EMPLOYMENT TRIBUNALS

Claimant: **Mr D. Carabott**

Respondent: **London Borough of Newham**

Heard at: **East London Hearing Centre**

On: **25-28 September 2023**

Before: **Employment Judge Massarella**
Members: **Ms C. Edwards**
Miss N. Murphy

Representation
Claimant: Ms S. Driver (U.S. Attorney)
Respondent: Mr S. Chan (Counsel)

JUDGMENT

The judgment of the Tribunal is that: -

1. **the Tribunal lacks jurisdiction to hear the Claimant's claims; they were presented outside the statutory time limit; it was reasonably practicable to present them in time; the claims are dismissed.**

REASONS

Procedural history

1. This case was presented in December 2020. It has a long and complex procedural history, involving several preliminary hearings; it is a matter of record and is not summarised in this judgment.

2. The case was eventually listed for final hearing in July 2023. Unfortunately, owing to an administrative error, it was listed before a judge sitting alone, rather than a full panel (required because of the PIDA and TU pre-dismissal detriment claims). The Tribunal's attempts to secure the attendance of non-legal members who would be available for all five days were unsuccessful. There was no alternative to adjourning the hearing. The earliest available

dates, which the parties could attend, were these dates in late September 2023.

The hearing

3. The Tribunal spent the first morning of this hearing dealing with an application by the Claimant's representative (Ms Driver, who is a U.S. attorney and who had been given permission at an earlier stage of proceedings to represent the Claimant by video link) to admit around 160 pages of additional documents, which had not been included in the bundle. Given that the existing bundle was over 700 pages long, we asked Ms Driver to consider which of these additional documents she would be referring to in the time allocated to the case. We gave the parties the afternoon of the first day to seek to resolve the issue, while we read into the case.

4. At the beginning of the second day, a supplementary bundle of 46 pages had been prepared, containing documents which the Respondent's Counsel (Ms Chan) accepted were potentially relevant. We expected to begin hearing evidence that morning.

5. Ms Chan then raised a jurisdictional issue. She had been informed the night before by one of the Respondent's witnesses (Mr David Humphries, who was the dismissing officer) that the dismissal letter, which the Respondent's legal representatives had previously believed was sent by post to the Claimant on 10 July 2020, had also been sent to him by email on the same day. A question arose as to whether the claim had been presented in time. The only claims which had previously been accepted as being in time were those relating to dismissal (automatically unfair dismissal by reason of whistleblowing and/or trade union activities and ordinary unfair dismissal). All other claims predated the dismissal and were *prima facie* out of time. The strict 'reasonably practicable' test for an extension of time applied to all the claims.

6. The jurisdictional issue had been flagged up earlier in proceedings, on the basis that the effective date of termination had been given by the Claimant in his ET1 as 10 July 2020. That was the date identified in the dismissal letter as being the date of the termination of the Claimant's employment. However, the Respondent had then accepted in correspondence that, given that the hard copy dismissal letter was sent by post on Friday, 10 July 2020, it would not have arrived before Monday, 13 July 2020, which it accepted would be the date of communication of dismissal, from which time ran. The Claimant contacted ACAS on 12 October 2020 and presented his ET1 on 10 December 2020, which was in time by reference to a termination date of 13 July 2020.

7. There had been no judicial determination of any jurisdictional issue. Insofar as there had been a concession by the Respondent that the claim was in time, it now appeared that the concession was based on incomplete information.

8. We reminded ourselves that a jurisdictional issue can be raised at any stage of proceedings. We considered that it was not only just to permit the Respondent to raise this issue now, but essential to do so. If it was not considered, there would be a possibility that the Claimant's claims might be upheld in circumstances where the Tribunal lacked jurisdiction to determine them; alternatively, a multi-day trial might take place, at the conclusion of which the

Tribunal would be bound to find that it had lacked jurisdiction all along. After some discussion with parties, the Tribunal decided that it be appropriate for the matter to be dealt with as a preliminary issue; if the argument was correct, it was a point which would knock the case out in its entirety.

9. We had already pointed out to Ms Driver that the Claimant had not led evidence in his witness statement about the time limits issues in relation to the pre-dismissal claims. We had offered her the opportunity to ask supplementary questions at the beginning of his oral evidence, so that he could explain why he issued those claims when he did and not earlier.

10. Because this new jurisdictional issue was a point which could lead to the dismissal all his claims, we decided that a more structured approach was required. We adjourned at lunchtime, so that the Claimant could give Ms Driver detailed instructions and a witness statement could be prepared. We asked that the statement be sent to the Respondent and the Tribunal by 6 p.m. that afternoon to enable the Tribunal to read it first thing the next morning and Ms Chan to prepare her questions. In fact, the statement was sent through at 16:33.

