EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4100250/2021

Preliminary Hearing held by Cloud Video Platform (CVP) on 8 June 2021

Employment Judge P O'Donnell

Mr R Crow	**Claimant** **In Person**
J & I Pipework Services	**Respondent** **Mr Kaiden** **Counsel,** **instructed** **by Kennedys,** **Solicitors**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that the claim of unfair dismissal was presented to the Tribunal out of time and that it was reasonably practicable for the claim to be lodged timeously. The Tribunal was not prepared to exercise its discretion to hear the claim out of time. In these circumstances, the Tribunal does not have jurisdiction to hear the claim of unfair dismissal and it is hereby dismissed.

REASONS

Introduction

1. The Claimant had brought a number of complaints relating to his dismissal. These originally included claims of disability discrimination under the Equality Act 2010 and a claim for redundancy pay. These claims were withdrawn at an earlier stage of the Tribunal process.

2. This left a claim for unfair dismissal as the only claim live before the Tribunal. The Respondent had raised a jurisdictional issue, that is, that the claim of unfair dismissal was lodged out of time and so the Tribunal did not have the power to hear it.

3. The present hearing was listed to determine whether the claim of unfair dismissal was lodged out of time and, if so, whether the Tribunal should exercise its discretion to hear the claim out of time.

4. The hearing was held remotely by way of Cloud Video Platform (CVP).

Preliminary issues

5. At the outset of the hearing, Counsel for the Respondent had raised a query as to whether or not the Claimant had complied with directions made at an earlier case management hearing to set out his position on the issue of time bar. The Respondent had no record of receiving these.

6. The Claimant confirmed that he had not done so as he did not know how to do this. There was no suggestion from the Respondent that they were prejudiced by this or that a fair trial was possible. The Tribunal continued with the hearing in order to avoid further delay.

7. It also emerged that, although he had received the emails from the Respondent's agent with the joint bundle, the Claimant had not been able to open these and so did not have the bundle before him. The Tribunal was reluctant to proceed in circumstances where both parties did not have access to relevant documents that may be referenced in evidence. The Claimant suggested that the documents could be sent by post and the Tribunal explained that this would mean that the hearing would not proceed and would need to be postponed to a later date.

8. In the event, with the assistance of Counsel for the Respondent and his instructing solicitors, the Claimant was able to access the documents and the hearing could proceed.

Evidence

9. The Tribunal heard evidence only from the Claimant. The Respondent did not lead any witness evidence.

10. Given that the Claimant was a party litigant, the Tribunal asked him a series of questions to elicit his evidence-in-chief and then gave him the opportunity to add anything further which he considered relevant.

11. The Tribunal found the Claimant to be a credible witness who very honestly stated where he could not recall events given the passage of time. In particular, although he could recall taking certain steps in the process leading to his ET1 being lodged, he could not recall the precise dates or order of events. This did mean that the Claimant's evidence was not entirely reliable although that was not a particularly significant issue given that there was not a significant dispute of facts.

12. The only real dispute related to the date of dismissal; the Claimant said that this was 23 July 2020 whereas the letter of dismissal gave an earlier date. For reasons set out below, the Tribunal preferred the documentary evidence in this regard. In any event, the date of dismissal was not fundamental to the case as the claim would still be presented out of time if the later date was used.

13. There was a bundle of documents prepared by the Respondent. The Tribunal had directed that this was to be a joint bundle but notes that the Claimant did not engage with the Respondent's agent in preparing the bundle. References to page numbers below are references to pages in the bundle.

Findings in fact

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

15. The Claimant commenced employment with the Respondent in 2017 or 2018. He did not have a formal job title but would describe his job as a mechanical fitter.

16. On 8 July 2020, the Respondent sent an email to the Claimant (p82) informing him that he had been selected for redundancy and that his employment would be terminated on 17 July 2020.

17. After his dismissal, the Claimant contacted his local Citizens Advice Bureau for advice on his rights. He could not recall the precise date when he contacted them.

18. He was advised by the CAB to appeal his dismissal and he contacted the Respondent about this by email dated 10 July 2020.

19. He was also advised by CAB that he needed to engage the ACAS Early Conciliation process and he did so on 15 October 2020 (p1). He was not advised that there was a time limit for doing so and did not receive any advice on time limits at any time prior to his ET1 being lodged.

20. The Early Conciliation Certificate was issued on 15 November 2020 (p1). The Claimant did not take any further advice from CAB, ACAS or any other adviser after this was issued until shortly before lodging his ET1.

21. The Claimant's ET1 was lodged online on 15 January 2021. By this point in time the Claimant had felt that matters had gone on too long and phoned ACAS either on 14 or 15 January 2021. It was at the point that he was

informed of time limits and also found out about the ability to lodge the ET1 online. He proceeded to lodge his claim at that point.

Claimant's submissions

22. The Claimant made the following submissions.

23. It had been a very stressful time for the Claimant and he had no income. He had been on pain medication at the time when he had been dismissed due to an injury.

24. He did not know anything about the process; he was a layman and had never had any experience of this. He was not aware of the time bar and he wanted a fair opportunity to put his case.

25. In rebuttal, he stated that it was not a case that he was ignorant but rather that he was unknowledgeable and unqualified on the law.

Respondent's submissions

26. Counsel for the Respondent produced written submissions which were adopted and supplemented these orally.

27. The written submissions begin by setting out the issues to be determined and a short summary of some of the Tribunal procedure to date. In particular, it notes the directions made for the Claimant to set out his position and the failure to do so.

