EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4100045/20 (V)

Held on 27 August 2020

Employment Judge J M Hendry

Mr S Thain	**Claimant** **In Person**
SSE Contracting Ltd	**Respondent** **Represented by** **Ms L Finlayson,** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The claims made by the claimant against the respondents of unfair dismissal, unlawful deduction from wages and breach of contract being time-barred and the Tribunal having no jurisdiction to hear them are dismissed.

REASONS

1. The claimant in his ET1 sought findings that he was unfairly, constructively dismissed by the respondents and that they had failed to pay his properly between March and December 2018 and made various deductions from wages.

2. The respondent's denied the claims and took the position that the claims were time-barred.

3. The case proceeded to a preliminary hearing on time-bar which took place by CVP on 27 August 2020. I heard evidence from the claimant then after submissions from the respondents. I made the following findings in fact:

1. The claimant is Stephen Thain. He is years of age. He lives at 22 Firthview, Dingwall, Ross-shire, IV15 9PF. The claimant was employed by the respondents for approximately 16 years latterly as an Electrical Project Manager.

2. The respondents were involved in a contract in Craigellachie and the claimant was involved with that contract. There were difficulties with the contract which led to pressure on the claimant and other staff.

3. He began to experience various difficulties at work. He believed that his workload was too high and that it had precipitated an extended illness in 2016. The claimant complained about workload and pressure at work.

4. In early 2019 the claimant was disappointed to learn that although some staff had been made redundant he was not. The respondents wanted to keep his services.

5. The claimant was involved in a dispute in relation to travel expenses claimed by those working with him. He agreed to liaise with the company and co-ordinate the dispute on their behalf. The staff wanted to take legal advice and the claimant agreed to speak to a friend who was a solicitor in about March 2019 to ascertain how the claim could be progressed. These claims ultimately proceeded to the Employment Tribunal proceedings being taken.

6. Matters did not improve at work for the claimant. He was working overtime and he had issues over the payment of the overtime claimed by him.

7. The claimant felt that he could not carry on working for the respondents given the difficulties that had occurred and that were continuing in relation to his work. He handed in his notice on 19 July 2019. His leaving date and effective date of termination was 16 August 2019.

8. The claimant was paid monthly. His last salary was paid on 23 August 2019.

9. The claimant lodged a grievance. The initial grievance was rejected and he appealed. The claimant was hopeful that the respondents would uphold his grievance in relation to his claim for various monthly payments and he was ultimately disappointed by that failure to do so and the delay the process took.

10. Over Christmas 2019 the claimant spoke to his father about these difficulties and on his suggestion took legal advice. The claimant contacted the Citizens Advice Bureau who put him in touch with ACAS. He contacted ACAS and looked at their website. He applied to ACAS for an early Conciliation Certificate on 21 December 2019. The claimant then raised the current proceedings on 6 January 2020.

11. The claimant is an articulate, intelligent and able person. He rose through the ranks in SSE from an Apprentice to Project Manager. He is conversant with the use of the internet and uses it both socially and at work. The claimant was aware of the general terms that employees could make claims against their employers in the Employment Tribunal system. He was aware of the concept of unfair dismissal but unaware of time limits and when such time limits were applied.

Credibility

4. I found the claimant to be a credible and reliable witness who gave his evidence in a clear manner. He was clearly affected by the events leading up to his resignation and this impacted on his evidence.

Submissions

5. The respondent set out their submissions in writing prior to the hearing. They had arranged for this to occur to allow the claimant as a party litigant an opportunity of considering those submissions prior to the hearing.

6. The respondent's solicitor first of all referred to Section 111(2) of the Employment Rights Act 1995 which deals with time limits. Section 111(2) is subject to section 207(B) which extends the time limit for submitting a claim in order to facilitate early conciliation. As the claimant did not contact ACAS until after the date on which the original time limit had already expired, section 207B of the Employment Rights Act 1996 did not operate to extend the time limit and the claim was submitted out of time.

7. She submitted that the burden rests on the claimant to persuade a tribunal that it was 'not reasonably practicable' to bring a claim in time (**Porter v Bandridge Ltd [1978] ICR 943, CA) at 948**). The Tribunal will often focus on the 'practical' hurdles faced by the claimant, rather than any subjective difficulties such as a lack of knowledge of the law or an ongoing relationship with the employer. Referring to the case of **Dedman v British Building and Engineering Appliances [1973] IRLR 379**, the solicitor quoted Scarman LJ who held that practicability does not always mean "knowledge". Where a claimant states a lack of knowledge as to the time limits, Scarman LJ found that the Tribunal should ask ([1974] ICR at 64): "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'."

8. The respondent's position was that if a claimant (as here) knows of the facts giving rise to the claim and ought reasonably to know that they had the right to bring a claim, then it would normally be reasonably practicable for them to bring a claim in time. If a claimant has some idea that they could bring a claim but does not properly investigate his rights, then a tribunal is even less likely to extend time. A belief that time does not run for the purpose of Section 111(2) ERA whilst an internal appeal is pending can be reasonable depending on the facts (**John Lewis Partnership v Charman UKEAT/0079/11/ZT (unreported)**). In **Bodha v Hampshire Area Health Authority [1982] ICR 200** the court held that: *"There may be cases where the special facts...may persuade an Industrial Tribunal, as a question of fact,..that it was not reasonably practicable to complain to the Industrial Tribunal within the time limit. But we do not think that the mere fact of a pending internal appeal by itself is sufficient to justify a finding of fact that it was not "reasonably practicable" to present a complaint to the Industrial Tribunal"* Per Browne - Wilkinson J 205C.

