EMPLOYMENT TRIBUNALS

Claimant: W Slack

Respondent: Secretary of State for Business, Energy and Industrial Strategy

Heard at: Newcastle Tribunal by CVP

On: 27 October 2022

Before: Employment Judge Murphy

Representation

Claimant: In person
Respondent: Mr P Soni, RPS Officer

RESERVED JUDGMENT

The judgment of the Tribunal is that:

(i) the claims for arrears of pay, holiday, pay and notice pay under section 182 of the Employment Rights Act 1996 ("ERA") are 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.

(ii) The claim for a statutory redundancy payment under sections 166 and 170 of ERA is dismissed. The claimant did not, within the six-month time limit specified in section 164(1) of ERA, take any of the actions prescribed by that subsection. In the ensuing six-month period, the claimant referred to the Tribunal a question as to his right to a statutory redundancy payment as envisaged by s.164(2) but it does not appear to the Tribunal to be just and equitable that the claimant should receive a redundancy payment.

REASONS

Introduction

1. The claimant brings claims under sections 170 and 188 of ERA against the respondent. The claimant claims a statutory redundancy payment (under s.170) and arrears of pay, holiday pay, and notice pay (under s.188). He asserts he was an employee of Rapax Limited ("the Company") which is insolvent within the meaning of section 166 and 183 of ERA. The respondent accepts that the Company is and was insolvent at the material time. The respondent denies the claims on the basis (1) that they are time barred; and (2) that the claimant was not an employee of the Company for the purposes of sections 182 and 230 of ERA.

2. A hearing took place remotely by video conferencing on 27 October 2022. This was allocated 3 hours. I determined that a public preliminary hearing would initially be held to determine the question of whether the claim was brought within the time limit set out in sections 164 and 170 of ERA regarding the redundancy payment claim and in section 188(2) of ERA regarding the other claims.

3. Were it to be determined that the Tribunal has jurisdiction to consider the claim following determination of the time limitation issue, I confirmed that, time permitting, the Tribunal would proceed to hold a further separate public preliminary hearing on the disputed question of employment status. In the event there was insufficient time to make a determination and deliver oral judgment on the time bar issue, and I reserved my decision on this preliminary issue.

4. An adjournment was granted prior to hearing evidence to enable the claimant to access ERA online. He was directed to the relevant provisions with which the preliminary hearing was concerned and confirmed having read these during the adjournment.

5. In the course of the evidence, it transpired that the claimant's position is that his employment ended on 6 October 2021, and not on 17 March 2020 as stated on his ET1 at box 5.1. Mr Soni advised that the respondent disputes that the claimant was employed, but if he was employed, the respondent disputes that the employment ended on 6 October 2021. The respondent says any employment terminated on 17 March 2020.

6. The issues for determination at the PH were:

    a. Were the claims for notice, arrears of pay and holiday pay brought under section 182 of ERA made within the time limit in section 188(2) of the Employment Rights Act 1996? The Tribunal will decide:

        i. Was the claim made to the Tribunal within three months of the date on which the decision of the Secretary of State on the claimant's application was communicated to the applicant?
        ii. If not, was it reasonably practicable for the claim to be made to the Tribunal within the time limit?

iii. If it was not reasonably practicable for the claim to be made to the Tribunal within the time limit, was it made within a reasonable period?

b. Was the claim for a statutory redundancy payment brought in accordance with the requirements of sections 166 and 170 of ERA? The Tribunal will decide:
   i. Did the claimant make a claim for the redundancy payment by notice in writing to Rapax Ltd before the end of the period of 6 months beginning with the relevant date or otherwise comply with section 164(1) of ERA? (For this purpose the relevant date is the effective date of termination (s.145 ERA))
   ii. If not, did the claimant refer to the Tribunal a question as to his right to a statutory redundancy payment during the 6 months immediately following the period mentioned in (i) above?
   iii. If so, does it appear to the Tribunal to be just and equitable that the claimant should receive a statutory redundancy payment?

