EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4110641/2021

Preliminary Hearing Held at Glasgow on 31 January 2022

Employment Judge Murphy

Mr G Campbell	**Claimant** **In Person**
Royal Mail Group Ltd	**Respondent** **Represented by** **Ms C Maher,** **Solicitor**

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 respondent resists the claim on the merits and also on the ground that it is time barred.

2. A preliminary hearing was fixed to determine the issue of time bar. I heard oral evidence from the claimant and from his Trade Union representative, Allan Donnachie. Mr Donnachie did not represent the claimant at the preliminary hearing but attended as a witness only. The respondent led no witness evidence.

Findings in Fact

3. Having considered the evidence, I found the following facts to be proved on the balance of probabilities.

4. The claimant was employed by the respondent as a postman from 1986 until 29 August 2020 when he was dismissed. The respondent attributed his dismissal to conduct. It arose from an incident which was alleged to have taken place on 12 September 2019. The claimant was initially suspended after the alleged incident then remained off on a period of sickness absence. He was suffering from depression. He was absent from work for an extended period with disciplinary proceedings pending. He did not attend a disciplinary hearing due to his illness. He was notified of his summary dismissal by a letter which he received and read on 29 August 2020.

5. He was advised and represented by Allan Donnachie, Area Processing Representative of the Communication Workers' Union based in the Glasgow Mail Centre in. Mr Donnachie was an employee of the respondent but was released full time to perform trade union duties. He has performed this role since 2017. In that time, he has dealt with approximately seven dismissal's including the claimant's. Before taking up the Area processing Representative post, he had over ten years' experience as a Unit representative with the CWU.

6. He has received no training in employment law from the CWU.

7. The claimant was unhappy about his dismissal. He liaised with Mr Donnachie regarding the submission of an appeal. Mr Donnachie lodged

an appeal on the claimant's behalf on 31 August 2020. Mr Donnachie did not discuss with the claimant the possibility of bringing employment tribunal proceedings at the time of his dismissal. He did not discuss with the claimant the time limit for bring such proceedings at that time. The claimant was not aware of the time limit for lodging a complaint of unfair dismissal. Mr Donnachie's own grasp of the rules around the time limits was weak at that time and indeed by the time of this Tribunal hearing. Mr Donnachie did not inform the claimant either that he or that the CWU would not provide advice to the claimant on potential Employment Tribunal proceedings arising from the dismissal or suggest that it was the claimant's responsibility to seek advice on this possible course of action from other sources.

8. Both the claimant and Mr Donnachie believed that Tribunal proceedings ought not to be considered as an option until the internal appeal process with the respondent was exhausted. Mr Donnachie understood this to be 'normal policy' within the CWU. He had been informed of this policy by at different times by two more senior representatives within the trade union.

9. Mr Donnachie's understanding of his role was that, once an appeal had been lodged on behalf of a member, the matter would be passed to the Divisional Representative for Scotland and Northern Ireland, Tam Dewar. It was the role of the Divisional Representative to represent the member at the appeal hearing and also to liaise with the member regarding any possible employment tribunal claim. Mr Donnachie admitted that advising on tribunal proceedings fell outside his skillset. When he lodged the claimant's appeal at the end of August 2020, Mr Donnachie informed Mr Dewar of the claimant's case. He passed Mr Dewar a copy of the appeal letter. Mr Donnachie believed that Mr Dewar would discuss the case further with the claimant, including any discussion regarding employment tribunal proceedings, once an appeal hearing date was confirmed.

10. There were significant delays with the appeal process. The claimant's appeal was not heard until March 2021 and the appeal outcome was not issued until 29 April 2021.

