

CVP on 23rd May 2023. I gave a brief extempore decision during the hearing. I have now been asked by the respondent to provide a full statement of reasons.

Legal Framework

4. In relation to the claim for unfair dismissal, the appropriate section is 111(2)(b) of the Act which reads as follows:

“111.— Complaints to [employment tribunal]

(1) A complaint may be presented to an [employment tribunal]¹ against an employer by any person that he was unfairly dismissed by the employer.

(2) [Subject to the following provisions of this section]², an [employment tribunal]¹ 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.”

5. In relation to the first claim for unlawful deduction from wages under section 13 of the Act, the applicable law in terms of time limits is to be found at section 23 of the Act, which reads as follows:

“23

....

(2) Subject to subsection (4), an [employment tribunal]² shall not consider a complaint under this section unless it is presented before the end of the period of three months beginning with—

(a) in the case of a complaint relating to a deduction by the employer, the date of payment of the wages from which the deduction was made, or

(b) in the case of a complaint relating to a payment received by the employer, the date when the payment was received.

(3) Where a complaint is brought under this section in respect of—

(a) a series of deductions or payments, or

(b) a number of payments falling within subsection (1)(d) and made in pursuance of demands for payment subject to the same limit under section 21(1) but received by the employer on different dates,

the references in subsection (2) to the deduction or payment are to the last deduction or payment in the series or to the last of the payments so received.

.....

(4) Where the [employment tribunal] is satisfied that it was not reasonably practicable for a complaint under this section to be presented before the end of the relevant period of three months, the tribunal may consider the complaint if it is presented within such further period as the tribunal considers reasonable.

(4A) An employment tribunal is not (despite subsections (3) and (4)) to consider so much of a complaint brought under this section as relates to a deduction where the date of payment of the wages from which the deduction was made was before the period of two years ending with the date of presentation of the complaint.”

6. In essence, there is a 3 month period for bringing either of the two claims (subject to early conciliation). For claims lodged outside of the period, time can only be extended if it was not ‘*reasonably practicable*’ to meet the 3 month time period and, if so, can only be extended for such additional period as is reasonable in the circumstances. It is therefore a two stage test.
7. When a claimant tries to excuse late presentation of his or her ET1 claim form on the ground that it was not reasonably practicable to present the claim within the time limit, three general rules apply. Firstly, section 111(2)(b) (and its equivalents in other applicable legislation) should be given a ‘liberal construction in favour of the employee. Secondly, what is reasonably practicable is a question of fact and thus a matter for the tribunal to decide. The test is empirical and involves no legal concept. Practical common sense is the keynote. Thirdly, the onus of proving that presentation in time was not reasonably practicable rests on the claimant.
8. The term ‘reasonably practicable’ does not mean reasonable, which would be too favourable to employees, and does not mean physically possible, which would be too favourable to employers, but means something like ‘reasonably feasible’. Lady Smith in *Asda Stores Ltd v Kauser EAT 0165/07* explained it in the following words: ‘the relevant test is not simply a matter of looking at what was possible but to ask whether, on the facts of the case as found, it was reasonable to expect that which was possible to have been done’.

Findings and Reasons

9. As stated, I heard this application on 23rd May 2023. I heard evidence from the claimant, who adopted his witness statement which appears at page 57 of the bundle. He was cross examined by Mr Muirhead on behalf of the respondent. I had the benefit of reading an agreed hearing bundle which comprises 147 pages. I also had written submissions from Mr Middleton. I was assisted by helpful oral submissions from both advocates.
10. I find that the claimant was given a notice of termination of his employment dated 21st October 2021 [48], and received on 22nd October 2021. This was not in dispute. It is the respondent’s position that this brought the contract to an immediate end. If the said notice was to have that effect, it must, in my view, have done so clearly. In my judgment, it was not at all clear. It did not expressly indicate that it relied on the contractual clause permitting payment in lieu of notice. The claimant was entitled to two weeks notice. This was not in dispute.
11. The stated understanding of the author of the letter was that the claimant had not reached two years service, which the respondent now accepts was an error. The letter goes on to state: “*Any outstanding wages will be processed with the normal payroll run following your last day of employment, at which time you will*

receive your form P45'. Conspicuously, no final date of employment is mentioned. However, it does give the impression that it is not the day of the letter i.e. 21st October.

