EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4107639/2021

Held on 15 June 2021 – By Cloud Video Platform

Employment Judge: P O'Donnell

Mr H Moore	**Claimant** **In Person**
Stack and Still Limited	**Respondent** **Represented by:** **Mr Alexander –** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that:-

1. The claim that the Respondent had failed to provide written reasons for dismissal in breach of s92 of the Employment Rights Act 1996 is withdrawn and dismissed under Rule 52.

2. The Claimant's effective date of termination was 19 October 2020.

3. The claims of unfair dismissal under s100 of the Employment Rights Act 1996 and s12(3) of the Employment Relations Act 1999 were, therefore, lodged in time.

4. The claims under s44 of the 1996 Act, s10 of the 1999 Act and s12(1) of the 1999 Act were lodged out of time. The Tribunal considers that it was reasonably practicable for those claims to have been lodged in time and so it

does not exercise its discretion to hear the claims out of time. Those claims are hereby dismissed.

REASONS

Introduction

1. The Claimant has brought a number of complaints against his former employer, the Respondent in this case. The Respondent resists these claims and raises a jurisdictional defence that all of the claims were lodged out of time.

2. The present hearing was listed to determine the following issues in relation to the time bar defence:-

    a. What was the Claimant's effective date of termination?

    b. Whether the claims identified by the Respondent as being out of time were or were not lodged within the relevant time limit.

    c. In relation to any claim which was not lodged within the relevant time limit, whether it was lodged within such further period as the Tribunal considers reasonable in circumstances where the Tribunal considers that it was not reasonably practicable for the claim to have been lodged within the relevant time limit for the Tribunal to exercise its discretion to hear any such claim out of time.

3. There had been a fourth issue regarding any alleged acts which occurred after the Claimant's dismissal but this issue fell away after the Claimant provided further specification of the dates on which he said the acts giving rise to his claims occurred and confirmed that none of these occurred post-dismissal.

4. The hearing was conducted by way of Cloud Video Platform.

Preliminary issues

5. At the outset of the hearing, the Tribunal identified a number of preliminary issues to be addressed before evidence was heard.

6. First, there were two documents described as transcripts in the bundle and the Tribunal wanted to confirm if these were transcripts of a relevant recording and,

if so, had the Claimant had the opportunity to hear the recording and confirm the transcript was an accurate reproduction of what was said.

7. It was explained by Mr Alexander that the documents were transcripts of a recording of the meeting at which the Claimant was told he was being dismissed. One was prepared by the Claimant and the other by the Respondent but that, in relation to the relevant part of the recording, the transcripts agree as to what was said. The Claimant agreed with this position.

8. The second issue related to the claims being pursued and, in particular, the claim that the Respondent had failed to provide him with written reasons for dismissal. The Tribunal had noted that there was a further jurisdictional issue with this claim that the Claimant did not have the necessary two years' continuous service to have the right to pursue this claim. The Tribunal was concerned that if it were to find in the Claimant's favour on the time bar issue in relation to this claim then this would be academic given the service issue and it would only delay progress of the case.

9. The Tribunal indicated that, if the Claimant insisted on this claim, there was the option of dealing with the service issue today if both parties were willing to waive the normal notice requirements of an issue to be determined.

10. The Claimant replied that, in order to avoid delay, he would withdraw this claim. The Tribunal explained that it would dismiss the claim under Rule 52 which would bring the claim to an end.

11. The Tribunal then confirmed the parties' understanding that the claims which remained were as follows:-

    a. "Automatic" unfair dismissal under s100 of the Employment Rights Act 1996 and s12 of the Employment Relations Act 1999.

    b. Detriment under s44 of the 1996 Act.

c. A breach of the right to be accompanied under s10 of the 1999 Act.

d. Detriment under s12 of the 1999 Act.

12. Finally, the Tribunal confirmed with parties their position on when the time limits began for each claim:-

a. In relation all the claims but unfair dismissal, the parties were agreed that the time limit began on 12 October 2020.

b. In relation to the unfair dismissal claims, the parties were agreed that the time limit ran from the effective date of termination (EDT) but were in dispute as to when this was; the Claimant says he was dismissed with one week's notice on 12 October 2020 meaning that the EDT was 19 October 2020; the Respondent says that the Claimant was dismissed without notice on 12 October 2020 and paid in lieu meaning that the EDT was 12 October 2020.

Evidence

13. The Tribunal heard evidence from the following witnesses:-

a. The Claimant.

b. Boston Alexander (BA), the Claimant's manager who communicated the decision to dismiss him.