28. The submissions go on to set out a brief summary of the facts of the case setting out the dates of the relevant events in the process of the Claimant's case being lodged.

29. The relevant statutory provisions are then set out (ss111 and 207B ERA). Reference is made to the cases of *Porter* and *Khan* (below).

30. Mr Kaiden's submissions then turn to the application of the law to the facts of this case. It is submitted that the correct date of termination is 17 July 2020 in light of what is said in the 8 July email (p82).

31. In engaging ACAS Early Conciliation before the end of the normal time limit on 16 October 2020 and the Certificate being issued on 16 November 2020, it is submitted that the time limit was extended to 15 December 2020 under the provisions in s207B ERA.

32. The ET1 was submitted on 15 January 2021 and so, it is submitted, it was a month (or 31 days) out of time. It was pointed out that, even if the Claimant was correct in relation to the date of dismissal, the ET1 would still have been lodged out of time.

33. Turning to his oral submissions, Mr Kaiden submitted that the operative reason for any delay given by the Claimant is that of ignorance. Although the Claimant talked about his health and the effect of medication, he was able to contact ACAS, lodge Early Conciliation and lodge the ET1. The reason was, therefore, that the Claimant did not know of the time limit.

34. It was submitted that the law is clear; ignorance does not provide an excuse unless that ignorance is reasonable. It was clear that the Claimant had the ability to carry out research and could know of the right but not time limit. He had spoken to ACAS and CAB but could not recall what was said. It was submitted that the Claimant had failed to make sufficient enquiries and his ignorance was not reasonable.

Relevant Law

35. Section 111(2)(a) of the Employment Rights Act 1996 (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.

36. The Tribunal has discretion under 111(2)(b) ERA 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.

37. 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.

38. 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).

39. 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).

40. 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."

41. 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).

42. 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*).

43. 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.

44. 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."

45. 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.

46. 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).

47. 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

48. Although it would not make a difference to the question of whether or not the claim was lodged in time, the Tribunal did consider that it should come to a view as to the correct date for the effective date of termination.

49. As stated above, this was the only real dispute of fact between the parties and the Tribunal preferred the express and unambiguous evidence of the email of 8 July 2020 at p82 which very clearly gave the date of termination as 17 July 2020. The Claimant gave evidence that it was 23 July 2020 but there was no evidence to explain why he considered that date to be the end of his employment. There was certainly nothing in the email dismissing the Claimant from which anyone could construe the date of 23 July 2020 as the date of dismissal and, in the absence of any other evidence suggesting this was the date of dismissal, the Tribunal considered that the email had to be read at face value.

50. In these circumstances, the normal time limit under s111 would have expired on 16 October 2020. The Claimant had commenced ACAS Early Conciliation on the day before and so the time limit was paused under s207B. The Certificate was issued on 15 November 2020 and the Tribunal agrees with the calculation by Counsel for the Respondent that s207B extends the time limit to 15 December 2020.

51. The ET1 was lodged on 15 January 2021 and so the claim was not presented to the Tribunal within the extended time limit. It is, therefore, out of time and the question becomes whether the Tribunal is prepared to exercise its discretion to hear the claim out of time in terms of s111(2) ERA.

52. 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.

53. In his evidence and submissions, the Claimant did raise the fact that he found the loss of his job to be stressful, that he had been on pain medication at the time and that he was not sure how to go about dealing with the matter. Whilst the Tribunal is sympathetic to the difficulties in which the Claimant found himself, it does note that, at no point, did the Claimant seek to suggest that any of this rendered him incapable of taking the necessary steps to lodge his claim timeously.

54. In any event, the evidence before the Tribunal showed that the Claimant was not incapable of progressing matters; he raised the issue of an appeal very shortly after his dismissal; he was capable of seeking advice in the period after his dismissal; he was able to timeously engage ACAS Early Conciliation; he was able to lodge the ET1 online when he became aware of the need to do so.

55. Rather, the Tribunal agrees with the submission made by Counsel for the Respondent that the operative cause of the delay in lodging the ET1 in time was the Claimant's ignorance of the time limit.

56. The Tribunal does not consider that, on the facts of this case, whether the Claimant's lack of knowledge of the time limits arose from his own ignorance or from a failure of any adviser to inform him of it makes any real difference to the Tribunal's considerations.

57. Applying the principles set out in *Khan* and *Dedman*, the Claimant's lack of knowledge does not provide an excuse in circumstances where either he or his advisers could be reasonably expected to know of the time limit; it is

certainly reasonable to expect an advice organisation such as CAB to know of this and it is also reasonable to expect the Claimant to know given that, even absent him seeking advice, he could have found out about the time limit with very limited research. There was no evidence to suggest that the Claimant had done anything, beyond contacting CAB, to investigate these matters. In the Tribunal's view, therefore, he did not make all reasonable enquiries and so any ignorance of the time limits is not reasonable.

58. In these circumstances, the Tribunal considers that it was reasonably practicable for the Claimant to have presented his ET1 in time where the reason for the delay was ignorance of the time limit and such ignorance was not reasonable.

59. The Tribunal, therefore, declines to exercise its discretion under s111(2)(b) to hear the claim out of time.

60. Having found that the ET1 was presented out of time and not being willing to exercise its discretion to hear the claim out of time, the Tribunal finds that it does not have jurisdiction to hear the claim of unfair dismissal and it is hereby dismissed.

Employment Judge: Peter O'Donnell
Date of Judgment: 17 June 2021
Entered in register: 28 June 2021
and copied to parties