7. The Tribunal heard evidence from the claimant. The respondent did not lead any evidence. The claimant's evidence in chief was taken orally in the absence of a witness statement having been prepared. A bundle running to 153 pages was lodged by the respondent and was referred to in the course of the claimant's evidence.

Facts

8. Having heard the evidence, I make the following findings of fact, and any that appear in the 'Discussion and Decision' section, on the balance of probabilities.

9. The claimant worked as a robotics engineer at Rapax Ltd, which contracted to provide services to Nissan. He was the sole company director and shareholder of Rapax Ltd. He initially worked on the Nossan contract from 26 September 2019.

10. This continued for approximately 6 months until 17 March 2020. Around this time, the Covid 19 pandemic hit the country and the claimant's work for Nissan stopped. He was informed he was not eligible for the Coronavirus Job Retention Scheme because of employment status but, at least, latterly was eligible for funds from the Government's Self-Employment Income Support Scheme (SEISS). He received approximately £571 per month from this source. He did so until the scheme ended at the end of September 2021. The claimant tried to develop new business for Rapax Ltd in the period after the income from

Nissan ceased but was not ultimately successful in securing any further contracts for the company.

11. In or around the summer of 2021, Rapax Ltd was without an income. The claimant contacted an organisation called The Director's Helpline for advice what to do about his company. He explained the situation to them. He explained to them that he was classed as self-employed for the purposes of the SEISS. The Directors' Helpline told him that the best thing to do was to place the company in liquidation as the business was unsustainable. They advised him, however, that he should delay in doing so until he had accrued two years' service so that he would be eligible to claim a statutory redundancy payment from the Insolvency Service. They put him in touch with a company of consultants called Redundancy Claims UK ("RCUK"). That company was not a regulated firm of solicitors but a "trading style" of Wilmslow Wealth Management Ltd which, according to its email footers, is authorised and regulated by the Financial Conduct Authority. It is a claims management company which provides advice to company directors.

12. On or about 3 August 2021, the claimant instructed RCUK to advise him with regard to the entitlements he could claim from the Government in the event he placed his company into liquidation. He discussed with them fully his situation.

13. On 3 August 2021, RCUK completed a form on the claimant's behalf. The form was a form created by the Insolvency Service called an RP3 and was headed "Extra Information if you are a director". The form was sent to the claimant by RCUK with instructions not to complete it, but only to sign the second page and not to date it. It said, "The form will be completed by your Case Manager later in the process". The claimant received the form to his email, and, on 13 August 2021, he applied his electronic signature. The form was subsequently completed on his behalf by an RCUK caseworker. The form recorded that the last day of work for which the claimant was paid was 12 Feb 2021 and that he was on a reduced salary of zero between 13 February 2021 and 17 September 2021. The claimant disputes the accuracy of the information entered in the form by RCUK on his behalf.

14. On 13 August 2021, as well as signing the blank form, the claimant signed a letter of authority which RCUK provided to him. This letter authorised RCUK in relation to his redundancy claim and instructed the liquidator and the redundancy payments office to make available to RCUK any information they requested regarding his claim and to discuss matters with RCUK concerning his "*redundancy claim and other statutory entitlements*". At this point the company had not been placed in liquidation and there was no liquidator. At this point, the claimant had not accrued two years' service at Rapax Ltd and had not made a claim for a redundancy payment to the RPS. RCUK were aware of this. RCUK knew about the requirement for 2 years' service to be eligible for a redundancy payment. Like The Director's Helpline, RCUK advised the claimant to delay liquidating the company and terminating his own

employment until such time as he had accrued 2 years' service on the basis that he would be entitled to a statutory redundancy payment if he delayed until this date.

15. In accordance with their advice, the claimant arranged for a liquidator to be appointed on 5 October 2021.

16. The claimant maintained in his evidence that his employment terminated on 6 October 2021. The respondent disputes that is correct. The claimant recorded in his ET1 form that the employment terminated on 17 March 2020. The claimant explained that was when his work with Nissan came to an end and, he said, this was why he erroneously entered this date in the box. The respondent disputes there was an employment relationship, but if there was, it says it ended on 17 March 2020.

