EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4103510/2023

Preliminary Hearing held remotely by Cloud Video Platform at Glasgow on 23 October 2023

Employment Judge A Kemp

Mr A Gilmour	**Claimant**
Mears Supported Living Ltd	**Respondent**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

1. **The Tribunal does not have jurisdiction to consider the claims for unfair dismissal and breach of contract, and they are dismissed.**

2. **The Tribunal does have jurisdiction to consider the claim for a statutory redundancy payment, and a Final Hearing shall be fixed in relation to the same.**

REASONS

Introduction

1. This was a Preliminary Hearing held remotely on the issue of jurisdiction in relation to time-bar. The claimant was represented by his wife Mrs Marie Gilmour and the respondent by Mr Yetman.

Claims

2. The claims made by the claimant were clarified at the start of the hearing and are for unfair dismissal and a statutory redundancy payment under the Employment Rights Act 1996 ("the 1996 Act") and for notice pay, which is a claim for breach of contract which is within the jurisdiction of the Tribunal by virtue of the Employment Tribunals (Extension of Jurisdiction) (Scotland) Order 1994 ("the 1994 Order"). It was confirmed that no claim for unlawful deduction from wages was made.

Issues

3. After discussion Mr Yetman helpfully accepted that the claim for a statutory redundancy payment, which has a six month time limit under section 164 of the 1996 Act, was within the jurisdiction of the Tribunal on the basis of timing. That claim had not been directly addressed in the Response Form, but the respondent denies that the reason or principal reason for dismissal was redundancy, as it contends that it was for conduct, from which it follows that the respondent does not accept that there was a redundancy, which he confirmed was the respondent's position in relation to that claim. That is a matter that I address further below.

4. I identified the following as the remaining issues before me, which were agreed with the parties prior to hearing evidence

(i) whether the claim for unfair dismissal is within the jurisdiction of the Tribunal under Sections 111 of the 1996 Act and in that regard
(a) what was the effective date of termination,
(b) if it was as the respondent contended, 12 January 2023, was it not reasonably practicable for the claimant to have presented the claim in time, and
(c) if so, was the claim presented within a reasonable period of time thereafter.

(ii) Whether the claim for breach of contract is similarly within the jurisdiction of the Tribunal under Regulation 7 of the 1994 Order, in which the issues are essentially the same.

Evidence

5. A Bundle of Documents had been prepared by the parties. Evidence was given by the claimant and his wife. Many but not all of the documents in the Bundle were referred to in evidence. The form P45 was provided on the morning of the hearing and added to it.

6. The Tribunal had required the claimant to provide information by answering questions on 14 August 2023, which the claimant did on 17 August 2023. The questions and answers were –

(i) Does the claimant accept that he received an email on 12 January 2023 enclosing a letter informing him that he had been dismissed as alleged in the ET3?

I can't seem to find a letter confirming dismissal among my records so not sure what date this was received.

(ii) If not, when does the claimant say he was informed of his dismissal?

I was advised of this.

(iii) Does the claimant accept that he was informed that he was being dismissed with immediate effect? If not, what does the claimant say was said by the respondent as to when his dismissal took effect?

I am not sure what the letter exactly said.

(iv) How did the claimant identify the date of 25 January 2023 as the date of termination as set out in the ET1?

The date that I used in my ET1 was the end of employment date provided on my P45 and as this is a government document which is legal and binding I thought that this would be the correct date to use. I also thought that the 3 months limit to apply for a tribunal after dismissal could be extended in certain circumstances. My circumstances I feel would merit this extension, if the judge were to find against the date of 25th January 2023. I feel that because I was suffering from mental health problems, not engaging with life in

general and my wife having to deal with this for me whilst she had her own mental health issues, helping our adult kids who also have mental health problems and working full time and doing overtime to try and make up the shortfall from me not working merits this.

7. Before evidence was given I explained to Mrs Gllmour, who did not have experience of conducting a case as a representative, how the hearing would take place, about asking questions, about the need to refer to any documents considered to be relevant to the issues as unless referred to they were not evidence before me, and to cover all matters comprehensively. I explained that I could give a measure of assistance under the overriding objective to put parties on an equal footing, and to elicit the facts by asking questions under Rule 41, but that I could not act as if the adviser to the claimant.

