EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4109180/2021
Preliminary Hearing Held via Cloud Video Platform (CVP) on 10 August 2021
Employment Judge Murphy

Mr G Taggart	**Claimant** **Mr D Jaap** **Represented by** **Solicitor**
Bridge of Weir Leather Company Ltd	**First Respondent** **represented by** **Ms J Wright** **Solicitor**
Scottish Leather Group Operations Limited	**Second Respondent** **represented by Ms J** **Wright**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The claimant's complaint of unfair dismissal is dismissed. The Tribunal, having determined that the claimant lodged his 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 complaint was ostensibly presented against two respondents. It was clarified during the preliminary discussion that the two respondents identified are in fact one in the same company. Scottish Leather Group Operations Limited changed its name in November 2020. It was formerly known as Bridge of Weir Leather Company Limited. Parties agreed that, should the claim proceed, it should do so only against Scottish Leather Group Operations Ltd. Hereinafter, the judgment therefore refers to the respondent in the singular as opposed to the plural form.

2. 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.

3. 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.

4. The Tribunal heard oral evidence from the claimant only and found him to be a credible witness though his memory was not clear on a number of aspects of events. Although a brief Inventory of Productions was lodged, it was only sparingly referred to by the claimant when giving his evidence. Unusually, the claimant's evidence did not fully accord with the terms of his own ET1 in relation to the sequence of events regarding the late lodging of his complaint. The ET1 had been prepared and lodged on his behalf by Waldrons Solicitors. Although the claimant acknowledged having reviewed the draft claim before it was lodged, in his evidence to the Tribunal he could recall no discussion with Waldrons on the subject of time bar and did not believe he had been informed of the missed time limit until he received a call from Mr Jaap a week or two ago. Mr Jaap represented the claimant on an agency basis for Waldrons at the Preliminary Hearing. Ms Wright represented the respondent.

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 until 12 October 2020 when he was dismissed. He was employed as a multi-skilled maintenance engineer. The respondent attributed his dismissal to redundancy.
2. The claimant was unhappy about various matters in relation to his dismissal. He appealed the decision without success. He also involved his Trade Union, Community. He liaised with a union representative named Jason. The claimant could not recall Jason's surname, but believed him to be an area representative. Soon after his dismissal in October 2020, Jason informed the claimant that the union would present a claim for unfair dismissal on his behalf, to which the claimant agreed. The union was also bringing proceedings on behalf of other individuals affected by redundancies within the respondent's group of companies.
3. At no time did Jason or any other representative from the Trade Union discuss time limits with the claimant. The claimant had no awareness of the time limit for bringing an unfair dismissal complaint nor even of the existence of a time limit in principle. However, as at October 2020, he had been given to understand by his trade union that a claim was being prepared on his behalf and would be lodged imminently.
4. At some stage the union instructed a firm of solicitors named Waldrons Solicitors in relation to the claimant's complaint. They or the claimant's trade union advisers initiated an Early Conciliation ("EC") process through ACAS on the claimant's behalf. The claimant had an awareness at the time from the union or Waldrons that the EC process was going on but was not involved in the detail. On 2 December 2020, an EC process was initiated in respect of prospective respondent, Scottish Leather Group Operations Limited. On 7 December 2020, a further EC process was initiated in respect of prospective respondent, Bridge of Weir Leather

Company Ltd.
5. An ACAS EC certificate was issued on 14 January 2021 in respect of Scottish Leather Group Operations Limited. On 18 January 2021, an EC certificate was issued in respect of Bridge of Weir Leather Company Ltd.

6. On 22 March 2021, the claimant received contact from Ms Briscoe of Waldrons. There may have been earlier contact from Ms Briscoe; the claimant could not recall dates. He discussed the case with her. He has no recollection of discussing time limits.

7. Prior to submitting the ET1 on 15 April 2021, Waldrons provided to the claimant a copy of the proposed claim to review. This document included an express acknowledgement that the claim was being lodged out of time. It stated:
4. As this was part of a group redundancy the solicitor incorrectly noted that the earliest limitation date for the claimant was 1 5 March 2021 , which was the earliest date of dismissal that the solicitor had seen in the papers.
5.On 14 March 2021 the Claimant informed Waldrons that he was dismissed on 8 October 2021 . The limitation period had expired on

18 February 2021. The Claimant has been informed and asked Waldrons to submit the claim out of time.

8. Though he does not dispute having seen these paragraphs (and, the Tribunal finds, did see them), the claimant did not appreciate the significance of them. He does not recall having been informed by Ms Briscoe that a time limit had been missed.

9. The ET 1 was lodged by Waldrons on 1 5 April 2021 . The claimant had no understanding of when the time bar issue was first identified by his advisors or how soon thereafter the claim was lodged since he did not recollect any discussion of these matters with the union or his solicitors.

Relevant Law

10. 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.

11. 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).

12. There can only be one mandatory EC process and only one EC certificate issued under the statutory scheme relating to any matter. Any second or subsequent process relating to the same matter is therefore outside the statutory scheme and will not extend the limitation period **(HMRC v Serra Garau** [2017] ICR 1121, **Romero v Nottingham City Council** UKEAT/0303/17/DM).

13. 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.

14. 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).

15. 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.
16. 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? \/\/as *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."*

Submissions

17. Mr Jaap gave an oral submission on behalf of the claimant and lodged a brief written submission. What follows is a summary, not a verbatim account. The facts set out in his written submission were not fully led in evidence. Essentially, however, Mr Jaap acknowledged that the claimant had relied upon his professional advisers in relation to the lodging of his claim and the question of time bar. He submitted there was no fault on the claimant's part, and that he ought not to be penalized for their failure. He pointed out it was perhaps common for members of the public not to be aware of tribunal time limits. He suggested there was no prejudice to the respondent in extending the time limit since the respondent was dealing with other claims arising from the redundancies. Mr Jaap referred the Tribunal to guidance in the case of **British Coal Corporation v Keeble** 1997 [IRLR] 336. He confirmed that he had had sight of Ms Wright's written submission and that he did not dispute her summation of the legal position.