17. The claimant made an online application to the respondent for a statutory redundancy payment, arrears of pay and holiday pay on 7 October 2021. He made a further application to the respondent on 12 October 2021 for notice pay.

18. The claimant believed RCUK were acting on his behalf and would advise him of any time limits with which he need be concerned.

19. The respondent responded to the claimant's applications by letter dated 14 January 2022. The respondent rejected all claims and informed the claimant in relation to each claim that he was not entitled because the respondent did not believe that he was an employee as described in section 230 (1) of ERA.

20. The respondent's letter ended with the following paragraphs:

> *You have the right to make a claim to an employment tribunal if you think you've been paid the wrong amount. There are time limits on when you can make a claim.*
>
> *Information about time limits and when and how to make a claim to an employment tribunal is available at: https://www.gov.uk/insolvency-service/your-redundancy-payment*

21. The claimant received the respondent's letter on 14 January 2022 by email. The claimant did not click the link. The link was to the Government's website with information about redundancy payments and gave basic information about the Tribunal time limits in redundancy claims and in other insolvency claims.

22. The claimant sent an email to the respondent to contest the decision on 14 February 2022. He contested it on the ground that he was a company director of Rapax Ltd. He attached a copy of Companies House documentation to evidence his directorship.

23. On 14 February 2022, the claimant or RCUK initiated the Early Conciliation process through ACAS, naming Rapax Ltd and the Secretary of State as prospective respondents. On 16 February 2022, ACAS issued Early Conciliation Certificates in respect of each prospective respondent.

24. On 25 February, the respondent responded to the claimant. The letter was sent as an attachment to an email which the claimant received that day. In the response, the respondent accepted the claimant was a director of the insolvent company but disputed that he was an employee for the purposes of ERA. The letter ended with the following paragraph:

> *If you disagree with our decision to reject your claim on employee status grounds, you can challenge this at Employment Tribunal (ET). Please note, you have 3 months from the date of rejection (25 November 2021) to submit a claim to ET. For further information regarding ET, please see the following link Make a claim to an employment tribunal: Make a claim - GOV.UK (www.gov.uk).*

25. The date of 25 November 2021 referred to in the letter was incorrect. The date of the rejection letter, from which time ran (for the section 188 claims only), was 14 January 2022. The claimant read the letter and noticed the November date given as the date of rejection was inaccurate. It was his belief, at this point, that the time limit for responding to all claims was three months from the correct date of the rejection letter (that is, from 14 January 2022).

26. The claimant corresponded further with the respondent about the dispute on 28 February 2022. He implored the respondent to change its decision. On 10 March 2022, the respondent replied to the claimant's email and the claimant received their emailed response that day. The respondent again stated its position that the claimant did not have the requisite employment status. Their letter also included this paragraph:

> *While more than 3 months have passed since the rejection of your claim, this time limit does not apply to the redundancy component. This means you may still be able to challenge the rejection of redundancy pay on employment status grounds at ET. For further information please see the following link, Make a claim to an employment tribunal: Make a claim - GOV.UK (www.gov.uk), or discuss*

27. The claimant noticed the letter appeared to be incorrect. Three months had not passed since the rejection letter which was dated 14 January. Three months would not elapse until 13 April 2022 and the date of the respondent's letter was 10 March 2022. Although the claimant read the rest of the paragraph, he did not take on board the advice that a different time limit applied to his claim for a redundancy payment than to his other claims. He continued to believe that the time limit for all claims was three months less one day from the date of the Secretary of State's rejection letter.

28. The claimant did not, by 5 April 2022 (or at all), make a claim in writing to Rapax Ltd for a redundancy payment. Nor did he raise a Tribunal claim by that date under either section 170 or section 111 of ERA.

