EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4104149/2020

Preliminary Hearing held by CVP on 25 January 2021

Employment Judge McFatridge

Mr Daniel Kuczora	**Claimant** **In person**
Gather & Gather Limited	**Respondent** **Represented by** **Mr P Olszewski,** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Tribunal is that the Tribunal does not have jurisdiction to hear the claimant's claim of unfair dismissal as it was submitted out of time. The claim is dismissed.

REASONS

1. The claimant submitted a claim to the Tribunal in which he claimed that he had been unfairly dismissed by the respondent. The claim was received by the Tribunal on 2 August 2020. The early conciliation certificate bore a date of receipt by ACAS of the EC notification of 10 June 2020 and the EC certificate was issued by ACAS on 9 July 2020. Within the ET1 the claimant stated that his employment ended on 27 February 2020. The claim was, on the face of it, out of time however it was provisionally accepted by the Employment Tribunal under reservation of the time bar issue and both claimant and respondent were advised of this. The

respondent submitted a response in which they maintained that the claim was time barred and stated in any event that the claimant had been dismissed by reason of conduct and that the dismissal was substantively and procedurally fair. A preliminary hearing was fixed in order to deal with the time bar issue. At the hearing the claimant gave evidence on his own behalf. The claimant gave his evidence through an interpreter and I would wish to thank her for her assistance in the case. A joint bundle of productions was lodged. During the hearing the claimant referred in his oral evidence to various text messages which he had sent. These had not been lodged by the claimant. After the hearing had concluded the claimant sent copies of these text messages to the Tribunal. I was not prepared to accept them as additional productions in the case however in any event as can be seen below I accepted that the text messages had been sent on the basis of the claimant's evidence. On the basis of the evidence and the productions I found the following essential matters relevant to the issue I required to determine to be proved or agreed.

Findings in fact

2. The claimant was employed by the respondent as a Junior Commis Chef in a canteen at the Sky 2 campus in Livingston, Scotland. On 6 February 2020 the claimant attended a disciplinary hearing at which he was advised he was being dismissed. He was dismissed for reasons relating to conduct. At the time of his dismissal he already had a live final written warning. The claimant was advised that he was being given three weeks' notice of termination but he was not required to attend work during this period. The effective date of termination of employment was 27 February 2020. The claimant was given a letter dated 6 February advising him of his dismissal. This was lodged (pages 51-52).

3. The claimant had been accompanied at the disciplinary hearing by Claire Binnie who is a union representative employed by Unite the Union. Unite are a trade union. Excerpts from their website were lodged (pages 56-57). This confirms that Unite members are entitled to receive "free legal advice and support from experts."

4. The claimant submitted an appeal against his dismissal in writing dated 10 February. By letter dated 25 February 2020 the claimant was invited to an appeal hearing scheduled to take place on 4 March 2020. He was advised of his right to be accompanied at this meeting. The claimant duly attended the appeal meeting on 4 March. He was once again accompanied by Ms Binnie. At the end of the meeting the claimant was advised that he would be advised of the outcome of the meeting in due course. He was told that because of the Covid pandemic it might take a little longer but that they would keep the claimant and his union representative advised. The claimant did not receive a letter from the respondent advising of the outcome of the appeal which was that his appeal had been dismissed. The respondent lodged a letter dated 8 April 2020 which bore to be a letter to the claimant addressed to him at his correct address advising him that his appeal had been dismissed however the first time the claimant saw this was when he saw it lodged as part of the documentation for the Tribunal.

5. The claimant contacted Ms Binnie by text message on or about 4 April. She advised him that she had not heard anything from the respondent.

6. The claimant does not speak very good English. Initially, he had a girlfriend who spoke and wrote much better English than he did and was able to assist him with communication. He understood that she contacted Ms Binnie to ask for updates but the claimant did not hear anything as to the result of these enquiries. The claimant was contacted by Ms Binnie on or about 4 June and Ms Binnie advised him that he was now too late to submit a claim to the Tribunal but that if he wished he could proceed anyway and argue the time bar point later.

7. The claimant contacted ACAS and commenced early conciliation on or about 10 June. He was assisted in this by his girlfriend. The claimant received the early conciliation certificate on or about 9 July. By this time he and his girlfriend were having relationship difficulties and they have since split up. The claimant contacted someone else who was able to assist him with completing the ET1. The ET1 was completed online and lodged with the Tribunal on 2 August 2020.

