EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4112023/2021 (V)

Heard by means of CVP on 15 March 2022

Employment Judge J Young

Blair Allan	**Claimant** **In Person**
Hydrasun Limited	**Respondent** **Represented by:** **Ms L Usher, Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that under section 111 of the Employment Rights Act 1996 the Tribunal does not have jurisdiction to hear the claimant's complaint of unfair dismissal which is dismissed; and that the claims for discrimination because of the protected characteristic of age and for "clash of interests outside the workplace" having been withdrawn are also dismissed.

REASONS

Introduction

1. In this case the claimant presented a claim to the Employment Tribunal complaining that he had been unfairly dismissed and discriminated against because of the protected characteristic of age. He also made reference to a claim of a "clash of interests outside of the workplace".

2. The response from the respondent was that the claimant had been dismissed by reason of redundancy on 25 September 2015 and the claim having been presented to the Tribunal on 27 October 2021 was out of time and so the Tribunal lacked jurisdiction in respect of any of these claims. In any event it was denied that the dismissal was unfair, it being contended that the respondent had been faced with a redundancy situation and had followed due process in the selection of the claimant for redundancy. It was also denied that there was any discrimination of the claimant on age or other ground and that the claim of "clash of interests" was not one which could be competently heard by the Tribunal.

3. Subsequent to a preliminary hearing for case management purposes on 10 January 2022 the claimant was ordered to provide further specification of his claims and to provide information regarding why it was that his claim was not presented within 3 months of the alleged act of discrimination and alleged unfair dismissal. At that time this preliminary hearing was fixed in relation to the plea of time bar taken by the respondent.

4. In the ensuing correspondence the claimant confirmed that he was not proceeding with his claim for "clash of interests outside the workplace" and also that he would not proceed with his claim for alleged discrimination because of the protected characteristic of age. At this hearing the claimant was asked and confirmed that was his position and that his claim was for unfair dismissal only. In those circumstances the Judgment reflects that position.

Issue for the Tribunal

5. The issue for the Tribunal was whether in terms of section 111 of the Employment Rights Act 1996 it was reasonably practicable for the claimant to have lodged his claim for unfair dismissal before the end of the period of 3 months beginning with the effective date of termination of his employment or, if it was not reasonably practicable to do so, in such further period as the Tribunal considered reasonable.

The hearing

6. At the hearing the claimant gave evidence along with Carole Small, Group HR Manager for the respondent since July 2012 and John Grant, Factory Manager with the respondent and who had been employed by them since March 1984.

Documents

7. The parties had helpfully liaised in providing a joint file of documents paginated 1-113 (J1-113). The respondent had also produced a chronology.

8. From the relevant evidence led, admissions made and documents produced I was able to make findings in fact on the issue.

Findings in Fact

9. The claimant was employed by the respondent in the period between 28 January 2013 and 25 September 2015 when his employment was terminated. He was employed as a CNC Operator/Setter which involved him in the manufacture of metal parts for fuel lines and pipes utilised principally in the oil and gas industry.

10. The respondent in September 2015 were faced with a redundancy situation given the downturn in the oil and gas industry. That affected approximately 70/80 employees in all areas of the respondent business.

11. The claimant was based in factory premises in Aviemore and the respondent found it necessary to reduce the number of CNC operators/setters from 9 to 5. A scoring exercise was put in place and the claimant was one of the 4 lowest scorers as a result of that exercise.

12. The claimant met with Carole Small, HR Manager and John Grant, Factory Manager on 22nd September 2015 when the background to the redundancy situation and a need for reduction was explained. The meeting covered matters narrated within a letter sent to the claimant dated 23 September 2015 (J68/69).

13. That letter advised that the claimant's role would not be confirmed as redundant until Friday 25th September to allow time for individual consultation and for the claimant to raise any questions. It was explained there were no vacancies across the company at that time to which he could be placed. It was stated that if there was nothing that the claimant had to raise then his role would be considered redundant with effect from Friday 25 September 2015 and that he would receive appropriate payments at that time. The letter concluded by saying:-

> *"On behalf of the company, thank you for your service and commitment to the Aviemore site and should the current climate improve and we require to recruit in the future, we will of course ensure you are contacted"*

14. By email of 24 September 2015 the claimant advised that he would wish to make representation regarding the scoring exercise but at that point had not received the score sheet (J75).