8. The dates of early conciliation and presentation of the Claim Form were agreed at the commencement of the hearing.

Facts

9. I found the following facts, material to the issues before me, established:

10. The claimant is Mr Anthony Gilmour.

11. The respondent is Mears Supported Living Ltd.

12. The claimant was employed by the respondent as a Support Worker from in or around January 2017.

13. The claimant lives with his wife Mrs Marie Gilmour and their two adult children.

14. On 12 January 2023 an email was sent by the respondent to the claimant attaching a letter which informed him that he had been summarily dismissed following a disciplinary hearing held in absence on 10 January 2023. It referred to an email sent by the claimant on 30 December 2022 to the effect that he would not attend the disciplinary hearing. It stated that the dismissal was for gross misconduct, and was “with effect from 12 January 2023 without notice or payment in lieu of notice”. The letter further stated that “all information regarding how I came to my decision

along with the right to appeal details will come out to you in a letter by 17 January 2023."

15. The email was properly addressed to the claimant's email address. The email and letter were not read by the claimant at the time of receipt, but were read by the claimant's wife on or around 14 January 2023.

16. The full reasons for that decision to dismiss the claimant were set out in a letter dated 18 January 2023. It was also sent to the claimant's email address on the same date, correctly addressed, and read shortly afterwards by Mrs Gilmour but not the claimant himself. It confirmed the termination date of 12 January 2023.

17. The respondent sent the claimant a form P45, for the purposes of income tax and national insurance contributions, which stated a "leaving date" of 12 January 2023. The form P45 was dated 25 January 2023, that date appearing below a section for certification of the contents of the form by the respondent. It was not read by the claimant, but was read by his wife who, after doing so, believed that the termination date of employment was 25 January 2023 as that date was the date of birth of her mother, who had passed away in April 2022. She told the claimant that at the time of receipt of that form on or around 27 January 2023.

18. The claimant had suffered from mental health difficulties for a period of over two years by January 2023. He had depression, and received medication from his General Practitioner (the detail of which was not given in evidence). He saw his General Practitioner about every fortnight. He did not engage with matters in relation to the termination of his employment, and left what to do with regard to the consequences of that to his wife. His condition required care from his wife in the period after the termination of his employment.

19. Mrs Gilmour is employed as a member of an ambulance crew. She also suffers from mental health difficulties including chronic depression. She receives medication for that, being Duloxetine. Her condition and an earlier operation causes her fatigue. She was in the period January to April 2023 caring for her husband and her two adult children who also have mental health difficulties, as well as working. After the claimant's

employment terminated she continued to work, and worked overtime of at least ten hours per week in addition to her standard hours of thirty seven and a half hours per week. That exacerbated the fatigue she suffered from at that time.

20. The claimant and his wife did not at any stage seek legal advice with regard to the dismissal.

21. Mrs Gilmour had commenced a claim of unfair dismissal against a former employer some years earlier and was aware of the requirement for early conciliation and the time-limit that applied to such claims as those for unfair dismissal and breach of contract.

22. The claimant commenced early conciliation in respect of the respondent on 23 April 2023. His wife did so in his behalf. She continued to believe in the period up to her doing so that the effective date of termination was 25 January 2023.

23. A Certificate for early conciliation in respect of the respondent was issued on 4 June 2023.

24. The Claim Form commencing the claims by the claimant was presented to the Tribunal on 28 June 2023. It was drafted by Mrs Gilmour on the claimant's behalf.

Claimant's submission

25. Mrs Gilmour in a brief submission said that she had checked the ACAS and government websites (although had not spoken about that in evidence), and that she knows that she had the dates mixed up. There were things that she had to deal with. There were justifiable reasons for why the wrong date was in her head.

