EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Miss Christine Hochleitner	v	Barnet, Enfield and Haringey Mental Health NHS Trust

Heard at: Cambridge **On:** 12 October 2022

Before: Employment Judge T Brown (sitting alone)

Appearances:
For the Claimant: Mr C Kelly, Counsel
For the Respondent: Ms H Patterson, Counsel

JUDGMENT having been sent to the parties on 4 November 2022 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunal Rules of Procedure 2013, the following reasons are provided:

REASONS

1. I must apologise for the time that has been taken to provide these written reasons to the parties: there is currently a very long wait for dictated reasons to be typed by HMCTS, and this has caused a long delay.

2. There is no dispute that the Claimant worked for the Respondent Trust as Statman and Induction Lead and was dismissed by the Trust with immediate effect, on 22 February 2021 with pay in lieu of notice.

3. On 10 August 2021, the Claimant started a claim in the Employment Tribunals complaining that her dismissal had been unfair. That claim had been sent to the Employment Tribunals on 8 August 2021. The starting of the claim followed ACAS Early Conciliation between 16 June 2021 and 28 July 2021.

4. The start of ACAS Early Conciliation was therefore more than three months after the effective date of termination, and therefore there is no dispute that the claim was presented out of time. ACAS Early Conciliation needed to have started by 21 May 2021 for the Claimant to be able to begin the claim in time

5. The Respondent took such a jurisdictional point in its Response and this Preliminary Hearing was listed to deal with it.

6. On 2 August 2022, the Claimant made an application to amend her claim to pursue a reference for a redundancy payment. At the start of the Hearing before me, Mr Kelly for the Claimant said that this Application was not being pursued and he accepted that the claim did not include, without amendment, reference to a redundancy payment and therefore the only matter for me to decide today is the jurisdictional issue relating to time limits for the purposes of the Claimant's complaint of unfair dismissal.

7. In deciding this preliminary issue I had a 54-page bundle of documents in PDF format, a four page witness statement for the Claimant, also in PDF format, and written closing submissions for the Respondent. I also heard oral submissions from each representative. I am very grateful to both counsel for their comprehensive, helpful and succinct presentation of their respective cases.

8. The legal principles are not in dispute between the parties: the applicable law as to time limits is provided by section 111, Employment Rights Act 1996, which, as material reads:

> 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.

9. Cygnet Behavioural Health Ltd v Britton [2022] EAT 108 sets out a summary of the applicable legal principles at [18] to [24], held at [25] by Cavanagh J to be an accurate summary of the law.

10. Reasonable practicability is a question of fact. Mr Kelly emphasises the need to consider the facts of each particular case and I remind myself that in applying the reasonable practicability test, I must give it a liberal construction in favour of the employee.

11. Ms Patterson referred me to the decision of the Employment Appeal Tribunal in Norbert Dentressangle Logistics Limited v Hutton UKEATS/0011/13, in which Mr Justice Langstaff, President of the Employment Appeal Tribunal, said that:

> *"to ask whether it was reasonable to expect that which was possible to have been done…"*

... is a useful insight. I remind myself however that those are not the words of the statutory test and that I must apply the statutory test and that

reasonable practicability is a question of fact for me.

12. Since the Claimant was dismissed on 22 February 2021 and since this, therefore, was the effective date of termination for the purposes of the Employment Rights Act 1996, the ordinary three month time limit to present a complaint to the Employment Tribunals expired on 21 May 2021. Therefore by this date the Claimant ordinarily needed either to have presented such a complaint, or to have taken steps to extend time by beginning ACAS Early Conciliation.

13. I will therefore start my factual and legal assessment by reference to the circumstances as they looked, at around 21 May 2021, since it is whether it was not reasonably practicable for the Claimant to have taken the necessary steps by that date which matters in the first instance. Consideration of a wider time frame becomes relevant only if I conclude that it was not reasonably practicable for a claim to have been presented in time.

14. Following her dismissal on 22 February 2021, the Claimant took advice from the Citizens Advice Bureau at the Royal Courts of Justice, who wrote to the Trust on 9 March 2021 arguing in essence that the Claimant should have been paid a redundancy payment in the circumstances in which she had been dismissed.

15. On the facts, a reference for a redundancy payment under s 163 Employment Rights Act 1996 (which has a six-month time limit) was clearly a possible form of action open to the Claimant, but since the Claimant had beyond doubt been dismissed, so too was a complaint for unfair dismissal. I considered, therefore, as at 21 May 2021, a reasonable advisor would have been alive to the existence of an unfair dismissal complaint.