11. What the Tribunal did not know at that point, and only discovered when reading back through the voluminous case file on the third day of the hearing, was that a preliminary hearing on time had been listed in 2021, but converted to a case management discussion after the Respondent indicated that it no longer pursued the time point. As part of that process, the Claimant had already produced a witness statement, as well as a statement from his daughter. Neither of the legal representatives was aware of this. We gave them time to consider whether either of them wished to rely on those earlier statements; they both confirmed that they did not.

12. Consequently, we had regard only to the Claimant's more recent statement and the documents in the bundle to which we were taken. We heard oral submissions from both representatives.

13. Evidence and submissions took a full day. We gave oral judgment on the fourth day of the hearing. Our findings and conclusions, set out below, were unanimous.

Findings of fact

14. The Tribunal makes the following findings of fact on the balance of probabilities.

15. The disciplinary hearing, which was conducted by Mr Humphries, took place on 15 June 2020. The Claimant was assisted at the hearing by Mr Alex Owolade. He is not a lawyer; his role was as a Unite London & East Regional Accredited Support Companion. At the end of the hearing, Mr Humphries gave Mr Owolade permission to lodge some written submissions on behalf of the Claimant by 19 June 2020. Extensions were requested, and granted, to 22 June 2020 and again to 24 June 2020. In the event, Mr Owolade provided the document on 29 June 2020.

16. Mr Owolade telephoned the Claimant the same day and told him that Mr Humphries had emailed him to say that he had received the submissions and that the Claimant would get a decision within the next 10 working days.

17. We find that the Claimant understood that he would receive the decision no later than 13 July 2020, but that it might arrive earlier than that.

18. Mr Humphries sent the email attaching the outcome letter at 12:18 on 10 July 2020. He sent it to the Claimant's personal email address, and it was received. Mr Humphries did not copy Mr Owolade in. In his covering email he wrote that the attachments had also been posted to the Claimant. The subject header of the email is: 'Disciplinary Hearing Outcome'. There are four attachments, one of which is titled 'Outcome Letter'.

19. The Claimant told the Tribunal in oral evidence that he had only very recently set up this email address. That was incorrect. We were shown an email from the Claimant to his employer on 22 August 2019, sent from the same email address, about the disciplinary investigation which was already underway. We note that the email is written in the first person. The Claimant had previously explained that his usual approach was to write something down and show it to his wife, she would then type it up, he would check it and it would then be sent. We were also taken to numerous emails from June 2020, which the Respondent's managers and Mr Owolade sent to the Claimant about the ongoing disciplinary process. We are satisfied that sending emails to this address was an established means of communicating with the Claimant.

20. The Claimant is dyslexic. We accept his evidence that he habitually asked his wife to help him read and absorb emails. He told us that the account received a large number of emails because his wife also used it, among other things, for Internet shopping and buying items on eBay. He explained that his wife would sit down in the evening when she had time and go through his emails to see which were relevant and which were not. He also said that he would go through them himself.

21. The Claimant used the email address primarily for Facebook and online games. If he saw an email from the Respondent, he would say to his wife: 'I've got one here from Newham, read that one.' His wife worked Monday to Friday at a school. She worked long hours. The Claimant's oral evidence was that he would not usually ask her to help him with emails when she got home from work but would probably ask her to go through them with him at the weekend. He suggested in his statement that he might wait until the beginning of the following week. We think that is unlikely because it is inconsistent with his evidence that he was reluctant ask for her help on a day when she was working.

22. The Claimant could not recall when he and his wife looked at the email containing the outcome letter, although he did not deny doing so, either in his witness statement or in oral evidence. Although he said in his witness statement that he did not pay much attention to his emails, he did not assert that neither he nor his wife had noticed this particular email when it arrived.

23. We also record that, in an email of 23 July 2020, Mr Owolade sent an email on the Claimant's behalf to request an extension of the deadline to submit an

appeal against dismissal, which begins: 'As you are aware Dennis was dismissed on 10th July without notice'. In a second email, dated 31 July 2020, in which Mr Owolade submitted the grounds of appeal, he wrote:

> 'I would like to submit Dennis Carabott's Grounds of Appeal against the conduct and outcome of the disciplinary investigation and hearing *which Mr Carabott received on 10th July 2020*' [emphasis added].

24. In our judgment, the fact that Mr Owolade, with whom the Claimant worked closely, identified 10 July 2020 as the date on which the Claimant received the outcome letter, is significant.

25. On the balance of probabilities, we find that the Claimant saw the email from Mr Humphries in his inbox on the day it arrived. He was expecting an outcome letter around this time; he was understandably very anxious about the outcome of the disciplinary process; we think it likely that he was looking out for any communication from his employer, or for any update from Mr Owolade, whether by post or email.

26. We find that he told his wife that it had arrived when she got home from work. We are prepared to accept his evidence that he did not ask her to go through the letter with him there and then because she had had a very long day at work. We note that the letter is several pages long and it would take the Claimant some time to go through it carefully.

