EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4103116/2023

Held at Aberdeen on 1 August 2023

Employment Judge J M Hendry

Mr D McDonald	**Claimant** **Represented by** **Mr R Jones,** **SICAB**
Tulloch Developments Limited	**Respondent** **Represented by** **Ms L Auld,** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is:

1. That the claim for unfair dismissal is out of time and that it was reasonably practicable for the claimant to have lodged it within the primary limitation period, that claim is dismissed.
2. That the claims for disability discrimination are out of time and that it would not be just and equitable to grant an extension of time and that the claims are dismissed.

REASONS

1. A preliminary hearing took place by CVP Digital Platform on 1 August 2023 in order to consider whether the claims made by Mr McDonald for unfair dismissal and disability discrimination were out of time and should if so, be allowed late.

2. Parties prepared an index of documents for the preliminary hearing. Mr Jones on behalf of Mr McDonald prepared a helpful statement of the claimant's position setting out, in particular, the various steps the claimant assisted by his mother had taken to raise proceedings.

3. I should record that there was a third claim for holiday pay and notice which the claimant had. Just prior to the hearing the respondents sent a cheque in settlement of these sums. I indicated to the claimant that he should cash cheque and write to the Tribunal confirming whether this now settles these claims of if they are still in dispute. These claims will remain outstanding until formally withdrawn.

Background-Time Limits

4. One of the difficulties the claimant faced in this this case is that there were two time limits operating. The first related to his unfair dismissal claim. It was agreed that the effective date of termination was 16 December 2022. The claimant had accordingly until 15 March 2023 to raise Employment Tribunal proceedings, contact ACAS and enter into early conciliation. The claimant, perhaps understandably, because of his health difficulties and problems getting benefits focussed on his second claim for notice and holiday pay. His last pay was 23 December and accordingly any claim for accrued holiday pay and notice pay would run from this date. The claimant would have until 22 March 2023 to raise proceedings for these claims.

5. It was clear from the papers that because of the claimant's health difficulties his mother, Mrs Heather Moar acted on his behalf through out, taking advice about his employment rights and arranging for proceedings to be issued. This was all done with his consent and she was in effect his agent.

Evidence

6. It was agreed that I would hear evidence first of all from the claimant, Mr McDonald and then from Mrs Moar. Finally, I would hear submissions on the matter.

Facts

7. The significant dates are:
   - The claimant was dismissed on the 16 December 2022
   - the claimant contacted ACAS on 21 March 2023;
   - an ACAS Certificate was issued on 2 May 2023;
   - the claim was made to the Employment Tribunal on 1 June 2023.

8. The claimant worked as a Plant Operator for the respondent company. He had worked with them in excess of 12 years before termination of his employment. He was on good terms with the owners of the business and believed that there was a close relationship between them.

9. The claimant suffered a stroke on 16 May 2022. It significantly affected his mobility. Shortly after this the claimant suffered two epileptic seizures in a row. These had an impact on his cognitive functions particularly his memory and ability to concentrate. During all this period the claimant relied on his mother, Heather Moar for practical help and to represent his interests. He was left with mobility and cognitive difficulties that made it difficult for him to act on his own behalf.

10. The claimant was also disadvantaged by geography in that he lived in Unst which is the most northerly inhabited island in the UK. Mrs Moar who lived on the mainland worked and she had to visit the claimant at weekends which involved a long journey and the use of ferries. She helped him to complete official forms for benefits and modifications to his house, contact organisations for advice and generally act as his agent or representative. She did so with his full consent and authority.

11. The claimant had been airlifted from Shetland in an induced coma on 3 November 2022 following an epileptic seizure and taken to Aberdeen Royal Infirmary. The respondents were told about this by text (IDp8). They were aware of his health problems.

12. The claimant was generally disappointed at the failure by the respondents to keep in contact with him or enquire about his state of health. There was no further contact following the text. The claimant received a notice of termination of his employment on 9 November with effective date of dismissal of 16 December 2022.

