EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4100474/20 (V)

Held on 3 November 2020

Employment Judge J M Hendry

Mrs F Milne	**Claimant** **In Person**
Bodco Ltd	**Respondent** **Represented by** **Mr S Allison** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The claims for notice pay and accrued wages made by the Claimant having been made out of time, when it was reasonably practicable for them to be made timeously, the Tribunal has no jurisdiction to consider them and they are dismissed.

REASONS

1. The Claimant raised proceedings against Bodco Ltd. The claims arose out of the Respondent company taking over the public house and restaurant business formerly run by the Claimant's original employer ''Beerbelly''.

2. The case was due to proceed to a Preliminary hearing on time-bar on the 3 November 2020. The parties had, however, agreed a statement of facts and

a schedule of loss and it was agreed at the outset of the hearing that the Tribunal would hear evidence about the merits of the claims and also deal with the issue of time-bar. If the Claimant was successful in surmounting the time bar issue the Tribunal would issue a Judgment dealing with the merits of the case. This was in accordance with the overriding objective to deal with the claims efficiently.

3. The Tribunal heard evidence from the Claimant Mrs Fiona Milne and also from the Director of the Respondent Company Mr Gavin Stevenson. The Tribunal considered the Joint Bundle of Productions (JB 1-22).

Facts

4. The Claimant worked at the Mains of Scotstown Public House in Bridge of Don, Aberdeen from 4 December 2006 until termination of her employment. The premises, until latterly, had been run by a company '' Beerbelly'' owned by a Martin Young. Mr Young had a number of licensed premises in and around Aberdeen and the office situated at the Mains of Scotstown was used to provide shared services for these other business enterprises. The Claimant was employed as Finance and Payroll Assistant at the premises.

5. In about June 2011 she received a copy of her Statement of Main Terms of Employment (JB17). In terms of that Statement she was advised in terms of Clause 22 that she was entitled to Notice of one week for every year of continuous employment up to a maximum of 12.

6. The premises at Mains of Scotstown were owned by a brewery "Punch'' and leased to Mr Young's company. The Claimant heard in about April 2019 that Mr Young did not intend renewing the lease of the premises which was due to expire that year. The business was not doing well.

7. The Claimant heard nothing formally from her employers until she saw a post on the company Facebook page in about June. It was indicated there that the company would cease trading at the premises when the lease expired in

August but that jobs would be preserved as most employees would pass to the new lease holders or be allocated jobs in other parts of the business.

8. There was no formal consultation with the Claimant or other staff either on the part of the employers, ‘‘Beerbelly’’ or any other party. Mr Young had an informal discussion with the Claimant at some point during this period. He indicated that he did not have a similar position in his other businesses for the Claimant and it was in her best interests to stay where she was due to her length of service as there was a possibility of her being made redundant by the incoming employers. She asked if he would make her redundant. He considered the matter and later told her that he didn't want to do this as his company was going into liquidation and that a redundancy of just one staff member would raise issues.

9. The Claimant noted that her employers began moving assets and equipment out of the premises and she became aware that the date of the transfer to the new lease holders was the 28 August 2019.

10. Mr Young approached the owners of the premises ‘‘Punch’’ and also made contact with a Mr Gavin Stevenson who he knew and asked if he would take over the business. Despite the relatively short notice he agreed to do so.

11. On 28 August Mr Young came into the Claimant's office. Her computer and files had been removed. Only the personnel files of staff who were remaining in the business remained. He explained that a transfer of the business had taken place and that he had spoken to Gavin Stevenson, the owner of Bodco Ltd and that she was to be made redundant. He said he had left £3,000 in stock to cover the cost of the redundancy. He explained that Bodco Ltd were to start trading immediately which they did that day.

12. The Claimant was due to finish work at 3.30pm. She had an important appointment at 4.45pm. Mr Stevenson was interviewing staff in the premises throughout the day. She got a message to him that she had to meet him because she had to leave for her appointment. The Claimant was asked to

meet Mr Stevenson and one of his colleagues "Theresa" at about 4.20pm. He had been given the cost of the Claimant's redundancy by Mr Young who had made the appropriate calculations. They talked the claimant through the calculations. Theresa wrote a rough note on her note pad. The wording was to the effect: "*I Fiona Milne accept voluntary redundancy.*" The calculation was written down showing 12 years' service and holiday pay totalling £3539.40. The Claimant signed accepting the redundancy payment. She regarded her employment as having ended immediately as did the Respondent company. She left the premises and did not return. She did not regard herself as being an employee of the Respondent except for the work she did on the day of the transfer.