29. On 13 April 2022, RCUK emailed the claimant about his claimsand he received the email that day. They advised him that they could see no reason why his claim to the Insolvency Service should not have been successful. They indicated, however, that they would not support the claim to the Tribunal due to the costs associated with instructing a barrister. They advised in their correspondence that "*The next stage would be to instigate the employment tribunal process which must be issued within 3 months less one day of the date of the rejection letter*." Further down their letter, they repeated this advice, stating "*You are of course at liberty to make continue your claim to the Tribunal and do it yourself but must do so within 3 months less one day from the date of your rejection letter*. *The first stage would be to apply for the ACAS certificate and we have already completed this for you, please see the certificates attached. The ACAS process also serves to extend your deadline by a further month."*

30. The 'normal' 3-month time limit for the arrears of pay, holiday pay and notice pay expired on 13 April 2022 which was the date on which the case manager at RCUK sent this correspondence to the claimant.

31. The claimant trusted RCUK and relied upon its advice in its email of 13 April 2022 regarding time limits. He continued to believe the same time limit applied for all his claims including his claim for a statutory redundancy payment. Although he had previously believed that the time limit was three months from the date of the rejection letter, his understanding changed on 13 April 2022. From that date, he believed, based on RCUK's correspondence, that that the time limit was extended by a month because of the ACAS EC process. The claimant now believed that the (extended) time limit for raising all his claims to an Employment Tribunal was 12 or 13 May 2022.

32. The claimant prepared an ET1 form to lodge with the Employment Tribunal. He sent it by post. The claim was received by the Tribunal on 10 May 2022. He presented claims for arrears of pay, notice pay, holiday pay and a statutory redundancy payment on that date.

Relevant Law

Time Limits in claims under section 182 of ERA

33. Part XII of ERA provides for certain employee rights on the insolvency of an employer. Under that Part of the Act, the Secretary of State has an obligation to pay employees debts to which they are entitled out of the National Insurance fund in certain prescribed circumstances. The debts to which Part XII applies include arrears of pay, holiday pay and notice pay. They do not include statutory redundancy payments ("SRPs"). There is a different regime governing entitlement to such payments, found in Part XI of ERA. The relevant law relating to time limits in such claims is set out under a separate heading below.

34. The law relating to time limits in respect of claims brought under section 182 of ERA (regarding debts owed by insolvent employers (excluding SRPs) is set out in s.188 of ERA. Section 188, so far as relevant, provides as follows:

> *(1) A person who has applied for a payment under section 182 may present a complaint to an employment tribunal –*
>
> *a. That the Secretary of State has failed to make any such payment*
>
> *b. …*
>
> *(2) An Employment Tribunal shall not consider a complaint under subsection (1) unless it is presented to the Tribunal –*
>
> *(a) before the end of the period of three months beginning with the date on which the decision of the Secretary of State on the application was communicated to the applicant, or*
>
> *(b) Within such further period as the Tribunal considers reasonable in a case where it is not reasonably practicable for the complaint to be presented before the end of that period of three months.*

35. The types of claims to which a requirement applies to enter Early Conciliation through ACAS are listed in section 18(1) of the Employment Tribunals Act 1996. The 'relevant proceedings' listed there do not include claims brought under sections 182 and 188 of ERA. The requirement does not apply to these types of claims.

36. S.207B of ERA provides for an extension to the three-month time limit in certain circumstances where the requirement to enter Early Conciliation applies. 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. However, section 207B applies only

where ERA provides for it to apply for the purposes of a provision of the Act. There is no provision in section 188 to confirm the application of section 207B to complaints brought under that section. That is doubtless because the requirement to enter Early Conciliation does not apply to claims brought under that section and neither, therefore, do the stop the clock provisions.

37. Where a claim has been lodged outside 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.

38. 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).

39. 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.

40. The **Dedman** principle applies however careful the selection of adviser and however reasonable it was for the employee to rely on the advice. The adviser must be a professional or skilled adviser (not necessarily a lawyer, but advice from friends or colleagues will not count); the adviser must themselves have been at fault in the advice they gave, and the wrong advice must have been the substantial cause of the missed deadline.