13. On 11 November 2022 the claimant was transferred back to the Gilbert Bain hospital in Shetland. Mrs Moar discovered the letter terminating her son's employment that day.

14. The claimant was discharged from hospital on 17 December 2022. He was moved to temporary accommodation. During this period Mrs Moar was in contact with the local authority to try and get adaptations to the claimant's house in Unst to allow him to return there. She also had to apply for benefits on his behalf. She encountered various difficulties in relation to these matters. The benefits were not initially paid and she had to go through various procedures to get the matter resolved.

15. The claimant received his final notice pay on 23 December 2022 and his P45 on 29 December.

16. Following the epileptic seizure in November the claimant had impaired cognitive functions. He had mobility difficulties and it took some time before he could walk even short distances.

17. In the New Year of 2023 the claimant began to slowly improve and his mother felt able to discuss what should be done about his dismissal. They were unhappy about the manner of his dismissal. However, principally they were concerned that he hadn't been fully paid his full statutory notice pay and accrued holiday pay. This was particularly important for him given the difficulty he had in obtaining benefits. During this time the claimant tried to resolve these issues with the respondents and contacted them on 9 January to discuss the situation. He was unhappy at the response.

18. On 16 January 2023 Mrs Moar made contact with Shetland Islands Citizens Advice Bureau (SICAB). She enquired about receiving support about the claimant's benefit and employment situation. She had to complete various forms to allow her to represent her son's interest with the SICAB.

19. On the same date Mrs Moar sent an e-mail to the respondents requesting a signed copy of the claimant's contract and further correspondence referring to his purported "redundancy". She requested this information to allow SICAB to calculate his holiday pay. She also raised the issue of the claimant not receiving benefits. The respondents had not provided SSPI forms.

20. The respondents responded on 16 January with the signed contract and the termination letter. Their position was that because the claimant had been off work since May 2022 and the respondents had paid contractual sick pay the claimant was not entitled to holiday pay.

21. On 24 January Mrs Moar provided the necessary authority to SICAB for them to assist her with her son's issues. They noted:

"*I was advised to contact Mrs Moar on 30 January 2023. She was told the employer should have followed a fair process on the dismissal as laid down by the ACAS Code of Practice. They should have paid notice pay and full holiday pay. I was told to raise the matter informally with the employer and then to proceed to a formal grievance. I explained that once she had been through this process a decision could be made on whether to raise Employment Tribunal proceedings. She was told at this point that the deadline for Employment Tribunal proceedings was three months less one day from the dismissal date.*"

22. At this point Mrs Moar and the claimant were unsure about raising proceedings. The claimant's brother, Connor, worked with the respondent company and both she and Mr McDonald were concerned that if they raised proceedings it might affect his position with their.

23. The SICAB made contact with Mrs Moar on 6 February. She requested a face-to-face meeting.

24. There then followed a period of inaction regarding the issue of the claimant's Employment Tribunal proceedings. This is because the claimant's had experienced a short-term deterioration of his mental health to the extent there was an ongoing concern for his safety. He had become depressed. A multi-disciplinary report was completed by various agencies for the Shetland Islands Council at this time called a "With You for You Review" which summarised the various difficulties the claimant was facing which were contributing to his deteriorating in mental health.

25. During this period the claimant was unable to leave the house but remained in contact with his mother.

26. Mrs Moar contacted ACAS on 5 March 2023. She was principally seeking advice about the non-payment of holiday pay and notice pay but thought that she did mention unfair dismissal.

27. The SICAB sent a follow-up e-mail on 9 March 2023 reminding her about the time limit and asking her to contact them if she needed further support.

28. Mrs Moar contacted SICAB on 10 March and advised the adviser to check a letter raising a grievance on her son's behalf addressed to the respondent. She drafted the letter a month earlier but had not sent it because of concerns relating to the claimant's mental health and her other son still being employed by the respondent.

29. The SICAB advisor reviewed the letter. Mrs Moar was strongly advised to contact ACAS to start early conciliation given that the limitation period was approaching. Mrs Moar sent a letter on the claimant's behalf to the respondents on 10 March.