8. The claimant's effective date of termination of employment was 27 February. The claimant required to have lodged his application or at least commenced early conciliation so as to invoke the extension of time proceedings no later than 26 May 2020. His claim was not lodged until 2 August. Following the intimation of the late ET1 to the respondent the respondent had written to the Tribunal on 24 August 2020 indicating that they considered the claim to have been submitted out of time and asking that the claim be dismissed without requiring the respondent to lodge an ET3. The claimant wrote to the Tribunal on 31 August 2020 regarding this application. He set out the relevant statutory provisions regarding the time limit for presenting an application and the not reasonably practicable extension. He ended by stating

> "Summarising the above argument stated by myself improved that there was substantial fault of my adviser which led to the failure to present the complaint in time and I didn't know about my rights regarding the time limits and Employment Tribunal rules."

Matters arising from the evidence

9. The claimant gave his evidence through an interpreter. It was clear that the claimant understood some English since he would occasionally respond prior to the interpreter translating the questions. I considered that he was trying to assist the Tribunal by giving truthful evidence. The claimant showed screenshots of the texts which he had received from his union representative. I accepted that these were what the claimant described them to be. The only matter where I had reason to question the claimant's evidence was in relation to his assertion that he had made numerous telephone calls to Ms Binnie. It was unclear from his evidence whether he was claiming to have made these himself or whether it was his ex-girlfriend who had made them. In any event, I did not consider that this was evidence which was relevant to the issue before me. It may well of course be relevant to any future claim which might be made by the claimant against the union. I decided that I was not prepared to make a finding one way or the other in relation to this. I was prepared to make a finding that the claimant had not received the letter giving him the outcome of the appeal. I also accepted that Ms Binnie had texted him on 4 April

saying that she was still waiting to hear from the respondent. I also accepted that Ms Binnie had advised him on or about 4 June that he was now too late to lodge a Tribunal claim in respect of his dismissal.

Discussion and decision

10. Both parties made full submissions. The claimant's position as I understood it was that it was not reasonably practicable for him to submit his claim in time because he had been let down by Ms Binnie. In addition he referred to the fact that he did not speak or write good English. He was reliant on others to assist him. He had first of all been reliant on his ex-girlfriend and then had to rely on someone else who had helped him with the Tribunal form and subsequent correspondence. He also said that he had not received the letter from the respondent confirming that his appeal had been dismissed.

11. The respondent's position was that it was quite clear from the claimant's letter to the Tribunal on 31 August that the primary reason that the claim had not been submitted in time was because of a failure by the claimant's adviser. The position was that the claimant did have access to someone who could assist him with written English. He had first of all had assistance from his ex-girlfriend and then had assistance from someone else who had helped him with the Tribunal application. It was their position that the issue of whether or not he had received the letter dismissing his appeal was irrelevant. He knew from 6 February that he had been dismissed. The respondent's representative referred to the well-known line of cases to the effect that where the claimant is advised by an expert legal adviser then he is liable for any omissions of that adviser. If that adviser fails to deal with matters appropriately then the claimant's remedy is to take action against the adviser.

12. The respondent's representative referred to the two parts of the test. The claimant first of all had to show that it was not reasonably practicable for him to have lodged his claim within the initial three month period. He pointed out that the claimant had been told by Ms Binnie on 4 June that he was out of time for submitting his claim but that he should submit it anyway and try to persuade the Tribunal to extend time at a later date. He

had then waited some six days before getting in touch with ACAS. There was no real explanation for this. Furthermore, the claimant had received his early conciliation certificate on 9 July. There was absolutely no explanation as to why the claimant waited around three weeks before submitting his ET1 to the Tribunal. The claimant had simply indicated in his evidence that he was no longer able to get his ex-girlfriend to assist him with communicating in written English however it was clear that the claimant had been able to access advice from another person. There was absolutely no explanation as to why he had not done this sooner.

Discussion and decision

13. Section 111 of the Employment Rights Act 1996 provides

> "(2) An employment tribunal shall not consider a complaint of unfair dismissal unless it is presented to the tribunal
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> (a) before the end of the period of three months beginning with the effective date of termination, or
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> (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."

14. In this case the claim ought to have been lodged by 26 May 2020 subject to any extension of time granted in terms of the Early Conciliation Regulations. The claim was not lodged until 2 August and was therefore some 57 days late. Due to the fact the claimant did not commence early conciliation on or prior to 26 May he is not entitled to any extension of time under the Early Conciliation Regulations. In order to fall within the terms of the escape clause contained within section 111(2)(b) the onus was therefore on the claimant to satisfy me that it was not reasonably practicable for the complaint to be presented before 26 May 2020 (***Porter v Bandridge Ltd [1978] IRLR 271***).