14. There was an agreed bundle of documents prepared by the parties. Page references below are references to pages in the bundle.

15. This was not a case in which there was any real dispute of fact; parties were agreed as to what was said at the meeting on 12 October 2020 and that the transcript led in evidence was an accurate record of what was said; there was no dispute about what any of the documents said and they stood for themselves.

16. The real dispute between the witnesses, particularly in relation to the issue of the EDT, is how any utterances on 12 October or subsequent correspondence should be interpreted. The Tribunal did not place any real evidential weight on either witness' interpretation as this was inevitably affected by the respective arguments being advanced by the parties. Rather, the Tribunal considered that it had to approach the interpretation of the evidence from the perspective of the reasonable, objective observer and give the words used, either orally or in writing, the natural meaning which they would have when viewed in the context of all the evidence.

17. One matter which the Tribunal did find unusual is that the letter of dismissal (pp83-85), despite being in BA's name, was prepared and issued without any input from him; the decision to issue was made by someone at head office but BA did not know who; it was drafted by someone at head office but, again, BA did not know who; he was not spoken to about the contents of the letter prior to it being drafted and assumed it was drafted using the audio recording of the meeting of 12 October which was sent to head office by him; he was not asked to review or proof-read it before it was issued.

18. Putting aside the wisdom of someone allowing letters to be issued in their name without any input or control, the Tribunal considers that the effect of this is that it could give no weight to any evidence from BA about what was intended or meant by the words used in the letter. The evidence from BA was no more than speculation or assumptions about what some other person (unknown to him) had meant when drafting the letter.

19. The Tribunal also gave no weight to the evidence from BA that if he had meant to serve the Claimant with notice then he would have said so. Any such assertion has to be taken with a grain of salt when it has been said in the context of a hearing where that very matter was in dispute. In any event, what BA would have done is irrelevant; the question is what was communicated to the Claimant and this will be addressed below.

Findings in fact

20. The Tribunal made the following relevant findings in fact.

21. The Claimant was employed by the Respondent as a server from 3 November 2018.

22. On 11 October 2020, he spoke to BA about taking leave in the next week (that is, week commencing 19 October 2020). He asked to be left off the rota for that week which had not yet been prepared. BA asked the Claimant to put the request on an app used by the Respondent for clocking staff in and out as well as dealing with holidays.

23. In the morning on 12 October, BA informed the Claimant that his request was refused. The Claimant explained his reasons for the request, that he did not feel safe working at that time, and asked him to speak to Mr Cameron, the operations director, to explain that reason.

24. Approximately 3.30pm, BA asked the Claimant to meet with him for a chat and asked if it was okay if he brought Mr Gibb, the assistant manager. BA also asked if the meeting could be recorded. The Claimant agreed to both requests.

25. BA and the Claimant discussed the reasons for the Claimant's request and the concerns which he had. Towards the end of the discussion, BA asked the Claimant if he would turn up to work if offered shifts the next week. The Claimant replied that he would discuss it with BA.

26. There is then an exchange which appears in the transcript at p74 and is worth reproducing in full ("HM" is the Claimant):-

BA *Okay. With all that said, we are going to go by your contract and give you your week's notice. With that we will also pay the rest of your shifts for the rest of the week, as well as any outstanding holidays that*

you may have. I am very sorry and I do wish you the absolute best in the future, Hugh.

HM Erm, okay. So what I've done and what I'm saying isn't really a sack-able offence.

BA No, we no longer…as you've already stated as well, it's a zero-hour contract. We are going by your contract on this one, and unfortunately we no longer require your services at Stack and Still.

HM As of right now?

BA As of right now.

27. The Claimant then left the premises and there was no further discussion with BA.

28. Later that day, the Claimant sent an email (p80-81) to Paul Reynolds, chief executive officer, requesting written reasons for his dismissal.

29. Having received no response to that email, the Claimant sent a further email to BA and other managers (copying in Mr Reynolds) on 13 October 2020 repeating the request for written reasons for his dismissal (p80).

30. On 14 October 2020, Mr Reynolds sent an email to the Claimant (p82) alleging that he had approached the Respondent's property manager and informed them that the Respondent was illegally storing alcohol. The email went on to say that the Claimant would receive his termination confirmation that day and instructing him to not enter the Respondent's premises again.

31. The Claimant replied by email the same day (p82) disputing what the factual accuracy of the contents of Mr Reynolds email regarding any conversation he may have had. It went on the say "*I can speak to whomever I choose. You have no right to contact me about any such conversation so please refrain from doing so*".

