EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 8000943/2024
Open Preliminary Hearing Held in Glasgow via Cloud Video Platform (CVP) on 29 October 2024

Employment Judge: Russell Bradley

Jamie McGuire	**Claimant** **In person**
Search Consultancy Limited	**Respondent** **Represented by** **Ms R Morgan** **Barrister**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is that:-

1. it was reasonably practicable for the claim of unfair dismissal to have been presented in time;
2. in presenting it on 28 June 2024 it was presented out of time;
3. the tribunal does not have jurisdiction to consider the claim in terms of section 111 of the Employment Rights Act 1996; and
4. it is accordingly dismissed.

REASONS

Introduction

1. On 11 September 2024 parties received notice of this preliminary hearing. As per that notice its purpose was to "*determine whether the claim has been lodged within the relevant statutory time limit and, if not, whether the Tribunal exercises its discretion to hear the claim out of time*."
2. The ET1 was presented on 28 June 2024. Early conciliation had started on 16 June 2023. The certificate was issued on 28 July 2023.
3. The claimant had been employed by the respondent as a warehouse operative. He was employed as an agency worker. His contract with the respondent began on 8 or 9 August 2022. It ended on 16 June 2023. By that date (and for some time prior) he worked for John McGavigan Ltd (or CCL Design) on an agency basis via the respondent.
4. While whistleblowing was a theme within the ET1, I was not clear what claim or claims were being maintained by the claimant. Before hearing evidence, he confirmed that his claim was of "*automatic*" unfair dismissal. He alleged that the reason for his dismissal was that he had made a protected disclosure. His claim was thus brought under section 103A of the Employment Rights Act 1996. The claimant knew that as such he did not require to have the two years' service to bring the claim as ordinarily required by section 108(1) of that Act.

The Issues for this hearing

5. Having clarified that the single claim was of unfair dismissal, the issues (reflecting section 111 of the 1996 Act) for this hearing were:-
    1. Was it reasonably practicable for the claimant to have presented his claim in time?
    2. If not was it presented within a reasonable time thereafter?

Evidence

6. I heard evidence from the claimant. I also heard evidence from Jillian Fleming, the respondent's group HR manager. An indexed bundle of 66

pages had been prepared. It contained some contemporaneous material. Most but not all of it was spoken to by one or other or both witnesses. The claimant referred to (and read aloud) from text messages on his mobile telephone without objection. Similarly he used his telephone to source other oral evidence.

Findings in Fact

7. From the evidence that I heard, the non-contentious issues from the tribunal paperwork and the bundle material which was spoken to in evidence I found the following facts admitted or proved.
8. The claimant is Jamie McGuire.
9. The respondent is Search Consultancy Limited. It is a recruitment agency. Its work covers between 15 and 17 sectors. It operates across the UK. It engages temporary workers such as the claimant. They do work for third parties such as John McGavigan Ltd. The respondent also places permanent staff into posts for its third party customers.
10. The respondent uses an electronic system to record data about its agency workers. It is called its "*RDS file*".
11. On or about 8 August 2022 the claimant was employed by the respondent as a warehouse operative. He was employed as an agency worker. For the entirety of his employment, the Claimant was assigned to carry out work services for John McGavigan Ltd in Bishopbriggs, Glasgow. He was recruited for the role by Tracy McIntyre an employee of the respondent. The respondent's account manager for John McGavigan Ltd was Remi Kalasauskas.
12. The claimant was not issued with a written statement of particulars of employment by the respondent.
13. Some time in May 2023 the claimant was offered employment by CCL. As a result the claimant learned that that role, equivalent to his agency work, was paid at a rate higher than he was receiving from the respondent. He raised the issue with David Mulgrew, then the respondent's senior director.
14. On 31 May 2023 (17.18) (**page 52**) Mr Mulgrew emailed the claimant. In it Mr Mulgrew; set out an explanation for the pay discrepancy; indicated that he

accepted that there was a sum due to the claimant of £127.93; and undertook to have it paid to him on 2 June ("*this Friday*").

15. The claimant replied that day (at 6.08pm) (**pages 51 and 52**). He said that the information provided by CCL was "*still contradictory …….so I will need to begin early conciliation or tribunal proceedings*." The claimant contacted ACAS at that time. Their advice then was to speak with the Citizens' Advice Bureau or a solicitor.

