EMPLOYMENT TRIBUNALS

Claimant:
Mr Gary Tipple

Respondent:
RJD Fabrications Ltd
(in Administration)

RECORD OF A PRELIMINARY HEARING

Heard at: Leeds (by Phone - recorded) **On: 30 July 2020**

Before: Employment Judge R S Drake (sitting alone)

Appearances
For the Claimant: No Attendance
For Respondent: No Attendance

RESERVED JUDGEMENT ON PRELIMINARY ISSUE

1 The claim for a Protective Award under Section 189 Trade Union & Labour Relations (Consolidation) Act 1992 ("TULRCA") having been presented on 24 March 2020 is out of time by 159 days (the period from 4 March 2020 to 24 March 2020 covered by the Claimant's ACAS Early Conciliation Certificate having followed the expiry of the time limit as prescribed by Section 189(5) TULRCA, thus having no effect on the running of time) thus causing the expiry date for issuing proceedings to be 17 October 2019 (the "Primary Period") in relation to termination of employment which he asserted was without notice or pay in lieu on 18 July 2019 and alleged causing events.

2 The Claimant has not established it was not reasonably practicable to issue his claim in time or that he issued within a reasonable time after expiry of the Primary Period.

3 The claim is therefore dismissed for want of jurisdiction as the Tribunal may not hear it.

REASONS

1. I noted that this hearing was listed to consider a preliminary issue as to jurisdiction as specified by EJ Deeley in her Orders date 15 July 2020. The Respondents assert that the claim was issued outside of the time limit specified by S189(5) TULRCA and if relevant also Article of the Employment Tribunals Extension of Jurisdiction (England & Wales) Order 1994 (the "Primary Period") and that the Claimant cannot show it was not reasonably practicable

to issue within the Primary Period as defined by S189(5) TULRCA and S111(2)(a) ERA and that he issued within a time the Tribunal could find reasonable thereafter.

2. After hearing evidence from the Claimant in the sole form of a message to the Tribunal dated 20 July 2020 and read submissions from both sides, and having ascertained that though the Claimant didn't attend today's hearing in person or by phone and that the Respondent's Administrators had stated in writing (the ET3) they assert the Tribunal does not have jurisdiction to hear the claims and that they would not consent thereto, I decided to make my decision on the basis of what/all the documentary material before me being the pleadings and the correspondence referred to above.

3. I have concluded that I do not find that the Claimant's arguments are sufficiently persuasive to discharge the onus upon him as set out by the law outlined below, but that indeed the Respondent's arguments in response are more than persuasive and are compelling to the extent that I find myself bound by the Court of Appeal's decision in **Dedman v British Building & Engineering Appliances Ltd [1973] IRLR 379**

Facts

4. I find the following: -

   a The Claimant was summarily dismissed on 18 July 2019 from which date time started running and was not interrupted by submission to ACAS for Early Conciliation which started on 4 March 2020 and ended 20 March 2020;

   b The Primary Period for issuing claims in respect of the Claimant's dismissal and any accrued rights therefore expired on 17 October 2019;

   c The Claimant only thereafter initiated the ACAS Early Conciliation process which took place outside the Primary Period;

   d The claimant lodged his claim so as to be received by the tribunal on 24 March 2020 and he was thus 159 days out of time;

   e He issued his claim electronically and has communicated with the tribunal throughout by email thus demonstrating his ability to communicate using modern means;

   f He didn't produce any evidence from a Doctor to suggest any medical based difficulty, But when challenged by employment judge Daly to explain why he was so far out of time by her letter dated 15th of July his only response was to make a reply by email dated 20th of July;

   g In that email he says " …the reason I am taking this to a tribunal is no notifications on being made redundant ... no notifications of redundancy ... several of my work mates have been to tribunal already and wone case ... reason I didn't apply before now RJD or KMPG administration never gave any information saying I could …" ;

   e The Claimant Has not ever made nor now makes any other representations to explain his delay or as to why the tribunal should conclude that he issued within a reasonable period of time after the primary period expired;

   f The Claimant is an apparently intelligent person capable of using IT methods of communication and research as to his rights and he has not shown he faced any

physical or medical barriers (such as, non-exhaustively, hospitalised absence from normal life) to issuing his claim and certainly nothing put in his way imposed upon him by the Respondents so as to prevent him being able to take advice and act upon it within due time;

g He does seek to argue he was misinformed as to time limits and compliance therewith or that may have been mistaken in this respect having been in receipt of advice throughout all relevant times;

h If the claims proceeded, the Respondent would have to call many witnesses and require them to recall events and oral statements after a long passage of time in relation to the matters complained of, and would face greater difficulty in defending the Claimant's testimony than the Claimant himself would face if the claims proceeded;

i No explanation was given by the Claimant as to why it took him a further just less than two-month time period after expiry to issue his claims sufficient to show such delay was not unreasonable.