13. The Claimant contacted the Respondent company on a number of occasions throughout September as she did not immediately receive her agreed redundancy payment as she expected. She was unable to speak to anyone until she managed to speak to Anita Stevenson the wife of the Director Gavin Stevenson at some point in September.

14. The Claimant was also dissatisfied that she hadn't received a day's pay or her P45. When she spoke to Mrs Stevenson she indicated that she would look into the matter. The Claimant did not hear anything further. She made various efforts to contact Mrs Stevenson and Mr Stevenson about the matter over the following weeks but was unable to make contact with them. She believed that they were avoiding returning her calls.

15. The Claimant sent an e-mail on 4 December (JBp32) to the Respondent asking for her days' pay and her P45. The email said that 'If by Friday 6th December there is still no further response from you, I have no alternative but to take the matter further''. She received no response. The Claimant mentioned her difficulties to her daughter who suggested she contact ACAS for advice. The Claimant contacted ACAS for advice on 12 December and at that point she was told she should have been given or received payment in lieu of notice. She understood that her claim was in time as she believed that the date for calculating time limits ran from the date of the last payment made

to her in September. She entered into the early conciliation process on 13 December a certificate was issued on 13 January. She raised proceedings which were received by the Central Office of Employment Tribunals in Scotland on 25 January 2020.

Witnesses

16. I found the Claimant to be a credible and overall generally reliable witness who gave her evidence, both evidence that clearly assisted her case and evidence that did not, in a straightforward manner. I accept that her evidence around the telephone call to Mrs Stevenson may be incorrect in that she said that the redundancy payment was made the same day as the call but that it seems to have been paid before the call as the only issues she raised were her days' pay and P45. Nothing turns on that dispute.

17. I accepted Mr Stevenson as a reliable witness to fact, and generally credible, although I had considerable reservations about a crucial part of his evidence. Given his involvement as a former senior Manager with Punch, as an owner of a number of businesses and having himself gone through a redundancy process himself where his notice was an important right, his evidence of his apparent lack of knowledge or interest in the Claimant's entitlement to notice and his assertion that this was not discussed or raised with Mr Young does not seem credible. To be fair I would add that I accept he was taking over the business in somewhat of a hurry and may not have given the matter his full attention but a prudent employer would have asked about notice and not assumed that the Claimant was content to receive a redundancy payment and be immediately dismissed.

Submissions

18. Mr Allison prepared and lodged detailed and comprehensive written submissions and referred to authorities. He dealt with the following issues namely the Effective Date of Termination, Statutory time limits for lodging a claim for wages and/or notice pay, the concept of ''reasonably practicable''

and the second leg of the test whether a claim was then made within such further period as the tribunal considers reasonable.

19. He submitted that it was not disputed that the Effective Date of Termination (EDT) was the 28 August 2019. He referred to section 97(1)(b) of the Employment Rights Act 1996 (ERA) which states that the EDT "in relation to an employee whose contract of employment is terminated without notice" means the date on which termination takes effect. (These words being mirrored in section 145(2)(b) of the ERA in terms of any EDT for redundancy purposes). The Claimant hadn't sought to argue the EDT was another date other than 28 August 2019.

20. The evidence which supported the EDT being 28 August 2019 was that the Claimant stated in her ET1 that she "accepted voluntary redundancy" on that date (P7). She was aware that her employment had ended on 28 August 2019. Her email to the tribunal dated 5 June 2020 stated, "Redundancy meeting held on 28 August 2019 at which time my employment ended." (P27).The Claimant signed her consent to be made voluntarily redundant. The Claimant could theoretically have had another job to go to. The Respondents' Director, Mr Gavin Stevenson, gave direct evidence that he thought the Claimant was content to get her redundancy pay. This seems to be what was agreed with Mr Martin Young, the Claimant's previous employer, that she would be made redundant that day. He had left stock to pay for the redundancy. It is also noted that, in the Joint Statement of Agreed Facts, paragraph 3 confirms that Mrs Milne's employment ended on 28 August 2019.

21. Section 23(2)(a) of the ERA states that a tribunal shall not consider a complaint unless it is presented "before the end of the period of three months, beginning with the date of payment of the wages from which the deduction was made".

