice of immediate dismissal. The phrase 'payment in lieu of notice' would then almost certainly mean a payment in respect of damages for loss of opportunity to work out the notice period and the EDT would accordingly be the date that the employee was notified of dismissal.

9. In *McCabe v Greater Glasgow Health Board* [2014] UKEATS/0004/14/SM, Langstaff J observed at [6-7] that the fact that the employer would be in breach of contract in dismissing the employee summarily might be a pointer against immediate dismissal, particularly in the case of a large employer or

public authority, although this must be decided in the light of all the circumstances of the case.

Time limits

10. S.111 Employment Rights Act 1996 ('ERA') provides (as relevant):

> **(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.**

11. The Court of Appeal in *Palmer v Southend-on-Sea Borough Council* [1984] ICR 372 at [34] held that to construe the words 'reasonably practicable' as the equivalent of 'reasonable' would be to take a view too favourable to the employee; but to limit their construction to that which is reasonably capable, physically, of being done would be too restrictive. The best approach is to read 'practicable' as the equivalent of 'feasible' and to ask: 'was it reasonably feasible to present the complaint to the Industrial Tribunal within the relevant three months?'

12. In *Walls Meat Co Ltd v Khan* [1979] ICR 52 at p.56, Denning LJ held that the following general test should be applied in determining the question of reasonable practicability.

> **'Had the man just cause or excuse for not presenting his complaint within the prescribed time limit? 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 have been 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.'**

13. In the same case (at p.61), Brandon LJ drew a distinction between a Claimant who is ignorant of the right to claim, and a Claimant who knows of the right to claim but is ignorant of the time limit:

> **'While I do not, as I have said, see any difference in principle in the effect of reasonable ignorance as between the three cases to which I have referred, I do see a great deal of difference in practice in the ease or difficulty with which a finding that the relevant ignorance is reasonable may be made. Thus, where a person is reasonably ignorant of the existence of the right at all, he can hardly be found to have been acting unreasonably in not making inquiries as to how, and within what period, he should exercise it. By contrast, if he does know of the existence of the right, it may in many cases at least, though not necessarily all, be difficult for him to satisfy an industrial Tribunal that he behaved reasonably in not making such enquiries.'**

14. Where a Claimant is suffering from an illness, particularly toward the end of the limitation period, the Tribunal is entitled to find that it was not reasonably practicable for the claim to be brought in time (*Norbert Dentressangle Logistics*

Ltd v Hutton EATS 0011/13 and *Schultz v Esso Petroleum Co Ltd [1999] ICR 1202*).

The issues

15. I must first decide when the EDT was: for the Claimant, Ms Grace argues for 31 May 2019; for the Respondent, Ms Brown argues for 13 February 2019. On either case, the claim was presented out of time and the Claimant will require an extension, if the claim is to proceed. Accordingly, I must go on to decide whether it was reasonably practicable for the Claimant to issue his claim in time; if not, whether the claim was brought within such further period as was reasonable.

When was the EDT?

16. A meeting took place on 13 February 2019, at which the Claimant was dismissed by Ms Denise Cracknell. The Claimant did not attend that meeting, as he had recently had surgery; his union representative attended on his behalf. The notes of that meeting record Ms Cracknell saying:

> 'my decision is to dismiss [him] on the grounds of capability due to ill-health… He will be entitled to 12 weeks' pay in lieu of notice in addition to any accrued outstanding annual leave and my plan is to contact him today to confirm the outcome'.

17. Ms Cracknell then telephoned the Claimant. The Claimant said that he was 'not in a fit state' to take in the information which she gave him during that call. I do not accept that evidence, given the content of Ms Cracknell's email summary of the discussion, which suggests that a detailed discussion had taken place, to which the Claimant contributed. On the balance of probabilities, I find that Ms Cracknell did tell the Claimant in the course of that phone call that his employment would end on 13 February 2019. The Claimant accepted in cross-examination that she 'might have told him' this. I further find that the Claimant understood that information.

18. In any event, in a letter also dated 13 February 2019, but not received by the Claimant until 20 February 2019, Ms Cracknell wrote:

> 'It is with regret that I consider that I have no alternative but to terminate your employment on the grounds of capability due to ill-health. Your last day of employment with the Trust will be 13 February 2019 and you will receive twelve weeks' paid notice plus any accrued but untaken annual leave up to this date.'