Respondent's submission

26. The following is a very basic summary of the submission made. The effective date of termination was 12 January 2023, as that date was clearly

provided in the letters of 12 and 18 January 2023. The onus of proving reasonable practicability lay with the claimant. Reference was made to ***Reed in Partnership v Fraine UKEAT0520/10*** and to ***Britton***, cited below. The context included the underlying allegations which were serious. No medical evidence had been provided. The claimant and his wife had not been incapacitated, and the actual delay being short did not support their position that it had not been reasonably practicable to have presented the claim in time. The test for reasonable practicability had not been met, and the claim had not been pursued within a reasonable period of time if it had been met.

Law

27. The right not to be unfairly dismissed is provided for in section 94 of the 1996 Act. It is subject to certain qualifications, one of which is in relation to time bar in section 111, which is an issue going to the jurisdiction of the Tribunal.

28. The terms of that section 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.
> (2A) Section 207B (extension of time limits to facilitate conciliation before institution of proceedings) applies for the purposes of subsection (2)(a).

(3) Where a dismissal is with notice, an employment tribunal shall consider a complaint under this section if it is presented after the notice is given but before the effective date of termination.

(4) In relation to a complaint which is presented as mentioned in subsection (3), the provisions of this Act, so far as they relate to unfair dismissal, have effect as if—

(a) references to a complaint by a person that he was unfairly dismissed by his employer included references to a complaint by a person that his employer has given him notice in such circumstances that he will be unfairly dismissed when the notice expires,

(b) references to reinstatement included references to the withdrawal of the notice by the employer,

(c) references to the effective date of termination included references to the date which would be the effective date of termination on the expiry of the notice, and

(d) references to an employee ceasing to be employed included references to an employee having been given notice of dismissal.

(5) Where the dismissal is alleged to be unfair by virtue of section 104F (blacklists),

(a) subsection (2)(b) does not apply, and

(b) an employment tribunal may consider a complaint that is otherwise out of time if, in all the circumstances of the case, it considers that it is just and equitable to do so."

29. Section 207B of the 1996 Act provides for an extension of the time limits to allow early conciliation.

30. The effect of the provisions is that a claim of unfair dismissal must be commenced, initially by early conciliation, within a period of three months from the effective date of termination, followed by timeous presentation of the Claim Form to the Tribunal (which in this case is within a month of the early conciliation certificate if early conciliation itself was commenced in time), unless it was not reasonably practicable to have done so, in which event it must be presented within a reasonable period of time from when it was.

31. What is the effective date of termination is provided for in section 97 of the 1996 Act. The material terms of that section for the purposes of the present case are –

> **"97 Effective date of termination**
>
> (1) Subject to the following provisions of this section, 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, and
>
> (c) [in relation to an employee who is employed under a limited-term contract which terminates by virtue of the limiting event without being renewed under the same contract, means the date on which the termination takes effect.]
>
> (2) Where—
>
> (a) the contract of employment is terminated by the employer, and
>
> (b) the notice required by section 86 to be given by an employer would, if duly given on the material date, expire on a date later than the effective date of termination (as defined by subsection (1)),
>
> for the purposes of sections 108(1), 119(1) and 227(3) the later date is the effective date of termination.
>
> (3) In subsection (2)(b) 'the material date' means—
>
> (a) the date when notice of termination was given by the employer, or
>
> (b) where no notice was given, the date when the contract of employment was terminated by the employer……."

32. The onus is on the employer to communicate to the employee the fact and date of the dismissal: ***Widdicombe v Longcombe Software Ltd [1998] ICR 710.*** The effective date of termination is a wholly statutory concept, to

be determined by applying the wording of sub-s (1); it cannot be altered simply by agreement between the parties: ***Fitzgerald v University of Kent at Canterbury [2004] IRLR 300*.** Extrinsic matters (such as receipt of the P45) are not relevant even if in practice they are important: ***Newham London Borough v Ward [1985] IRLR 509****.*

33. Where dismissal is communicated to the employee in a letter, the effective date of termination is not retroactive to the date that the letter was written, posted or delivered, but is the date when the employee either reads the letter or reasonably had the opportunity of knowing about it: ***Brown v Southall and Knight [1980] ICR 617****, w*hich was approved by the Supreme Court in ***Gisda Cyf v Barratt [2010] ICR 1475***, in which it was held that in applying the test of the reasonable opportunity to read the letter a subjective approach is to be taken taking into account the claimant's circumstances and being 'mindful of the human dimension in considering what is or is not reasonable to expect of someone facing the prospect of dismissal from employment.'

