EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: S/4102629/2018

Preliminary Hearing Held at Glasgow on 7 August 2018

Employment Judge: Mr A Kemp (sitting alone)

Mr John Dealey	**Claimant** **In person**
Timbmet Ltd	**Respondents** **Represented by:** **Mr S Hughes** **Counsel**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Tribunal does not have jurisdiction and the Claim is dismissed.

REASONS

Introduction

1. The Claim made was for unfair dismissal. The Respondents challenged whether the Tribunal had jurisdiction having regard to the terms of section 111(2) of the Employment Rights Act 1996, on time-bar. A Preliminary Hearing was fixed to determine that issue.

2. The Claimant gave evidence. He provided various documents. He was unrepresented. At the commencement of the hearing I explained to him that in accordance with the overriding objective I could assist him to a certain extent, in that the Respondents were represented, but that I could not do so as his representative.

3. Although there was no medical evidence on the issue it was possible that the Claimant may be a disabled person under the Equality Act 2010, although that had not been raised specifically as an issue and it did not appear to me from the evidence I had, referred to below, that he was. He was permitted to refer to notes he had prepared during his evidence, and to comment on documents which had not been copied initially as referred to below. At the commencement of the hearing and during the course of it I explained to the Claimant that he could request a break at any stage.

4. The issues that arose in the case were:

(i) Was it not reasonably practicable for the Claimant to have presented his Claim timeously under section 111(2) of the Employment Rights Act 1996?

(ii) If so, was the Claim presented within a reasonable time thereafter, under that same section?

The Facts

5. The Tribunal found the following facts established:

6. The Claimant was employed by the Respondents from 1 February 2000 as a Timber Labourer.

7. In late 2015 he sustained injuries in a cycling accident and was off work for about 9 months, being fractures of his clavicle and scapula.

8. In November 2016 the Claimant was again injured, after what he claimed was an assault by a colleague. He did not sustain any fractures.

9. The Claimant had further periods of absence from work, including one from June 201 7 onwards.

10. He was treated for conditions that included one related to blood pressure, hypertension and stress and a head injury. His treatment was both from his General Practitioner and at hospital. He had fit notes for absences from work. The first was dated 5 June 2017 for the period 5 to 19 June 2017 for "head injury high blood pressure". The next was for the period 4 to 8 August 2017 for "hypertension". The next series were for the period 1 8 September 201 7 to 29 May 2018 for stress and hypertension.

11. He sought legal advice from Thompsons, Solicitors, on 23 August 2017 on issues related to conditions at work with the Respondents.

12. The Claimant did not appear at hearings in relation to his alleged incapacity for work, fixed for 29 August 2017 or 6 September 2017.

13. His employment was terminated by the Respondents in his absence with effect from 6 September 2017 on the ground of his incapacity. That date is the effective date of termination for statutory purposes.

14. The Claimant thought that the timebar for a claim to the Tribunal was one of either three years, or three months after his solicitors ceased acting for him.

15. After the dismissal he felt inundated by various pressures, including financial ones and those related to health. He found it difficult to cope with matters.

16. His solicitors ceased to act for him on 18 December 201 7 when they wrote to him to confirm that fact.

17. Shortly after that he telephoned ACAS for advice. The date and content of that call he was not able to recall.

18. He commenced Early Conciliation through ACAS on 14 February 2018.

19. Also on 14 February 2018 he presented the present Claim to the Employment Tribunal.

The Law

20. Section 111 of the Employment Rights Act 1996 provides as follows:

> **"111 Complaints to employment tribunal**
>
> (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.
>
> (2A) Section 207A(3) (extension because of mediation in certain European cross-border disputes) and section 207B (extension of time limits to facilitate conciliation before institution of proceedings) apply for the purposes of subsection (2)(a)."