32. The Claimant was issued with a letter confirming his dismissal dated 14 October 2020. This was in BA's name but, as noted above, he did not make the decision to send the letter, he did not draft it, he had no input into its contents other than sending the audio recording to head office and he did not review its contents before it was issued.

33. The letter opens with the following paragraph:-

> "*Further to your conversation with myself on the 12th October 2020, I am writing to confirm the termination of your employment from Stack and Still Ltd on 12th October 2020 and as per out conversation, it has been my decision to terminate your employment as we no longer require your services. As per the termination clause in your contract with one weeks notice as you have under two years service with Stack and Still Ltd.*"

34. The letter then includes a copied and pasted extract from the Claimant's contract regarding termination of employment setting out the different notice periods depending on length of service. It also notes that the Respondent reserves the right to require employees to take all or part of any outstanding holiday entitlement during their notice as well as reserving the right to make a payment in lieu of notice.

35. The letter then continues as follows:-

> "*During your notice period we do not require you to undertake any shifts for Stack and Still Ltd, and as your weekly hours vary, we will pay you 40 hours for the period. You will also receive your outstanding holiday hours, totalling 32.5 hours as well as any hours worked from the 26th September 2020 to the 12th October 2020.*"

36. The Claimant appealed the decision to dismiss him by letter dated 18 October 2020 (p86). There was an exchange of correspondence regarding the Claimant's hours of work (pp87 & 88) but no formal response to the appeal. By letter dated 26 October 2020 (p90), the Claimant effectively withdrew his

appeal for the reasons set out in that letter and the Respondent replied to this by letter dated 28 October 2020 (p91).

37. The Claimant's final pay slip (p92) was issued on 31 October 2020 and included payments for holiday pay, basic pay and "notice period".

38. The Claimant's P45 (pp93-94) was issued on 15 April 2021 and gives his leaving date as 12 October 2020. No evidence was led by the Respondent explaining the delay of just over 6 months in issuing the P45.

39. After his dismissal, the Claimant sought advice on his rights. He contacted Bridgeton Citizens Advice Bureau (CAB) shortly after his dismissal giving a brief outline of what had happened. He was aware that he would need two years' service to be able to bring a claim and CAB confirmed that this was the general rule. He was asked to send in any correspondence and he did so by email dated 23 October 2020.

40. He did not receive any reply from CAB. He contacted them again in mid-November but had no response.

41. He began looking at other alternative sources of advice; he contacted Govan Law Centre but was outside their catchment area; he contacted another agency whose name he could not recall but they could not assist; he looked into whether he was eligible for Legal Aid and identified that he did not meet the criteria; he did not contact any law firms.

42. The Claimant then began his own research into the law. In early January 2021, on or around 6 or 7 January, he identified that there were exceptions to the requirement for two years' service which might apply in his case. He found this on the Scottish Government website which also identified that he needed to contact ACAS before he could pursue a claim.

43. The Claimant commenced ACAS Early Conciliation on 12 January 2021 and the Early Conciliation certificate was issued on 13 January 2021 (p1).

44. The Claimant lodged his ET1 online on 12 February 2021 (p2).

45. In terms of time limits, the Claimant's research had identified that there was a 3 month time limit for lodging a claim for unfair dismissal which ran from the end of the contract. The Claimant believed that his contract ended on 19 October 2020 and so he was in time when contacting ACAS on 12 January 2021.

46. In his research, the Claimant did not identify that other claims had time limits which ran from other dates. He considered that these were all ancillary to the unfair dismissal claim and so would run from the same date.

Claimant's submissions

47. The Claimant made the following submissions.

48. He was told explicitly that he was being given one week's notice and would also be paid for the shifts he had worked.

49. There was written confirmation that he was given one week's notice and that he was not expected to work during his notice period.

50. Garden leave was mentioned in the handbook. Pay in lieu of notice was never mentioned to him.

51. Basic pay was calculated by the Respondent on average hours. The 40 hours paid to him in his final pay were for the shifts worked.

52. The letter is clear and reads as garden leave. Pay in lieu of notice is not mentioned until the ET3 was lodged.

53. The EDT was, therefore, 19 October 2020 and the unfair dismissal claim is in time.

54. If not then the Claimant submitted that the Respondent misled him as to the EDT and he had a reasonable belief that it was 19 October.

55. He was unable to access legal advice and had enquired as to his legal rights. This impacted on his ability to lodge his claim as did the pandemic.

