EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4109321/2021 (V)

Held via Cloud Video Platform (CVP) on 2 August 2021

Employment Judge Murphy (sitting alone)

Ms S Macdonald — **Claimant**
In Person

Falkirk Community Trust — **Respondent**
represented by
Ms C Howie
Solicitor

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The claimant's complaint of unfair dismissal is dismissed. The Tribunal, having determined that the claimant lodged her complaint out of time and not being satisfied that it was not reasonably practicable to lodge it in time, has no jurisdiction to hear the complaint.

REASONS

Issues

1. The claimant has presented a claim for unfair dismissal. The respondent resists the claim on the merits and also on the ground that it is time barred in circumstances where it was presented out of time and it would have been reasonably practicable for the claimant to have presented it in time.

2. In the circumstances a preliminary hearing was fixed to determine the issue of time bar. The hearing took place via cloud video conferencing, there being no objection by either

party to this format. The tribunal heard oral evidence from the claimant only and found her to be a credible witness. During her evidence the claimant made reference to documents in a relatively brief Inventory of Productions.

Findings in Fact

Having heard the claimant's evidence, the Tribunal found the following facts to be proved.

1. The claimant was employed by the respondent from 7 January 2013 to 30 January 2020 when she was dismissed summarily at a disciplinary hearing. She was employed as a catering assistant.

2. When the disciplinary allegations were made against the claimant in or around September 2019, the claimant consulted the Citizens Advice Bureau. The CAB advisor did not discuss time limits for lodging an unfair dismissal claim during the consultation. At that stage, the claimant had yet to be dismissed. When the CAB advisor established that the claimant was a member of Unison, he advised her to get in touch with her trade union for advice and representation.

3. At the disciplinary hearing on 30 January 2020, the claimant was accompanied by her trade union representative, Russ Patterson of Unison. After the dismissal, the claimant met with Mr Patterson to discuss the lodging of an appeal. At this stage Mr Patterson also discussed with her the possibility of lodging an unfair dismissal complaint in the Employment Tribunal, and it was discussed that this action would be taken in the event that the claimant's internal appeal was unsuccessful.

4. The respondent wrote to the claimant on 2 March 2020 and invited her to an appeal hearing on 25 March 2020. Covid 19 struck, and the respondent's General Manager wrote to the claimant on 19th March 2020to inform her that her appeal hearing was to be postponed in view of the pandemic. He advised he would contact her as soon as the arrangements for the hearing were rescheduled.

5. The claimant had a further discussion with Mr Patterson following receipt of that letter. In that conversation, it was acknowledged that the claimant would require to wait until respondent contacted her with a fresh hearing date. There was no discussion at that

time about the possibility of lodging an unfair dismissal complaint or the time limits for doing so.

6. The claimant did not know about the three-month time limit prior to its expiry. The claimant had made an assumption that she was precluded from lodging a complaint in the Employment Tribunal if she had not exhausted her employer's internal appeal procedure. The claimant was not advised by Mr Patterson or anyone else that this was the case. She simply held this assumption, and she did not make inquiries of Mr Patterson or anyone else regarding the position in relation to time limits.

7. On 12th June 2020, Mr Patterson called the claimant to inform her that, due to a serious illness, he could no longer represent her. He advised that he would hand her paperwork into Unison and that they would assign a new representative. In the event, Unison did not assign a new representative until prompted to do so by contact from the claimant in October 2020. In the period between 12 June and 5 October 2020, the claimant did not contact Unison to ask about the allocation of a new representative, or otherwise to discuss her case.

8. On 5 October 2020, the respondent wrote to the claimant again about her appeal. The respondent's chief executive officer indicated that she would contact the claimant shortly regarding arrangements for the rescheduled hearing and, among other matters, asked the claimant to advise her as soon as possible if she no longer wished to proceed with her appeal.