19. That letter states explicitly that the Claimant's employment ended on 3 February 2019. In my judgment, there is no ambiguity in the wording, such as to require me to invoke the *contra proferentem* rule, as Ms Grace invites me to do. The reference to 12 weeks' paid notice is, in my judgment, plainly a reference to payment in lieu of notice, of which he had been deprived. I consider that the alternative construction, urged on me by Ms Grace (that the reasonable interpretation is that the Claimant would continue to be in employment until notice expired), is incompatible with the express reference to the 13 February 2019 being 'your last day of employment with the Trust'. I also accept Ms Brown's submission that the reference to the Claimant being paid

'any accrued but untaken annual leave up to this date' can only be consistent with a termination date of 13 February 2019. If the Claimant's employment had continued beyond that date, he would have continued to accrue holiday entitlement.

20. I find support for my conclusions in the subsequent events.

21. In an ill-health retirement form, completed by the Respondent, it was again stated that the date of termination was 13 February 2019. The Claimant submitted that form himself, as his application for ill-health retirement; in doing so, he did not query the EDT.

22. In an email of 20 February 2019, the Claimant's union representative referred to the fact that the Claimant 'is no longer employed by the Trust'; and in an email dated 25 February 2019, the Claimant himself referred to the fact that 'I am no longer an EPUT employee.'

23. As a matter of fact, in his final payslip, a payment of £8433.12 was paid to the Claimant, marked 'Lieu of Notice NP', and a payment in the amount of £2811.05, marked 'Lieu of Annual Leave'.

24. In the light of that evidence, I reject the Claimant's evidence (in re-examination) that he thought that his employment ended at the conclusion of his appeal against dismissal, on 27 August 2019, which is why he gave that as the effective date of termination in his ET1 form. All the contemporaneous evidence from February 2019 confirms that the Claimant was told by the Respondent, and understood, that his employment terminated on 13 February 2019.

25. The Claimant relied on a passage in the appeal outcome letter which said the following:

> 'the letter of 31 January 2019 does not request you to complete any ill-health retirement, only to discuss the process. During the hearing Mark showed us a letter confirming that you had received ill-health forms on 21 February 2019, you agreed during the meeting that you had received the forms and completed them during your twelve weeks' notice period which ended on 31 May 2019. Therefore, you have been given enough notice and opportunity to complete all ill-health retirement forms. Therefore, I am unable to uphold this.'

26. I accept the Respondent's evidence that this reference to a notice period 'which ended on 31 May 2019' was simply an error. In any event, it cannot retrospectively alter the fact that, by the time the statement was made, the Claimant's employment had terminated many months before.

27. Ms Grace submitted that dismissing the Claimant without notice might have been in breach of contract; she could put it no higher than that because the Claimant's contract was not in the bundle, and it was unclear whether it contained a PILON clause. Nonetheless, she submitted that, in the light of Langstaff P's comments in the *McCabe* case, it was likely that the Claimant was dismissed with notice. I reject that submission, noting that Langstaff P specifically observes at [7] that:

> **'The improbability of such an employer acting in breach of contract is however only likely to be decisive if the facts are otherwise somewhat uncertain or ambiguous and have also to be balanced to some extent by knowing that if such an employer did not wish to breach the contract by its behaviour, it could very shortly afterwards have said so and attempted to retrieve the situation. If it did not do so, this of itself would tend to support a conclusion that it's being in breach was not so improbable as first sight would suggest. I must emphasise that this is only one factor in an assessment which centrally depends on how the parties behaved: in particular, (1) what the employer (if a large employer, a manager on its behalf) actually said; (2) what the parties did; (3) what any contemporaneous documents shows was said and, more particularly, understood; (4) whether at the time the parties objectively showed that they have the same understanding of what had happened.'**

28. As will be apparent from my findings above, I do not consider that the facts are 'otherwise somewhat uncertain or ambiguous'. On the contrary, I have concluded that all parties understood at the time that the Claimant's employment ended on 13 February 2019.

29. Accordingly, in my judgment the effective date of termination was 13 February 2019, and the applicable limitation period expired on 12 May 2019.

Was it reasonably practicable for the Claimant to present his claim in time?

30. The Claimant relies on a number of factors, which he contends made it not reasonably practicable for him to present his claim in time: the advice he received from his trade union; his ill-health; and the delays in dealing with his appeal.

Advice from trade union

31. In his witness statement (at paragraph 18) the Claimant wrote:

> 'I had relied on the advice of my union representative, who pushed me to proceed with the appeal process and had not advised me about bringing a claim to the Employment Tribunal at all, least of all the time limitation for doing so.'