The Law

7. Both S189(5) TULRCA and S111 ERA 1996 provide as follows:

(1) An employee may present a complaint to an Employment Tribunal against an employer that he was unfairly dismissed

(2) An Employment Tribunal **shall not** *(again my emphasis) consider a complaint under this section unless it is presented—*

(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.*

8. The burden of proving that it was not reasonably practicable to present a claim in time is a high threshold and rests firmly on the Claimant **Porter v Bandridge Ltd [1978] ICR 943**).

9. In **Palmer v Southend BC [1984] ICR 472** the Court of Appeal held that "reasonably practicable" does not mean reasonable, and does not mean physically possible, but means something like "reasonably feasible". This is later elaborated by the EAT in **Asda Stores Plc v Kauser [2007] EAT 0165/07** by saying "the relevant test is not simply a matter of looking at what was possible but to ask whether on the facts of the case as found, it was reasonable to expect that which was possible to have been done"

10. I accept that it is trite law that where a Claimant is misadvised on limitation by a skilled advisor, the Claimant will be fixed with his advisor's default. As Lord Denning expressed in **Dedman v British Building and Engineering Appliances Ltd [1974] ICR 53** at para 18,

authoritatively approved most recently as a proposition of law by Lord Phillips MR in **Marks & Spencer Plc v Williams-Ryan [2005] ICR1293** (with emphasis added):

*" … **What is the position if he goes to skilled advisers and they make a mistake? The English Court has taken the view that the man must abide by their mistake**. There was a case where a man was dismissed and went to his **trade association** for advice. They acted on his behalf. They calculated the four weeks wrongly and posted the complaint two or three days late. It was held that it was 'practicable' for it to have been posted in time. He was not entitled to the benefit of the escape clause.* [*See* **Hammond v Haigh Castle & Co Ltd [1973] IRLR 91**]. *I think that was right. **If a man engages skilled advisers to act for or advise him – and they mistake the time limit and it is presented too late – he is out. His remedy is against them** … "*

11. I am aware of the following paragraph from **Williams-Ryan**, where at Paragraph 47, Lord Justice Keene said (again emphasis added) referring to the CAB but which I infer could just as appropriately be said of ACAS in the present case:

> " … *I would emphasise the importance of recognising that this is not a case … where the employee received advice from the CAB to await the outcome of the internal appeal procedures before making a complaint to an Employment Tribunal. The Employment Tribunal, in its Extended Reasons, records that in the short telephone conversation Ms Williams-Ryan had with someone at the CAB, there was, so far as she could remember, no discussion about taking a complaint to an Employment Tribunal. Nor does one know what questions the CAB staff member was asked during the course of that conversation.* ***This, therefore, is not one of those cases where an employee has been wrongly advised by a skilled adviser, nor one where it seems likely that the employee had a remedy against that adviser***".

12. By contrast, Claimant in the present case the Claimant does not seek to assert that he was advised or misadvised at any relevant time. **Williams-Ryan** does not therefore support the Claimant's implied argument that it was not reasonably practicable to advance his claim in time. If the Claimant was wrongly advised by any party, then his claim rests there in the words of Denning MR in **Dedman**.

Conclusions

13. The Effective Date of termination of employment and thus the starting point for the running of time for the purposes of S189(5) TULCA and S111 ERA was 18 July 2019. This is common ground for both parties. The Primary Time Limit expired 17 October 2019 and in this case was not extended by early conciliation sought via ACAS because it was also commenced out of time thus causing the expiry date of the Primary Period to remain as 17 October 2019

14. Further, I find that an unexplained or at best an unsatisfactorily explained delay occurred thereafter. All the Claimant can say is that he saw ex colleagues being successful in claims. This supports me in my finding that if he knew of such success, this did not prevent him but indeed encouraged him to apply and he could have done so in time but failed to do so.

15. There is no other explanation given by the Claimant and no change in circumstance which made ability to take action, advice, and act for himself into an inability to do so such that it was not reasonably feasible to issue proceedings before 17 October 2019. No evidence is

available to show that a further delay of nearly five months meant that issuing on 24 March 2020 was within a reasonable time after 8 September 2018.

14. The Claimant's claim is clearly out of time, about which there can be no argument at all. His case today does not sufficiently explain why and does not go anywhere near establishing it was not reasonably practice able to issue in time. It is clear from the authorities referred to in all the relevant submissions before me that his error of judgment as to time limits was no more than that, despite access to a skilled adviser, and is insufficient to show that it was not reasonably practicable for him to have brought her claims in time.

15. I judge the balance of prejudice to favour the Respondents as is clear from my factual finding above.

18. The Claimant faces the burden of proof and he must (1) prove to the Tribunal that it was not reasonably practicable for him to have brought his claims in time; and (2) persuade the Tribunal that there are exceptional reasons justifying the extension of the time limit for bringing the claims. I find there is no valid basis for the Tribunal to accede to any of these applications for the reasons given above having taken all evidence and submissions into account.

19. The claim is time-barred and is therefore struck out for want of jurisdiction.

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Employment Judge R S Drake

30 July 2020