22. The claim for Notice is also out of time (Section 93(3) refers to complaints to a tribunal under this section of the ERA and refers to section 111). Section

111(2)(a) of the ERA states that a tribunal shall not consider a complaint unless it is presented "before the end of the period of three months beginning with the effective date of termination." Section 23(4) and section 111(2)(b) state that where the tribunal is satisfied that it was "not reasonably practicable" for a complaint to be presented, the tribunal may consider the complaint if it is presented "within such further period as the tribunal considers reasonable."

23. Mr Allison then went on the consider the 'reasonably practicable' test. His position was that it was reasonably practicable for Mrs Milne's complaint to be lodged within three months of 28 August 2019. i.e. by 27 November 2019.

24. The tribunal needed to be satisfied that the claimant's ignorance of the relevant time limit was reasonable. He referred to the case of ***Wall's Meat Company Limited -v- Khan*** *[1979] ICR 52*. In this case, Mr Khan was summarily dismissed on 22 August 1976. Nine days after he was dismissed, he attended an employment exchange to draw unemployment pay and was told the matter would proceed to a tribunal in six weeks' time. His claim should have been lodged on or before 22 November 1976. On this occasion, the EAT found that he had "just cause" for not presenting his complaint within a three-month period. Mr Khan had believed that the employment exchange would deal with his unfair dismissal complaint.

25. In this case, Lord Justice Shaw stated, the following, *"I turn to the situation where a dismissed employee does know of his right to present his claim but does not realise that there is a time limit and delays his attempt to claim until that time limit is passed. I do not regard this situation as being one which <u>of itself</u> makes it not reasonably practicable to present a claim before the time limit has expired. There may be other factors which effectively impede the presentation of the claim in time. Some have been adverted to, such as illness; but in this context mere ignorance is not among them. Apart from extraneous considerations, such as illness or incapacity, once an ex-employee is aware of his rights it is practicable for him to pursue them from the day that he becomes aware of them…"*

26. The Claimant had given evidence that she was concerned about her job from 26 June 2019 until 28 August 2019. She had opportunity to take advice or research the position herself. Her contract alerts her to the fact that she is entitled to notice. It was accepted by the Claimant in her examination-in-chief that she had access to a computer both in work and at home and therefore could have researched the position online during these two months. She could have researched the matter after the 28 August when she was trying to get her P45 and was generally unhappy with the situation that had developed.

27. The only real dispute as to the evidence was around the calls between the Claimant and Mrs Anita Stevenson (Mr Stevenson's wife) between 28 August 2019 and 25 September 2019. The Claimant believed that she telephoned Mrs Stevenson on one occasion on 25 September 2019, on the day she was paid. (This is contrary to her position in the Joint Statement of Agreed Facts which was agreed earlier this week, where she stated that she received her redundancy and holiday pay on 25 September 2019 and, only after that, had she made contact with Mrs Stevenson). By comparison, Mr Stevenson gave evidence that the claimant had contacted his wife number of times between 28 August 2019 and 25 September 2019. Mr Stevenson referenced the fact that he believed the Claimant had gone on holiday shortly after 28 August 2019 and that he did not have the Claimant's bank details to immediately pay the redundancy payment. Mr Stevenson was, he submitted, a reliable and credible and could confirm the number of times the Claimant had made contact with his wife. The Claimant was probably mistaken about the chain of events. In the period of time between 28 August 2019 and 25 September when again, the Claimant could have investigated the position and/or taken legal advice.

28. It was, he stated, of particular note that the Claimant called Mrs Stevenson's mobile approximately fifteen times before 1 December 2019. (This is in addition to her contacting Mrs Stevenson prior to being paid on 25 September 2019) When asked during cross-examination about her first contact with Mrs Stevenson, following on from her payment, she stated that she first made

contact with Mrs Stevenson about her day's pay on 11 October 2019 and continued to make contact with her until the start of the December 2019. It should be noted that, if the Claimant had spoken to ACAS on or before 27 November 2019, or read her contract, it is likely that any claim would have been lodged in time. Additionally, it seems incredible that, given the Claimant's allegation that Mrs Stevenson blocked her calls that she didn't take advice about her situation then.