9. This letter prompted the claimant to contact Unison and she was, soon after, assigned a new trade union representative called Rodger Ridley. The claimant discussed her case with Mr Ridley at some stage between October and December 2020. At that time, Mr Ridley did not discuss with the claimant the possibility of lodging an unfair dismissal claim or the difficulty that the time limit for doing so had expired some months previously.

10. The respondent next wrote to the claimant on 3 March 2021 and informed her that her appeal would be heard on 25 March 2021. The claimant liaised with Mr Ridley regarding the preparation for her appeal hearing which duly took place on 25 March

2021. Mr Ridley accompanied the claimant at that hearing which was continued on 1 April 2021. On 1 that date, the appeal panel informed the claimant that her appeal had not been successful. The outcome was confirmed in writing on 8 April 2021.

11. At some stage between 1 April and 21 April 2021, the claimant discussed the question of an unfair dismissal complaint with Rodger Ridley. Mr Ridley gathered paperwork with a view to lodging a claim for unfair dismissal. It was then that he contacted the claimant and informed her that one of his colleagues had pointed out there was a three-month time limit which had expired. Mr Ridley informed the claimant that, on this basis, Unison would not submit a claim on her behalf to the Tribunal.

12. The claimant was put in touch with an individual called Dave O'Connor who she understood to hold a senior position in Unison. He explained to her that only in exceptional circumstances would a complaint of unfair dismissal be heard if it had been brought out of time. He told her that her claim was time barred and that the union would progress a complaint on her behalf. The claimant did not ask Mr O'Connor why her union representatives had not brought the time limit to her attention before then. At the time, the claimant assumed that Mr Patterson and Mr Ridley entertained the same mistaken assumption that she did, namely that a claim could not be lodged until any internal appeal was exhausted. The claimant had never been told by either of her representatives that they held such a belief.

13. The claimant contacted ACAS on 21 April 2021. They did refer to time bar and told the claimant that the claim appeared out of time but in certain circumstances that might not be the case. The claimant obtained an Early Conciliation certificate from ACAS on 22 April 2021.

14. The claimant lodged a complaint on 29 April 2021.

15. The claimant, while still employed by the respondent, had gone off sick with work related stress in or about October 2019. She was referred by her GP to a mental health nurse and prescribed sessions with him. These were initially held at her GP surgery but latterly, following the outbreak of the pandemic, they were held online using video conferencing. The claimant was diagnosed with stress and anxiety. She was signed off

as unfit for work in the period from her dismissal until the date when she lodged her claim.

16. The claimant was not, however, prevented by her ill health from lodging a claim earlier. In the event she had become aware of the time limit at an earlier stage, and been aware that the time limit ran regardless of the internal appeal process, she would have lodged her claim earlier. The claimant did not lodge a claim within the statutory time limit because she did not know of the time limit and held a mistaken belief that she required to wait until her internal appeal process had concluded before doing so. She continued to harbour that belief until it was corrected by Unison in April 2021. For this reason she did not lodge her complaint until that month.

17. The claimant's health situation caused symptoms including impatience, irritability and forgetfulness. However, her condition would not have prevented her from making inquiries of her union representatives or the CAB about unfair dismissal claims and possible time limits. Nor would it have prevented her from exploring the position online which she had the necessary access to do.

18. Likewise the challenges of the pandemic restrictions and lockdowns would not have prevented the claimant from making relevant inquiries.

19. The reason the claimant omitted to do so, either before the expiry of the normal time limit, or for some twelve months thereafter, was her mistaken assumption.

20. The respondent did not at any stage misrepresent the position regarding the time limit for lodging a claim with the employment tribunal to the claimant. The respondent did not comment at any time to the claimant on a possible claim for unfair dismissal or the applicable time limits in the Employment Tribunal.

