EMPLOYMENT TRIBUNALS

Heard at: Ashford (by video) **On:** 27 July 2023

Claimant: Mr Besmir Pepkolaj

Respondent: Barrett Steel Limited

Before: Employment Judge E Fowell

Representation:

Claimant In person

Respondent Nicholas Singer of counsel, instructed by Walker Moris LLP

JUDGMENT ON A PRELIMINARY ISSUE

1. The claim is dismissed because it was presented out of time

REASONS

1. These written reasons are provided at the request of the claimant following oral reasons given earlier today.

Background

2. Mr Pepkolaj worked for the company as a Crane Operator and Warehouse Assistant until his dismissal. The basic facts relating to his claim are clear. He had an accident at work on 24 November 2019 which caused him wrist pain. Following an MRI scan it was found that he needed surgery. That operation went ahead on 4 May 2021, after which he was given a plaster cast and signed off work. He then had a course of physiotherapy but his wrist remained sore and he was put on a waiting list for a further operation. Unfortunately this involved a very long waiting list; he was still off work over a year later. In August 2022 he was invited to a meeting to consider whether the company should terminate his employment and that meeting went ahead on 29 September 2022. There was still no scheduled date for an operation and he was told at the meeting that he would be dismissed. That was confirmed in a letter the following day.

3. That letter gave him the right of appeal, which he exercised. There was then an appeal meeting on 4 November 2022. The situation was unchanged and the appeal was dismissed - not at the meeting but in a follow-up letter dated 8

November 2022. It is clear from the records of the dismissal hearing and the appeal process that he was regarded as a very good worker and these decisions were reached reluctantly, on the basis that there was simply no clear end date for the further operation and recovery period.

4. The date given on the claim form as the date of dismissal was 8 November 2022, which was the date of the appeal outcome letter. On that basis the claim was accepted as presented in time. Early conciliation began on 16 January 2023, within three months of this appeal letter, and it ended on 31 January, 15 days later. The claim form followed on 6 February.

5. No issue was taken in the response form about the claim being out of time. The response form was submitted by the company directly without any legal help. However during the course of these proceedings the company has appointed a firm of solicitors, who promptly applied to strike out the claim on the basis that it was presented out of time. That is a question of the tribunal's jurisdiction and needs to be addressed regardless of when the issue is raised.

6. The general rule is that a claim of unfair dismissal must be presented within three months of the employment coming to an end. A Tribunal can only consider the claim if it is satisfied that it was "not reasonably practicable" for it to be presented in that time. Even then, it can only do so if that it was presented within a further reasonable period (s.111(2) Employment Rights Act 1996 (the ERA)). That three month period is now extended by section 207B ERA to allow for time spent in early conciliation before the claim is presented.

7. Let me state at the outset that it is clear that the dismissal took effect on 29 September 2022. I say that because Mr Pepkolaj still insisted during the course of his evidence today that the correct date was 8 November 2022. He went further, and said in his witness statement that anything the company have said to the contrary has been done with the intention of making him miss the deadline.

8. This hearing was initially listed to take place on 22 June 2023 but it became apparent that Mr Pepkolaj needed assistance from an Albanian interpreter and so it was re-listed, part heard, for today. That adjournment also provided the opportunity for witness statements to be prepared. I also had a bundle of 243 pages which had been prepared with a view to a final merits hearing. I am not concerned with those merits at all today.

Procedure and evidence

9. I therefore heard evidence from Mr Pepkolaj today and his partner Ms Zoja Shtjefanaku. She attended his dismissal hearing and has helped him at every stage of the process.

Findings of Fact

10. The first point to note is that Mr Pepkolaj is not a native English speaker. However it was clear at the last hearing as well as today that he has a perfectly good

functional grasp of English even if some phrases or terminology are unfamiliar to him. Ms Shtjefanaku is extremely fluent, although again English is not her first language and there is always the possibility that certain words or phrases are unclear to her, especially legal or technical terms. She explained that she had to google some things.

11. I did not hear evidence about how long each of them had been in the UK but it may be also that there is some lack of familiarity with workplace practices. It is clear that both of them formed the view that the dismissal did not take effect until the appeal process was concluded, and they were so clear in that view that it did not occur to either of them to check the position at any stage. That is clear from the fact that the date of dismissal is recorded on the claim form as 8 November and also the fact that Mr Pepkolaj has persisted in the view that that is still the correct date.

12. One of the confusions over terminology concerns the use of the word "appeal". In his witness statement Mr Pepkolaj referred to bringing a claim to this tribunal as an appeal, and criticised the company for telling him that there was no further right of appeal. Ms Shtjefanaku also complained that they ought to have been told at the dismissal meeting about the right to appeal to an employment tribunal and about the time limits that applied. Both he and his partner seem to view the company and the tribunal as being on different steps of the same ladder. That is not the case, and there is no obligation on an employer to explain such things – – but that view goes some way to explain why they thought or assumed that there was no need to think about going onto the next step until that (first) appeal was concluded.

