EMPLOYMENT TRIBUNALS

Claimant: **Mr S Uddin**

Respondent: **JP&S Services Ltd**

Heard at: **Watford (By CVP)** **On: 12 June 2023**

Before: **Employment Judge Bansal**

Representation

Claimant: **In person**

Respondent: **Mr P Doughty of Counsel**

RESERVED JUDGMENT

The Claimant's claim was not presented in time despite it being reasonably practicable to do so and is dismissed.

REASONS

1. The claimant presented his claim of unfair dismissal to the employment tribunal on 14 December 2022. The effective date of termination was 2 February 2022. The claimant engaged with ACAS on 12 December 2022 (Day A), and was issued with an Early Conciliation Certificate on 14 December 2022 (Day B).

2 The respondent resists the claim contending the claimant has been fairly dismissed on the grounds of capability. Further, it contends the tribunal does not have jurisdiction to hear the claim, as it has been presented out of time as the primary limitation period to present the claim expired on 1 May 2022.

3. By Notice of Hearing dated 1 March 2022, this claim was listed for a preliminary hearing, *"To consider a strike out of the claim, as it appears to have been brought out of time."* On the application by the respondent, this hearing was converted to a video hearing, which the claimant did not oppose.

4. At today's hearing, I was presented with an agreed bundle of documents of 55 pages prepared by the respondent, which included a witness statement of the claimant and some medical information in the form of Fit Notes and a letter from NHS University College Hospital London. Mr Doughty presented outline submissions, which he

expanded upon orally when giving his final submissions. He also referred me to two case authorities, ***Walls's Meat Co Ltd v Khan (1978) IRLR 499 & Lowri Beck Services Ltd v Patrick Brophy (2019) EWCA Civ 2490***

5. The claimant's statement was taken as his evidence in chief, upon which he was cross examined.

Findings of fact

6. From the evidence I heard, I make the following findings of fact.

7. The claimant commenced his employment with Gokani (UK) Ltd on 11 March 2018 as Customer Assistant/Retail Worker. On 25 January 2021, by a TUPE transfer his employment was transferred to the respondent. On 29 June 2021, his role changed to Night Watchman/Security.

8. On 7 July 2021, the claimant was on night shift at Hertford Road Service Station. At about 23.30 hours, he slipped and sustained injury to his head. He was taken to hospital and seen at the A&E Dept. He was prescribed Co-codamol and a muscle relaxant, and discharged from hospital that night. He was signed off sick from this date and did not return to work.

9. By letter dated 4 January 2022, the respondent wrote to the claimant asking him to confirm his plans to return to work within 2 weeks. It further stated if no response is received he will be issued with his P45. The claimant did not respond to this letter. Consequently, the respondent terminated the claimant's employment and issued his P45, with the effective date of termination stated as 2 February 2022. The date of termination is not in dispute between the parties.

10. During the period from 7 July 2021 (i.e the accident date) to 2 February 2022, (i.e the effective date of dismissal) the claimant submitted Fit Notes confirming his absence citing "head injury and back pain".

11. On receiving his P45, the claimant took the view his termination was inevitable given that he was not fit and able to return to work. He believed the respondent must have followed the correct procedure in terminating his employment. He did not think about it any further, as at this time his focus and priority was on his medical appointments for his pre-existing health condition.

12. On or about September 2022, the exact date the claimant is not able to confirm, he took his car for repair. Whilst at the garage, he had a conversation with the owner/mechanic about his accident at work in July 2021. The owner/mechanic said he would pass on the claimant's details to someone who he knew could assist him to make a claim. Following this conversation, the claimant was contacted by a male individual by telephone during which he had a discussion about his accident. The claimant recalls providing the individual with an account of the incident, including his personal information. The claimant said, he did not take a note of the name of the person or his contact details.

13. On 29 September 2022, Gull Law Chambers Ltd, a law firm based in Hounslow Middx submitted a Claim Notification Form (EL1) for a personal injury claim on behalf of the Claimant. In evidence, the claimant denied signing or seeing the EL1 Claim Form

submitted until he received the bundle for this hearing. He also said he had no recollection of approving the EL1 Claim Form before it was submitted.

14. In evidence, the claimant said he did not have a discussion about the termination of his employment. with the individual from Gull Law Chambers Ltd as his discussion was only limited to his accident.

15. Sometime in December 2022, the claimant attended at his hospital appointment. He stated that in general conversation with the nurse who attended to him, he mentioned his employment situation and about its termination. In this conversation, the nurse suggested he contact ACAS for advice.