32. At paragraph 21 he wrote:

> 'I submitted my claim very quickly upon becoming aware of my rights and obligations in connection with seeking to bring such a claim. It happened by chance during a conversation with a friend, as I had already become so despondent and hopeless in seeking to redress the role but I felt was thrust upon me.'

33. However, in an email dated 19 February 2019 to the Claimant, Ms Caroline Hennessy, the Claimant's union representative, wrote:

> 'I will be getting a view from Thompsons later this week on whether they feel that the Trust should have waited for the OH report. Although I do feel that as your own consultant had signed you off until May it's unlikely that that fact would have made much of a difference. If this is the same view as Thompsons then I'm afraid there is nothing more we can do. The trust, as far as I can see, has followed their process to the book.'

34. In an email dated 25 February 2019, Ms Hennessy wrote:

> 'In terms of your case, I phoned Thompsons and even though they did not have the occupational health report, the solicitor felt that the note from your consultant that signed you off until May was enough to be able to dismiss you on the grounds of ill-health.
>
> Can you please send to any paperwork you will receive from the appeal meeting so that I can double check it and go back to Thompsons if I spot anything in there. I'm afraid at the moment there is no legal recourse to pursue but please let me have sight of the paperwork so I can check to see I can't find anything.'

35. In cross-examination, the Claimant agreed that these emails showed that his union representatives were liaising with Thompsons about getting legal advice, and that the purpose of that advice was to consider bringing a Tribunal claim in relation to his dismissal. He further agreed that in these emails Ms Hennessy was informing him that she did not think that he had a meritorious claim.

36. In view of these emails, and the Claimant answers in cross-examination, I reject his evidence that his union had not advised him about bringing a Tribunal claim, and that he was unaware of his right to bring a claim before a chance discussion with a friend much later in the year. I accept Ms Brown's submission that the evidence suggests that by late February 2019, the Claimant's union and solicitors had concluded that he had poor prospects of succeeding in a Tribunal claim, and had advised him accordingly. The very fact that these emails do not set out the advice in more detail suggests to me that there must also have been oral discussions between the Claimant and his representatives as to the prospects of a Tribunal claim.

37. I find that the reason why the Claimant did not issue a claim within the relevant time limit was not because it was not reasonably practicable for him to do so, whether through ill-health or the protracted nature of the appeal process, but because he had been advised by his trade union that such a claim would not succeed, and he had accepted that advice. He made a conscious choice not to issue a claim. If that advice was incorrect and, as a result, the Claimant's claim is time-barred, the Claimant's remedy lies in a claim of negligence against his union. Negligent advice does not provide good grounds for an extension of time under the 'reasonably practicable' test.

38. Nor do I consider it likely that his trade union representative did not give him information as to time limits; on the contrary, I consider it inherently unlikely that experienced trade union representatives, supported by a specialist firm of solicitors, would not advise one of its members as to time limits.

39. If I am wrong about that, I considered whether, as someone who was aware of his right to bring a claim (as evidenced by the fact that he had been advised as to prospects of success), the Claimant acted reasonably in not himself making enquiries as to how, and within what period, he should exercise that right. If it is right that the union failed to advise him about time limits, the Claimant provided no good explanation as to why he did not ask it to do so: he was able to liaise with them very capably on other questions. He had no further contact with other solicitors about a possible claim until January 2020, when he went to see the firm of solicitors which is now on the record for him.

40. For completeness, I considered whether the Claimant ill-health provides a satisfactory explanation for any failure on his part to make enquiries as to what the relevant time limits for bringing a claim would be.

The Claimant's ill-health

41. In 2017, the Claimant underwent an operation on his spine, which allowed him to return to work in March 2018. On 9 May 2018, he was injured in a road traffic accident. He was unable to return to work and had further surgery on 23 January 2019.

42. The Claimant stated that, during the period between February and August 2019, he was in continuous pain, and underwent physiotherapy for three months. He started a course of counselling on 4 March 2019, which he found useful, although he explained that they did not alleviate all of his mental health issues and concerns. In February 2020 he commenced a course of CBT, and was referred to a psychiatrist.

43. I was taken to the following references in the medical records to mental health issues.

44. On 31 January 2019 his GP recorded:

> 'Received a call from a counsellor from an organisation called OH Assist… The service has been offering support to our patient and wanted to make us aware that he has had suicidal thoughts, mentioning he has had thoughts of taking an overdose, suffering severe back pain, struggling with work and low mood. Asking/advising if help can be arranged please.

45. On 1 February 2019, the GP referred the Claimant to the Mental Health Team. On 13 March 2019, the Claimant was diagnosed with Post-Traumatic Stress Disorder and Persistent Depressive Disorder, requiring a psychiatric referral.