29. It should he continued be noted that the Claimant did not take advice or investigate the matter further during these times, despite her increasing frustration at her calls not being returned. The Claimant's email to Mrs Stevenson dated 4 December 2019 has been produced (JBp32) and referred to in her evidence. It is of note that the Claimant states that she has been "trying for weeks to get hold of Mrs Stevenson". This is consistent with her evidence about making contact with Mrs Stevenson (and others) from 11 October 2019. Furthermore, in this email, she stated that "it is a legal requirement" for her to be paid. The Respondent's solicitor had noted that, during her examination-in-chief, she stated that she was "aware of the ability to lodge an employment tribunal claim" although she had not been involved in one before, nor did she have any friends who had raised an employment tribunal claim. She also stated in her examination-in-chief that, in her role as Payroll & Finance Administrator, she was aware of the strict time limits for VAT and tax returns. She also stated in cross-examination, that she knew that she had "legal rights" and "knew that she had to act pretty quick" but couldn't answer why she had waiting for two and a half months from being paid on 25 September to make contact with ACAS on 12 December 2019. It was he said of note that, during cross-examination, when asked about the email dated 4 December (which states that, if by 6 December 2019 there is no response, she has no alternative but to "take this matter further").

30. The Claimant's email to Mrs Stevenson dated 12 December 2019 (JBp33) has also been produced and has been referred to in evidence. Again, it should

be noted that the Claimant does not ask for her day's pay and instead asks for her twelve weeks' notice period. She refers to "tribunal action" in this email, presumably on the advice of ACAS. It should be recalled that the Claimant's original answer in cross-examination when asked whether ACAS advised her that her claim may be time-barred was that the ACAS conciliator had advised her that her claim might be time-barred. However, on further cross-examination, she stated that she did not understand the question and denied that ACAS had told her that the claim was potentially time barred. Mrs Milne, she should be relatively familiar with the phrase time-bar since it has been mentioned at both Preliminary Hearings and the word has been mentioned four times in the Note Following Preliminary Hearing (JBp39-40).

31. Lastly, the solicitor made reference to the Claimant's age and experience. The claimant is 51 years old and has experience in other employment. In her evidence, she confirmed that she used to work in reception in a garage dealership. She also confirmed that she had seen her contract of employment dated 20 June 2011 (JBp50-56) and had seen the clause relating to notice (JBp54). Mr Allison sought to distinguish the circumstances of this case from the case of ***John Lewis Partnership -v- Charman*** *UKEAT/0079/11* in which the EAT upheld a finding that a "young and inexperienced" 20-year-old who knew nothing about unfair dismissal rights or employment tribunals was "reasonably ignorant" of the deadline to submit his claim.

32. If the Tribunal comes to the view that it was not reasonably practicable for the claims to be lodged in time the tribunal must consider the second leg of the test which requires that the claim is lodged within such further period as the tribunal considers reasonable. Mr Allison submitted that he could not legitimately argue that the claimant has not lodged her claim within such further period as she did act very quickly when she became aware of her rights to notice pay.

33. The Claimant was given a period in which to consider the Submissions and to respond to them. She did so on the 10 November reiterating her position and explaining that she had never been made redundant before and didn't

know that notice should have been included. She accepted that ACAS had told her how strict the time limits were.

Discussion and Decision

34. In relation to the claims for unlawful deduction from wages and notice the claims must be lodged within three months of the claim arising (ERA Section 23 and 111).

35. What is the effective date of termination is set out in section 97 of the Act, the material terms of which are as follows:

> "**97 Effective date of termination**
>
> (1) Subject to the following provisions of this section, in this Part 'the effective date of termination'—
>
> (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, and
>
> (c) in relation to an employee who is employed under a limited-term contract which terminates by virtue of the limiting event without being renewed under the same contract, means the date on which the termination takes effect.
>
> (2) Where—
>
> (a) the contract of employment is terminated by the employer, and
>
> (b) the notice required by section 86 to be given by an employer would, if duly given on the material date, expire on a date later than the effective date of termination (as defined by subsection (1)),
>
> for the purposes of sections 108(1), 119(1) and 227(3) the later date is the effective date of termination.
>
> (3) In subsection (2)(b) 'the material date' means—
>
> (a) the date when notice of termination was given by the employer, or
>
> (b) where no notice was given, the date when the contract of employment was terminated by the employer"

36. I accept Mr Allison's submission that the facts here point to the Claimant accepting that her contract of employment ended on the 25 August. The circumstances support that interpretation. The Claimant expected to be made

redundant on the 28 August. She regarded herself as no longer being an employee of Bodco. She was free of any obligation to work. She expected to be paid her redundancy payment immediately. What was missed in this process was notice until the Claimant was alerted to the issue some time later. The Claimant, as Mr Allison submitted was an experienced Payroll Administrator. She must have seen staff come and go over the years and have an understanding of the concept of notice. Notice provisions also appeared in her contract. She should have been well aware of her rights to notice yet at the time she was prepared to accept termination of her employment without ever discussing notice with either her former or new employers even allowing for the lack of consultation and the rushed nature of the meeting she had on the 28 August she had some time to think about her rights before the transfer and take action after it.