30. An adviser from SICAB wrote to Mrs Moar on 10 March:

"*We are very willing to help you at any stage, but need to remind you that if it does need to be addressed via an Employment Tribunal this would need to be lodged within three months less one day of the event.*"

31. On 13 March SICAB contacted Mrs Moar to check she had been in contact with ACAS. Mrs Moar explained that she had tried to contact them on 10 and on 13 March. The telephone connections and internet connections from the Islands were poor. She had eventually got through after being left on hold for considerable periods. She was unable to speak to an ACAS adviser on 10 and 13 March and had to return to work.

32. Mrs Moar was finally able to contact an ACAS adviser on 14 March and she gave a detailed explanation of the background about the claimant having a stroke in May 2022. She was advised the deadline for early conciliation was 22 March due to the time limit running from 23 December and was sent a form to complete which had to be returned by 22 March.

33. Mrs Moar thought the 23 December would also be the deadline for unfair dismissal proceedings. She did not appreciate the difference between the claims in to relation to time limits. She didn't query the matter and accepted advice from ACAS that the later time limit applied. She has access to the internet and uses a smartphone. She did not check the time limits that applied.

Submissions

34. Ms Auld gave brief oral submissions at the hearing and followed this up with written submissions. Mr Jones had set out his submissions in the document lodged with the indexed bundle.

35. In this case, Ms Auld submitted, there was no dispute as to the effective date of termination which was 16 December. There was no dispute that the claim to the Employment Tribunal in relation to unfair dismissal was not made in time. Ms Auld then addressed section 111(2)(a) to the Employment Rights Act 1996. She stressed that the ACAS conciliation which ran from 21 March 2023 to 22 May 2023 had no impact on the limitation period because it already expired (***Pearce v. Bank of America Merrill Lynch*** UKEAT/0067/19/LA). The claims were out of time.

36. She then looked at the test in section 111(2)(b) that the burden of proof was on the claimant (***Porter v. Bandridge Ltd*** [1978] IRLR 271).

37. The test she continued was strict. This was emphasised in the case of ***London Underground v. Noel*** [1999] IRLR 621. She made reference to the cases of ***Walls Meat Company Ltd v. Khan*** [1978] IRLR 499 and ***Dedman v. British Building and Engineering Appliances Limited*** [1974] 1AER520. The solicitor referred me to the comments of Lady Smith in the case of ***Asda Stores Ltd v. Kauser*** EAT0165/07. The test could be explained in this way:

"*The relevant test is not simply a matter of 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.*"

38. Ms Auld made reference to the case of ***Signet Behavioural Health Ltd v. Britton*** [2022] EAT108 which was authority for the proposition that someone considering bringing a claim for unfair dismissal is expected to appraise themselves of the time limits. In this case the claimant through his mother was aware of the time limits because of the advice given to him by SICAB. When Mrs Moar contacted ACAS she did not initiate early conciliation at that time although the time limit was only ten days away. She says that she spoke to the ACAS adviser on 14 March who gave her a different deadline. However, the correct deadline had already been discussed and raised with her. Her confusion was not reasonable. This was not a case where erroneous advice had been given. Mrs Moar's position was that she had contacted ACAS principally because of the notice pay/holiday pay position although she claims that unfair dismissal was touched in the conversation she cannot clearly state that she was given incorrect advice by ACAS simply that she misunderstood the advice being given in relation to time-bar for the notice and holiday pay claims.

39. The claim she suggested also falls down in that the claim for unfair dismissal was not presented within a reasonable period after the expiry of the limitation period. She made reference to the case of ***Cullinan v. Balfour Beatty Engineering Services Ltd*** UKEAT/0537/10/DA. The delay here was a period of eleven weeks (***Golub v. University of Sussex*** [1981] WL695717.

40. Turning to discrimination Ms Auld took the Tribunal to section 123(1)(b) of the Equality Act and to the well-known case of ***Robertson v. Bexley Community Centre trading as Leisure Link*** [2003] IRLR 434.