15. The score sheet was then sent to him (J67) and by email of 25 September 2015 (J73/74) the claimant raised issues on each of the scoring criteria and made representation regarding the process undertaken.

16. That led to a discussion with the claimant on 2nd October 2015. Ms Small led the discussion by telephone from her Aberdeen office with Mr Grant, Douglas Duncan (deputy manager to Mr Grant) and the claimant attending in person in Aviemore. On conclusion of the discussion on scores the claimant was advised that the respondent would not be making any change to the scores he had achieved.

17. The disputed issue on this meeting related to whether or not the claimant had been given any reassurance or guarantee at this point that if a position of CNC/Operator/Setter arose in the future then he would be "*prioritised"* with an offer being made. The claimant's position was that he was not satisfied that the process was fair but that he was told by Ms Small that if in the future *"a position comes up then you will be offered"* which he advised was a *"relief to me – that was a solution".* He advised that his family members had indicated that he should be pursuing a claim that his selection was unfair albeit that advice seemed to be directed to challenging the decision at internal appeal. He indicated that given the offer of job in the future he decided not to take matters further.

18. The claimant's recollection was that he had met with a representative of the local Citizen's Advice Bureau around the time of the meeting of 2nd October 2015 about the redundancy exercise. He could not recall being given any specific advice about time limits on a Tribunal claim at that time.

19. The position of Ms Small and Mr Grant was that no such promise or guarantee had been given to the claimant. There was no mention of any possibility of Tribunal proceedings made by the claimant. That would have raised a *"red flag"* which would have been memorable. Ms Small indicated that it was likely she would advise the claimant that if the company would be hiring in the future then he should make application but that there was no promise or guarantee that he would be selected. None of the 4 CNC operators/setters affected received any such offer. Ms Small advised that on any view of the matter it would not have been fair to have singled out the

claimant in giving that promise or guarantee. It was something that would require to have been stated to all and was not.

20. The claimant did state that he had asked Mr Duncan who attended the meeting on 2 October 2015 to attend the Tribunal but Mr Duncan had not been able to assist the claimant in the matter.

21. In August 2016 the respondent advertised a vacancy for a CNC Operator/Setter (J78/79) and held a recruitment evening on 11 August 2016 in their premises in Aviemore which vacancy and open evening had been advertised to the University of Highlands and Islands.

22. In July 2018 the respondent advertised a vacancy for a CNC Operator/Setter (J81/84) which advert had been carried within the local newspaper.

23. A further vacancy had been advertised in June 2019 for a CNC Operator/Setter (J85/89) again in the local newspaper.

24. The vacancies of August 2016/July 2018/June 2019 had also been notified on the respondent website.

25. The claimant advised that none of these vacancies had come to his attention.

26. In August 2021 the respondent had made further advertisement of a vacancy for a CNC Operator/Setter (J92/95) and this had come to the attention of the claimant who expressed an interest by application via the *"Indeed.com"* website on 31 August 2021 (J96/98) and in his application indicated that "*Following my appeal after redundancy I was advised to reapply when the position was available" (J97).* He received a response from the respondent on 31 August 2021 thanking him for his application and seeking his "*salary expectations*" (J99). He then responded (J99) indicating he would accept whatever salary was appropriate and:-

"*Following on the appeal I made regarding my redundancy I was told I would be offered my job reinstating as soon as one came availability. I was devastated to recently hear this did not happen. I hope to rectify the situation".*

27. He followed this up by email of 22 September 2021 (J105) wherein he advised that he had applied for the role of CNC Operator/Setter and that when he "*appealed the redundancy I was assured I would be first prioritised for my job reinstating. Unsure if this is the first time a position has become available I was fortunate enough to see the job".*

28. In response he received an email from Ms Small of 28 September 2021 (J104) advising that the company would hire the best candidate for the role and that they would "*not give any commitment to reinstate employees whose roles are made redundant or who leave the company for any other reason, so I am unclear as to where this has come from"* (J104). The claimant responded on 28 September 2021 (J103) indicating:-