34. In the event that the claim is not commenced within three months of the effective date of termination (which includes the provisions for early conciliation) the claim is outwith the jurisdiction of the Tribunal unless the terms of section 111 as to reasonable practicability apply. The burden of proof is on the claimant to prove that it was not reasonably practicable to present the complaint in time: ***Porter v Bandridge Ltd [1978] IRLR 271.***

35. The question of what is reasonably practicable is explained in a number of authorities. In ***Palmer and Saunders v Southend on Sea Borough Council [1984] IRLR 119,*** a decision of the Court of Appeal, the court suggested that it is appropriate: "to ask colloquially and untrammelled by too much legal logic, 'Was it reasonably feasible to present the complaint to the Industrial Tribunal within the relevant three months'?" That, it explained, is a question of fact for the Tribunal taking account of all the circumstances. It gave the following guidance:

> "Dependent upon the circumstances of the particular case, an Industrial Tribunal may wish to consider the manner in which and reason for which the employee was dismissed, including the extent

> to which, if at all, the employer's conciliatory appeals machinery has been used. It will no doubt investigate what was the substantial cause of the employee's failure to comply with the statutory time limit; whether he had been physically prevented from complying with the limitation period, for instance by illness or a postal strike, or something similar. It may be relevant for the Industrial Tribunal to investigate whether at the time when he was dismissed, and if not then when thereafter, he knew that he had the right to complain that he had been unfairly dismissed; in some cases the Tribunal may have to consider whether there has been any misrepresentation about any relevant matter by the employer to the employee. It will frequently be necessary for it to know whether the employee was being advised at any material time and, if so, by whom; of the extent of the advisors' knowledge of the facts of the employee's case; and of the nature of any advice which they may have given to him. In any event it will probably be relevant in most cases for the Industrial Tribunal to ask itself whether there has been any substantial fault on the part of the employee or his advisor which has led to the failure to comply with the statutory time limit. Any list of possible relevant considerations, however, cannot be exhaustive and, as we have stressed, at the end of the day the matter is one of fact for the Industrial Tribunal taking all the circumstances of the given case into account."

36. Ignorance of a time limit has been an issue addressed in a number of cases. In ***Wall's Meat Co Ltd v Khan [1979] ICR 52*****,** the test which Lord Denning had earlier put forward in another case, Dedman, was re-iterated as -

> "It is simply to ask this question: Had the man just cause or excuse for not presenting his complaint within the prescribed time? 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 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."

37. In ***Marks and Spencer plc v Williams-Ryan [2005] IRLR 562*** the Court of Appeal stated that "The first principle is that section 111(2) should be given a liberal interpretation in favour of the employee." It set out the issues to consider when deciding the test of reasonable practicability, which included (i) what the claimant knew with regard to the time-limit (ii) what knowledge the claimant should reasonably have had and (iii) whether he was legally represented.

38. In ***Lowri Beck Services Ltd v Brophy [2019] EWCA Civ 2490***, the Court of Appeal re-stated that the test of reasonable practicability should be given a liberal interpretation in favour of the employee. The claimant in that case did not have professional advice, which was held to be a factor in his favour.

39. The nature of the test was considered more recently in ***Cygnet Behavioural Health Ltd v Britton [2022] EAT 18,*** in which it was stated that

> "the employment judge directed himself that section 111(2) should be given a liberal construction in favour of the employee, citing ***Dedman v. British Building & Engineering Appliances Ltd [1974] ICR 53, CA***. In my judgment, I note that this is not reflective of the way that section 111(2) has been interpreted and applied by the Court of Appeal in more recent cases. The test is a strict one and, perhaps in contrast to the 'just and equitable' extension in other statutory contexts, there is no valid basis for approaching the case on the basis that the ET should attempt to give the 'not reasonably practicable' test a liberal construction in favour of the claimant."