11. In the meantime, Mr Donnachie chased the respondent regarding the process. The normal time limit for initiating the Early Conciliation process through ACAS expired on 28 November 2020. By this date, no appeal hearing date had been fixed by the respondent. Mr Donnachie had had no discussion with the claimant regarding the option of a tribunal claim or time limits applying to such a claim. Mr Dewar had had no discussion with the claimant at all. The claimant did not seek advice from any other source at this stage. He believed the trade union was handling his case for him. He did not search on the internet for any information on Tribunal procedure. He remained unwell with depression. He remained ignorant of the time limit for bringing a claim. Although he was experience symptoms of depression, if he had been aware of the time limit which applied, he would have been sufficiently well to attend to the lodging of a complaint by 28 November 2020.

12. Mr Donnachie kept Mr Dewar updated on the appeal hearing delays. He emailed the Divisional Representative on 12 October 2020 to say the claimant hadn't received any correspondence from the respondent regarding his appeal. He copied in the respondent. He continued thereafter to chase Mr Dewar to ask him to chase the respondent about the claimant's internal appeal hearing. He emailed Mr Dewar in December 2020 and in February 2021 in this regard.

13. On 9 February 2021, Mr Dewar emailed Debbie Morgan, a Senior Case Handler in the legal services section at the CWU headquarters. He sought advice from Ms Morgan on whether there may be a claim. Ms Morgan requested a copy of the dismissal letter and the date the internal appeal was lodged. Her request was communicated to Mr Donnachie who sent Ms Morgan the documents on 16 February 2021.

14. On 22 February 2021, Mr Donnachie printed of a blank ET1 form and sent it to the claimant to be completed. The claimant swiftly completed the form. He sent it to Mr Donnachie immediately after doing so. At this stage, however, he remained unaware of the time limit and believed his

completed ET1 it would only be submitted to the Tribunal by the CWU as the next step if he was unsuccessful in his internal appeal.

15. Mr Donnachie was aware of his lack of expertise in Employment Tribunal proceedings. He had had a challenging experience in the past when seeking to represent a member in a Tribunal claim and had not, since then involved himself in Employment Tribunal matters. Notwithstanding that, Mr Donnachie chose not to refer the ET1 form to Mr Dewar for review. On this occasion he elected to deal with the matter himself. At this time he was in regular email correspondence with the CWU's legal services team about the claimant's case. Nevertheless, he did not refer the matter to Ms Morgan or to Unionline, the CWU's professional legal advisors.

16. Though he did not know the precise time limits which were applicable, by February 2021 Mr Donnachie harboured a concern that the claimant's Tribunal claim may be out of time. He expressed this concern in an email to Ms Morgan on 23 February 2021. He did not, however, inform the claimant of his fear that the tribunal claim was late.

17. He looked over the ET1 form completed by the claimant. He made no adjustments. The ET1 contained no details of an ACAS Early Conciliation Certificate. None had been issued at the point when the claimant completed the claim form. Mr Donnachie addressed an envelope to the Glasgow Employment Tribunal in Bothwell Street. He placed the claimant's ET1 in the envelope on or about 25 February 2021. He did not retain a copy of the ET1 form. He did not personally post the envelope, but, as was his daily practice with outgoing mail, he left it on his desk that afternoon for the TU representative on the later shift to post. He did not request that his colleague post the claim form using a tracked delivery service. When Mr Donnachie attended work the next day, the envelope was no longer on the desk. He did not ask his colleague whether it had been posted but assumed that it had been.

18. Ms Morgan informed Mr Donnachie by email that the issue had been referred to solicitors for advice and that she would return to him when advice was available.

19. In the meantime, the claimant or Mr Donnachie initiated the early conciliation process with ACAS on 24 February 2020. The EC certificate was later issued on 4 March 20221.

20. The ET1 form prepared in February 2020 was not received by the Employment Tribunal.

21. The claimant's appeal proceeded by video link on 10 March 2021. Just before the hearing, the claimant discussed with Mr Dewar his Employment Tribunal claim. Mr Dewar informed the claimant that his complaint was potentially out of time. This was the first occasion when a representative of the CWU told the claimant this was the case.

22. Mr Dewar joined the appeal video conference to support the claimant. There was a delay in issuing the appeal outcome. The claimant received a letter from the respondent on 29 April 2021, dated 23 April, which informed him that his appeal had been rejected.