"*During the appeal meeting following my redundancy in 2015 there was the agreement that I would be offered my employment reinstated as soon as it became available. This agreement was so I agreed not to take it further to a Tribunal"*

29. On 1st October 2021 the claimant asked whether the advertised position had been filled and was told that it had and he had been unsuccessful in the application (J102). He responded to state that:-

"*Reminding of our agreement my application was provided after contacting Hydrasun directly, even the Aviemore branch. I should have been contacted directly by yourselves to offer the position before it was advertised considering our agreement to not go to a Tribunal. Unaware if this is the first time a position for a CNC Operator/Setter was advertised, it has been over 5 years.*

Considering this breach in our agreement and avoidance of a Tribunal, it is breaking the law" (J101/102)

30. Thereafter the claimant made application to ACAS for early conciliation on 22 October 2021; received his Certificate on 25 October 2021 and lodged his ET1 on 27 October 2021.

31. The claimant's position was that he had not proceeded to a Tribunal claim given the promise and assurance he had received on 2nd October 2015. It was only when he realised that a vacancy was available as a CNC Operator/Setter in August 2021 that he raised the issue. On ascertaining that the job had been filled he then made application to the Tribunal.

Submissions

32. Each party made submissions and no discourtesy is intended in making a summary.

The Claimant

33. The claimant advised that at the meeting of 2nd October 2015 he had been told by Ms Small that he would be offered a position as soon as a vacancy became available in the future. She may have said that out of sympathy for his position at the time but that did not matter, it had been an assurance which was given. In the letter of 23rd September 2015 it was stated that the company would be in touch on vacancies but that had never happened.

34. It was a solution for him at the time that he would get priority for a role and so on that basis he had not gone forward to a Tribunal. He should now be allowed to proceed.

The Respondent

35. It was emphasised that this was a case where the application to the Tribunal was significantly out of time namely 73 months after the effective date of termination.

36. The onus to show that it was not reasonably practicable to lodge the Tribunal application within the 3 month time limit was on the claimant. The test was whether or not it was *"reasonably feasible"* to do so.

37. It was stated that there was no agreement made or reassurance given on 2nd October 2015 that the respondent would offer the claimant a role to avoid Tribunal proceedings. Both Ms Small and Mr Grant who attended the meeting confirmed that there was no such agreement; if there had been such agreement then there would have been a settlement agreement organised; such agreement would have required to incorporate all 4 redundant personnel at the time; there was no documentary evidence from the claimant or other evidence beyond his word to substantiate such agreement; there was no contact made by the claimant to the company in August 2016, June 2018 or July 2019 when advertisement had been made; the claimant had been inconsistent in the email correspondence as to the nature of this promise or reassurance; even if there had been such agreement that was not a reason for not lodging a Tribunal claim; if he felt that the dismissal was unfair at the time then it was reasonably feasible to lodge a claim.

38. In any event he knew on 1 October 2021 that the role he had made application for had been filled and thus in his eyes there was a *"breach of the agreement".* Yet he had not made his application for early conciliation until 21 October 2021.

39. The balance of prejudice lay with the respondent given the length of time since termination. All the witnesses had made reference to the difficulty of recalling events some 6 years ago including the claimant. The time limit was there for a reason namely to preserve the cogency of evidence and it was not likely to be preserved given the length of time that had passed.

Discussion and Conclusions

Relevant Law

40. In respect of unfair dismissal claims the rule on time limit is set down in section 111(2)(a) of the Employment Rights Act 1996 (ERA) which provides that the time for presenting an unfair dismissal claim is "*before the end of the period of three months beginning with the effective date of termination".* In this case the effective date of termination was 25 September 2015 and so the claim should have been lodged by 24 December 2015.