56. The Claimant asks the Tribunal to consider the exceptional circumstances of the case and exercise its discretion to hear the claim out of time because it was not reasonably practicable to lodge his claim earlier.

57. In rebuttal, the Claimant submitted that the letter from the CAB does not disagree that he contacted them in November 2020.

58. In terms of the period after Early Conciliation, he had a reasonable belief that he had engaged this in time and it was reasonable for him to submit his ET1 when he did.

Respondent's submissions

59. The Respondent's agent made the following submissions.

60. He started by setting out the issues to be determined at the hearing. In terms of the EDT, it was submitted that the Claimant was dismissed in person at the meeting on 12 October 2020 and was dismissed immediately being paid in lieu of notice.

61. In relation to the four remaining claims, the Claimant agrees in relation to three of them that the time limit runs from 12 October and the dispute relates to the unfair dismissal claim. ACAS Early Conciliation was lodged on 12 January 2021 and this was outside the normal time limit which ran from 12 October 2020.

62. Reference was made to s97(1) of the Employment Rights Act which sets out how the EDT is determined in circumstances where notice is, or is not, given.

63. Reference was then made to *Brown v Southall and Knight* [1980] ICR 617, *McMaster v Manchester Airport plc* UKEAT/49/97 and *Gisda Cyf v Barratt* [2010] IRLR 1073 regarding the principle that dismissal is effective when the employee knows of it.

64. It was submitted that the Claimant knew of his dismissal at the meeting on 12 October and what is said at that meeting is important on the basis of the transcript.

65. In response to a question from the Tribunal as to how the Respondent says the words used at p74 about the Claimant being given notice should be interpreted, Mr Alexander submitted that this was the Claimant being given pay in lieu of notice. The Tribunal went to ask what words used by BA said that pay in lieu of notice and Mr Alexander said that they were not in that sentence alone.

66. The Tribunal asked whether the Respondent was saying that the natural meaning of the words used by BA was that pay in lieu of notice was being given. Mr Alexander submitted that the meaning of the words was that the Claimant was entitled to notice and that the Respondent would satisfy this with pay in lieu.

67. The Tribunal went on to enquire what the Respondent was saying was the meaning of the next sentence regarding what the Claimant would be paid and Mr Alexander submitted that this was that he would be paid in lieu. The Tribunal asked Mr Alexander to comment on the suggestion that this sentence could be read as meaning that the Claimant was to be paid for his notice period and Mr Alexander accepted that this could be interpreted in this way. Asked by the Tribunal whether the *contra proferentem* rule would come into play in such circumstances, Mr Alexander replied that this has to be read in the context of the subsequent comments that the Claimant's services were no longer required "*as of right now*".

68. Evidence had been heard that BA would have said that the Claimant was being served with notice if that was what was intended.

69. It was submitted that the Claimant's subsequent conduct suggested that he knew he had been dismissed. This was a reference to the email of 14 October regarding the Respondent contacting the Claimant.

70. The letter of dismissal expressly says that the Claimant was dismissed on 12 October 2020. The Tribunal asked where it was said this was expressly said and Mr Alexander referred to the first sentence of the first paragraph which stated "*the termination of your employment from Stack and Still Ltd on 12th October 2020*".

71. Mr Alexander went on to make reference to the section of the contract which was included in the letter of dismissal which made reference to the Respondent reserving the right to pay in lieu of notice.

72. The Tribunal asked Mr Alexander to go back to the first paragraph of the letter as he had failed to address the second sentence which stated that the Claimant was being dismissed with one week's notice. The Tribunal asked what the Respondent said was the natural reading of this sentence and Mr Alexander

accepted that it said notice was being served if read on its own but that pay in lieu was being given if read in the overall context.

73. The Tribunal asked Mr Alexander to explain the relevance of the copied and pasted extract which talks of reserving the right to pay in lieu of notice given that reserving the right is not the same as exercising it. He replied that its inclusion in the letter is one of the factors pointing to pay in lieu of notice being given when viewed in the overall context of the case.

74. It was submitted that there was no legitimate basis for the Claimant to say the termination of his employment was delayed. A referral to notice period in the letter of dismissal does not retrospectively change what is said at the meeting. There was no reference to garden leave.

75. The Tribunal asked whether the reference to "during the notice period" in the letter of dismissal suggested that there was a notice period. Mr Alexander accepted that the wording was unhelpful but that it does suggest that the termination date of 12 October 2020.