13. It is not easy from the events in question to see how they formed the view that the date of dismissal was 8 November 2022. Taking things in chronological order, the first point to note is that during Mr Pepkolaj's long absence from work he pursued a personal injury claim against the company and that resulted in a substantial settlement in his favour. Terms were agreed by solicitors on his behalf on 24 November 2022, so they were representing him in that personal injury claim throughout the dismissal process. Those solicitors also have a specialist employment team but he did not consult them about his work situation or about bringing a tribunal claim, at least not until quite recently.

14. Reviewing the key events, as his absence progressed the HR business partner, Mr Walkland, wrote to him on 26 August 2022 (page 66) inviting him to a meeting where, the letter stated,

> "… we are considering dismissing you with notice based on ill-health capability."

15. The date for the hearing was confirmed in a follow-up letter (69) which stated

> "The outcome of the meeting may be a consideration of your future employment within the business."

16. Mr Pepkolaj then attended that meeting with his partner on 29 September 2022. Mr Walkland was also there together with the decision-maker, Mr Novis, Operations Director. As already mentioned, the focus of the discussion was on when Mr Pepkolaj might get treatment for his wrist and Mr Novis is recorded as stating at the end

> "because there is [no] foreseeable end date the decision is to dismiss you on ill-health capability. I know it's not nice for you to hear."

17. That was then followed by letter the following day which stated:

> As discussed, there is currently no prospect of you returning to work within the foreseeable future, therefore, unfortunately the company is no longer able to support your absence and we need to ensure your job role is sufficiently covered. As a result, I regret to inform you that we have no other option at this time but to terminate your employment on the grounds of ill health capability.
>
> This will take effect immediately and you will be paid 1 month pay in lieu of notice as well as 42 accrued but untaken holiday leave. Full details are in the attached statement. Your P45 will be sent to your home address and your final pay will be paid on 31st October 2022.
>
> You have the right to appeal this decision and, should you wish to do so, please email hr@barrettsteel.com within 10 days of receipt of this letter providing the full reasons why you wish to appeal.
>
> If you have any questions about the content of this letter, please do not hesitate to contact me.
>
> Finally, I would like to take this opportunity to express my regret that your employment with Barrett Steel Shoreham has ended in this way. Thank you for your contribution to the organisation during your employment and I wish you the best for the future.

18. That was accompanied by a table setting out the payments which were due. The table stated in one of the rows: Contractual Termination Date - 29/09/2022

19. Mr Pepkolaj duly appealed, sending the appeal to the stated email address. His email began ""My name is Besmir Pepkolaj and I am writing this email to appeal the decision of Barrett Steel company to dismiss me from work."

20. He then attended an appeal hearing on 4 November 2022 (page 84). That meeting also focused on when he could expect surgery. The Managing Director, Mr Gawker, took time to consider the position and set out his decision by letter four days later. He reached the same conclusion as Mr Novis, for very much the same reasons, stating

> "Ultimately, it is my decision to uphold the dismissal and not to reinstate you."

21. Despite this language of reinstatement and the previous clear statements that the dismissal took effect on 29 September, Mr Pepkolaj and his partner took this to

mean that only now was his employment at an end. They made arrangements to see Citizens Advice and got an appointment on 25 November 2022.

22. It is not quite clear why they did not consult their solicitors about things. Ms Shtjefanaku suggested that it was not fair that they would have to spend some of the money from the personal injury settlement on legal advice. However, they explained things to the adviser at Citizens Advice and it was then that they found out for the first time that there was a three month time limit for bringing a claim. They were also told that they needed to contact ACAS first.

23. Both of them accepted in evidence that they told the adviser that he had been dismissed on 8 November 2022, and on that basis he was told that he had three months from that date to contact ACAS about early conciliation.

24. No other advice was sought and no internet or the searches were carried out for information. They felt sure of the position and so there was no reason for them to do so.

25. As a result, ACAS were not contacted until 16 January 2023, two months and eight days after the date of the appeal outcome letter, but more than three months after the actual dismissal – three months and 18 days.

Applicable Law

26. Summarising the key principles, a claimant's complete lack of awareness of his right to claim unfair dismissal may mean that it was not reasonably practicable to present a claim in time, but that ignorance or lack of awareness must itself be reasonable: **Dedman v British Building and Engineering Appliances Ltd** 1974 ICR 53. In **Porter v Bandridge Ltd** 1978 ICR 943, CA, the Court of Appeal held that the correct test is not whether the claimant knew of his rights but whether he *ought* to have known of them.