21. Before proceedings can be issued in an Employment Tribunal, prospective Claimants must first contact ACAS and provide it with certain basic information to enable ACAS to explore the possibility of resolving the dispute by conciliation (Employment Tribunals Act 1996 section 18A(1)). This process is known as 'early conciliation' (EC), with the detail being provided by regulations made under that section, namely, the Employment Tribunals (Early Conciliation: Exemptions and Rules of Procedure) Regulations 2014

SI 2014/254. They provide in effect that within the period of three months from the effective date of termination of employment EC must start, doing so then extends the period of time bar during EC itself, and is then extended by a further month for the presentation of the Claim Form to the Tribunal. If not, then a Tribunal cannot consider a claim unless it was not reasonably practicable to have done so in time, and then if EC starts, and the Claim is presented, within a reasonable period of time. *

22. The question of what is reasonably practicable is explained in a number of authorities, including ***Palmer and Saunders v Southend on Sea Borough Council [1984] IRLR 119,*** a decision of the Court of Appeal in England, where the following is stated:

> "34. In the end, most of the decided cases have been decisions on their own particular facts and must be regarded as such. However, we think that one can say that to construe the words "reasonably practicable" as the equivalent of "reasonable" is to take a view too favourable to the employee. On the other hand, "reasonably practicable" means more than merely what is reasonably capable physically of being done. [...] Perhaps to read the word "practicable" as the equivalent of "feasible", as Sir John Brightman did in Singh's case and to ask colloquially and untrammelled by too much legal logic, 'Was it reasonably feasible to present the complaint to the Industrial Tribunal within the relevant three months?' is the best approach to the correct application of the relevant subsection.
>
> 35. What however is abundantly clear on all the authorities is that the answer to the relevant question is pre eminently an issue of fact for the Industrial Tribunal and that it is seldom that an appeal from its decision will lie. Dependent upon the circumstances of the particular case, an Industrial Tribunal may wish to consider the manner in which and reason for which the employee was dismissed, including the extent to which, if at all, the employer's conciliatory appeals machinery has been used. It would no doubt investigate what was the substantial cause of the employee's failure to comply with the statutory time limit, whether he had

been physically prevented from complying with the limitation period for instance by illness or a postal strike or something similar. […] Any list of possible relevant considerations, however, cannot be exhaustive, and, as we have stressed, at the end of the day the matter is one of fact for the Industrial Tribunal, taking all the circumstances of the given case into account."

23. In ***Asda Stores Ltd v Kauser 'UKEAT/01 65/07,*** a decision of the Employment Appeal Tribunal, Lady Smith at paragraph 17 commented that it was perhaps difficult to discern how:

"[…] 'reasonably feasible' adds anything to 'reasonably practicable', since the word 'practicable' means possible and possible is a synonym for feasible. The short point seems to be that the court has been astute to underline the need to be aware that the relevant test is not simply a matter of looking at what was possible but asking whether, on the facts of the case as found, it was reasonable to expect that which was possible to have been done."

24. In ***Schultz v Esso Petroleum Company [1999] IRLR 488*** the Court of Appeal stated that the approach to what was reasonably practicable should vary according to whether it falls in the earlier weeks or the far more critical later weeks leading up to the expiry of the period of limitation.

25. In ***Northamptonshire County Council v Entwistle [2010] IRLR 741*** there was a full summary of the authorities concerning the "not reasonably practicable" test, with particular reference to the position where a skilled adviser, such as a solicitor, has been used by the Claimant. Just because a solicitor had been acting for the Claimant does not mean that the argument as to reasonable practicability cannot be made. It is a question of fact and circumstance. There may be occasions where despite the fact of or ability to take advice from a solicitor, it remained not reasonably practicable to have presented the Claim in time. That was considered for example in ***Ebay (UK) Ltd v Buzzeo UKEAT/01 59/13***

26. The burden of proof is on the claimant to prove that it was not reasonably practicable to present the complaint in time: ***Porter v Bandridge Ltd [1978] IRLR 271.***

Submissions

27. I asked Mr Hughes to give his submission first as the Claimant was unrepresented, and he agreed to do so. He stated that it was not clear whether the Claimant was arguing for ignorance of the law, a medical condition, or both. If it was ignorance, he suggested that that did not avail him, as he had sought legal assistance prior to the dismissal.

28. On the issue of a medical condition he referred to the case of ***Norbert Dentressangle Logistics Ltd v Hutton UKEATS/0011/13/BI.*** In that case the then President of the EAT had stated that in such cases as the present medical evidence was not strictly necessary but it was desirable and only in the rarest of cases might a Tribunal accept medical evidence solely from the Claimant.

29. He suggested that it was reasonably practicable to have presented the Claim in time, given that the Claimant was taking legal advice about two weeks before the dismissal. He had also spoken to ACAS after his solicitors ceased to act, and it would be most surprising if they had not made him aware of the time bar issue. If the Tribunal did not accept his argument that it had been reasonably practicable to have presented the Claim in time, it had not been presented in a reasonable period thereafter given those facts.