41. 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."*

Time limits in claims under section 170 of ERA (Statutory Redundancy Payment)

42. SRPs cannot be claimed under Part XII of ERA, including in the event of insolvency. Part XI of ERA contains the relevant provisions. Under that Part of the Act, an employee whose employer is insolvent may apply for payment to the Secretary of State (section 166). ERA does not state a time limit for the making of such an application to Secretary of State but the employee must claim the defaulting employer is 'liable' to pay an SRP. Where such an application is made, section 170(1) provides that any question as to the liability of the employer to pay the employer's payment shall be referred to an Employment Tribunal. Section 170 does not provide any time limits for such a referral.

43. In determining such a referral, however, the Tribunal must concern itself with the employer's liability to pay which liability is restricted by certain time limits found in section 164 of ERA. It states:

> *(1) An employee does not have any right to a redundancy payment unless, before the end of the period of six months beginning with the relevant date—*
>
> *(a) the payment has been agreed and paid,*
>
> *(b) the employee has made a claim for the payment by notice in writing given to the employer,*
>
> *(c) a question as to the employee's right to, or the amount of, the payment has been referred to an employment tribunal, or*
>
> *(d) a complaint relating to his dismissal has been presented by the employee under section 111.*
>
> *(2) An employee is not deprived of his right to a redundancy payment by subsection (1) if, during the period of six months immediately following the period mentioned in that subsection, the employee—*

(a) makes a claim for the payment by notice in writing given to the employer,

(b) refers to an employment tribunal a question as to his right to, or the amount of, the payment, or

(c) presents a complaint relating to his dismissal under section 111,

and it appears to the tribunal to be just and equitable that the employee should receive a redundancy payment.

(3) In determining under subsection (2) whether it is just and equitable that an employee should receive a redundancy payment an employment tribunal shall have regard to—

(a) the reason shown by the employee for his failure to take any such step as is referred to in subsection (2) within the period mentioned in subsection (1), and

(b) all the other relevant circumstances.

(5) Section 207B (extension of time limits to facilitate conciliation before institution of proceedings) applies for the purposes of subsections (1)(c) and (2).

Discussion and decision

44. The respondent's representative gave an oral submission. Mr Soni set out the relevant time limit issues raised. He reiterated the respondent's disagreement that the claimant's employment ended on 6 October 2021 and submitted it ended on 17 March 2020 as stated in the ET1. He observed that an RP3 form was submitted on 13 August 2021 on the claimant's behalf which indicated the document had been generated on 3 August 2021. Mr Soni submitted this indicated any employment of the claimant had terminated at that stage with the result he lacked the necessary two years' service to claim a redundancy payment. He founded on the fact that the claimant had instructed RCUK at that time.

45. With regard to the remaining claims, Mr Soni noted the Secretary of State's rejection was sent on 14 January 2021. He acknowledged that there were errors in the information about time limits set out in the correspondence from the Redundancy Payments Service. He said, however, that the correspondence was clear on how the dates should be calculated. He referred to the email of 13 April 2022 from RCUK and said it made clear the three month time limit. He noted that ACAS conciliation was complete and that all the claimant needed to do was complete and submit the ET1 claim to the Tribunal. Mr Soni submitted that the claimant knew the time limit and failed to make his claim within it.

46. The claimant declined to give any submission initially but gave a reply to Mr Soni's submission. He noted that there were fundamental

mistakes and a lack of clarity both in the information he received from the Insolvency Service and the information provided by his consultant at RCUK. He suggested the most reliable source of information was the Insolvency Practitioner and that they should be trusted to give the 'official dates'.

Arrears of Pay, Notice, Holiday Pay (s.188)

Was the claim made to the Tribunal within three months of the date on which the decision of the Secretary of State on the claimant's application was communicated to the applicant?