41. The respondents submitted that the claimant had the support of his mother who acted as his representative throughout and from the SICAB. It was

accepted that there were long periods where the claimant was unable to progress matters himself. It provided sufficient justification as to why he was unable to commence early conciliation proceedings prior to 15 May and to lodge the claim prior to 1 June. The claims for disability discrimination were also weak. The Tribunal should take this into account and it would not be just and equitable in considering all the circumstances to extend the time limit to allow the complaint to proceed.

Discussion and Decision

42. The material parts of the Section 111 of the Employment Rights Act 1996 which govern complaints to an employment tribunal are as follows:

''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.''

43. This involves a two- stage test. In the present case the claim is some weeks out of time. It involves asking firstly whether it was not reasonably practicable to present the claim in time and, only if it was not, to proceed to consider whether it was presented in a reasonable time thereafter. The two questions should not be conflated. The Tribunal has no general power to extend time limits and the burden of proof rests on the claimant to establish that both parts of the test are satisfied.

44. The expression "reasonably practicable" does not mean that the employee can simply say that his actions were reasonable and escape the time limit. On the other hand, an employee does not have to do everything possible to bring their claim. In ***Palmer and Saunders v. Southend-On-Sea Borough Council*** [1984] IRLR 119 it was said that reasonably practical should be treated as meaning "reasonably feasible". The case of ***Schultz v. Esso***

Petroleum Ltd [1999] IRLR 488 is authority for the proposition that whenever a question arises as to whether a particular step or action was reasonably practicable (or feasible), the qualification of reasonableness requires the answer to be given against the background of the surrounding circumstances.

45. One recurring issue in many cases as in this one is the issue of the claimant's lack of knowledge of employment tribunal time limits or as the law puts whether there is ''reasonable ignorance". The question of whether it is open to an employee ignorant of their rights to rely on that ignorance as a reason why it was not reasonably practicable to present a claim in time has been the subject of a number of decisions of the higher courts. In ***Dedman v British Building and Engineering Appliances Ltd*** [1973] IRLR 379 Scarman LJ posed the following question:

"Does the fact that a complainant knows he has rights under the Act inevitably mean that it is practicable for him in the circumstances to present his complaint within the time limit? Clearly no: he may be prevented by illness or absence, or by some physical obstacle, or by some untoward and unexpected turn of events.
Contrariwise, does total ignorance of his rights inevitably mean that it is impracticable for him to present his complaint in time? In my opinion, no. It would be necessary to pay regard to his circumstances and the course of events. What were his opportunities for finding out that he had rights? Did he take them? If not, why not? Was he misled or deceived? Should there prove to be an acceptable explanation of his continuing ignorance of the existence of his rights, it would not be appropriate to disregard it, relying on the maxim "ignorance of the law is no excuse." The word "practicable" is there to moderate the severity of the maxim and to require an examination of the circumstances of his ignorance. But what, if, as here, a complainant knows he has rights, but does not know that there is a time limit? Ordinarily, I would not expect him to be able to rely on such ignorance as making it impracticable to present his complaint in time. Unless he can show a specific and acceptable explanation for not acting within four weeks, he will be out of court."

46. In the case of ***Wall's Meat Co Ltd v Khan*** [1978] IRLR 499 Brandon LJ dealt with the issue of ignorance of rights in the following way:

"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 three months, if the ignorance on the one hand, or the mistaken belief on the other, is itself reasonable."

47. In these and in subsequent cases it has been held that the question of whether bringing proceedings in time was not reasonably practical turns, not on what was known to the employee, but upon what the employee ought to have known (***Porter v Bandridge Ltd*** [1978] ICR 943, ***Avon County Council v Haywood-Hicks*** [1978] IRLR 118. It is also apparent that where someone is aware that a right exists, rather than being wholly unaware of any such right, then it will be much harder for them to show that they ought not have taken steps to find out what the time limits were.