40. It is, with great respect to the EAT, difficult to understand that last sentence except in the context of a distinction with the test in discrimination law. The reference to a liberal interpretation in favour of the employee had itself been made in ***Williams-Ryan,*** which the EAT in ***Britton*** cited, and although ***Brophy*** was not mentioned it had re-stated that principle.

41. The facts in ***Britton*** however included that the claimant had dyslexia and mental health problems, but given what the claimant had been able to do

during the relevant period (which included moving house and responding to a regulatory matter) it had been perverse to find that it had not been reasonably practicable to have presented the claim timeously after finding out about time-limits. The EAT noted what the claimant had done in the material period and that the claimant had not been "incapacitated".

42. Where a claimant was under a mistake as to the detail of the time limit, guidance on the issues that arise was given in ***Dedman*** as follows:

> "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 be inappropriate 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".

43. It appears to me firstly that the statutory words must be applied, and secondly that in doing so whilst a liberal interpretation of those words in favour of the employee is permissible, that is against the test of reasonable practicability, and not whether what the claimant did was reasonable. It is different in kind to the test of what is just and equitable in the Equality Act 2010, as the EAT in ***Britton*** emphasised. It can include examination of whether a mistake, such as of the effective date of termination, was in all the circumstances one reasonably made such that it was not reasonably practicable for him to have presented the claim (by commencing early conciliation) in time. All of the circumstances are considered when making that assessment.

44. The test for a claim of breach of contract is essentially in the same terms under Regulation 7 of the 1994 Order as found in section 111 of the 1996 Act. It is also based on the effective date of termination. The claims for breach of contract and unfair dismissal are therefore either both within the jurisdiction of the Tribunal, or both not.

Observations on the evidence

45. The claimant and his wife both gave evidence, and I was satisfied that they did so truthfully, and did their best to be accurate in what they said. There was no medical evidence to support the evidence of mental health difficulties that they spoke to.

46. The respondent did not lead evidence.

Discussion

(i) What was the effective date of termination of employment

47. I consider that the claimant had a reasonable opportunity to read the email sent to him on 12 January 2023, and that the email had a letter attached which made clear that the date of termination was 12 January 2023. That was confirmed by the further letter of 18 January 2023. Both letters were received by the claimant at his email address, and were capable of being read by him. They were in fact read by his wife. Given the circumstances (that there was a disciplinary hearing which according to the letter of 12 January 2023 the claimant had said that he would not be attending in his own message of 30 December 2023, and that the communications were by email) it appeared to me that the claimant had the opportunity to read the email on the date of its being sent to him. Taking account of the human dimension and circumstances overall it is I consider reasonable to expect that it would have been read that day. That it was read two days later is not I consider determinative, but that difference of two days does not make a material difference to the outcome of the present case in any event.

48. The claimant suggested that the P45 contained a different date for termination, being 25 January 2023. That is however wrong. It does not. It provides as the date of leaving 12 January 2023. The date of 25 January 2023 is on the form, but is below the details of the respondent and the certification section, paragraph 13, and is the date the form was completed. That is firstly consistent with the date given in the two letters, and secondly not something that would mislead a person. Whilst the P45 is not strictly relevant for the effective date of termination, it is in any event not I consider appropriate to hold that as Mrs Gilmour thought that that was the effective date of termination, honestly if mistakenly, that in law is

the correct date. It is not, as the authorities set out above make clear, a matter of subjective view. It is a statutory concept, and I consider that the effective date of termination in this case is 12 January 2023. The result is that unless it was not reasonably practicable to have presented the claim by commencing early conciliation on or before 11 April 2023, the claim is outwith the jurisdiction of the Tribunal.

(ii) Was it reasonably practicable to have commenced the Claim timeously?