76. The Tribunal again raised the question of whether the *contra proferentem* rule applies to construe any ambiguity in the letter against the interests of the Respondent who wrote the letter. Mr Alexander replied that the focus should be on what was said on 12 October. The Tribunal questioned whether he was saying that the letter was irrelevant and Mr Alexander replied that it was relevant but that weight should be placed on what was said at the meeting. It was submitted that, overall, this points to a termination date of 12 October 2020.

77. Reference was made to *Société Générale v Geys* [2011] IRLR 482 regarding the difference between the EDT and when a contract terminates for the purposes of contract law.

78. The Respondent's position is that each claim is out of time. Mr Alexander began to set out the relevant statutory provisions relating to the time limits for each claim but the Tribunal indicated that it did not require him to go through each of these if it would make it easier for him.

79. It was submitted that the time limit in all four claims expired on 11 January 2021. The "stop the clock" provisions under s207B of the 1996 Act do not apply where Early Conciliation is engaged outside the ordinary time limit (*Pearce v Bank of America Merrill Lynch* UKEAT/0067/19). In this case, the Claimant cannot rely on those provisions and so when he lodged his ET1 on 12 February 2021, it was 32 days out of time.

80. Turning to the issue of the Tribunal's discretion to hear the claims out of time, it was submitted that the Claimant had not established that it was not reasonably practicable for him to have lodged his claims in time and the burden is on him (*Porter v Bandridge* below).

81. The case of *Palmer & Saunders* (below) was referred to for the test to be applied, that is, whether it was reasonably feasible for the claim to be presented in time.

82. Ignorance of the law must be reasonable (*Khan*, below). There must be just cause or excuse for any ignorance or mistake or the claimant must take the consequence.

83. Mr Alexander also made reference to the case of *Reed in Partnership Ltd v Fraine* UKEAT/0520/10 and *Smith v Pimlico Plumbers* UKEAT/0211/19. The latter was relied on in relation to the question of whether there was some real impediment to the ability of a claim to enquire about their rights.

84. It was submitted that it was clearly reasonably practicable for the claim to have been lodged in time. The Claimant thought the EDT was 19 October but dismissal was immediate. However, he was fully aware of the other acts having occurred on 12 October.

85. The Claimant had no discussions with CAB regarding time limits and only followed up with them once (a point with which the CAB disagrees). The Claimant did try to contact other sources.

86. Rather, the Claimant lodged his claim based on his own research. The claim that was lodged was thorough and the Claimant is an intelligent and able person who has been able to understand legal issues. He was not misled as to his rights or time limits. He was able to carry out his own research and could have done so at an earlier date. Information regarding time limits is available online.

87. Although the Claimant lodged an appeal, this was closed off in early course and it could not be said that this caused any delay.

88. It was submitted that there was an unreasonable delay in lodging the claim and the Claimant could have obtained further advice.

89. In these circumstances, the claims should be dismissed.

Relevant Law

90. Section 97 of the Employment Rights Act 1996 (ERA) defines the effective date of termination (EDT) as follows:-

> (*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.*

91. The employer has the onus of communicating the fact and date of the dismissal to the employee (*Widdicombe v Longcombe Software Ltd [1998] ICR 710)*.

92. If an employee is dismissed with notice but is not required to work during the notice but is given money in lieu, the effective date of termination is the date on which the notice expires (*IPC Business Press Ltd v Gray [1977] ICR 858, Lees v Arthur Greaves (Lees) Ltd [1974] IRLR 93*, *and Brindle v H W Smith (Cabinets) Ltd [1972] IRLR 125*.

93. On the other hand, if the employee is dismissed with no notice then any money paid to them is compensation for the breach of contract in the employer's failure to give notice and the EDT is the date on which they are informed of their dismissal. The EDT is not delayed or extended by the payment in lieu in such a case (*British Building and Engineering Appliances Ltd v Dedman* [1973] IRLR 379).

94. The EDT is a wholly statutory concept and it cannot be altered by agreement between the parties (*Fitzgerald v University of Kent at Canterbury* [2004] IRLR 300).

95. Section 111(2)(a) ERA states that the Tribunal shall not consider a complaint of unfair dismissal unless it is presented within 3 months of the effective date of termination. In relation to the other claims pursued in this case, the relevant statutory provisions have a similar time limit (that is, within 3 months) which runs from the date of the alleged breach of the relevant right.

96. The Tribunal has discretion under 111(2)(b) to hear a claim outwith the time limit set in s111(2)(a) where they consider that it was not reasonably practicable for the claim to be presented within the 3 month time limit and it was presented within a further period that the Tribunal considers to be reasonable. The same discretion is given to the Tribunal under the relevant statutory provisions which appertain to the other claims being pursued.