30. The Claimant was then asked to make his submission, and he suggested that he had done the best that he could. He sought an acknowledgement in relation to the assault at work as he referred to it that something had happened. He said that that and the dismissal had taken a toll on his health. It had been hard for him to get to the present hearing. He described in general terms the difficulties that he had experienced.

Discussion

31. The Claimant came to the hearing with various documents, and copies were taken of those he wished to refer to by the clerk. It was explained to the Claimant that the issues related to timebar in the period between dismissal and presenting the Claim, and that any document that might be relevant to that should be given to the clerk for copying. An adjournment was offered for him to renew his document, but the Claimant was able to obtain from the documents he had taken with him those he wished to have copied. He then gave evidence.

32. Initially the Claimant was invited to set out his position in his own words. He was permitted to refer to some notes that he had made himself, and to refer to further documents he had taken with him even though they had not been included in those copied by the clerk at the commencement of the hearing, with no objection from Mr Hughes for the Respondents. When it became clear that he was not able to articulate clearly what his position was, I sought to elicit that by questioning him on matters related to the dismissal and events that followed that.

33. The Claimant clearly found giving evidence not easy. He tried his best I am sure, but he did appear to find it difficult to answer the question asked of him on occasion. He was offered the possibility of taking a break when he was becoming more emotional when giving evidence, but did not wish to do so.

34. There was no medical evidence setting out his physical or mental health before me save correspondence and fit notes, but I sought to give him every opportunity to put forward his description of his circumstances, medical condition, and how he was in the period that is initially considered, up to 5 December 2017, and then in the period thereafter until the Claim was presented pm 14 February 2018.

35. Mr Hughes sought clarification on such matters in what was both a careful and considerate cross examination.

36. Despite the questions asked, it was difficult to discern the detail of the facts that may be relevant to the issues. I was only able to make the factual findings set out above. I was not clear on the Claimant's physical health during those two periods, but still less clear on his mental health during those periods. There were documents that the Claimant had produced from a Community Psychiatric Nurse, but dated outwith the period between dismissal and presenting the Claim, as was a document from the Scottish Association for Mental Health. There were fit notes from the General Practitioner for periods both before, during and after the two periods which referred to his suffering from stress and hypertension. It appeared to me that he still suffered from such conditions. The extent and effect of them however was more difficult to judge in the absence of a medical report, letter from his General Practitioner, medical notes or other such evidence.

37. Some of the facts are not in dispute. The key dates are 6 September 2017 when the employment ended, and 14 February 2018 when both EC started and the Claim was presented. It was not disputed that the Claim was lodged out of time.

38. On a number of occasions I sought to ask about the period of time between dismissal and commencing the claim. I explained that the effect of the statutory provisions was that EC had to start by 5 December 2017. I tried to ascertain what the Claimant's physical and mental health had been during that period.

39. Whilst the Claimant had produced a number of documents, just one of them was from within that period, and was a letter confirming a hospital appointment for a cardiography. The Claimant was not able to explain in detail what happened, and what condition was being treated save that it related he thought to blood pressure.

40. I sought to understand by further questioning what had happened in the period between 5 December 2017 and 14 February 2018 when EC commenced and the Claim itself was presented. I was not able to obtain any detail. It appeared that matters continued. I was not able to learn why the Claimant had sought to commence the EC and Claim itself on the date that he did. If there was a trigger for it, I was not able to find that out by my questioning.

41. The ***Dentressangle*** case was cited to me by the Respondents, and I have considered it. Like the present case it concerned a Claimant who gave evidence that he had found it difficult to function after the dismissal. The Claimant in that case appeared for himself, and had not called medical evidence. His evidence as to his state of health however was accepted by the Employment Judge as being sufficient to meet the test as to reasonable practicability. Counsel for the Respondent and Appellant conceded that it was not essential to have medical evidence, but said that it was desirable. That is undoubtably correct, as the Employment Appeal Tribunal noted. I note that in that case the Judge had accepted the Claimant's evidence that he had not been able to function sufficiently to present the Claim timeously, but had done so when he had been able to. That conclusion was accepted by the EAT as permissible.