27. Where the claimant is generally aware of his rights, ignorance of the time limit will rarely be acceptable as a reason for delay. This is because a claimant who is aware of his rights will generally be taken to have been put on inquiry as to the time limit. Indeed, in **Trevelyans (Birmingham) Ltd v Norton** 1991 ICR 488, EAT, it was held that when a claimant knows of his or her right to complain of unfair dismissal, he is under an obligation to seek information and advice about how to enforce that right. Failure to do so will usually lead the tribunal to reject the claim.

28. The case closest to this one is Sodexo Health Care Services Ltd v Harmer EATS 0079/08. There, Ms Harmer submitted her unfair dismissal claim 23 days late because she wrongly assumed that the time limit in respect of her claim would not start running until the end of the appeal process. The tribunal accepted jurisdiction but the Scottish EAT overturned the decision on appeal.

29. The views of the tribunal are recorded at paragraph 16:

> "The claimant knew on 18 February that the internal appeal procedure was finished, and that was still some two and a half weeks before the statutory deadline, but in her state of knowledge the calculation of the three month period began only then. The claimant had no conception that that two and a half weeks and the date of 4 March would have any significance and, as far as I can see from the circumstances, no reason because of the advice she had been given to be looking out for them. I cannot make any finding on why her Trade Union Representative came to form the misconceived view that he had, since by agreement between the parties I was not hearing oral evidence. Further, since it was the claimant herself who was to handle the presentation of the complaint I am concerned really only with her state of mind. That state of her understanding continued well beyond both the end of the internal appeal process and the expiry of the normal statutory time limit. Neither of these events could have effected any change to her state of mistaken understanding and indeed she remained thus misconceived beyond the point when she actually did present her claim form on 27 March because she was still acting under the mistaken advice. Her mistaken belief was only corrected by a solicitor whom she consulted later. It follows, following Theobald, that I conclude that under section 111(2) ERA , although in the two and a bit weeks following the end of the appeal, it would have been feasible for the claimant to present her complaint (as it no doubt would have been before then) it was not in my view reasonably practicable to have done so."

30. The view of the Employment Appeal Tribunal is recorded at paragraph 23:

> "The Tribunal approached this case on the basis that it was a "defective advice" case. By that, I mean a case where a claimant asserts that the late presentation of the claim was caused by defective advice. But that is not this claimant's position. What she says is that her adviser, who was her union representative, told her that she could not apply to the Tribunal until she had exhausted the appeal process. He was not asked about time limits. He did not give advice about time limits. The claimant, who accepts that she had read about the three month time limit, assumed that it would not start running until the end of the appeal process. That was her assumption and she and only she can be held responsible for it. There is no indication of her having made any enquiries about the matter, notwithstanding her knowing that there was a three month time limit, either whilst the appeal process was ongoing or when it finished, as could reasonably have been expected of her. This was not a case of a claimant who was totally ignorant of the existence of time limits. Equally, this is not a case of a claimant who either sought or received advice about time limits. Nor is it a case of a claimant who, like the employee in Dedman, had handed over the responsibility of presenting her claim to her adviser.

Conclusions

31. The simple answer to this case is that I cannot see any legitimate reason to form a different view to that of the Employment Appeal Tribunal in **Sodexho**. It is not a case based on defective advice; that is accepted by Mr Pepkolaj and his partner. It is a case in which they, like Ms Harman, have made an incorrect assumption about when this three month period began.

32. It is human nature to seize on the parts of a document or a message that give some comfort and ignoring the less pleasant parts. Perhaps for that reason they

have focused on the right of appeal at the expense of everything else in the dismissal letter. All of the other communications from the company are entirely consistent with that dismissal letter. The company's approach of telling him that the dismissal would take effect immediately and giving him a right of appeal is perfectly normal practice. That approach, and the terminology used, may be unfamiliar to Mr Pepkolaj, but it was clearly set out. There was certainly no responsibility on the company's part for Mr Pepkolaj's mistake. In many ways his assumption is perfectly natural; it makes every sense to pursue an internal appeal first. And had the dismissal letter been shown to the Citizens Advice adviser, no doubt Mr Pepkolaj would have been told that the three months was already well underway. As it is, and as all these cases maintain, it was his responsibility to establish the position and only he can be responsible for it.

33. That is no doubt a difficult conclusion for him to accept but I am bound by these authorities, particularly **Sodexho**, to come to that conclusion. In doing so I should make clear that I do not in any way doubt the evidence I have heard from Mr Popkolaj or Ms Shtjefanaku about what they believed and the steps they took, but the onus was on them to find out the correct position and so the claim was out of time.

34. For all of the above reasons the claim is dismissed.

Employment Judge Fowell

Date 27 July 2023