97. Under s207B ERA, the effect of a claim entering ACAS Early Conciliation is to pause the time limit until the date on which the Early Conciliation Certificate is issued. The time limit is then extended by the period the claim was in Early Conciliation or to one month after the Certificate is issued if the Early Conciliation ends after the normal time limit.

98. The burden of proving that it was not reasonably practicable for the claim to be lodged within the normal time limit is on the claimant (*Porter v Bandridge Ltd* [1978] IRLR 271).

99. In assessing the "reasonably practicable" element of the test, the question which the Tribunal has to answer is "what was the substantial cause of the employee's failure to comply" and then assess whether, given that cause, it was not reasonably practicable for the claimant to lodge the claim in time (*London International College v Sen* [1992] IRLR 292, EAT and [1993] IRLR 333, Court of Appeal and *Palmer and Saunders v Southend-on-Sea Borough Council* [1984] IRLR 119).

100. One of the most common reasons why a claimant will not lodge their claim within the normal time limit is either ignorance of, or a mistake regarding, the application of the relevant time limit. The leading case on this is *Wall's Meat Co Ltd v Khan* [1978] IRLR 49 where, at paras 60-61, Brandon LJ stated :-

> *"the impediment [to a timeous claim] may be mental, namely, the state of mind of the complainant in the form of ignorance of, or mistaken belief with regard to, essential matters. Such states of mind can, however, only be regarded as impediments making it not reasonably practicable to present a complaint within the period of three months, if the ignorance on the one hand, or the mistaken belief on the other, is itself reasonable."*

101. The test for whether it was reasonable for the claimant to be aware of the time limit is an objective one and the Tribunal should consider whether a claimant ought to have known of the correct application of the time limit (see *Porter, Khan, Avon County Council v Haywood-Hicks* [1978] IRLR 118).

102. Ignorance or mistake "*will, further, not be reasonable if it arises from the fault of the complainant in not making such inquiries as he should reasonably in all the circumstances have made*" (as per Brandon LJ in *Khan*).

103. Another very common reason for the time limit being missed is a mistake made by an adviser. If that is the reason then, as a general rule, the claimant does not get the benefit of the escape clause (*Dedman v British Building and Engineering Appliances Ltd* [1973] IRLR 379). However, there are a number of conditions for that general rule to apply; the adviser must be a professional or skilled adviser (they do not need to be a qualified lawyer); the adviser must themselves have been at fault in the advice which they gave; the wrong advice must have been the substantial cause of the time limit being missed.

104. The issue of ignorance or mistake by the claimant as to the application of the time limit can overlap with that of mistake by the professional adviser where a claimant asserts that the adviser did not inform them of the time limit. The

principle in *Dedman* applies in such cases to deprive the claimant of the escape clause and the position is summed by Lord Denning in *Khan*:-

> *"I would venture to take the simple test given by the majority in [Dedman]. It is simply to ask this question: had the man just cause or excuse for not presenting his claim within the prescribed time? Ignorance of his rights — or ignorance of the time limits — is not just cause or excuse, unless it appears that he or his advisers could not reasonably be 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."*

105. Where the Tribunal concludes that it was not reasonably practicable for the claimant to have lodged his claim in time then it must go on to consider whether it was lodged in some further period that the Tribunal considers reasonable.

106. This is a question for the Tribunal to determine in exercising its discretion (*Khan*) but it must do so reasonably and the Tribunal is not free to allow a claim to be heard no matter how late it is lodged (*Westward Circuits Ltd v Read* [1973] ICR 301).

107. In assessing the further delay, the Tribunal should take account of all relevant factors including the length of the further delay and the reason for it. It will also be relevant for the Tribunal to assess the actual knowledge which the claimant had regarding their rights (particularly the application of the time limit) and what knowledge they could reasonably be expected to have or investigations they could reasonably be expected to make about their rights (*Northumberland County Council v Thompson* UKEAT/209/07, [2007] All ER (D) 95 (Sep)).

Decision

108. The Tribunal will address each of the three issues to be determined in turn.

Effective date of termination

109. On the basis of the evidence which it has heard, the Tribunal has little hesitation in finding that the Claimant was dismissed with notice and that his EDT was 19 October 2020. For reasons it will set out below, the Tribunal found the Respondent's arguments that they had dismissed the Claimant without notice and, instead, paid in lieu to be entirely unconvincing and considered that the Respondent's case on this point was almost entirely without merit.