16. After this conversation, some days later the claimant made contact with ACAS and was told he had a case for unfair dismissal but was advised to contact the Citizen Advice Bureau (CAB). The claimant confirmed he made contact with the CAB, but found they were not able to assist him.

17. On 12 December 2022 the claimant contacted ACAS for early conciliation. The EC Certificate was issued on 14 December 2022, and he presented his claim on the same day.

18. In evidence the claimant, confirmed as follows.

    (a) The accident in July 2021, has affected him mentally and physically. He suffers from anxiety; fatigue and his mobility is restricted. Also, his medication has increased, which has caused him side effects, making him feel tired and drowsy.

    (b) He is able to carry out his day to day activities albeit with some restriction. He is able to drive and take his wife shopping; he transports his daughter to school and home daily;

    (c) At the date of dismissal, although he was aware of the legal/court system, he did not know that he could make a claim to an employment tribunal. He first considered making a claim about his dismissal on 12 December 2022, after speaking with ACAS that day. Prior to this he made no enquiries about his employment rights. This was because he was of the view the Respondent had followed the proper procedure and that his priority was on his health, and attending his medical appointments for his exiting medical conditions.

    (d) He does have access to the internet at home. He is aware how to access and use the internet but is not a frequent user. His 4 children who are of ages 13- 23 years, use the internet regularly and he does ask them for their assistance, when required. He did not undertake any search on the internet about his employment rights, and neither did he ask his children to assist him, as has not told his children he has been dismissed from his employment.

    (e) He is aware of ACAS & the CAB and only approached them first in either late November or early December 2022. Since the start of this claim, he has sought advice from a local law firm of solicitors in connection with this hearing. He is not able to afford the legal fees hence the reason why he is representing himself.

(f) He is aware and understands his claim has been presented late. ACAS explained this to him.

19. In the bundle, the claimant disclosed a letter dated 12 April 2023, written by Dr Elaine Murphy (Consultant Adult inherited Metabolic Disease) of NHS University College London Hospitals, which has been written for the purposes of this hearing. It records, the claimant has a rare genetic disorder of hypophosphataemic rickets, and has been unable to work due to pain and reduced mobility. It further states, " *He has applied for compensation through an industrial tribunal but is concerned that he may have exceeded the time limit to report this accident. He attributes this delay in reporting to the shock and stress of the accident and the multiple adjustments that he has had to make to his life and ask that this be taken into account please.."*

The Law

20. Section 111(2) of the Employment Rights Act 1996, provides that an employment tribunal shall not consider a complaint of unfair dismissal unless it is presented before the end of the period of three months beginning with the effective date of termination, or 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.

21. The burden of proof for establishing that it was not reasonably practicable to present the claim in time is on the claimant. The EAT reiterated in ***Cygnet Behavioral Health Ltd v Britton [2022] EAT 108*** (Para 53) that: "A person who is considering bringing a claim for unfair dismissal is expected to appraise themselves of the time limits that apply; it is their responsibility to do so."

22. Subsection 18A(1) of the Employment Tribunals Act 1996 provides that, *"Before a person ("the prospective claimant") presents an application to institute relevant proceedings relating to any matter, the prospective claimant must provide to ACAS prescribed information, in the prescribed manner, about that matter".* S18A(8) provides *"A person who is subject to the requirements in subsection (1) may not present an application to institute relevant proceedings without a certificate under subsection (4)."*

23. Section 207B Employment Rights Act 1996 ('ERA') extends the above time limits by not counting the period beginning with Day A (the day on which the prospective claimants contact ACAS to request Early Conciliation) and ending with Day B (the day they get the Early Conciliation Certificate) and if the relevant time limit would (if not extended by subsection 207B (4) ERA) expire during the period beginning with day A and ending one month after Day B the time limit expires instead at the end of that period.

24. However that extension does not apply if by the time the prospective claimant contacts ACAS to request early conciliation the above three-month period has already expired. It is too late. ***In Pearce v Bank of America Merill Lynch and others UKEAT/0067/19/LA*** it was held that although time may be extended to allow for ACAS Early Conciliation that is only possible where the reference to ACAS takes place during the primary limitation period.