Relevant Law

21. The law relating to time limits in respect of unfair dismissal is set out in the Employment Rights Act 1996 ("ERA"). Section 111, so far as relevant, provides as follows:

> *(1) A complaint may be presented to an Employment Tribunal against an employer by any person that he was unfairly dismissed by the employer.*

(2) Subject to the following provisions of this section an Employment Tribunal shall not consider a complaint under this section unless it is presented to the Tribunal –

(a) Before the end of the period of three months beginning with the effective date of termination, or

(b) Within such further period as the Tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.

22. S.207B of ERA provides for an extension to the three-month time limit in certain circumstances. In effect, s.207B(3) of ERA 'stops the clock' during the period in which the parties are undertaking early conciliation and extends the time limit by the number of days between 'day A' and 'Day B' as defined in the legislation. This 'stop the clock' provision only has effect if the early conciliation process is commenced before the expiry of the statutory time limit. Where a limitation period has already expired before the conciliation commences, there is no extension (**Pearce v Bank of America Merrill Lynch** UKEAT/0067/19).

23. Where a claim has been lodged outwith the three-month time limit, the Tribunal must determine whether it was not reasonably practicable for the claimant to present the claim in time. The burden of proof lies with the claimant. If the claimant succeeds in showing that it was not reasonably practicable, then the Tribunal must determine whether the further period within which the claim was brought was reasonable.

24. In **Lowri Beck Services Ltd v Brophy** 2019 EWCA Civ 2490, the Court of Appeal summarised the approach along the following lines.

1. The test should be given a "liberal interpretation in favour of the employee".

2. The statutory language is not to be taken only as referring to physical impracticability and might be paraphrased as to whether it was "reasonably feasible" for that reason.

3. If an employee misses the time limit because he or she is ignorant about the existence of the time limit, or mistaken about when it expires in their case, the question is whether that ignorance or mistake is reasonable. If it is, then it will not

have been reasonably practicable for them to bring the claim in time. Importantly, in assessing whether ignorance or mistake are reasonable, it is necessary to take into account enquiries which the claimant or their adviser should have made.

4. If the employee retains a skilled adviser, any unreasonable ignorance or mistake on the part of the adviser is attributed to the employee (**Dedman v British Building and Engineering Appliances Ltd** [1974] ICR 53).

5. The test of reasonable practicability is one of fact and not of law (**Palmer and Saunders v Southend-on-Sea Borough Council** [1984] IRLR 119).

25. With respect to the effect of the retention of a skilled adviser *per* **Dedman**, it was held in **Syed v Ford Motor Co Ltd** [1979] IRLR 35 that trade union officials fell to be categorized as 'skilled advisers', such that their wrong advice was visited on the claimant.

26. With respect to the issue of ignorance of the time limit, in **Wall's Meat Ltd v Khan** [1978] IRLR 499, Brandon LJ held that ignorance or mistake will 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." In **Dedman**, Scarman LJ explained that relevant questions for the Tribunal would be:

> "What were his opportunities for finding out that he had rights? Did he take them? If not, why not? Was he misled or deceived? Should there prove to be an acceptable explanation of his continuing ignorance of his rights, would it be appropriate to disregard it, relying on the maxim "ignorance of the law is no excuse". The word "practicable is there to moderate the severity of the maxim and to require an examination of the circumstances of his ignorance."

27. Unless there are additional circumstances, the mere fact of invoking an internal appeals procedure is not regarded as sufficient to justify a finding that it was not reasonably practicable to present the claim in time (**Palmer**). In **Bhoda (Vishnudut) v Hampshire Area Health Authority** [1982] ICR 200 (approved by the CA in **Palmer**), it was held that:

> "there may be cases where the special facts (additional to the bare fact that there is an internal appeal pending) may persuade an [employment] tribunal, as a question of fact, that it was not

> reasonably practicable to complain to the … tribunal within the time limit. But we do not think that the mere fact of a pending internal appeal, by itself, is sufficient to justify a finding of fact that it was not "reasonably practicable" to present a complaint to the …tribunal."