27. We find that they read it together, at the very latest, on Saturday, 11 July 2020. The email was so clearly marked that anyone seeing it would have no doubt as to its contents. Once the Claimant and his wife had seen what it was, it would make no sense for them to ignore it: this was a communication of the utmost importance to both of them. Although it would have been better if the email had been copied to Mr Owolade, the fact that it was not copied to him does not show that the Claimant did not read it.

28. There was no evidence that he and his wife were away from home that weekend. We remind ourselves that Covid restrictions were still in place at that point and that there were limited options for leisure and travel. To find that the Claimant did not read the email at the weekend would require us to accept that neither the Claimant nor his wife looked at their email inbox over the weekend, when the Claimant's own evidence was that this was an account which his wife used a great deal and which he himself used and checked.

29. Accordingly, we find that the Claimant knew that he had been summarily dismissed on 11 July 2020.

30. If we are wrong about that, we are satisfied that he had a reasonable opportunity to read the email and the attached dismissal letter on that date.

31. We do not accept the Claimant's evidence that he was unable to read the letter by reason of ill-health, as he suggested in his oral evidence. Although the Claimant explained in his witness statement that his mother had sadly died in March 2020, and that he was devastated with grief and depression, we note that he had been signed fit to return to work by his GP and fit to attend the disciplinary hearing by OH in May 2020. That remained the position in July 2020.

The law

The date of dismissal

32. The relevant definition of the term 'effective date of termination' is contained in s.97(1) of the Employment Rights Act 1996 ('ERA'). So far as is relevant, it provides:

> **[…] in this Part the effective date of termination –**
>
> > **(a) in relation to an employee whose contract of employment is terminated by notice, whether given by his employer or by the employee, means the date on which the notice expires,**
> >
> > **(b) in relation to an employee whose contract of employment is terminated without notice, means the date on which the termination takes effect […]**

33. In *Gisda Cyf v Barratt* [2010] ICR 1475, the Supreme Court held that that s.97 ERA was a statutory construct which should be interpreted in its setting as part of a charter protecting employee's rights and, therefore, an interpretation that promoted those rights, as opposed to one which was consonant with traditional contract law principles, was to be preferred; that it would be unfair for time to begin to run against an employee in relation to an unfair dismissal complaint before the employee knew, or at least had had a reasonable chance to find out, that she had been dismissed; that, therefore, where dismissal without notice was communicated to an employee in a letter, the contract of employment did not terminate until the employee had actually read the letter or had had a reasonable opportunity of discovering its contents; and that, in considering whether the claimant had had a reasonable opportunity to discover the contents of the letter sent to her by her employer, the employment tribunal was entitled to take into account the reasonableness of her behaviour in failing to avail herself of a earlier chance to discover what it contained.

34. The Court rejected a narrowing of the term 'reasonable opportunity' in the test established in *Brown v Southall & Knight* [1980] ICR 617, so as to exclude consideration of an employee's behaviour. Lord Kerr stated that concentrating solely on what is practically feasible may 'compromise the concept of what can realistically be expected'. The tribunal had not erred in law in taking the claimant's circumstances into account when considering whether she had had a reasonable opportunity to discover the contents of the letter, and the fact that she could have discovered the letter's contents over the weekend by phone was one of the factors to be looked at. The Court noted as an aside that an employer who wants to be certain that an employee is aware of a dismissal always has the option of dismissing him or her face to face.

Extension of time

35. S.111(2) ERA 1996 provides:

> **an employment tribunal shall not consider a complaint [of unfair dismissal] 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.**

36. The 'reasonably practicable' provision for extending time also applies in whistleblowing and trade union detriment claims and in claims of automatically unfair dismissal.

37. The Court of Appeal in *Palmer v Southend-on-Sea Borough Council* [1984] ICR 372 at [34] held that to construe the words 'reasonably practicable' as the equivalent of 'reasonable' would be to take a view too favourable to the employee; but to limit their construction to that which is reasonably capable, physically, of being done would be too restrictive. The best approach is to read 'practicable' as the equivalent of 'feasible' and to ask: 'was it reasonably feasible to present the complaint to the Industrial Tribunal within the relevant three months?'

38. In *Walls Meat Co Ltd v Khan* [1979] ICR 52 at p.56, Denning LJ held that the following general test should be applied in determining the question of reasonable practicability.