16. On 1 June Mr Mulgrew replied (**page 51**). In it he said tht he would speak again with CCL.

17. The claimant replied that day (**page 51**). In it he; expressed hope that on receipt of other paperwork he would be able to satisfy himself that he would be paid correctly; and asked if the other agency staff would also receive back pay.

18. Some time thereafter the claimant again raised with the respondent what he believed to be a discrepancy between what he was being paid and the pay rate of a comparator employed by John McGavigan Ltd. He asked to see a copy of a contract of employment of a comparator employee.

19. On 16 June (at 16.47pm) the claimant received a text from Tracy McIntyre. It said, "*I was trying to let you know that I am also terminating your contract with Search as of this afternoon. I'll organise your P45 and any outstanding holiday pay*." That email followed a telephone conversation between them earlier that day. In that conversation, Ms McIntyre told the claimant that she was terminating his employment.

20. The claimant believed that he was dismissed because he had complained about the discrepancy between his pay and that of a comparable employee of John McGavigan Ltd. The claimant believed that he had "*blown the whistle*" about a breach of a legal obligation, it being the duty to pay salary at the correct due to him.

21. On 16 June the respondent issued to the claimant a pay advice slip (**page 57**). It records that he worked 37.5 hours (called units) in week ending (Friday) 16 June. It recorded that his hourly rate was £11.85. His pay for those hours of work were thus £444.38. Taking account of what Mr Mulgrew

had said in his email of 31 May that hourly rate was wrong. It should have been £11.90.

22. The pay advice slip also shows a payment of £50.00. It is said to represent 1 Unit. The rate of pay for that Unit is (obviously) £50.00. The corresponding narrative describes it as "*Adjust Rates*" for week ended 4 June 2023.
23. The claimant worked at John McGavigan Ltd in the whole period of his employment with the respondent. He enjoyed his work there.
24. On 16 June the claimant started early conciliation (**page 3**).
25. On 22 June the claimant and Mr Mulgrew exchanged further emails in which the claimant maintained that he had continued to be underpaid (**pages 54 and 55**.)
26. The respondent's RDS file shows three entries on 21 July relative to the claimant (**page 58**). The first (09.54) records "*Notice has been given to Jamie McGuire to end of Sunday 18 June 2023. Reason: deemed resignation*". The second (also at 09.54) records "*P45 requested for Jamie McGuire. Reason: Voluntary*." The thrid (at 09.56) says "*Sent Candidate Notice Deemed Resignation email to Jamie McGuire*." Neither the Notice nor the email were produced by the respondent within the bundle.
27. On 28 July the conciliation certificate was issued (**page 3**). By that time the claimant was aware of the nature of the claim that he intended to make to this tribunal. In the period between 28 July and 29 October the claimant was aware of the time limit of three months in which he required to present his claim. Around this time the claimant undertook internet research about the claim that he believed he could make.
28. In the period of early conciliation the claimant spoke with a conciliation officer. He felt that he was being passed through various conciliation officers without any progress being made.
29. Around this time and before 29 October the claimant had been advised to seek advice from the Citizens' Advice Bureau. He contacted several of their offices about his whistleblowing claim. He did not receive any meaningful assistance from them.

30. Around this time and before 29 October the claimant had been advised to seek legal advice about his whistleblowing claim which he did. He was not able to make any meaningful progress with any of them.
31. In the period between 16 June and 9 October the claimant had a series of employers. By 9 October he obtained "*stable*" employment which he has has retained.
32. On or about 9 October 2023 the claimant felt well enough to be able to progress an employment tribunal claim. Prior to then he had experienced difficulties in his neighbourhood. They had resulted in him having to move home. Prior to then he had suffered some challenges with his mental health.
33. On 28 June 2024 the claimant presented his ET1.
34. By 14.55 on 6 September 2024 the claimant had seen the ET3 and the Grounds of Resistance. At that time he replied to the tribunal (**page 37**). Of note, he said, "*I apologise for the time limit, I was expecting to receive a callback from acas that never happened. I see that search claimed I was never dismissed, however I have a text message from them that states they are terminating my contract*." His reference to the question of his dismissal was a comment on the respondent's pleading (**page 33**), " *…the Claimant was not dismissed. He decided that no longer wanted to work on the assignment he had been working on (at CCL), and when he had no contact with the Respondent for a period of 4 weeks, he was processed as a deemed resignation in line with his Written Statement of Particulars*."