37. The Claimant was also aware of the existence of employment tribunals as dealing with employer/employee disputes. Her difficulty seems to have been simply that she forgot about the issue of notice or that it wasn't important to her at the time. Rather naively perhaps she accepted that the EDT was the 28 August and the consequence is that any claim for notice pay and wages would have arisen then.

38. For completeness I would add that before proceedings can be issued in an Employment Tribunal Claimants must contact ACAS and explore the possibility of resolving the dispute by conciliation. This process is known as 'Early Conciliation' (EC). The Claimant did not contact ACAS until the 13 December to start that process. The Employment Tribunals (Early Conciliation: Exemptions and Rules of Procedure) Regulations 2014 SI 2014/254 provide that within the period of three months from the effective date of termination of employment EC must start. This has the effect of extending the period of time bar ('stopping the clock') and the period is then extended by a further month to allow presentation of the Claim Form to the Tribunal. In the present case the extension of time does not assist the

Claimant as the primary limitation period expired (27 November) before she entered into early conciliation.

39. The question of what is reasonably practicable is explained in a number of authorities, particularly ***Palmer and Saunders v Southend on Sea Borough Council [1984] IRLR 119***, a decision of the Court of Appeal in England. The following guidance was given:

> *"34. In the end, most of the decided cases have been decisions on their own particular facts and must be regarded as such. However, we think that one can say that to construe the words "reasonably practicable" as the equivalent of "reasonable" is to take a view too favourable to the employee. On the other hand, "reasonably practicable" means more than merely what is reasonably capable physically of being done. … Perhaps to read the word "practicable" as the equivalent of "feasible", as Sir John Brightman did in Singh's case and to ask colloquially and untrammelled by too much legal logic, 'Was it reasonably feasible to present the complaint to the Industrial Tribunal within the relevant three months?' is the best approach to the correct application of the relevant subsection.*
> *35. What however is abundantly clear on all the authorities is that the answer to the relevant question is pre-eminently an issue of fact for the Industrial Tribunal and that it is seldom that an appeal from its decision will lie. Dependent upon the circumstances of the particular case, an Industrial Tribunal may wish to consider the manner in which and reason for which the employee was dismissed, including the extent to which, if at all, the employer's conciliatory appeals machinery has been used. It would no doubt investigate what was the substantial cause of the employee's failure to comply with the statutory time limit, whether he had been physically prevented from complying with the limitation period for instance by illness or a postal strike or something similar. […] Any list of possible relevant considerations, however, cannot be exhaustive, and, as we have stressed, at the end of the day the matter is one of fact for the Industrial Tribunal, taking all the circumstances of the given case into account."*

40. The burden of proof is on the claimant to prove that it was not reasonably practicable to present the complaint in time: ***Porter v Bandridge Ltd [1978] IRLR 271***.

41. This case turns on whether the Claimant's ignorance of her rights was in all the circumstances reasonable (***Wall's Meat Company***). I regret to say that my conclusion is that it wasn't. She was concerned about her job and what

was to happen to her for some months. The Claimant asked Mr Young why he could not make her redundant. She did not look at her contract of employment and raise the issue of notice. The Claimant had the experience though her job and the resources to seek advice. It is just unfortunate that she delayed so long to do so. Claiming ignorance of rights or time limits is much more difficult to argue when most people, including the Claimant, can readily access the answers on the Internet. There are websites such as those of ACAS and the Citizen's Advice Bureau which can assist. The Claimant could have used her smartphone to check those rights from the huge volume of information available. Time limits in modern life are ubiquitous. Unfortunately for her the Claimant delayed for some months before turning her attention to considering those rights. In these circumstances I regret to conclude that it was reasonably practicable for her to make these claims and accordingly they are time barred and the tribunal has no jurisdiction to hear them.

42. As a postscript I would remind the Claimant that the time limits binding Employment Tribunals do not bind the Sheriff Court which would have jurisdiction to hear claims for non-payment of wages and breach of contract (notice pay).

Employment Judge **James Hendry**

Date of Judgement **13 November 2020**

Date sent to parties **13 November 2020**