49. In light of the facts that I have found, and the law set out above, I do not consider that the claimant has demonstrated that it was not reasonably practicable to have presented the claims timeously. I am conscious of the mental health difficulties both the claimant and his wife spoke to, the fact that the claimant was not engaging with matters resulting from the termination of employment and that his wife did so for him acting as a form of lay representative, and that she was both working overtime and had fatigue. I have considerable sympathy for them both given those circumstances and the evidence I heard. But I must apply the statutory test, and it is the onus of the claimant to establish that he meets it.

50. Firstly, the fundamental difficulty in this case in my view was that Mrs Gilmour did not read properly the three documents which stated the termination date. They were each, I consider, entirely clear. They stated without any dubiety what the termination date was (in the P45 form it was the “leaving date” but the difference between that, and the date of certification of the form, was I consider clear also). The letters of 12 and 18 January 2023 are clear and explicit as to the date on which termination of employment took effect. She thought, wrongly in light of the authorities above, that what mattered was the P45. She received that and appears to have looked at the date of the form, not the leaving date which was stated correctly to be 12 January 2023, and focussed on the later date simply as it was her mother’s birthday, her mother having passed away the previous year. What was however material in this context is that the leaving date was clear, and the suggestion in the answers to the questions quoted above that the P45 had a termination date of 25 January 2023 is wrong.

51. On a human level I can understand how such a mistake of fact was made. It was I entirely accept a genuine mistake. But I must judge the issue more objectively, and assess whether that mistake was a reasonable one, or that there was a just cause for it, given the authorities set out above. In my judgment I cannot say that it was. Making due allowance for all that was said on behalf of the claimant it appears to me that Mrs Gilmour, acting as her husband's representative, knew about the requirements for early conciliation and of the time limits that applied. She had had experience of an unfair dismissal case herself earlier, as she candidly confirmed in her evidence, which was to her credit. That therefore meant, I consider, that it was necessary to take an appropriate degree of care to check the termination date, and take the necessary action in time. The essential difficulty for the claimant's case is that such a check did not take place, rather there was a mistaken focussing on a date that was not stated to be the leaving date, or the date of termination, and that issue was never corrected. Using the words in ***Palmer*** there was, I have reluctantly concluded, substantial fault in not identifying the correct date of termination from the three documents each making that clear as 12 January 2023. There was nothing that was done by the respondent that misled the claimant or his wife into the mistaken view that was held.

52. Secondly the Claim Form was prepared by Mrs Gilmour in detailed terms, and submitted on 28 June 2023. If the effective date of termination had been on 25 January 2023, and early conciliation therefore commenced timeously, that would have been in time. As it was not the correct date however, it was out of time, but no reason for the late timing was given other than the misunderstanding over the correct date, and the home pressures that were experienced at the material time including from depression and fatigue exacerbated by working overtime. Those pressures and the overall circumstances were not suggested to have particularly changed in the period from 11 to 23 April 2023, or until the Claim Form was presented later. There was no evidence presented of any improvement of the depression felt either by the claimant or his wife. Had the understanding as to the date of termination been correct initially, or the misunderstanding been corrected after being checked within the relevant time period, I was satisfied that the Claim Form was most likely

to have been submitted timeously. Mrs Gilmour herself said that normally she takes steps early in a process. It appeared to me that the sole cause of the delay in commencing Early Conciliation was the mistake over the date of termination.

53. Thirdly, there was no independent evidence from a GP or otherwise such as GP records of the extent of the difficulties caused by depression for either the claimant or his wife. That is in the context of Early Conciliation taking place on 23 April 2023, and the Claim Form having been submitted on 28 June 2023, in terms which are comprehensive. It is also in the context of the claimant's wife continuing to work as the member of an ambulance crew and doing so with overtime. The claimant himself was not working, and I accept the evidence that he did not engage with the matter himself, but he did have assistance from his wife, and her role in doing so is a matter that I consider does require to be weighed in the balance.