23. There was no comment or misrepresentation by the respondent to the claimant or his union representatives about the time limits for bringing a complaint of unfair dismissal in the Employment Tribunal at any stage. The respondent made no suggestion that any such complaint required to be delayed until after the internal appeal process.

24. On 9 July 2021, the claimant was copied into an email chain between Tam Dewar and Debra Morgan. Ms Morgan asked Mr Dewar for a copy of the ET1 submitted to the Employment Tribunal. Mr Dewar replied later that day, copying in the claimant, and advised that he had not seen the ET1 form. He asked the claimant to forward it. He acknowledged in that email that the deadline for submitting the ET1 had been missed.

25. This prompted the claimant to contact the Employment Tribunal shortly thereafter to enquire about his claim form. He was informed that the ET1

he prepared in February 2021 had not been received. Around this time, the union advised him that they would no longer be representing him in relation to his case.

26. The claimant contacted Strathclyde University Law Clinic in the summer. He had two Zoom meetings with advisors. They informed him of the rules regarding time limits in unfair dismissal claims. They did not agree to represent the claimant in relation to the submission of a further claim. The claimant's second meeting with the Law Clinic took place two or three weeks before he submitted an ET1 on 3 August 2021. The claimant delayed a further two or three weeks to submit the claim because he was still deciding whether he should do so, given the advice received that it would be out of time.

27. The ET1 submitted on 3 August 2021 was rejected by Employment Judge Hoey on 6 August 2021 because the claimant had not, on the face of the information in the claimant form, complied with the ACAS Early Conciliation requirements. The claimant sought reconsideration and Employment Judge Hoey, on reconsidering the decision, determined the claim form could be treated as 'accepted' for the purposes of the Employment Tribunal Rules 2013 on 18 August 2021.

Relevant Law

28. 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.*

29. 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).

30. 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.

31. 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).

32. With respect to the effect of the retention of a skilled adviser *per* **Dedman**, it has been held by tribunals of first instance in **Syed v Ford Motor Co Ltd** [1979] IRLR 35 and other cases that trade union officials fall to be categorized as 'skilled advisers', such that their wrong advice was visited on the claimant.

33. With respect to 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."*

34. 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 and Saunders v Southend-on-Sea Borough Council** [1984] IRLR 119). 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."

35. 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

36. The claimant gave a brief oral submission. He said he had experienced no natural justice from the beginning to the end of the process. He argued he had been mistreated by both the respondent and by his trade union. He suggested he wouldn't be here today if proper processes had been followed and asked that his case be allowed to proceed.

37. Ms Maher spoke to a written submission. This is briefly summarized. She referred to the relevant test for determining the Effective Date of Termination and to the provisions of section 111(2)(a) of ERA. Ms Maher referred to the Court of Appeal decisions in **Palmer** and **London Underground Ltd v Noel**

[1999] ICR 109 in relation to the interpretation of 'reasonable practicability'. The existence of an internal appeal, Ms Maher said, was not in itself sufficient to justify a finding that it was not reasonably practicable to present a complaint within the time limit.

38. She relied upon the claimant's representation by the CWU and referred to 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.

39. In any event, said Ms Maher, 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 the complaint was lodged some 49 weeks after the EDT. With regard to the claimant's health, she noted that he was sufficiently well to engage with the appeal process in March 2021, but that he failed thereafter to lodge his claim until August 2021.

Discussion and Decision

40. It was common ground that the claimant's Effective Date of Termination ("EDT") was 29 August 2020. The 'normal' three month time limit expired on 28 November 2020. The claimant did not commence Early Conciliation through ACAS before that date, so the time limit did not fall to be extended in terms of s.207B(3) of ERA.

41. I required to consider, first of all, whether it was reasonably practicable for the claimant to have lodged his claim by 28 November 2020. Only if I were to conclude it was not, would it be necessary to consider the question of whether the claim was lodged within a reasonable time thereafter.