28. A list of possible "additional" considerations was set out in **Palmer** to include the question of the claimant's state of knowledge of his or her right to claim for unfair dismissal and of the time limit, and whether the employer had misrepresented any relevant matter to the employee.

Submissions

29. The claimant declined to make a submission.

30. Ms Howie gave an oral submission on behalf of the respondent and subsequently lodged with the Tribunal the written document to which she had spoken, copying to the claimant. The following is a summary of Ms Howie's submission which is not reproduced verbatim here.

31. It was not in dispute that the claimant had not lodged her complaint within the normal time limit. Ms Howie submitted that the claimant's reasons for failing to lodge her claim timeously fell into 3 categories:

    a. That she was waiting for the conclusion of the appeals process;

    b. That she lacked knowledge of the correct time limit; and

    c. That there was fault on her TU representatives' part for not advising her of the time limits.

32. Ms Howie submitted that the mere fact the claimant's appeal was pending until April 2021 was not of itself sufficient to amount to 'special facts' for the purposes of **Bodha**. In addition to **Bhoda**, Ms Howie relied upon **Community Integrated Care v Ms C M Peacock** 2010 WI 4180768, in which Lady Smith, referring to **Palmer**, stated:

> "It is well established that the fact an appeal is pending does not of itself delay the running of the three-month period. It follows that the delay in the appeal process does not do so either."

33. On the claimant's lack of knowledge of the time limits, Ms Howie cited the Court of Appeal decision in **Porter v Bandridge Ltd** [1978] IRLR 271 as authority for the proposition that the correct test is whether the claimant ought to have been aware of the relevant time limit. If the claimant was not aware of the time limits, submitted Ms Howie, her trade union representation meant that she ought reasonably to have been so. The claimant accepted in her evidence that she had the opportunity of accessing the union but declined to do so. Ms Howie also pointed out the claimant accepted that Mr Patterson and Mr Ridley appeared to be experienced advisers who she would have expected to have been aware of the time limits. It was Ms Howie's contention that, notwithstanding the claimant's evidence, it was highly likely that the claimant had in fact been advised of the time limit by her union representatives.

34. Ms Howie referred to the case of **Riley v Tesco Stores Ltd** 1979 ICR 223 where it was stated that where an employee consults an adviser but a complaint is not presented within the time limit, the tribunal is entitled, in the absence of contrary evidence, to infer that it was 'reasonably practicable' to present the claim in time. Ms Howie also relied upon **Porter** and **Dedman** to argue that the engagement of trade union representation militated against a finding that the claimant's ignorance of the time limits rendered it not reasonably practicable to submit her claim on time. She also cited the dicta of Mr Justice Wood in **Trevelyans (Birmingham) Ltd v Norton** 1991 ICR 488, EAT to the effect that, where an applicant has knowledge of his rights to claim unfair dismissal, then there is an obligation on him to seek information or advice about the enforcement of those rights. The longer the delay, Ms Howie said, the less likely a claimant could show she had no knowledge of the right to claim unfair dismissal.

35. In Ms Howie's submission, the claimant had ample opportunities to make inquiries during the unprecedented confinement to her home wrought by lockdown.

36. Ms Howie also relied upon the fact of the claimant's access to trade union support and representation. She referred the Tribunal to **Dedman** to support the position that where a man engages skilled advisers and they mistake the time limit, his remedy is against those advisers in a negligence claim.

37. In the event the Tribunal were to accept it was not reasonably practicable for the claimant to lodge her claim on time, Ms Howie submitted that it was not presented in such further period as was reasonable. She referred to **The Royal Bank of Scotland plc v Theobald** UKEAT/0444/06 in regard to the correct approach. There, she said, it was accepted by a tribunal that if it was not reasonably practicable for a claimant to lodge an unfair dismissal claim within the normal time limit, it will be incumbent on the claimant to provide a 'full and frank' explanation of events in the period between the expiry of the time limit and the submission of the claim. The EAT found there that a two-week delay, viewed against a three-month time limit, is "quite significant". The delay in this case of one year from the expiry of the original time limit, was not, in the respondent's submission reasonable. Even after the claimant learned of the unsuccessful appeal outcome, Ms Howie pointed out, it took her a further four weeks to lodge her claim and, in her submission, the claimant's explanation of the reason for this further delay was inadequate.