54. Whilst I accepted the evidence from Mrs Gilmour as to her own mental health difficulties, and that she worked overtime which exacerbated the fatigue she suffered, that she was caring for her family at this time, I did not conclude that that was sufficient to have caused her not to be able to understand the accurate date of termination, or to have taken steps to commence early conciliation and to present the Claim Form timeously, to the extent required to meet the test of what is reasonably practicable. She was acting for her husband, and knew of the requirements for early conciliation and as to timebar from a previous claim she had made, and in that situation it appeared to me that the fact that legal advice was not sought was not of sufficient weight to meet the statutory test given all the other circumstances. I concluded that she was reasonably able to have commenced Early Conciliation timeously, and then to have presented the Claim Form timeously, despite the difficulties she spoke to in evidence.

55. I did not however take account of documents that had not been addressed in cross-examination, which the respondent argued for in submission, as they were simply documents in the Bundle and not strictly therefore evidence before me.

56. In my view cases such as the present are very largely fact dependent, and I did not derive assistance from the ***Fraine*** case. ***Britton*** however stresses the test that is to be applied in law. It does also use the word "incapacitated" (in paragraph 60) in that context. Whilst that is I consider taking matters further than the Court of Appeal authorities suggested, such that it is not a requirement that the person acting be in law incapacitated to such an extent as to be incapable of properly taking a decision (incapax as it is known in Scots law) the impediment to pursuing the claim timeously must be sufficiently material that doing so was not reasonably practicable. There is a need to consider all of the evidence, as that case makes clear, both what was not done as well as what was done. Even giving the statutory words a liberal interpretation following the Court of Appeal authorities referred to, I have concluded that I am not able to bring the evidence I heard from the claimant and his wife within the test I require to apply.

57. It follows that I have concluded that the claimant has not proved that it was not reasonably practicable to have commenced early conciliation on or before 11 April 2023, and that the claim as to unfair dismissal and breach of contract is not therefore within the jurisdiction of the Tribunal.

(iii) Was the Claim commenced within a reasonable period of time?

58. This issue does not now arise, but if I had held that it was not reasonably practicable to have presented the claims timeously, I would have held that the claims were not presented within a reasonable period of time. By the late commencement of early conciliation the extension of time provided by the section referred to above is not engaged. Once the Certificate was issued therefore the onus was on the claimant to present the claim without delay. There was a period of over three weeks from the issuing of the Early Conciliation Certificate and the presenting of the Claim Form, and I consider that the explanation for that delay was again only the misunderstanding, honestly but not reasonably held, over the date of termination. It was reasonable to have acted within a few days of the certificate being issued. I consider that the claimant has not established this aspect of the test accordingly.

Conclusion

59. It follows from the foregoing that I must dismiss the claims of unfair dismissal and breach of contract as they are not within the jurisdiction of the Employment Tribunal. For completeness I might add that there is a different time-limit for breach of contract claims in an action taken in court, but that is not a matter for this jurisdiction.

60. As was conceded by the respondent the time-limit under section 164 of the 1996 Act for a claim for a statutory redundancy payment is six months, that claim was therefore made in time and is within the jurisdiction of the Tribunal on such a basis. I have so determined in the Judgment. That means that the Tribunal can hear the claim, but in all the circumstances it appears to me to be in accordance with the overriding objective to comment further on that remaining claim.

61. The respondent's position is that it dismissed him not for redundancy but for conduct, in particular that it believed that he had committed an act of gross misconduct. The claimant's Claim Form alleges that his wife told him that the respondent may seek to dismiss him to avoid paying him redundancy. The inference is that the reason provided by the respondent for the dismissal is challenged as not being the reason in law.

62. The right to a redundancy payment is provided for in section 135 of the 1996 Act, and the definition of redundancy is in section 139. Section 140 provides that a summary dismissal is not a redundancy, to summarise its terms. On the face of the letters of 12 and 18 January 2023 the dismissal was not for redundancy, and although the claimant is able to seek to challenge that that may not be the simplest of tasks for him. Unless the issue of the reason or principal reason for the dismissal is resolved by agreement or otherwise that dispute is nevertheless an issue of fact which will require to be determined by hearing evidence.

63. The Tribunal will separately contact the parties to make arrangements for a Final Hearing for that remaining claim.

Employment Judge: **A Kemp**
Date of Judgment: **31 October 2023**
Entered in register: **31 October 2023**
and copied to parties