48. The issue of bad advice is often another factor that commonly presents itself. In ***Dedman*** Lord Denning stated (at 381):

"If a man engages skilled advisers to act for him — and they mistake the time limit and present [the complaint] too late — he is out. His remedy is against them."

Lord Denning repeated the principle in ***Wall's Meat Co*** (at 502, 56, respectively), where he said:

"I would venture to take the simple test given by the majority in [Dedman]. It is simply to ask this question: had the man just cause or excuse for not presenting his claim within the prescribed time? Ignorance of his rights — or ignorance of the time limits — is not just cause or excuse, unless it appears that he or his advisers could not reasonably be 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."

And in the same case Brandon LJ observed (at 502, 60) that whilst ignorance of, or a mistaken belief regarding, the time limit could mean that it was not reasonably practicable to present the claim in time, provided the ignorance or mistaken belief was itself reasonable, neither state of mind will be reasonable:

" *… if it arises from the fault of the complainant in not making such inquiries 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."*

49. In ***Marks & Spencer plc v Williams-Ryan*** [2005] IRLR 562 Lord Phillips MR stated (at para 32):

"I would hesitate to say that an employee can never pray in aid the fact that he was misled by advice from someone at a CAB. It seems to me that this may well depend on who it was who gave the advice and in what circumstances. Certainly, the mere fact of seeking advice from a CAB cannot, as a matter of law, rule out the possibility of demonstrating that it was not reasonably practicable to make a timely application to an employment tribunal."

50. More recently in ***Paczkowski v Sieradzka*** [2017] ICR 62 the question of whether advice from a CAB was to be equated with that of a "skilled adviser" was considered to be a question of fact depending on the nature and circumstances of the advice given.

51. In ***Palmer*** following a review of the earlier authorities including ***Dedman*** and ***Wall's Meat***, May LJ concluded that the question of whether a step was or was not reasonably practicable would include the advice given, or available, but that was a material consideration which would have to be taken into account along with all of the other circumstances.

52. The question of whether an employee has presented their claim within a reasonable time of the original time limit is a question to be determined objectively by the employment tribunal taking into account all material matters (***Westward Circuits Ltd v Read*** [1973] ICR 301, NIRC).

53. Time limits apply to many aspects of modern life. On one of the changes that modern technology has brought is that an interested person now has access to a vast volume of information, of varying quality, from the Internet and indeed applications to an employment tribunal are made on- line. A simple search under unfair dismissal and time limits would lead to results that would include reliable purveyors of information such as official Government and ACAS websites as well as reliable providers of information such as the CAB.

54. The background in this case is deeply unfortunate. Why the employers did not give the claimant the full notice he was entitled to and pay the accrued holiday pay he would be entitled to is perplexing. The claimant and his mother

had considerable difficulties and problems to overcome during the months from the claimant having his stroke to the raising of proceedings. The claimant's mother did her very best to assist her son throughout. She contacted the SICAB in time and took advice. It could be argued that the advice given could have been set out more clearly with the two separate time limits that were operating made more apparent to her. The advice at the outset to raise the issues as a grievance with the employers should have been qualified by the fact that this was not a necessary precursor to raising Tribunal proceedings and that when contacting ACAS she should have asked for an Early Conciliation certificate to allow the unfair dismissal proceedings to be raised.

55. That said the advice when looked at dispassionately should have alerted Mrs Moar to the problem particularly the email dated 10 March which restated that proceedings had to be raised ''*within three months less one day of the event''* By the time the time limit was running out the claimant had asked to proceed with an unfair dismissal claim and she had the correct advice about time limits. In addition, Mrs Moar could also have readily checked the time limits and her understanding on the internet or asked for further assistance which was on offer. That she did not was perhaps understandable in the circumstances given the many pressures she was facing in trying her best to assist her son with so many difficulties.