110. There were no words used by the Respondent, either at the meeting on 12 October or in the letter of 14 October, which expressly and unambiguously stated that the Claimant had been dismissed with pay in lieu of notice. Indeed, that phrase does not appear except in the copied and pasted extract from the Claimant's contract.

111. Further, the Tribunal did not consider that a reasonably objective observer would interpret what was said on 12 October or in the letter of 14 October as amounting to dismissal with pay in lieu of notice. Rather, it is the Tribunal's view that a reasonably objective observer would give the natural and plain meaning to the phrases "*give you your week's notice*" and "*terminating you with one weeks notice*" which is that the Claimant was being given notice of dismissal.

112. The Tribunal is not persuaded that any other utterance on 12 October is sufficient clear and unambiguous to alter that interpretation of what was said. The comment by BA regarding what payments would be made to the Claimant after he informed the Claimant he was dismissed is entirely consistent with a dismissal with notice and nothing in what is said by BA indicates that pay in lieu of notice was being paid.

113. The Respondent places great reliance on the subsequent exchange in which the words "*as of right now*" were used. However, that has to be viewed, as the submissions on behalf of the Respondent urged, in context and the Claimant's question arose from a comment from BA that "*we are going by your contract on this one*" and that his services were no longer required. This is a repeat of what BA said earlier in which he stated that the Respondent was going by the contract and giving the Claimant notice and is consistent with the position that the Claimant is being dismissed with notice.

114. At best, the words "*as of right now*" are ambiguous. In his evidence, the Claimant stated that he was asking if he was to leave "right now" rather than finishing his shift. However, regardless of what the Claimant meant or what BA understood the Claimant to be asking, the Tribunal does not consider that this exchange is sufficiently clear and unambiguous to alter the meaning of what was said previously about giving the Claimant notice.

115. Turning to the letter of dismissal, the Tribunal considers that this is relevant evidence; it was an opportunity for the Respondent to confirm what was discussed and avoid any confusion that might result from any differing recollections of the discussion; it is a common practice within business for dismissal to be confirmed in writing for these very reasons.

116. The Tribunal has already addressed the wording in the first paragraph which makes reference to the Claimant being terminated with one week's notice as clearly meaning that he was dismissed with notice. However, the letter goes to make specific reference to a notice period and that the Claimant does not require to work during this period. This clearly indicates that the Respondent, when framing the letter, was of the view that there was a notice period and that can arise for no other reason than the Claimant having been dismissed with notice.

117. The Respondent placed reliance on the phrase in the first sentence of the letter which describes the termination of his employment being on 12 October 2020. The Tribunal returns to the point, urged on it by the Respondent's submissions, to view this in the whole context and this is simply not enough to outweigh what a reasonably objective observer would consider was being said on 12 October and the unambiguous phrases used in the letter that the Claimant was being dismissed with notice and was not to work during his notice period.

118. In the Tribunal's view, the reference to the date does no more than describe the date on which the Claimant was dismissed in the sense of being told that he was dismissed. However, the date on which dismissal is communicated is different than the EDT and, indeed, in every case where notice is given the two dates are inevitably different.

119. Reliance was also placed on the reference in the copied and pasted extract from the contract to the Respondent reserving the right to pay in lieu. However, this provides no assistance to the Respondent at all; it is part of a wider extract from the contract which starts from the principle that dismissal will be with a period of notice determined by service and, following the Respondent's logic, the reference to notice being given would give weight to the Claimant's position; reserving a power under the contract is not the same as exercising it and it needs to be clear that the power has been exercised which is not the position in this case; the extract also includes reference to a power for the Respondent to insist on an employee taking their outstanding holiday entitlement during the notice period and there was no suggestion by the Respondent that the mere reference to this power means it was exercised.

120. There were a number of other matters raised by the Respondent in cross-examination and submissions which, in the Tribunal's view, provide them with no assistance:-

a. The Tribunal does not consider that the email exchange with Mr Reynolds provides any evidence that the Claimant considered he was no longer employed. The reference to Mr Reynolds not being entitled to contact him was clearly a reference to the matter in question and not an assertion that Mr Reynolds could not contact him at all.

b. The Claimant's final payslip does not provide any evidence that there was pay in lieu of notice. The pay line labelled "notice period" can easily be a reference to payment for a period of notice and, indeed, is a more natural interpretation of the phrase especially given the reference to a notice period in the letter of 14 October.

c. The P45 provides no assistance at all. It was prepared more than six months after the Claimant's dismissal and, importantly, after the Claimant had lodged his ET1 and the Respondent had submitted their ET3. The Tribunal is not prepared to give weight to a document prepared by a party after proceedings have commenced when they have the opportunity to ensure that any such document reflects their case.

d. There was also reference to a letter from the CAB at p96 in which the writer of that letter made reference to termination of employment on 12 October 2020. However, the person who wrote that letter was not called to give evidence and what was in their mind or what was meant by them is a matter of pure speculation. In any event, what view they had of events is irrelevant and what matters is what was communicated by the Respondent to the Claimant at the time.