Comment on the evidence

35. The claimant gave his evidence in a calm and assured manner. His evidence was consistent on disputed areas even under professional cross-examination. It was consistent with the contemporaneous bundle paperwork, such as it was. I found him to be both credible and reliable. He clearly believed (correctly as it turned out) that the respondent had not been paying his salary at the correct rate.
36. While Ms Fleming gave evidence which the respondent must have believed was helpful, she was at the disadvantage of not being able to speak directly from personal knowledge to any of the contemporaneous exchanges about the claimant's pay dispute or about the circumstances leading up to or the

date of his dismissal. This was because she was not involved at that time. She spoke to **page 58**, the screenshot from the respondent's RDS file. Confronted with the content of Tracy McIntyre's text to the claimant of 16 June 2023 she had to accept (and did) that the information contained on **page 58** was incorrect. She also claimed that the claimant had worked for a number of the respondent's customers between August 2022 and 16 June 2023. I did not accept her evidence on this point. It was contradicted by the claimant's evidence and the respondent's own pleading (**page 32** at paragraph 2). As an aside, it was surprising that having seen the claimant's email of 6 September 2024 and included it in the bundle the respondent had not sought to recover the text message to which it referred either from Tracy McIntyre or from the claimant himself.

Submissions

37. Both parties made oral submissions. I mean no disservice to either by neither repeating nor summarising them. While not critical to what I had to decide, I do not agree with Ms Morgan's submission to the effect that the claim should be "*struck out*" under Rule 37 of the Employment Tribunal Rules of Procedure 2013. That was not the purpose of this hearing.

Law

38. Section Section 111(2) of the Employment Rights Act 1996 provides: "*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*."

39. What is reasonably practicable is essentially a question of fact and the onus of proving that presentation in time was not reasonably practicable rests on the claimant. "*That imposes a duty upon him to show precisely why it was that he did not present his complaint*." (***Porter v Bandridge Ltd*** [1978] ICR 943). In ***Palmer & Saunders v Southend-on-Sea Borough Council*** 1984

IRLR 119 the Court of Appeal concluded that "*reasonably practicable*" did not mean reasonable but "*reasonably feasible*". On the question of ignorance of the law, of the right to make a complaint to an Employment Tribunal and of the time limits in place for doing so, the case of ***Porter*** (supra) ruled, by a majority, that the correct test is not "*whether the claimant knew of his or her rights, but whether he or she ought to have known of them*." On ignorance of time limits, the case of ***Trevelyans (Birmingham) Ltd v Norton*** [1991] I.C.R. 488 noted that when a claimant is aware of their right to make a claim to an employment tribunal, they should then seek advice as to how they should go about advancing that claim, and should therefore be aware of the time limits having sought that advice.

Discussion and decision

40. I had some sympathy for the claimant. He had (as it turned out, correctly) challenged his employer about his rate of pay more than once. Further, his challenge was not, it seems, only for his benefit. He was trying to ensure that his agency worker colleagues were also being paid at the correct rate. Not only was he then dismissed, but within its own internal paperwork and in these proceedings the respondent misrepresented his dismissal as a "*deemed resignation*." That does them no credit.

41. However, my view on the first issue is that it was reasonably practicable for the claimant to have presented his claim in time. He knew of his right to make this claim when he contacted ACAS. He certainly knew of his right to make this claim by the time early conciliation started, on 16 June 2023. Within the limitation period, he had been told of "*the three month rule*". Even if some instability in his working and domestic life had meant that it was not reasonably practicable for him to present his claim before 9 October (which in any event I do not accept) it was at least by then reasonably practicable for him to have done so. Strictly speaking I do not require to consider the second issue. But if I had, my view is that the claim (presented on 28 June 2024) was not presented within a reasonable time after the expiry of the extended limitation date.

42. That being so the tribunal does not have jurisdiction to hear the claim applying section 111 of the Employment Rights Act 1996. That is reflected in the judgment.

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R Bradley
Employment Judge

1 November 2024
Date of Judgment

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Date sent to parties **06 November 2024**