47. The respondent's decision was communicated to the claimant on 14 January 2022. The time limit expired on 13 April 2022. The time was not extended by section 207B of ERA (the stop the clock provisions) because that section does not apply to claims brought under section 182 and 188 of ERA. The claim was lodged on 10 May 2022. Therefore, it was not brought within the time limit but was brought almost 4 weeks (27 days) later.

If not, was it reasonably practicable for the claim to be made to the Tribunal within the time limit?

48. I required to consider, first of all, whether it was reasonably practicable for the claimant to have lodged his claim by 13 April 2022. 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.

49. The caselaw is clear that, if an employee retains a skilled adviser, any unreasonable ignorance or mistake on the part of the adviser is attributed to the employee. Unfortunately for the claimant, this case falls squarely within the **Dedman** principle.

50. It matters not how diligent the claimant was in identifying RCUK to advise him and process his claims on his behalf. It matters not how reasonable it was for the claimant to rely on the advice of RCUK.

51. The RCUK caseworkers were or held themselves out to be professional or skilled advisers, albeit not lawyers. They were at fault in the advice they gave. They had been instructed since August 2021 and could have given the correct advice on time limits at a much earlier stage than they did. They did not distinguish between the different rules on time limits for the claimant's statutory redundancy payment claim and his other claims. When they did give advice on time limits, they provided it on the last date on which the claimant could have timeously lodged an ET1 in relation to his claims under section 182 of ERA. They did not make it clear that the three-month time limit expired on that date.

52. More significantly, they provided incorrect advice regarding the implications of the ACAS Early Conciliation process. That process was, in fact, unnecessary for section 182 claims. They told him "*The first stage would be to apply for the ACAS certificate and we have already completed this for you, please see the certificates attached. The ACAS process also serves to extend your deadline by a further month."* In fact,

no stop the clock provisions applied to this type of claim and the ACAS process did not serve to extend the time limit at all. Even if the 'stop the clock' provisions had applied, their asserted effect was incorrectly stated by RCUK. Because of the timing of the Claimant's conciliation period and the limitation date, section 207B(4) would have had no application even if s.207B generally applied (which it didn't).

53. I find as a matter of fact that RCUK could reasonably have been expected to have been aware of the correct time limits. They are a claims management company which seeks to profit from advising company directors in relation to redundancy and other claims against the Insolvency Service. They accepted the claimant's instruction to liaise with the Insolvency Service and process all claims on his behalf. Their field of specialism is relatively narrow, and it would be reasonable to expect them to have sufficient expertise to advise correctly on the time limits in the types of claims upon which they advise.

54. I accept the claimant's assertion that the advice given by RCUK was the substantial cause of the missed deadline. Having previously believed there to be a 3-month deadline within which to claim from the rejection date, I accept that after reading their email he believed he benefited from a further extension of one month. I accept that this is the reason that he did not lodge his ET1 by 13 April 2022 but did so on 10 May 2022.

55. In these circumstances, I find, as a matter of fact that it was reasonably practicable for the claimant to present his claims under section 182 of ERA within three-month time limit prescribed by section 188 of ERA. As such, the claim is time barred and is dismissed. It is unnecessary to go on to consider whether the claim was lodged within a reasonable time thereafter

Statutory Redundancy Payment

56. The legislative scheme in relation to time limits for redundancy is such that a determination of the limitation questions posed by section 164 (1) and (2) require a determination of certain other matters including whether it is "*just and equitable that the claimant should receive a redundancy payment*." In turn, that question brings into play issues which are contentious in this case and which were not the primary focus of the preliminary hearing. These are (1) whether the claimant was an employee of Rapax Ltd; (2) whether the claimant had the requisite two years' service with Rapax Ltd (requiring consideration of the effective date of termination, if indeed the was claimant was an employee); and (3) whether the claimant was dismissed by reason of redundancy.

57. I did not hear evidence about the claimant's employment status. I heard only limited evidence about the circumstances of the ending claimant's relationship with Rapax Ltd. Likewise, I heard some limited evidence about the date on which the claimant says his employment terminated,

but again this was not the primary focus of inquiry. It had not been appreciated that the termination date would be in dispute before the claimant began his evidence and asserted a different date to that stated in his ET1.