12. However, it is my judgment that the letter was a clear termination of whatever contract of employment existed between the parties. I find it brought the claimant's employment to an end with effect from 5th November 2022 i.e. two weeks from receipt of the notice of termination.
13. I do not accept the claimant's contention that his employment continued until January 2023. As I will go into in more detail below, I am satisfied that there was an ongoing relationship between the claimant and respondent, from which the claimant derived the impression that his work with the respondent might resume in some form. However, as a matter of strict contract law, the notice issued and accepted dated 21st October 2022 brought his employment to an end.
14. The claimant engaged in early conciliation with ACAS from 8th November 2021 to 19th December 2021. It was agreed by the parties that the time for bringing a claim relating to the dismissal on 5th November 2022 was 16th March 2023. This was significant because it meant that the first claim, lodged on 15th March 2023, had, according to my findings, being initiated within the statutory time limit, even if one takes the 5th November 2022 as the relevant commencement of the limitation period. There is, of course, an argument, that the time limit for this claim commenced when the respondent last paid the claimant, which was at the end of January 2023 [55]. In which case the expiry of the time limit may fall at a later date. I therefore dismissed the application in relation to the first claim, for unlawful deduction from wages.
15. The position was of course different for the second claim, which was lodged a day out of time, on 17th March 2023. The claimant would therefore need to satisfy me firstly that it had not been reasonably practicable to lodge the claim with time. I note first of all that the claimant had, in fact, lodged a claim in time. This was a different claim with potentially different applicable time limits. Also, I find that the lodging of the first claim a day before the expiry of the time limit for the unfair dismissal claim was a matter of coincidence. There were at least four arguable EDT's in this case. It must have been extremely confusing for the claimant, or anyone seeking to give him advice about time limits. I am satisfied that he did not have professional legal representation prior to lodging his claims.
16. I am also satisfied that the waters were 'muddied' somewhat by the respondent in this matter. I accept the claimant's evidence that in September 2022, so prior to his dismissal, he was told by the respondent that they couldn't afford to keep him on as an employee, but that he might continue as a 'consultant', whatever that may have been intended, to mean. I accept that he had several discussions about this both, before and after his dismissal, with Mrs Dugdale, who was a senior manager for the respondent.
17. In my judgment, these discussions took place until late January/early February 2023. I have come to this conclusion for 2 reasons. The first is the the claimant's outstanding wage issues were not resolved until the letter of 26th January 2023 [55]. There was a very long delay between the original notice of termination on

21st October, and this letter. I have seen no explanation from the respondent about this. In my judgment, it can be explained by a continuing possibility of a relationship between the parties.

18. Secondly, there is the fact that the claimant remained registered with CQC as the manager of the business. He was not deregistered until 8th February 2023. This is an important status for a business providing regulated activities. Failure to deal properly with registration can carry criminal sanction. I find it unlikely that he would have remained registered, or that the respondent would have allowed him to retain that status, unless there was an ongoing relationship of sorts. There has been no contrary satisfactory explanatory from the respondent.
19. Further, I accept the claimant's evidence that he continued to deal with matters on behalf of the respondent post his dismissal, including liaising with Surrey County Council who were investigating the respondent. He was also involved in the completion of the 'capacity tracker' which is a weekly key performance indicator. This is found on a NHS/CQC portal. He was also taking part in the attempt to obtain new contracts from Nottingham County Council, and in relation to the care of asylum seekers entering the country via Heathrow airport.
20. I also accept that the claimant did not believe that his employment had come to an end until the CQC letter of 8th February. I have found that this was incorrect. As a matter of law, that letter clearly has limited if any significance to the contractual relationship between the parties. However, the claimant is not a contract lawyer, and should be held to those standards of knowledge. He thought he continued with some form of work for the respondent. It was reasonable in my view that he held that belief. He explained that one of the reasons he did not submit the claim until he did was because he was in discussions with Mrs Dugdale as to how to grow the business. I accept this evidence. He described Mrs Dugdale as a family friend. He trusted her even though there was no formal agreement in place after October 2022.
21. The claimant went on to explain that there had been an attempt to settle matters out of court, which had come to an end in or about 15th March 2023. This caused him to lodge the first claim. The claimant admitted that he was aware of the existence of a three month time limit for bringing tribunal claims, although he was not sure from where that information had come.
22. In summary, this is a case where the claimant was confused by the conduct of the respondent. In effect, he was given an expectation of a continuing working relationship until the end of January 2023, before which it would not have been appropriate to have considered bringing a claim against his former employer until that time. Accordingly, I find that it was not reasonably practicable to have lodged the second claim until three months from that date. Further, I find that the short delay of one day is reasonable in the circumstances.
23. I therefore dismiss the application in relation to both claims. They will both be considered at a final hearing.

Richard Wood

11th August 2023

Sent to the parties on:

23/7/2023

For the Tribunal Office:

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