25. What is 'reasonably practicable 'is a question of fact for the tribunal.

26. The word' practicable 'is to be given a liberal interpretation in favour of the employee ***(Dedman v British Building and Engineering Appliances Ltd [1974] 1AER 520).*** May LJ described the relevant test in this way: *'We think that one can say that to construe the words "reasonably practicable" as the equivalent of "reasonable" is to take a view that is too favourable to the employee. On the other hand, "reasonably practicable" means more than merely what is reasonably capable physically of being done - different, for instance, from its construction in the context of the legislation relating to factories compare Marshall v Gotham Co Ltd (1954) AC 360,HL. In the context in which the words are used in the1978 Consolidation Act, however ineptly as we think, they mean something between these two. Perhaps to read the word "practicable as the equivalent of "feasible" as Sir John Brightman did in Singh v Post Office (1973), CR437 NIRC and to ask colloquially and untrammelled by too much legal logic-"was it reasonably feasible to present the complaint to the employment tribunal within the relevant 3 months?"-is the best approach to the correct application of the relevant subsection." (**Palmer and Saunders v Southend-on-Sea Borough Council [1984] ICR at 384,385**). He said the factors could not be described exhaustively but listed a number of considerations which might be investigated including the manner of, and reason for the dismissal, whether the employer's conciliatory appeals machinery have been used, the substantive cause of the claimant's failure to comply with the time limit whether there was any physical impediment preventing compliance, such as illness, or a postal strike, whether, and if so when, the claimant knew of his rights, whether the employer had misrepresented any relevant matter to the employee, whether the claimant had been advised by anyone, and the nature of any advice given, and whether there was any substantial fault on the part of the claimant or his adviser which led to the failure to present the complaint in time.*

27. If ill health is given as a reason although its effects have to be assessed in relation to the overall period of limitation, the weight to be attached to a period of disabling illness varies according to whether it occurred in the earlier weeks or the far more critical weeks leading up to the expiry of the limitation period ***(Schultz v Esso Petroleum Co Ltd (1999) IRLR 488).*** It was also held in that case that :*'when a question arises as to whether a particular step or action was reasonably practicable or feasible, the injection of the qualification of reasonableness requires the answer to be given against the background of the surrounding circumstances and the aim to be achieved. In a case of this kind, surrounding circumstances will always include whether or not the claimant is hoping to avoid litigation by pursuing alternative remedies.'*

28. Whether the illness is sufficient to make it not reasonably practicable to submit the claim in time is a question of fact for the tribunal. Although it may be legitimate for the tribunal to consider what else the claimant had been able to achieve in the three months since dismissal, it should not assume that just because the claimant has managed to cope with certain difficulties that could have been (but were not) overwhelming, it would have been reasonably practicable to also cope with the burden of submitting a tribunal claim.

29. If ignorance is given as a reason Brandon LJ said in ***Walls Meat Co Ltd v Khan (1978) IRLR 499,*** *"The performance or an act, in this case the presentation of a complaint, is not reasonably practicable if there is some impediment which reasonably prevents, or interferes with, or inhibits, such performance. The impediment may be physical, for*

instance the illness of the complainant or a postal strike, or the impediment may be mental, namely the state of mind of the complainant in the form of ignorance of, or mistaken belief with regard to, essential matters. Such states of mind can, however, only be regarded as impediments making it not reasonably practicable to present a complaint within the period of 3 months, if the ignorance on the one hand, or the mistaken belief on the other, is itself reasonable. Either state of mind will, further, not to be reasonable if it arises from the fault of the complainant in not making such enquiries as he should reasonably in all the circumstances have made, or from the fault of his solicitors or other professional advisers in not giving him such information as they should reasonably in all the circumstances have given him." He went on:' *With regard to ignorance operating as a similar impediment, I should have thought that, if in any particular case an employee was reasonably ignorant of either (a) his right to make a complaint of unfair dismissal at all, or (b) how to make it, or (c) that it was necessary for him to make it within a period of 3 months from the date of dismissal, an [employment] tribunal could and should be satisfied that it was not reasonably practicable for his complaint to be presented within the period concerned. For this purpose I do not see any difference, provided always that the ignorance in each case is reasonable, between ignorance of (a) the existence of the right, or (b) the proper way to exercise it, or (c) the proper time within which to exercise it. In particular, so far as (c), the proper time within which to exercise the right, is concerned, I do not see it can justly be said to be reasonably practicable for a person to comply with the time limit of which he is reasonably ignorant. While I do not, as I have said, see any difference in principle in the effect of reasonable ignorance as between the 3 cases to which I have referred, I do see a great deal of difference in practice in the ease or difficulty with which a finding that the relevant ignorance is reasonable may be made. Thus, where a person is reasonably ignorant of the existence of the right at all, he can hardly be found to have been acting unreasonably in not making enquiries as to how, and within what period, he should exercise it. By contrast, if he does know of the existence of the right, it may in many cases at least, though not necessarily all, be difficult for him to satisfy an [employment] tribunal that he behaved reasonably in not making such enquiries. To that extent, therefore, it may, in general, be easier for a complainant to avail himself of the "escape clause" on the ground that he was reasonably ignorant of his having a right at all, than on the ground that, knowing of the right, he was reasonably ignorant of the method by which, or the time limit within which, he ought to exercise it."*

