EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4104775/2020 (V)

Preliminary Hearing held remotely by Cloud Video Platform (CVP) on 5 August 2021

Employment Judge J Shepherd

Miss L Alexander	**Claimant** **Represented by:** **Ms R Page** **Solicitor**
GEOAmey PECS Limited	**Respondent** **Represented by:** **Mr T Cross** **Consultant**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Tribunal is that the claim for unfair dismissal was presented outside the period specified in section 111 of the Employment Rights Act 1996, that it was reasonably practicable to have presented that complaint within time, and that the claim for unfair dismissal is therefore dismissed on the basis that the Tribunal has no jurisdiction to hear it.

REASONS

Introduction

1. The claimant commenced ACAS Early Conciliation on 10 August 2020 and the certificate was issued on 13 August 2020. The claimant submitted a claim of unfair dismissal to the Tribunal on 24 August 2020. A preliminary hearing was fixed to determine whether the Tribunal has jurisdiction to hear the claim, or whether it was submitted out of time.

2. The claimant gave evidence on her own behalf. The respondent did not lead any evidence. A joint set of productions was lodged, extending to 80 pages.

Issues to be determined

3. Whether the claim was presented to the Tribunal before the end of the period of three months beginning with the effective date of termination, in accordance with section 111(2)(a) of the Employment Rights Act 1996?

4. If not, whether the Tribunal is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months and, if so, whether the complaint was presented within such further period as the Tribunal considers reasonable?

Findings in fact

5. The Tribunal found the following facts, relevant to the issues to be determined, to be admitted or proven.

6. The claimant was a Custody Officer. Following a disciplinary hearing that took place on 16 March 2020 the Claimant received a telephone call from Mr Stephen McGuire, Regional Manager, on 18 March 2020 informing her that she was to be summarily dismissed.

7. The claimant was upset and called her union, GMB, to ask to speak to her union representative, Martin McCulloch. The claimant instead spoke with another union representative, Karen Leonard, and informed her that she had

been dismissed. This message was passed on to Mr McCulloch the same day.

8. On the same day, 18 March 2020, upset about the news of her dismissal, the claimant drank alcohol and took drugs in an attempt to end her life. She recalls waking up in Glasgow Royal Infirmary not realising what had happened. There had been a similar incident on 17 February 2020 when the claimant had also taken alcohol and drugs in an attempt to end her life. This had occurred after she was suspended from her job on 14 February 2020 pending the disciplinary investigation.

9. The claimant's medical records stated that on assessment after the overdose in February 2020 that there was 'no ongoing thought plan or intent of wanting to end her life and she was wholly regretful of her actions. In the absence of acute psychiatric morbidity there was no requirement for input from mental health services at this time.' After the overdose on 18 March 2020, her assessment states: 'She is not currently on any medication for her mood as states anti-depressants killer her partner. Linda strongly denied any current suicidal ideation. She stated she was keen to get home. She was future focused and stated she plans to appeal her sacking and plans to contact ATOS and her Union rep.' It appears that the reference to ATOS is in fact a reference to ACAS.

10. The respondent wrote to the claimant by letter dated 18 March 2020 informing her that, following the disciplinary hearing on 16 March 2020, the decision had been taken to summarily dismiss her from her employment, with effect from 18 March 2020.

11. With the assistance of her union, the Claimant appealed her dismissal but the appeal was not successful and the claimant was informed, by letter dated 7 May 2020, that the decision to dismiss her had been upheld.

12. The claimant believed that her union would commence the ACAS Early Conciliation process on her behalf. The claimant asked her union representative whether ACAS would contact her directly and was informed by

the union that any contact from ACAS would be with the union. The claimant therefore believed that her union representatives had matters in hand.

13. On 5 June 2020 the Claimant exchanged a number of emails with Mr McCulloch. She queried whether there had been any word back from ACAS. In response Mr McCulloch said that he would contact the Claimant and ask her to gather up all minutes of hearings and investigation notes and stated 'From this I will submit to solicitors Linda and it will be their judgment as to whether or not you have case for Employment Tribunal…" In an email in response the Claimant stated "I though it was with acas. As isnt there a time limit sure Karen said it had been sent to them" and in reply Mr McCulloch stated "Thanks for the update, limitation date is three months less one day re Employment Tribunal from date of dismissal."

14. The union had not commenced ACAS Early Conciliation and the time period in which to file the claim was therefore not extended beyond the three month time limit. The time limit passed on 17 June 2020 without early conciliation being commenced, and without any claim being filed with the Tribunal. At this time, the claimant still believed that her union representatives had matters in hand and had already contacted ACAS on her behalf.