58. In these circumstances, I make no determination in this judgment as to the claimant's employment status, the effective date of termination (and his consequent continuity of service) or the reason for his dismissal. Instead, in analysing the redundancy payment time limitation issues, I have taken the claimant's case at its highest. I have, therefore, assumed, for these purposes only, that the claimant was indeed an employee of Rapax Ltd at all material times; that his employment terminated on 6 October 2022; that he had two years' service by that date; and that his employment was terminated by reason of redundancy. I reiterate that these issues are not judicially determined in this judgment.

Did the claimant make a claim for the redundancy payment by notice in writing to the asserted employer before the end of the period of 6 months beginning with the relevant date or otherwise comply with section 164 of ERA?

59. On the assumption that the claimant's employment terminated on 6 October 2021, the last date to take one of the actions prescribed by section 164(1) of ERA was 5 April 2022. I have found as a fact that the claimant did not make a claim in writing to Rapax Ltd for a redundancy payment by that date or at all. The claimant took none of the actions prescribed by section 164(1) within six months of his asserted termination date.

Did the claimant refer to the Tribunal a question as to his right to a statutory redundancy payment during the 6 months immediately following the first six month period mentioned above?

60. The claimant referred to the Tribunal a question as to his right to a statutory redundancy payment (which had been rejected by the respondent). He did so on 10 May 2022. This date fell within the period of six months immediately following the six-month period which ended on 5 April 2022. The 'stop the clock' provisions in section 207B of ERA do apply to the SRP claim but, in the event, are not particularly material on the facts here. With or without the benefit of the section 207B extension, the claimant made the referral to the Tribunal well within the second 6-month period provided for in section 164(2). Even with the extension, the referral was not made within the initial 6-month period prescribed by section 164(1).

Does it appear to the Tribunal to be just and equitable that the claimant should receive a statutory redundancy payment?

61. In these circumstances, the Tribunal has discretion to permit the claim to proceed notwithstanding it was not brought in the initial 6-month limitation period if it appears to the Tribunal to be just and equitable that the claimant should receive a statutory redundancy payment.

62. The test is different to the "reasonably practicable" test applicable to claims under section 182. Similar wording is found in relation to time limits in discrimination claims in section 123 of the Equality Act 2010 and interpretive caselaw has developed in that context. Although the phrase "just and equitable" appears in both Acts, there is an important point of distinction: in the Equality Act, the question is whether the Tribunal thinks it just and equitable to extend the period of time in which the claim can brought; in section 164(2) of ERA, the question is whether it appears just and equitable not just that the time be extended, but that the employee should receive a redundancy payment.

63. Section 163 prescribes that in determining whether it is just and equitable that the employee should receive a redundancy payment, I should have regard to the reason shown by the employee for his failure to take a relevant step within the initial six-month period and all other relevant circumstances.

64. With regard to the claimant's reason for failing to take any of the prescribed actions within the 6-month period, the situation at the expiry of that period (on 5 April 2022) was that the claimant had instructed RCUK. RCUK did not advise him of the time limits in that period. When the period expired, they had not yet sent their email of 13 April 2022 with its incorrect advice.

65. Be that as it may, the claimant was broadly aware of the existence of some time limit at that date. In the rejection letter from the Insolvency Service dated 14 January 2022, he was told "*There are time limits on when you can make a claim. Information about time limits and when and how to make a claim to an employment tribunal is available at* ..[link]". Though the claimant didn't click the link which would have informed him of the 6-month time limit in cases of redundancy from the date of dismissal, he was aware generally that a time limit applied.

66. Subsequently he received correspondence from the Insolvency Service on 10 March 2022. It said, "*While more than 3 months have passed since the rejection of your claim, this time limit does not apply to the redundancy component. This means you may still be able to challenge the rejection of redundancy pay on employment status grounds at ET. For further information please see the following link* [link] *or discuss with your representative".* The claimant did not click the link nor absorb the information in the letter about the existence of a different time limit for redundancy claims. He continued to believe the time limit was three months from the date of the rejection letter. He did not take up the suggestion of contacting his representative to discuss the matter. He placed trust in RCUK to advise him.