16. What appears to have happened in reality is that the Citizens Advice Bureau wrongly believed that the effect of s 97(2) Employment Rights Act 1996, was to extend time for the purposes of s 111 of the Employment Rights Act 1996 because the Claimant had been dismissed summarily with pay in lieu of notice. In fact, s 97 extends time only in relation to the qualifying period of employment and to the effective date of termination for the purposes of remedy and it does not extend time for the purposes of statutory time limits.

17. While the Claimant did not rely primarily on a legal argument to that effect before me, in fact from her witness statement, that is what the Claimant had been advised by the Citizens Advice Bureau (see paragraph 22 of the Claimant's witness statement) and indeed this is the primary ground on which the Claimant relies in her witness statement on the question of time limits.

18. I find as a fact that this is why the Claimant did not take the necessary steps to preserve her position on time limits by 21 May 2021, because of the Citizens Advice Bureau's erroneous belief that this was not the relevant date by which those steps needed to be taken. In my judgement it would have been reasonable for the Citizens Advice Bureau to

appreciate that s 97 of the Employment Rights Act 1996 did not apply to extend time limits in unfair dismissal complaints. Time limits on such complaints are not esoteric, the principles are very well settled and the need to take care with time limits is well known.

19. Had the Citizens Advice Bureau not misunderstood the position and mis-advised the Claimant as to the position, there was in my judgement no reason why ACAS Early Conciliation could not begin by 21 May 2021. The Claimant knew, as at 21 May 2021 that she had an outstanding appeal against her dismissal. At that time, the reason for the Claimant's dismissal appeared to be redundancy, but the Claimant could not know then what would happen in the handling of her appeal against dismissal. She did not and could not know that the Respondent would later re-characterise the reason for her dismissal, because that happened after that date, and she could not know whether or not the Respondent would allow her appeal, as in fact, in substance it did. These later reasons therefore did not and could not bear on what was practicable or not practicable or reasonable or unreasonable when the ordinary three-month time limit expired, at which date, the Claimant had a potential complaint of unfair dismissal.

20. In my judgment it is difficult to say that the Claimant could not reasonably be expected to take the first necessary step towards pursuing an unfair dismissal complaint because she did not know what position the Trust would take after the expiry of the ordinary time limit on that date. In general, the time immediately before expiry of the ordinary three-month time limit is the time by which an employee who knows of their right not to be unfairly dismissed has to decide whether or not to pursue such a complaint. The Claimant and her advisors had enough information at that date to form a view about the fairness or unfairness of the Claimant's dismissal (and from the fact of the appeal, there were evidently grounds on which its fairness was challenged) and to consider, notwithstanding the outstanding appeal, whether a claim to the Employment Tribunals was merited since the appeal did not stay the time limit for a tribunal claim.

21. I find and conclude that the reason that the Claimant and her advisors did not act with greater haste was because of their belief that there was no pressure of time. There appears to me to be force in Ms Patterson's submission that, if a Respondent's behaviour *after* the expiry of the ordinary time limit were generally a weighty consideration in assessing the reasonable practicability of starting a claim, there would be very many cases in which employees sought to rely on matters happening after the expiry of the ordinary time limit to explain why it was not reasonably practicable to start a claim within the ordinary time limit. That would seem to me a difficult approach to statutory time limits based on reasonable practicability.

22. I am satisfied here that the reason that the Claimant took no action to pursue a complaint for ordinary unfair dismissal by 21 May 2021, was not solely or mainly because the focus was on a different type of claim and that the Respondent's position in relation to that may have changed, but because her advisors wrongly thought that time was extended to three months after 17 May 2021 so that there was no pressure of time.

23. I regret to say that on the authorities concerning reasonable practicability (as opposed to those concerning just and equitable extensions of time) this erroneous belief is to be attributed to the Claimant for the purposes of assessing reasonable practicability, although she herself was relying on advice from someone holding themselves out to be able to advise competently. I conclude that, although it was not practicable to start a claim by 21 May 2021, in misunderstanding of the law as to time limits, this was not a *reasonable* impracticability; it was an unreasonable impracticability.

24. Therefore, since the claim was not presented within the ordinary three month time limit, and since I have not been satisfied that it was not reasonably practicable for the complaint to be presented within that period, I must decline the Tribunal's jurisdiction and dismiss the claim.

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Employment Judge T Brown

30 January 2023

Judgment sent to the parties on

1 February 2023

For the Tribunal office