15. On 6 July 2020 the claimant hand delivered her documents to the union's solicitors. The claimant heard nothing further until she received a telephone call from Karen Leonard on 29 July 2020. Ms Leonard informed the claimant that her claim was time barred and apologised for this but told the claimant that there was nothing more that could be done.

16. The claimant then spoke with a friend on 9 August 2020, a QC that she had met through her work at the High Court, who informed her that she should make contact with ACAS herself and that she may have a chance to still bring a claim. The following day she contacted ACAS who provided her with a copy of the ET1 form to complete.

17. The claimant was trying to complete the ET1 form on her phone and tablet but was unable to do so. She had no printer and, due to the difficulties with

many places being closed as a consequence of the coronavirus pandemic, she was unable to get the form printed to complete it by hand. Eventually a friend said she would assist her and the Claimant was able to complete the form and file it on 24 August 2020.

18. The claimant started new employment on 2 August 2020 in the mental health sector.

Relevant law

19. S.111 ERA 1996 provides:

> 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.

20. What is reasonably practicable is a question of fact. The test is empirical and involves no legal concept. Practical common sense is the keynote (**Wall's Mat Co Ltd v Khan [1979] ICR 52, CA**).

21. The onus of proving that presentation in time was not reasonably practicable rests on the Claimant (**Porter v Bandridge Ltd 1978 ICR 943, CA**). If the Claimant satisfies the tribunal that the presentation of the complaint within time was not reasonably practicable then the tribunal must then go on to decide whether the claim was presented "within such further period as the tribunal considers reasonable."

22. In **Palmer v Southend-on-Sea BC [1984] ICR 372, CA**, the Court of Appeal emphasised that the phrase "reasonably practicable" does not mean simply

reasonable. That would be too favourable to employee. However, nor did it mean physically possible, which would be too favourable to employers. It meant something like 'reasonably feasible'. In **Asda Stores v Kauser UKEAT/0165/07** Lady Smith explained the test as follows: "the relevant test is not simply a matter of looking at what was possible but to ask whether, on the facts of the case as found, it was reasonable to expect that which was possible to have been done."

23. If a claimant engages skilled advisers to act for him or her in presenting a claim, it will normally be presumed that it was reasonably practicable to present the claim in time. As Lord Denning MR put it in **Dedman v British Building and Engineering Appliances Ltd 1974 ICR 53, CA**: 'If a man engages skilled advisers to act for him – and they mistake the time limit and present [the claim] too late – he is out. His remedy is against them.'

24. Trade union representatives are generally assumed to know the relevant time limits and to appreciate the necessity of presenting claims in time. In **Times Newspapers Ltd v O'Regan 1977 IRLR 101, EAT**, the claimant knew of her rights and knew of the three-month time limit when she was dismissed. However, a union official advised her incorrectly that the three months did not start to run while negotiations were taking place about her possible reinstatement. The EAT held that the claimant was not entitled to the benefit of the escape clause because the union official's fault was attributable to her and she could not claim that it had not been reasonably practicable to claim in time.

Claimant's submissions

25. Ms Page prepared written submissions acknowledging the relevance of the **Dedman** principle and that the onus is on the claimant to show why the Tribunal should depart from this. Ms Page asserted that the fact that advice had been taken did not automatically mean that it was not reasonably practicable for the claimant to have lodged the claim in time and referred to the Court of Appeal decision in **Marks & Spencer plc v Williams-Ryan [2005] EWCA Civ 470**. It was submitted on the Claimant's behalf that,

notwithstanding the general **Dedman** rule, the Tribunal must look at what advice (if any) was given, and what the circumstances were and if the Tribunal were satisfied that the claimant was told not to submit a claim and was under the impression that the GMB were to lodge a claim with ACAS on her behalf, then the **Dedman** principle would not apply.

26. Further, Ms Page submitted that it was not reasonably practicable for the claimant to lodge a claim within the time limit due to her health. Ms Page referred to the case of **University Hospitals Bristol NHS Foundation Trust v Williams UKEAT/0291/12** that she asserts has parallels with the claimant's case and that whilst the claimant was able to do certain tasks, there is no doubt that the double suicide attempt has had a bearing upon the claimant's ability to carry out tasks such as lodging a claim with the Tribunal.

27. Ms Page also asserts that consideration must be given to circumstances relating to the pandemic and lockdown. The claimant was unable to access the form ET1 correctly on her mobile device and tablet and, due to the lockdown, the claimant was unable to get access to a printer with libraries closed, businesses shut and being unable to visit friends made this task 'near impossible'.