56. The crux of the problem here was that she was very focussed, understandably, on the failure to pay the notice and accrued holiday pay which, in the absence of benefits, was so crucial for her disabled son, the claimant. I have nothing but admiration for all she seems to have done for the claimant and considerable sympathy for the situation that has arisen. However, as I have tried to explain the test is a strict one and I do not believe I can excuse her mistake in not getting raising proceedings in time given the advice she was given and the ability she had as a capable person to both understand that advice or check it herself through the use of the internet. It

cannot be said that it was not reasonably practicable to raise proceedings in time.

57. Even if I had concluded that it had not been reasonably practicable to raise proceedings the claimant would fail at the next hurdle which is contained in Section 111(2)(b) namely the proceedings were not raised within such further period as the tribunal considered reasonable. The claimant, if she had applied her mind to the unfair dismissal and disability issue would have realised that the starting point for the time limit to run would be the dismissal in December. Once she had made a mistake about the time limits which I did not believe was a reasonable one to make then although the test in this limb is easier it still requires the delay to be reasonable but any enquiry or consideration of time limits would have shown that the primary limitation period had expired.

58. There is no doubt that the claimant feels aggrieved at the way he has been treated. However, if he was unable to return to work his employers could have dismissed him fairly, going though a proper process, which would have resulted in him only receiving his notice pay and accrued holiday pay. I understand he was paid a redundancy payment by his former employers in circumstances where they seem to have had no legal obligation to do so.

59. I turned to consider the claim for disability discrimination. The extension of time that the Tribunal can grant is contained in Section 123 of the Equality Act:

> "***123 Time limits***
>
> ***(1) Subject to section 140B proceedings on a complaint within section 120 may not be brought after the end of—***
>
> ***(a) the period of 3 months starting with the date of the act to which the complaint relates, or***
>
> ***(b) such other period as the employment tribunal thinks just and equitable.***"

60. I considered the guidance contained in the well-known case of ***Robertson v. Bexley Community Centre trading as Leisure Link*** [2003] IRLR 434. The extension of time was said to be the exception rather than the rule. It has to be justified by the claimant. She must give cogent reasons for the delay. The Tribunal needs to consider the impact on both parties of any extension being granted and whether it is just and equitable.

61. In essence it is that she made a mistake and did not fully appreciate the advice she had been given. I also considered the case of ***British Coal Corporation v Keeble and ors 1997 IRLR 336, EAT)***. The exercise of discretion is one of weighing up the respective balance of prejudice. On the one hand the claimant has a statutory right to make claims which would be lost if the extension was not given. There would no practical prejudice to the respondent company other than having to face unwelcome claims. There was no suggestion that given the delay of 11 or so weeks any evidence would be lost or memories would have faded. No such suggestions were made.

62. The crucial factor for not exercising discretion in this case seems to me to be that the claim(s) are in my assessment weak. There is no mention of discrimination in the narrative of the ET1. In Box 9.2 which deal with remedy it is said that the remedy sought was to allow the claimant ‘‘to recover and rehabilitate’’ This appears to be a claim for reasonable adjustments.

63. The respondents were told about the claimant’s substantial health problems. Because of the claimant’s considerable deficits caused by the stroke and then the epileptic fits it does not seem likely that he would be able to return to work in any capacity and it is very difficult to imagine how any adjustment to the working environment could allow him to do so or indeed to return to work at all in the near future. It is not necessarily disability discrimination to dismiss someone who can no longer carry out the work for which they were employed.

64. I fully accept that the respondent company appears to have acted with some haste in terminating the claimant's employment but they no doubt did so not because he was a disabled person as such but because he would not be able to work because of the serious consequences of the stroke and epileptic fits. These actions were very upsetting to the claimant and his mother, no doubt failing to pay the notice pay and accrued holiday pay, added insult to injury but however unreasonable or insensitive their actions might seem that is not enough to suggest disability discrimination at least on its own. In all the circumstances including those set out earlier in relation to the late unfair dismissal claims my view is that the claims for disability discrimination should have been lodged on time and being weak the exercise of discretion should be refused. The claims are dismissed.

Employment Judge: J M Hendry
Date of Judgement: 14 August 2023
Date sent to Parties: 14 August 2023