42. 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. I was satisfied that the claimant was aware of the right to complain of unfair dismissal to an Employment Tribunal in general terms though he had a mistaken understanding of the position

regarding time limits. It was specifically in his contemplation that he would raise a Tribunal claim if his appeal were unsuccessful.

43. What is clear, is that at all times from the date of the claimant's dismissal on 29 August 2020 (and indeed before it) until as late as July 2021, the claimant was being advised by his trade union, the CWU, in relation to his dismissal. The trade union representatives, Mr Donnachie and Mr Dewar, were both aware of the date of the claimant's dismissal from the time the dismissal took place (in Mr Donnachie's case) or a day or two after (in Mr Dewar's case).

44. To the extent that the failure of the CWU to advise the claimant about the time limit prior to its expiry was erroneous or due to unreasonable ignorance, such error or unreasonable ignorance is to be attributed to the claimant under the **Dedman** principle. I conclude that Mr Donnachie, whom failing, Mr Dewar, falls to be regarded as a skilled advisor. The former had been employed in the full-time role of Area Processing Representative and had dealt with multiple dismissals in the three years since he took that post. The latter, Divisional Representative for Scotland and Northern Ireland, was also a full-time trade union official with a specific remit to advise members on dismissal appeals and potential employment tribunal proceedings. Both had access to support from the CWU Legal Services team based at the Union's headquarters. The Legal Services case handlers in turn had access to advice from qualified solicitors at Unionline.

45. Mr Donnachie and Mr Dewar, the claimant's skilled advisers, were at fault in failing to advise the claimant on the time limit. This failure was the substantial cause of the missed deadline on 28 November 2020. 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 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).

46. There was evidence of a mistake on Mr Donnachie's part. However, there was no evidence that his mistake was a 'reasonable mistake' that might have brought the claimant's case outside the **Dedman** principle. Mr Donnachie did

appear to have an erroneous understanding of the rules relating to time limits for unfair dismissal claims. However, he had access to the Divisional Representative, and to a Senior Case Handler in Legal Services. He was aware that employment tribunal proceedings fell outside of his own knowledge and skillset, yet he failed to seek out the expertise available within the union or from its dedicated professional advisors. His mistake as to the correct rules on time limits was not reasonable, having regard to those resources and the role he was carrying out as Area Representative. Mr Dewar was likewise aware of the claimant's dismissal date throughout but failed to raise any issue of Tribunal time limits with the claimant until March 2021. No evidence was led as to whether Mr Dewar also entertained an erroneous belief about the applicable time limits, but even if he did so, I do not find that such a mistake was reasonable in the circumstances. He was a senior Trade Union representative with a specific remit to advise members on appeal proceedings and potential Employment Tribunal claims. He too had access to legal advice and support from the union and its advisors.

47. I find that, notwithstanding the claimant's ignorance as to the existence of the statutory time limit for unfair dismissal, given his engagement of skilled advisers, it was reasonably practicable to do so within the normal time limit. His evidence was clear that his depression would not have prevented him from instructing a claim to be lodged in time on his behalf had the time limits been drawn to his attention. Indeed, he did swiftly prepare a complaint for the trade union to lodge in February 2021 which he turned around within a day or so even though, at the time of preparing the claim form, he was not aware of any urgency with regard to time limits. The time limit had by then already expired, unbeknown to the claimant and the requirement for an ACAS EC certificate had not been met in respect of the proposed submission.

48. I gave careful consideration to the question of the claimant's genuinely held but erroneous belief that he required to wait until his internal appeal was exhausted before lodging a complaint with the Tribunal. I 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 and I 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. This was not a case where the claimant was deceived or misled by the respondent.

49. Given my conclusion that it was reasonably practicable for the claimant to have lodged a complaint or notified ACAS within the normal three-month time limit, I need not go on to consider whether the claimant raised his claim within a reasonable time after that original time limit expired on 28 November 2020.

50. 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: 06 February 2022
Entered in register: 07 February 2022
and copied to parties