30. In ***John Lewis Partnership v Charman [2011] EAT 0079/11*** Underhill J held that a. Para. 9: "The starting-point is that if an employee is reasonably ignorant of the relevant time limits it cannot be said to be reasonably practicable for him to comply with them…. In the present case the Claimant was unquestionably ignorant of the time limits, whether one considers his own knowledge or that of himself and his father. The question is whether that ignorance was reasonable. I accept that it would not be reasonable if he ought reasonably to have made inquiries about how to bring an employment tribunal claim, which would inevitably have put him on notice of the time limits. The question thus comes down to whether the Claimant should have made such inquiries immediately following his dismissal".

Conclusion

31. I am concerned with the primary three-month time limit. The time limit for presenting a claim of unfair dismissal expired on midnight on 1 May 2022. The claimant does not

benefit from an extension of time under the EC provisions because he did not approach Acas (Day A) until 12 December 2022 by which date the three month time limit had already expired, and he did not obtain the EC Certificate (Day B) until 14 December 2022.

32. I found the Claimant to be well-spoken with good understanding of the English language. He was candid in cross examination and appeared to be an able person. The claimant submits that it was not reasonably practicable for the claim to be presented in time because (i) after the accident he was not well and was suffering from shock and stress, and (b) he was focused on his health, and therefore did not take any advice as to his legal rights and to making a claim for unfair dismissal until around late November/December 2022. I deal with each reason below.

33. (a) <u>not well as was suffering from shock and stress</u>
Notwithstanding that the claimant has provided no record or information about the frequency of his medical appointments or the increase in medication, which has affected him. However, I accept, his oral evidence that since his dismissal he has been attending hospital appointments, and his medication has been increased. However, the limited medical information disclosed does not shed any light on any physical or mental impairment which might have prevented him from seeking advice or making his own enquiries/research about his dismissal and legal rights to make a claim, within the limitation period. I am not satisfied that, at the relevant time he was incapacitated to the extent that he could not comply with the time limit. In fact, in evidence, the claimant admitted, he was able to do most things, for example, shopping with his wife during the week; transporting his daughter from school to home on a daily basis; he was able to speak and discuss with Gull Law Chambers about making an accident claim which has been pursued on his behalf.

34. <u>(b) was focused on his health and did not give consideration to making a claim until November/December 2022</u>.
In evidence the claimant candidly said, he did not apply his mind to seek any advice as to his legal rights and the possibility of making a claim to an employment tribunal, until late November/December 2022, (some 7 months after the expiry of the limitation period) because he put the issue of his dismissal to the back of his mind. I therefore accept the claimant was unaware during the primary limitation period of his right to make a claim and of the applicable time limits. He made no enquiries out of choice. I do not find this ignorance was reasonable, particularly as there was nothing preventing him from making his own enquiries following his dismissal. The claimant had access to and use of the internet; he could have asked his children for assistance but did not do so; he could have sought legal advice, whether paid or on a free basis. He was able to have discussions with Gull Law Chambers concerning his accident and gave instructions to make a personal injury claim. He could have had discussions with Gull Law Chambers about his employment claim, which he said he did not do. The fact that he made contact with ACAS in late November/December 2022, when his personal circumstances were no different to when he was dismissed demonstrates that had he done his own research and/or sought legal advice within the limitation period he would have known about the possibility of making a claim, the time limits and procedure involved, which he could have done. The fact is he left it far too late.

35. I therefore conclude that it was reasonably practicable for the claimant to present the claim in time. Accordingly, the tribunal does not have jurisdiction to hear his claim, and is therefore dismissed.

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Employment Judge Bansal

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Date 17 July 2023

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

25 July 2023

GDJ
FOR EMPLOYMENT TRIBUNALS