28. It was submitted on behalf of the claimant that although she became aware of the deadlines for making a tribunal claim, she genuinely believed that the union were dealing with this matter for her, that she believed that time would only start to run from the date she was informed of the outcome of her appeal against dismissal on 7 May 2020, and that although she was alerted to the limitation dated by the GMB on 5 June 2020, the claimant still believed she was in time.

Respondent's submissions

29. Mr Cross, on behalf of the Respondent, set out his submissions orally. He referred the Tribunal to **Palmer and Saunders v Southend-on-Sea Borough Council [1984] IRLR 119** in which the Court of Appeal stated that the meaning of the words "reasonably practicable" lies somewhere between

reasonable on the one hand and reasonably capable physically of being done on the other. Mr Cross noted that the Court of Appeal made clear that the answer to the question of whether it was reasonably feasible to present the complaint within the relevant three months is pre-eminently an issue of fact for the Tribunal taking all the circumstances of the given case into account and in determining this issue the Tribunal may wish to consider the substantial cause of the employee's failure to comply with the statutory time limit; whether she had been physically prevented from complying with the limitation period, for instance by illness or a postal strike, or something similar. It may be relevant for the Tribunal to investigate whether, at the time of dismissal, and if not when thereafter, the employee knew that she had the right to complain of unfair dismissal; in some cases the Tribunal may have to consider whether there was any misrepresentation about any relevant matter by the employer to the employee. It will frequently be necessary for the Tribunal to know whether the employee was being advised at any material time and, if so, by whom; of the extent of the advisor's knowledge of the facts of the employee's case; and of the nature of any advice which they may have given him. It will probably be relevant in most cases for the Tribunal to ask itself whether there was any substantial failure on the part of the employee or his advisor which led to the failure to comply with the time limit. The mere fact that an employee was pursuing an appeal through the internal machinery does not mean that it was not reasonably practicable for the unfair dismissal application to be made in time.

30. Mr Cross asserts that, whilst the claimant had a number of unfortunate health and domestic issues, there was no sustained medical impediment during the limitation period that would make it not feasible for her to file the claim in time. He notes that the claimant did know of her right to bring a claim for unfair dismissal and confirms that she was aware of the time limits from 5 June 2020 onwards. The claimant accepted that the dismissal letter confirmed the date of her dismissal and that this was therefore clear to the claimant.

31. Mr Cross asserted that the claimant engaged skilled advisers in her union representatives. He asserts that this is a case where the union were at fault

in allowing the time limit to pass without commencing ACAS early conciliation or filing a claim, but that the claimant's remedy lies with them, not the Respondent, as it was reasonably feasible for them to commence early conciliation and present a claim within the required time period.

32. Mr Cross also asserts that, even if it was not reasonably practicable to bring the claim within the time limit, that the claimant did not then raise the claim within a further reasonable period and in waiting from 13 August 2020 when the ACAS early conciliation certificate was issued until 24 August when the claim was filed, the claimant lacked the sense of urgency that should be expected given the background.

Decision

33. The effective date of termination of the claimant's employment was 18 March 2020. In order to comply with s.111 ERA the claim of unfair dismissal therefore needed to be brought by 17 June 2020 to be within the period of three months from the date of dismissal. ACAS Early Conciliation was not commenced within the three month time limit and the claimant therefore did not benefit from any extension of the primary limitation period. The ET1 was filed on 24 August 2020 and was therefore filed 68 days out of time.

34. The Tribunal first considered whether it was reasonably practicable for the claim to have been brought within the time limit. The claimant was at all material times receiving advice and assistance from experienced union representatives. Mr McCulloch had represented the claimant at her disciplinary hearing and was made aware of her summary dismissal on 18 March 2020. Other experienced union representatives, Ms Leonard and Ms Gilmour, were also involved with the claimant's case. The claimant was informed by her union representatives that they would commence the ACAS early conciliation process and she relied upon this, believing that the union was dealing with the necessary procedures for her to be able to bring a tribunal claim.

35. The claimant made enquiries with her union representatives on 5 June 2020 as to whether there had been any word from ACAS and also queried whether there was a time limit. The union representative did not inform the claimant that the union had not yet contacted ACAS on her behalf. Although her representative informed her on the same day that the limitation date was three months less a day from the date of dismissal, she was also informed that the union would be in touch to ask her to gather up all minutes of hearings and investigation notes and that the union would submit these documents to the solicitors for them to decide whether or not the claimant had a case that could be submitted to the Employment Tribunal. It would appear that the union did not invite the claimant to submit these documents to the union solicitors until after the time limit had already expired, as the claimant hand delivered those documents to the union solicitors on 6 July 2020. The Tribunal accepts that the claimant was relying on the union to inform her as to the steps she needed to take in bringing a tribunal claim, and that they did not expressly inform her that she would be out of time to bring a claim until after the time limit had already expired on 29 July 2020.