15. If I were so satisfied then I would require to go on to consider whether he had submitted the claim within such further period as I considered reasonable. The first stage however was for me to look at the claimant's

argument as to why it was not reasonably practicable for him to submit his claim by 26 May 2020. It would only be if I were so satisfied that I would require to go on to consider the second part of the test.

16. The issue of section 111(2) and its predecessor section which contained a similar provision has been considered extensively by the higher courts. Two of the leading cases are ***Dedman v British Building Engineering Appliances Ltd [1974] ICR 53*** and ***Palmer and another v Southend-on-Sea Borough Council [1984] ICR 372***. The matter has also been more recently considered by the Court of Appeal in the case of ***Marks and Spencer plc v Williams-Ryan [2005] EWCA civ 470***.

17. The position in this case is that the claimant states that he was ignorant of the time limit. As long ago as 1979 in the case of ***Wall's Meat Co Ltd v Khan [1979] ICR 52*** the court made it clear that the question was not simply whether or not a claimant was in fact ignorant of the time limit (either the fact there was a time limit or when the time limit ran) but whether such ignorance was reasonable. In the case of ***Dedman*** it was made clear that where a claimant had sought advice from a solicitor and a solicitor had given advice which was incorrect then this did not make the claimant's ignorance of the true legal position reasonable. The ignorance of the adviser would be visited on the claimant and the claimant's remedy would be to claim against the adviser rather than to have the time for lodging his claim extended. Over the years the courts have considered whether the ***Dedman*** principal should also be extended to a situation where the employee is advised by an adviser who is not a solicitor but is a skilled adviser. In the ***Williams-Ryan*** case the claimant had been given incorrect advice by the Citizens Advice Bureau and also by the respondent and in those circumstances the court decided that it would not be appropriate to visit the adviser's failure on the claimant and the claimant succeeded in having time extended. In the ***Dedman*** case Lord Denning set out the principle as follows (page 381):-

> "But 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 mistakes. 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 him – and they mistake the time limit and present it too late – he is out, his remedy is against them."

18. In my view the facts in this case fall squarely into that category. In this case the claimant was represented at both his disciplinary and appeal by a trade union official. In terms of the union's own advertising on their website he was entitled to expect expert advice. His case, which has not been tested in any way, is that the union adviser let him down. If this is the case then it appears to me that the appropriate course of action would be for the claimant to make a claim in the ordinary court against his adviser. In my view the fact that he says his adviser let him down by failing to advise him on such a fundamental matter as the time limit for entering Employment Tribunal proceedings does not render it not reasonably practicable for him to have lodged his claim in time. The claim could certainly have been lodged in time had his expert adviser chosen to do so.

19. I do not consider any of the other matters raised by the claimant to be relevant. It is not relevant whether or not the claimant was advised whether his appeal had been successful or not. Time runs from the effective date of termination of employment. It is not by any means unknown for appeal proceedings not to be concluded before the period of three months from this date has run out.

20. My understanding is that the claimant was not relying on his language difficulties as being a reason for him not lodging his claim prior to 26 May. I understood the language difficulties came in considering the second stage.

21. As noted above my finding is that it was reasonably practicable for the claimant to have submitted his claim within the initial period of three months. I accept the claimant may have been ignorant of the time limit but his ignorance was not itself reasonable since he had engaged a skilled

adviser and, on his own case, his skilled adviser had let him down. It is therefore not necessary for me to go on to consider the second part of the test set out in section 111(2). If I were wrong in this however I should say that even if I had found that it was not reasonably practicable for the claimant to have lodged his claim within the initial three month period (which I have not) I would not have found that the claimant had lodged the claim within a reasonable time thereafter.

22. On his own case the claimant knew by 4 June that he was outwith the time limit for lodging his claim. He has no explanation whatsoever as to why he waited six days before contacting ACAS on 10 June. His explanation as to why he delayed between 9 July and 2 August before submitting his claim to the Tribunal after early conciliation ceased is insufficient. He says that he was in the process of splitting up with his girlfriend. Whilst I can appreciate that this would have been stressful in my view the claimant knew that his claim had been late on 4 June. It would have been reasonable for him to have pulled out all the stops to get his application in to the Tribunal in time. Whilst I acknowledge the claimant's difficulty in that he had hitherto been reliant on his girlfriend to assist him with written English I note that the claimant was able to get someone else to lodge his claim fairly readily and he did not give any evidence as to why he could not have contacted that person prior to 2 August.

23. In the circumstances my finding is that the Tribunal has no jurisdiction to consider the claim and the claim falls to be dismissed.

Employment Judge: Ian McFatridge
Date of Judgment: 09 February 2021
Entered in register: 10 February 2021
and copied to parties