9. In the present case, the claimant has not shown why, in the circumstances, it was not reasonably practicable for him to bring a claim within the three month time limit. It is the respondent's submission that the claimant has failed to adduce any compelling evidence in this regard. He has stated that he waited to contact ACAS until after the grievance and appeal process concluded. The claimant is an intelligent and educated man and would be capable of conducting the necessary research or seeking out the necessary advice in order to submit his claim in time. He has access to the internet meaning that he had access to an abundance of online information which would explain the time limits for bringing a claim in the Employment Tribunal. He also demonstrated that he knows how to obtain legal advice.

10. Ms Finlayson continued that if it is found that it was not reasonably practicable to have presented the Constructive Unfair Dismissal claim in time the Tribunal must then decide whether it was presented 'within such further period as the

Tribunal considers reasonable' (section 111(2)(b) Employment Rights Act 1996). The relevant considerations under this test were set out by Mr Justice Underhill in **Cullinane v Balfour Beatty Engineering Services Ltd EAT 0537/10**. There is no information in the ET1 or further particulars as to why the claimant waited a further 6 days after receiving his Early Conciliation Certificate before presenting his claim The same ‘’Reasonable Practicability’’ test is used in Section 23(2) of the Employment Rights Act 1996 provides that an Employment Tribunal shall not consider a complaint of unlawful deduction of wages unless it is presented to the Tribunal before the end of the period of 3 months beginning with: (a) in the case of a complaint relating to a deduction by the employer, the date of payment of the wages from which the deduction was made. Section 23(3) provides that where a complaint is brought under this section in respect of a series of deductions, the reference in 23(2) to the deduction is to the last deduction in the series. 4.3 Section 23(2) is subject to section 207(B) which extends the time limit for submitting a claim in order to facilitate early conciliation. The claimant did not contact ACAS to commence Early Conciliation until 21 December 2019 after the date on which the original time limit had already expired, section 207B of the Employment Rights Act 1996 did not operate to extend the time limit and the claim was submitted out of time.

Judgment

11. Time limits are ubiquitous in modern life and Employment Law is no exception. Section 111(2) of the Employment Rights Act 1996 provides that an Employment Tribunal shall not consider a complaint of unfair dismissal unless it is presented to the Tribunal:- (a) before the end of the period of three months beginning with the effective date of termination, (Section 111(2)(a)); 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 (Section 111(2)(b)).

12. The Rules in relation to Early Conciliation operate to extend time limits in certain circumstances. They do not assist the claimant here.

13. The claimant described what he believed to be unreasonable behaviour on the part of his employers that had affected his health. Because of the continuing pressure of work, his health and for family reasons he decided to resign but at or about the same time he lodged a grievance in relation to longstanding failures on the part of the respondents, as he saw it, to properly pay him for additional hours worked and other matters relating to payment of his salary and expenses. Although I accepted his evidence that he lodged the grievance and then the appeal in the hope that the company would resolve matters it is noteworthy that he had obtained new employment in the interim and did not seek reinstatement in his ET1. It is difficult to understand therefore why he did not proceed with an unfair dismissal claim at about the point he resigned rather than await the result of a grievance process, which would not lead to reinstatement or re-engagement on more suitable (from his point of view) terms.

14. The core issue in this case is that the claimant was aware, in general terms, of Employment Tribunals role in the workplace and had been involved in assisting fellow employees in collectively pursuing a claim for travel expenses both internally and finally through raising an Employment Tribunal claim. He explained that he contacted a solicitor he knew personally and also the CAB to get advice on their behalf. The submission by Ms Finlayson that he was well aware of how to get appropriate advice is well made.

15. Unfortunately, from the claimant's point of view he did not protect his own interests by seeking advice from a solicitor or CAB or looking into the matter of time limits on the Internet himself as he was well capable of doing. His ignorance of the time limits and his belief that he could wait until internal processes concluded was not reasonable. His explanation that he trusted that the respondents would finally 'do the right thing' is difficult to accept given that he was aware that his colleagues eventually had to raise Employment

Tribunal claims of their own in the hope of vindicating their rights against the respondents.

16. The claimant suggested that he had in some way been ‘‘strung along’’ or ‘‘filibustered’’ by the respondents in relation to the grievance and appeal process but that is simply a suspicion on his part. He did not provide any evidence from which such a conclusion could be inferred nor point to any actions which deceived or misled him. The matter boils down to the fact that the claimant neglected to protect his own interests.

17. In the circumstances of this case it was reasonably practicable for the claims to be made on time and as a consequence the claims are out of time. The Tribunal has no jurisdiction to entertain the claims and they are dismissed. If the claimant wishes to pursue contractual claims against the respondents then he must apply to the Civil Courts.

Employment Judge Hendry

Dated: 1st September 2020

Date sent: 1st September 2020