36. The claimant had skilled union representatives acting for her. She was reassured that they had commenced ACAS Early Conciliation and believed that they would carry out any necessary steps to ensure that her tribunal claim was brought within the relevant time limits. Any fault on the part of her union representatives in failing to take the active steps to ensure the claim was issued in time are attributable to the claimant and it cannot be said that their failure to take the appropriate steps, or advise the claimant as to the steps she needed to take herself, rendered it not reasonably practicable for the claim to be brought within the time limit.

37. The claimant herself was aware that she could bring a claim for unfair dismissal and, although she initially had limited knowledge of the procedure to be followed in making such a claim, or the required time limits, by 5 June 2020 the claimant was aware of her right to claim unfair dismissal, the requirement to contact ACAS before making a claim, and she was also aware that the time limit for bringing a claim was three months less one day from the

date of dismissal as she had specifically asked her union representative in email correspondence if there was a time limit and had received this information in response. Unfortunately, despite this knowledge, the claimant appears to have placed too much reliance upon her union representatives in ensuring that the claim was filed on time.

38. The Tribunal finds that it was not reasonable for the claimant to conclude that time ran from the date of the appeal decision on 7 May 2020, rather than the date of actual dismissal on 18 March 2020, and it notes that this would still have meant that the time limit expired on 6 August 2020 and that the claimant did not take steps to issue a claim before this date. The information that the claimant had been provided with by the respondent as to the date of her dismissal was clear, similarly the information that was provided by the union as to the time limit for bringing a claim was clear, and left little room for confusion by the claimant.

39. The Tribunal accepts that the claimant was experiencing difficulties with her mental health throughout this period, from the time of her suspension on 14 February 2020 and up until she filed her claim on 24 August 2020 and beyond. This was plainly an extremely difficult time for her, amply demonstrated by the two overdoses she took in February and March 2020. However, the Tribunal does not consider that these mental health difficulties meant that it was not reasonably feasible for her to file her claim within the relevant time limits. Indeed it is clear that her health and personal problems were not the reason why the claim was brought out of time. Throughout the relevant period, the claimant was communicating with her union about her dismissal and potential tribunal claim. The medical evidence seen by the Tribunal does not demonstrate that the claimant's difficulties with her mental health at the material time prevented her from submitting the claim on time. The Tribunal notes that the claimant was able to correspond with her union during this period, and it also notes that the claimant was able to commence new employment on 2 August 2020. It is clear from the evidence that the reason why the claimant did not submit her claim within the time limit was because she believed that her union was dealing with ACAS on her behalf and that she

was unaware that this had not occurred and that the time limit had expired until she was informed of this on 29 July 2020.

40. For these reasons, the Tribunal concludes that it was reasonably practicable for the claimant to complain of unfair dismissal within the applicable time-limit.

41. Even if the Tribunal had concluded that it was not reasonably practicable for the claimant to bring the claim within the applicable time limit, it would not have found that the claim was lodged within a reasonable further period. The claimant was informed by her union representative on 29 July 2020 that the union had failed to commence the ACAS early conciliation process and that her claim was therefore time barred. However, the claimant's evidence before this tribunal was that she believed that the three month time limit only started to run from the decision on appeal on 7 May 2020. If her belief was correct, she would still have had another week to commence proceedings, but the claimant took no action at all until speaking with her friend on 9 August 2020 who advised her to contact ACAS herself, which she did the next day on 10 August 2020. The ACAS certificate was then issued on 13 August but the Claimant did not file her ET1 until 24 August 2020. Whilst the Tribunal has some sympathy with the difficulties the claimant experienced in completing her claim form which was compounded by practical difficulties caused by the pandemic, the Tribunal finds that the claimant did not act with the sense of urgency required of her given that she had been informed of her claim having been time barred on 29 July 2020. The tribunal therefore concludes that the claim was also not lodged within a further reasonable period.

42. The Tribunal accordingly does not have jurisdiction to hear the claimant's claim for unfair dismissal.

Employment Judge: Jude Shepherd
Date of Judgment: 10 August 2021
Entered in register: 30 September 2021
and copied to parties