67. RCUK did not contact him before the expiry of the 6-month period on 5 April 2022. I find that the reason the claimant did not take one of the prescribed actions set out in section 164(1) of ERA within the six-month time limit was because he was ignorant of the time limit. When it expired on 5 April 2022, he erroneously believed it would end on 13 April 2022.

He also believed RCUK were dealing with matters on his behalf and trusted that they would advise of any time limits.

68. I have considered all relevant factors to determine whether it appears just and that the claimant should receive a redundancy payment. Factors which weighed in favour of the granting of determining that he should not be deprived of any such right:-

    a. that the claimant was not at any point aware of the six-month time limit set down in, or the actions prescribed by, section 164(1) at any stage before the six month period expired;

    b. that the claimant sought advice from RCUK who held themselves out as competent to handle claims on his behalf and that they did not advise him with respect to the relevant matters before the six months expired;

    c. that the claimant received certain confusing information from the Insolvency Service regarding the date when time began to run which was not correct;

    d. that the disadvantage to the claimant if it is not found just and equitable that he receive an SRP is significant in that this will effectively end his claim for such a payment from the Insolvency Service.

69. However, having carefully considered all relevant matters, the following factors weighed more heavily in my deliberations:

    a. The claimant was aware of his intention to claim a statutory redundancy payment from at least August 2021, two months before he asserts his employment terminated and 8 months before the time limit expired. He had a substantial period of time in which to acquaint himself with the time limit;

    b. the claimant was aware that a time limit existed. He was told as much in the correspondence from the Insolvency Service as early as 14 January 2022. He took no steps to acquaint himself with the time limit which he could have done by merely clicking on their link. Even when he received the respondent's letter of 10 March 2022 which told him that some time limits had expired but that a different time limit applied to the redundancy component, the claimant neither sought to familiarise himself with the precise time limits nor contacted RCUK to ask them about the matter as the respondent's letter encouraged him to do. The claimant did not access the links sent to him which might have shed light on matters;

    c. the delay in taking one of the prescribed actions was not a delay of a few days but was over a month;

    d. Time limits are designed to ensure compliance with the principle of legal certainty.

    e. Aside from the reason for the lateness of the claim, the context in which the claim is made is part of the relevant circumstances for

consideration. I require to determine whether it appears just and equitable that the claimant should receive a redundancy payment. The claimant was the sole director and shareholder of Rapax Ltd. By the summer of 2021 it was appreciated by him in his capacity as director that the company was not sustainable. It had no income.

f. In **Mairs (Inspector of Taxes) v Haughey** [1993] IRLR 551, HL, Lord Wolf considered the nature of a redundancy payment. It was, he said in the nature of compensation for the loss of their job and the expectation of continued employment. He elaborated that a redundancy payment follows a situation in which an employee has found themselves without a job "*in circumstances over which they have no control*" (para 31). "*A redundancy payment has therefore a real element of compensating or relieving an employee for the consequences of his not being able to continue to earn a living in his former employment. The redundancy legislation reflects an appreciation that an employee who has remained in employment for for the minimum time has a stake in his employment which justifies his receiving compensation if he loses that stake*."

g. The House of Lords' characterisation and identified purpose of a redundancy payment appear removed from the realities of the present case. The claimant, as company director, had significant control over the circumstances of the termination of his employment and contrived to delay insolvency proceedings to ensure sufficient service was accrued. He did so with no real expectation that company revenue would be forthcoming to sustain his employment in the extended period between August and October 2021.

70. I conclude that it does not appear to me, having regard to all relevant circumstances, to be just and equitable that the claimant should receive a statutory redundancy payment.

L Murphy

Employment Judge Murphy (Scotland), acting as an Employment Judge (England and Wales)

Date 31 October 2022