46. On 21 February 2019, i.e. shortly before the diagnosis of PTSD, the Claimant sent a letter appealing against his dismissal. It is a comprehensive, four-page document, sent one day after he received the outcome. Although the Claimant explained that he had some help from his wife in drafting this letter, he acknowledged that he was personally involved in its preparation.

47. On 25 February 2019 the Claimant wrote the following email to his trade union [*original format retained*]:

> 'thank you for your email. I have sent the appeal today and also sent you a copy by post. I have also received the pension paperwork from Stacey Oliver HR, but she has put old information about my illness (letter dated from Dr Fox of 25 October 2018). There is not adequate and up-to-date information about illness such as my hospital stay in June 2017, spinal surgery in October 2017 and my recent spinal surgery in Jan 2019. However, I am seeing Occu. Health Dr Fox on 26 February 2019 as planned appointment, I am wondering whether he will see me or not as I am no longer an EPUT employee. If he will then where is he sending his report. I have to wait and see about the outcome. I will keep you informed for any developments.'

48. I note that, in this email, the Claimant deals capably with a number of issues and gives every indication of being alert to his own interests.

49. On 28 February 2019 the Claimant had an occupational health appointment, which he attended in person.

50. On 3 May 2019, just before limitation expired, the Claimant's GP records read [*original format retained*]:

> 'not such a positive week – has been an extreme pain – maybe because – has been to physio is back in rehab class & has been trying to walk around a little more – bittersweet results – trying to stay positive – embrace the not so good days – he has been an extra-strong pain killers and is trying to rest when he can – determined to keep focused on the light at the end of the tunnel'.

51. On 20 May 2019, just after limitation expired the GP notes record:

> 'cannot walk more than 10 yards without pain, using stick, cannot bend to wash himself, wife helps to dress, cannot go out to socialise, cannot drive, cannot sit more than 15 to 20 min, cannot sleep at night, due to pain'.

52. I accept, of course, that the Claimant was experiencing both physical and mental ill-health throughout the period. However, there is no medical evidence that those health difficulties rendered it not reasonably feasible for him to make enquiries about time limits, or indeed to issue proceedings, throughout this period. I accept Ms Brown's submission that the Claimant has provided no good explanation as to why it was feasible for him to issue proceedings in September 2019, but not in May 2019. The medical evidence suggests that there was little significant difference in his condition as between those two points.

53. The fact that the Claimant was able to lodge and pursue an appeal against his dismissal, lodge an application for ill-health retirement, attend an OH referral in person, correspond personally in some detail with his representatives, all at a time when he was experiencing ill-health, suggest that, had he elected to do so, he could have issued proceedings within the limitation period. The fact that he had assistance from his wife in taking those steps does not advance his argument; on the contrary, he could have taken advantage of her assistance to make further enquiries about time limits, or to issue proceedings.

54. Consequently, I am not satisfied that it was not reasonably practicable, by reason of ill-health, for the Claimant to make enquiries as to the relevant time limits; for the avoidance of doubt, nor am I satisfied that it was not reasonably practicable, by reason of ill-health, to present his claim in time.

<u>The conduct of the Claimant's appeal against dismissal</u>

55. The final matter relied on by the Claimant is the length of time it took the Respondent to deal with his appeal. It is right that the appeal process was protracted. The Claimant submitted his appeal on 21 February 2019. He received a response from the Respondent on 12 April 2019, arranging a hearing for 29 April 2019. He asked for further time to prepare. On 22 May

2019, the Respondent wrote to the Claimant acknowledging his request to postpone the hearing. A new date was arranged for 2 July 2019, but then cancelled by the Respondent. The appeal hearing went ahead on 31 July 2019 and the letter dismissing the appeal was sent on 27 August 2019.

56. The existence of an impending appeal does not itself provide grounds for a finding that it was not reasonably practicable to present a complaint in time. As Ms Brown points out, there is no suggestion that the Claimant was deceived or misled by the Respondent, nor that he was told that the internal procedures extended the time limit, whether by the Respondent or by his own representatives. On the contrary, it is his case that his representatives failed to advise him altogether as to his right to issue proceedings, or the time limits for doing so.

Conclusion

57. The Claimant presented his claim of unfair dismissal some four and a half months out of time, in circumstances where it was reasonably practicable for him to present it in time. Consequently, the Tribunal lacks jurisdiction to hear this claim and it is struck out.

Employment Judge Massarella
Date: 18 August 2020