41. The statutory provisions allow for an *"escape clause"* whereby an application can be allowed to proceed albeit late if presented *"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".*

42. What is reasonably practicable is a question of fact and thus a matter for a Tribunal to decide. As was submitted, in ***Palmer v Southend on Sea Borough Council*** 1984 ICR 372 the Court of Appeal advised that "*reasonably practicable"* does not mean reasonable which would be too favourable to employees and does not mean physically possible which would be too favourable to employers but means something like *"reasonably feasible".* In ***Asda Stores Limited v Kauser*** EAT0165/07 it was stated that 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".*

43. If it is found that it was *"not reasonably practicable"* to present the claim in time then it is necessary for a Tribunal to consider whether the claim was presented *"within such further period as the Tribunal considers reasonable".*

44. On this aspect of matters the Tribunal does not need to be satisfied that the claim was presented as soon as reasonably practicable but rather whether the claim was presented within a reasonable time after the time limit expired.

A claimant requires to act promptly once the obstacle that might have prevented a claim being made in time has been removed.

Conclusions

45. By 2nd October 2015 the claimant was aware of all the facts necessary for him to bring a claim of unfair dismissal to the Tribunal. He had been supplied with the scoring sheet by that time and had had a discussion with Ms Small and Mr Grant on his scores. Mr Grant had been responsible along with Mr Duncan for the scoring and they were able to explain the position. The claimant knew that the respondent was not to change the scoring on that date.

46. In terms of the statutory time limit he had until 24 December 2015 to lodge that claim if he was so minded. He had taken advice from CAB on general matters and while he could not recall if he had received any specific advice about time limits it was not part of his case that he did not lodge a Tribunal claim because he was unaware of any time limit. In any event even if that were his case he had the means and capacity to establish the position at the relevant time.

47. Rather his position was that because he had received an assurance about being offered a job in the future he decided he would not make a claim to the Tribunal. There was no evidence that in the discussion with Ms Small and Mr Grant the claimant indicated he had in mind taking a claim to the Tribunal. From the evidence no finding could be made that had been stated. Even in the discussion within the claimant's family the claimant indicated that their advice on him to "*take matters further*" was in proceeding with an internal appeal against the redundancy decision rather than taking Tribunal proceedings. There was no evidence that the claimant was misled by the respondent indicating that he should not make a claim to a Tribunal because CNC Operators/Setters may well be recruited in the future and if so he would be offered a position. Accordingly there could be no claim that he had been

given some assurance about a job in the future to prevent him from proceeding with a claim before the Tribunal.

48. Quite apart from there being no evidence that was the case I accepted Ms Small's position that she respected an individual's right to proceed to a Tribunal in the event that he/she considered a dismissal was unfair and it was not a matter for the respondent to seek to dissuade an individual from exercising that right by making promises about future employment.

49. The claimant's case then came to the position that because he considered that he would be favoured when it came to the vacancies arising he decided not to proceed with a claim to the Tribunal. I do not consider that meant that it was not *"reasonably practicable"* or feasible for him to have lodged a claim.

50. Even if an offer of a job in the future had been made that did not prevent him from exercising his right to proceed to a Tribunal with a claim for unfair dismissal from his existing employment. I did consider that it would be a necessary ingredient in any offer being made to the claimant (and subsequent plea that he was misled and so delayed making a claim) that the offer of a job in the future was made to prevent the claimant proceeding to a Tribunal or at least to dissuade him from doing so. That ingredient was missing in the claimant's case and so I considered that it was reasonably practicable to present a claim to the Tribunal within the time limit. There was nothing which prevented him from doing so.

51. That leaves aside the issue of whether or not the guarantee of a permanent position was ever made to the claimant. The weight of evidence was against that proposition. There was some difference in the claimant's expression of how that offer came to be made to him both in his oral evidence and in the e mail correspondence in 2021. It is far more likely that in the circumstances the claimant would have been told that if such a vacancy arose he would be considered for the role rather than being guaranteed selection. The guarantee of a job in the future was an unlikely offer to be made. That does not mean it was impossible but I did consider that the evidence of Ms Small

and Mr Grant was credible in stating that no such offer had been put forward. Thus while it would appear the respondent had reneged on their commitment to advise the claimant of any future vacancies I did not consider that meant they had also reneged on an undertaking to hire him in the event of vacancy occurring.

52. In those circumstances I find the Tribunal do not have jurisdiction and the claim of unfair dismissal requires to be dismissed.

Employment Judge J Young

Date of Judgment: 31 March 2022

Date sent to parties: 1 April 2022