Discussion and Decision

38. It was common ground that the claimant's Effective Date of Termination was 30 January 2020 and that the normal time limit expired on 29 April 2020. As the claimant did not commence early conciliation through ACAS before that date, there was no extension in terms of s.207B(3) of ERA.

39. The Tribunal required to consider, first of all, whether it was reasonably practicable for the claimant to have lodged her claim by 29 April 2020. Only if the Tribunal were to conclude it was not, would it require to go on to consider the question of whether the claim was lodged within a reasonable time thereafter.

40. The claimant was unaware of the three-month time limit at the material time, so that the question is whether her ignorance of that requirement was reasonable in the circumstances. The Tribunal was satisfied that the claimant was aware of the right to complain of unfair dismissal to an Employment Tribunal in the period between 30 January and 29 April 2020. This option had been specifically contemplated in discussions between the claimant and her trade union representative at the time, Mr Patterson. The claimant had an obligation to seek information or advice about the

enforcement of that right (**Trevelyans (Birmingham) Ltd**). She failed to do so, despite having access to Mr Patterson, and being aware of the option of contacting the CAB adviser with whom she had been in contact prior to her dismissal.

41. To the extent that the failure of Mr Patterson to advise the claimant about the time limit prior to its expiry, in the absence of an inquiry from her, was erroneous or attributable to unreasonable ignorance on his part, such error or unreasonable ignorance is to be attributed to the claimant under the **Dedman** principle.

42. The claimant's genuinely held but erroneous belief that she required to wait until her internal appeal was exhausted before lodging a complaint with the Tribunal was considered carefully by the Tribunal. The Tribunal was mindful that there may be cases where the special facts (additional to the bare fact that there is an internal appeal pending) might support a finding that, as a question of fact, it was not reasonably practicable to complain within the time limit (**Bodha**). However, a delay in the appeal process does not of itself delay the running of the three-month time limit (**Community Integrated Care**) and the Tribunal was unable to identify any 'special facts' or features pertaining alongside the internal appeal which meant it was not reasonably practicable to lodge the complaint within the normal time limit.

43. The claimant had access to advice and support from her trade union. This was not a case where she was deceived or misled by the respondent or anyone else. The claimant acknowledged a few times during her evidence that she was quite ignorant of, and did not understand, legal matters. She held that self-perception throughout the period following her dismissal, yet she did not avail herself of the opportunities available to her to check her understanding of the rules for bringing unfair dismissal claims. This was despite it being in her consciousness from as early as January or February 2020 that she might bring such a claim.

44. The Tribunal took into consideration the claimant's mental health condition at the material time but noted her own acknowledgement that this would not have prevented her from lodging a complaint on time had she been aware of the time limit. The Tribunal also noted that the claimant's mental health difficulties in the period prior to its expiry did not prevent her from liaising with her trade union representative over the

preparation and lodging of her internal appeal which suggests she would have been fit to do likewise in relation to a tribunal complaint, had she applied herself to this task.

45. The Tribunal concluded that the claimant's ignorance or mistake as to the existence of the statutory time limit for a complaint of unfair dismissal and the effect of her internal appeal on any such time limit, was not objectively reasonable in all the circumstances.

46. The Tribunal does not, therefore, need to consider whether the claimant raised her claim within a reasonable time after the original time limit expired on 29 April 2020.

47. In the circumstances, the Tribunal does not have the jurisdiction to hear the claimant's claim, which is dismissed.

Employment Judge: Lesley Murphy
Date of Judgment: 03 August 2021
Entered in register: 17 August 2021
and copied to parties