18. Ms Wright also gave an oral submission, speaking to her written submission. She referred to the relevant provisions of ERA and drew the Tribunal's attention to the Khan case for the approach to be taken. She referred to the explanation given for the late submission in the ET1 where it was said that the solicitor instructed had incorrectly noted the limitation date. Ms Wright relied upon the **Dedman** case for the proposition that, where skilled advisers are retained and the time limit is mistaken and presented late, the employee's remedy will lie against those advisers. In any event, said Ms Wright, even if the Tribunal was satisfied it was not reasonably practicable for the claim to be presented in time, it was not presented with a reasonable period after the time limit's expiry. She pointed out that, according to the ET1, Waldrons were informed of their mistake on 14 March 2021. She said the presentation of the claim on 15 April 2021, over a month later, was not reasonable. In relation to Mr Jaap's submission, she answered that the Tribunal had no scope to consider the prejudice to the respondent within the boundaries of the test to be applied. The question was one of reasonable practicability.

Discussion and Decision

19. It was common ground that the claimant's Effective Date of Termination ("EDT") was 12 October 2020. The normal time limit would have expired on 1 1 January 2021 . However, the claimant (or his advisers) commenced EC through ACAS before that date, so the time limit fell to be extended in terms of s.207B(3) of ERA.
20. The relevant ACAS EC Process and Certificate is that which was initiated on 2 December 2020 and culminated in the EC Certificate dated 1 3 January 2020 relating to Scottish Leather Group Operations Limited. The subsequent process which was in respect of the same entity but referred to the respondent's former name is irrelevant and has no impact on the limitation period **(Serra Garau).**

2 1. Day A is, therefore, 2 December 2020 and Day B is 1 3 January 2021 . The 42 days in the period starting with the day after Day A and ending with Day B fall to be added to the original time limit of 13 January 2021. The time limit is thereby extended to 24 February 2021 . As the revised time limit does not fall in the period starting Day A and ending one month after Day B, no further adjustment is necessary to calculate the extended time limit in accordance with section 207B of ERA.

22. The Tribunal required to consider, first of all, whether it was reasonably practicable for the claimant to have lodged his claim by 24 February 2021. 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.

23. The claimant was unaware of the three-month time limit at the material time, so that the question is whether his 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 12 October 2020 and 24 February 2021. It was specifically in his contemplation that he would do so from early on in that time frame.

24. It was not possible, based on the evidence the Tribunal heard, to ascertain when Waldrons solicitors were first instructed or what information they were given about the claimant's Effective Date of Termination at what time. Their candid admission in the ET1 which they prepared and lodged that one of their solicitors had incorrectly noted the limitation date implies perhaps that they were instructed prior to the expiry of the relevant time limit (that is, prior to 24 February). In any event, what is clear, is that at all times from October 2020 until the claim was lodged in April 2021 , the claimant was being advised by either his trade union and/or by Waldrons in relation to a proposed unfair dismissal claim. Instructions to prepare such a claim had been provided to Community soon after the EDT, in October 2020. The trade union representative was aware of the date of the claimant's dismissal. The union instructed Waldrons in relation to the matter.

25. Although one or other of the union or Waldrons had initiated a timeous EC process with ACAS on the claimant's behalf as a precursor to the lodging of an unfair dismissal claim, neither organization contacted the claimant to inform him of the time limits or discuss with him the impact of the EC Certificate on that time limit. To the extent that the failure of Community and / or Waldrons to advise the claimant about the time limit prior to its expiry, was erroneous or due to unreasonable ignorance on their part, such error or unreasonable ignorance is to be attributed to the claimant under the **Dedman** principle.

26. The Tribunal could only conclude, on the rather limited evidence available, that a skilled adviser of the claimant, whether that was Community or Waldrons, was at fault in advising or failing to advise on the time limit and that this failure was the substantial cause of the missed deadline. Where, as here, a claimant asserts ignorance of the time limit, that will not surmount the reasonable practicability test if it arises from the 'fault of his solicitors or other professional advisers in not giving him such information as they should reasonably in the circumstances have given him' **(Wall's Meat** per Brandon LJ at 502).

27. There was no evidence of a 'reasonable mistake' that might have brought the claimant's case outside the **Dedman** principle. Waldrons, though not present, had explained in the ET1 which they drafted that the solicitor incorrectly noted the wrong limitation date "as this was part of a group redundancy". There was no suggestion the firm had not been informed of the correct EDT, and indeed, the Tribunal has found as a matter of fact that the union, which instructed the solicitors, knew the date of the claimant's dismissal.

28. The Tribunal considered whether the case of **Keeble,** cited by Mr Jaap might assist. However, that case was concerned with the approach to the extension of time limits in discrimination complaints where there is a discretion afforded to the Tribunal to grant an extension, if it is considered 'just and equitable' to do so. The principles are not applicable in the unfair dismissal context where the legislative provisions differ.

29. The Tribunal concluded that, notwithstanding the claimant's ignorance as to the existence of the statutory time limit for unfair dismissal, given his engagement of skilled advisers and his instruction to them to lodge a claim on his behalf, it was reasonably practicable to do so within the normal time limit This was perhaps supported by the fact the claimant's advisers had managed to initiate the EC process within those time limits.
30. The Tribunal does not, therefore, need to consider whether the claimant raised his claim within a reasonable time after the original time limit expired on 24 February 2021 .

31 . 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: 12 August 2021
Entered in register: 30 August 2021
and copied to parties