42. What the then President of the EAT said about the argument as to reasonable practicability in the absence of independent medical evidence is as follows:

> "in most cases in which a claimant asserts that they were unable to bring themselves to put in a claim a Tribunal Judge will have little difficulty in refusing to accept that as a realistic evaluation of what occurred. It will be a very rare case in which it is accepted. But there seems to me no reason in principle why it should not be; it is, after all, essentially a question of fact and the assessment of a witness."

43. Whilst at first glance that may assist the position of the Claimant here to a certain extent, there are material differences. Firstly, the Claimant had on 23 August 201 7 contacted solicitors, and there was nothing before me to hold that the Claimant could not reasonably have contacted those same solicitors after he was dismissed and in the period up to 5 December 2017. They had acted for him in the period to 18 December 2017 on which date they wrote to him to confirm that they had ceased to do so, according to his evidence.

44. Secondly, there had been more detailed evidence given to the Dentressangle Tribunal on the Claimant's condition, and how he had been affected. That same level of detail was not before me. One example of that is that the Claimant did not explain to me precisely how the dismissal had affected him, what interactions he had had with his solicitors, or why the Claim was presented on the date that it was. He also said in evidence that he had contacted ACAS shortly after receiving the letter from his solicitors dated 18 December 201 7 in which they confirmed that they were ceasing to act. He could not however recall the detail of what he had discussed during that call.

45. I considered the Claimant's evidence that he had not known about the time-bar provisions, on which he thought either that he had three years to make a claim, or three months from his solicitors' ceasing to act. He did not explain where such a belief came from, or what enquiries he had made, either of his solicitors or otherwise. Whilst he may not have been aware of the provisions that do apply, the issue is whether his ignorance is reasonable. I cannot hold that it is, particularly given his seeking of advice from solicitors so shortly prior to his dismissal, with that related to circumstances at work according to his evidence, and their continuing to act for him until 18 December 2017.

46. The Claimant's recollection of matters was not consistent throughout. He stated at one stage that he had been absent from work for a period until his dismissal, which accorded with the Respondents' position in the Response Form that he had been absent from 2 June 2017 until his dismissal, but later the Claimant claimed that he had returned to work, and referred to his cycling

there. It appeared to me to be more likely that he had been absent, as the Respondents had referred to.

47. I took account of the Claimant being absent from two hearings, the latter one on 6 September 2017, and there was no evidence of any appeal or other process thereafter. The reason for that appeared from the fit notes to be stress and hypertension. The dismissal had been as a result of his continuing absences, and therefore his incapacity. They were factors that favoured the Claimant in considering the issues before me. They, together with his demeanour when giving evidence, caused me a measure of concern when making my decision.

48. I considered matters in the round, both regarding his state of knowledge on time-limits, and general state of health, and concluded that there was not sufficient evidence to hold that it had not been reasonably practicable for the Claimant to have presented the Claim, initially by commencing EC, in the primary time period ie by 5 December 2017.

49. The Claimant's condition and circumstances generally did not seem to me to change materially between for example the last days of November and the first days of December 2017 on the one hand, and when EC did commence on 14 February 2018 on the other hand. If there was a change, I had no evidence either written or oral of that. His taking of advice from solicitors so shortly prior to dismissal, with the first hearing about that fixed for a few days after his doing so, and that relationship continuing until 18 December 2017 was I considered a formidable hurdle for an argument as to reasonable practicability. The absence of either medical evidence or clear evidence from the Claimant himself as to the effect of mental or physical health issues made that hurdle more difficult still for him.

50. I make those findings against a considerable level of sympathy for the Claimant. I do accept that he found matters difficult after being dismissed, and that dismissal led to him having various issues to deal with. He had not

had prior experience of Employment Tribunals. He clearly was greatly upset at what he claimed had been an assault on him by a work colleague, although it had occurred some ten months prior to the dismissal, and he had had periods of absence from work for a variety of reasons, including for stress and hypertension which required treatment by his GP. That evidence is not I consider sufficient to establish that it was not reasonably practicable to have commenced his Claim timeously.

51. I must proceed on the basis of the evidence I heard, which was limited as is set out above. I consider that the Claimant has not discharged the onus of proof which is upon him. In light of that, I cannot hold that the terms of section 111(2) as referred to above have been met.

52. Regretfully therefore I require to hold that I do not have jurisdiction to consider the Claim made by the Claimant, and it must be dismissed.

Employment Judge: A Kemp
Date of Judgment: 10 August 2018
Entered in register: 14 August 2018
and copied to parties