> **'Had the man just cause or excuse for not presenting his complaint within the prescribed time limit? Ignorance of his rights – or ignorance of the time limit – is not just cause or excuse, unless it appears that he or his advisers could not reasonably have been expected to have been aware of them. If he or his advisers could reasonably have been so expected, it was his or their fault, and he must take the consequences.'**

39. In the same case (at p.61), Brandon LJ drew a distinction between a Claimant who is ignorant of the right to claim, and a Claimant who knows of the right to claim but is ignorant of the time limit:

> **'While I do not, as I have said, see any difference in principle in the effect of reasonable ignorance as between the three 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 inquiries 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 industrial Tribunal that he behaved reasonably in not making such enquiries.'**

Conclusions

40. Ms Driver argues on behalf of the Claimant that we should apply the rules in Part 6 of the Civil Procedure Rules as to the deemed date of service for certain documents. Ms Chan points out that the ET has its own rules (rules 85 to 92) in relation to the deemed date of service; there would be no grounds for importing rules from the CPR. In any event, we have concluded that neither set of rules has any application to the question we must decide. Those rules assist in determining the date of delivery of documents in the context of legal proceedings; they have no application to the question of when an employer's decision to dismiss should be taken to have been communicated to an employee. The definitive guidance on that question was given by the Supreme Court in the *Barratt* case, to which we have referred, and which we have applied.

41. We agree with Ms Driver that the effect of *Barratt* is to level the playing field between employer and employee in one respect: in a case where summary dismissal was communicated by email the dismissal does not take effect when the email is sent, but rather when the employee is found to have read it, or had a reasonable opportunity to read it, or otherwise to discover its contents.

42. In *Barratt*, that led to an effective date of termination which was sufficiently late to bring that claim in time. In the present case it has led us to identify an effective date of termination which is one day later than the date on which the email was sent; that is not sufficiently late to bring the claim in time. We have found as a matter of fact, on the balance of probabilities, that the Claimant read the outcome letter with his wife on 11 July 2020, alternatively that he had a reasonable opportunity to do so on that date.

43. In view of those findings, time began to run for limitation purposes on 11 July 2020. The Claimant was obliged to notify ACAS so as to begin early conciliation no later than 10 October 2020. He did not do so until 12 October 2020 and so he does not benefit from an extension of time while early conciliation took place. He issued his claim on 10 December 2020. It was two months out of time.

44. We then turn to the question of whether time should be extended. We remind ourselves that, unlike in discrimination claims, in unfair dismissal and detriment claims we do not have a broad discretion to extend time on the basis that it is just and equitable to do so, by reference to a range of factors, including the balance of prejudice and the underlying merits of the case. The test in this context is the stricter 'reasonably practicable' test.

45. We considered whether the Claimant has advanced good grounds, from which we could conclude that it was not reasonably practicable for him to notify ACAS before the end of the limitation period.

46. There was no suggestion that the Claimant was ignorant of his right to bring these claims to a Tribunal. As for his awareness of time limits, the Claimant said in his statement that he believed he had three months to contact ACAS; he was plainly aware of the existence of the three-month time limit. He also said that he did not have anyone's assistance in filing his claim; there is no suggestion that he was given misleading information by Mr Owolade. There was some suggestion in the Claimant's oral evidence that he was told that time ran from the conclusion of the internal appeal process, although he could not remember who told him that. However, he also volunteered that someone (again, he could not remember who) told him 'a little while after I was dismissed' that, in fact, he only had 90 days and that he should go to ACAS. That is consistent with the fact that he commenced ACAS early conciliation before the appeal was concluded (in December 2020).

47. Having found that the Claimant knew that he had been summarily dismissed at the latest on 11 July 2020, we are satisfied that he knew that he needed to contact ACAS by 10 October 2020 at the latest.

48. We observe that, if there was to be any confusion about the date for contacting ACAS, we could understand why the Claimant might have believed that he had to contact ACAS by 9 October 2020, i.e. a day earlier, given that

he may not have known that time ran from the date on which the employee learns, or had a reasonable opportunity to learn of the dismissal. By contrast, we can see no good reason at he would have believed that the mere fact that the postal version of the letter of dismissal did not arrive until 13 July 2020 gave him extra time, given that he had already seen the letter two days earlier, attached to an email. If he did believe that, in our judgement it was not a reasonable belief and, if he relied on it, he did not act reasonably.

49. Ms Driver points to the fact that, in one of the emails around this time, Mr Owolade asked Mr Humphries to send a hard copy of some documents to the Claimant. This does not alter the position. Whether or not the Claimant preferred to receive documents in hard copy form, for reasons connected to his dyslexia, we are satisfied that, as a matter of fact, he had read the electronic version of the letter on 11 July 2020 at the latest.

50. There was no cogent explanation as to why the Claimant left it until the very end of the limitation period to contact ACAS. For the reasons we have already given, we do not accept that his health was an impediment for his doing so. We note that he was able to draft and lodge an appeal by the end of July 2020.

51. In all the circumstances, we have concluded that it was reasonably practicable for the Claimant to present his claim in time. Consequently, the Tribunal does not have jurisdiction to hear the claims and they must be dismissed.

Employment Judge Massarella
Date: 29 September 2023