121. In these circumstances, the Tribunal considers that the Claimant was dismissed with notice on the basis of what was said to him on 12 October 2020 and what was subsequently said in the letter of 14 October 2020. The EDT is, therefore, 19 October 2020.

Are the claims in time?

122. Given the Tribunal's finding regarding the EDT, the claims of unfair dismissal under s100 ERA and s12(3) of the Employment Relations Act 1999 were lodged in time; the normal time limit expired on 18 January 2021 and so ACAS Early Conciliation was engaged before that time limit expired; the Claimant, therefore, benefits from the extension of time under s207B ERA and his ET1 was presented within the extended time limit.

123. On the other hand, it is also clear that the remaining claims under s44 ERA, s10 of the 1999 Act and s12(1) of the 1999 Act were lodged out of time; the time limit for these claims ran from 12 October 2020 under the relevant provisions (s48 ERA and s11 of the 1999 Act) and this expired on 11 January 2021; ACAS Early Conciliation was, therefore, engaged outwith the normal time limit and so the Claimant does not benefit from the extension of time under s207B ERA; this means that the ET1 was presented out of time.

Exercise of discretion to hear claims out of time

124. In considering whether to exercise its discretion, the first matter for the Tribunal is whether it had not been reasonably practicable for the claim to be lodged in time.

125. The evidence before the Tribunal showed that the Claimant was not incapable of taking steps to progress his case. He was able to lodge his appeal with the Respondent, he contacted the CAB and other potential sources of advice, he carried out research into the law and he was able to engage Early Conciliation and lodge his ET1 when he became aware of the need to do so.

126. This is not a case where the reason for the relevant claims being lodged out of time was some impediment which prevented the Claimant from acting timeously. Indeed, the Claimant does not seek to advance such an argument.

127. Rather, it is quite clear from the evidence and the submissions by the Claimant that the reason why the relevant claims were lodged out of time was because he was either ignorant or had made a mistake regarding the relevant legal provisions. In particular, he had identified that the time limit for his unfair dismissal claim ran from the EDT (which he correctly believed to be 19 October 2020) and proceeded on the mistaken belief or understanding that the time limit for the other claims ran from the EDT rather than an earlier date.

128. The question for the Tribunal is whether this ignorance or mistake is reasonable. For the reasons it sets out below, the Tribunal does not consider that the ignorance or mistake by the Claimant is reasonable.

129. The Tribunal was not presented with the internet pages on which the Claimant carried out his research. The Tribunal cannot, therefore, determine whether it was an error on the relevant website that led to the Claimant's mistake or whether it was a misinterpretation by the Claimant of what was said on that website. However, the Tribunal does not consider that this makes any difference to its decision; if it was an error on the website then the principle in *Dedman* would apply given that the website was a government site which would reasonably be expected to correctly state the law; if the Claimant misread the website then there is no evidence available to the Tribunal from which it could conclude that any misunderstanding by the Claimant was reasonable.

130. What is clear to the Tribunal is that information about the differing time limits is available to individuals. Pages from the Citizens Advice Scotland website (p97-100) covering time limits in the Employment Tribunal were put to the Claimant in cross-examination; those pages stated that time limits ran from the date of the act giving rise to a claim and the Claimant accepted that had he read that then he would not have proceeded on the basis that the EDT was the time limit for all claims.

131. For these reasons, the Tribunal considers that the Claimant could reasonably have avoided the mistake he made regarding the date from which time limits would run and so any such mistake was not reasonable. The Tribunal, therefore, concludes that it was reasonably practicable for the relevant claims to be lodged in time and so it declines to exercise its discretion to hear those claims out of time.

132. In these circumstances, the Tribunal does not have jurisdiction to hear the claims under s44 of the Employment Rights Act 1996, s10 of the Employment Relations Act 1999 and s12(1) of the 1999 Act. Those claims are hereby dismissed.

Employment Judge: Peter O'Donnell
Date of Judgment: 28 June 2021
Entered in register: 02 July 2021
and copied to parties