EMPLOYMENT TRIBUNALS

Claimant: **Mrs Christine Brown**

Respondent: **The British Red Cross Society**

Heard at: **Watford Employment Tribunal by CVP remote hearing**

On: **Tuesday 1 October 2024**

Before: **Employment Judge Hallen**
Representation

Claimant: Not present

Respondent: Mr K. Zaman- Counsel

JUDGMENT

This has been a remote hearing which has not been objected to by the parties. The form of remote hearing was by Cloud Video Platform. A face-to-face hearing was not held because the relevant matters could be determined in a remote hearing.

The judgment of the Tribunal is that: -

1. **The Claimant presented her claim for unpaid holiday pay and breach of contract after the time limit imposed by Section 23 of the Employment Rights Act 1996 and Regulation 30(2) of the Working Time Regulations had expired and the Tribunal has no jurisdiction to hear this complaint.**

2. **This Claim Form is accordingly struck out.**

REASONS

Background and Issues

1. This matter came before me having been listed for a preliminary hearing on the issue of jurisdiction on 20 September 2024 by the Tribunal on written notice. This listing followed an application made by the Respondent in respect of the Claimant's claim of

unpaid holiday pay and breach of contract had been presented outside the primary time limits for presentation of such claims pursuant to section 23 Employment Rights Act 1996 ('ERA') and Regulation 30(2) of the Working Time Regulations 1998 ('WTR'). Accordingly, the Tribunal listed the claim to consider whether the claim was out of time and if so whether the Claimant could persuade the Tribunal that time should be extended under the relevant test in the above section/regulation.

2. At the hearing before me, the Claimant was not present having written to the Tribunal by email on 30 September 2024 saying that she was not going to be present at the hearing and was not applying for a postponement of the hearing after having her earlier request for a postponement rejected by Regional Employment Judge Foxwell on 30 September 2024. At the hearing, I confirmed with the Respondent that I should consider whether the Claimant was asking for a reconsideration of Judge Foxwell's decision not to grant a postponement of todays hearing, whether the hearing could fairly proceed in the absence of the Claimant and if so, whether it was reasonably practicable for the Claim Form to have been filed at the Tribunal within three months of the effective date of dismissal or whether time should be extended to allow for the later submission of the Claim Form. I had in front of me an index and bundle of documents made up of 35 pages that contained the Claim Form, the dismissal letter, the Response Form, the ACAS early conciliation certificate and the notice of hearing for this hearing. I was also provided with the Claimant's application for a postponement of this hearing, the Respondent's objection to that request, Judge Foxwell's refusal of the request for postponement, the Claimant's email confirming that she was not asking for a postponement of todays hearing but would not be in attendance and the Claimants email of 19 September 2024 which was a short statement stating the reasons why the Claim Form was submitted late. I will refer to the content of relevant documents in the facts section of this judgement.

Facts

3. The Claimant was employed by the Respondent as a shop manager at a charity shop from 28 August 2014 until her dismissal on 14 June 2023 by reason of redundancy with a payment of 8 weeks pay in lieu of statutory notice. The effective date of dismissal was 14 June 2023. The Claimant had until 13 September 2023 to commence the ACAS early conciliation process and upon conclusion of that process to lodge her claim for unpaid holiday pay and breach of contract at the Employment Tribunal. It is a legal requirement that the ACAS pre claims conciliation process should be commenced before the expiry of the primary time period for lodging a claim namely within 3 months of the effective date of dismissal.

4. The Claimant did not complete the early conciliation process until 16 January 2024 outside the primary time period for lodging her claim and she filed her claim at the Tribunal on 16 January 2024 over four months outside the primary time period outlined above. In her Claim Form and in her email to the Tribunal dated 19 September 2024, she confirmed that she originally completed a Claim Form and filed it at the Tribunal without completing the ACAS early conciliation process. As a consequence, the Claim Form was rejected by the Tribunal. She subsequently completed the process between 15 and 16 January 2024 having taken further advice and lodged the Claim Form successfully on 16 January 2024. She said the reason for the late submission of the Claim Form was that she did *'not understand fully'* what she was supposed to do in respect of making a claim to the Employment Tribunal and advice to her *'was not clear enough'*. In her email of 19 September, she added to this explanation by saying that she contacted the Tribunal and

was told that her first Claim Form was not accepted because she did not first complete the ACAS pre claims conciliation process.

5. Upon the application of the Respondent made in the Response Form, the Tribunal listed the case for a preliminary hearing on jurisdiction as on the face of it, the Claim Form was lodged at the Tribunal out of time and the notification was sent to the parties on 20 September 2024.

6. On 26 September 2024, the Claimant applied to the Tribunal by e-mail to state that she was unable to attend the hearing listed for 1 October 2024 and would not be able to make it to the video link provided to her due to a family emergency in her home country. She did not outline the nature of the family emergency or the home country that she was attending to deal with the family emergency in her e-mail. She also stated that she could not attend the hearing remotely because the country in which she had to visit had not givien permission for her to represent herself from abroad. By e-mail dated 30 September, the Respondent opposed the application for a postponement of the jurisdiction hearing on the basis that it was made less than seven days before the hearing and under rule 30 A(2) of the Tribunal Procedure Rules, the Tribunal may only grant an application for a postponement last minute in exceptional circumstances. It was submitted that the nature of the family emergency that was referenced by the Claimant was not stated, nor had she provided any evidence of her travel booking or the country in which she intended to visit. The Claimant also did not explain why she waited until five days before the hearing to apply for a postponement seemingly knowing that she intended not to attend the hearing at least one week before her application was made. It was submitted that no exceptional circumstances had been shown by the Claimant in support of her application.

7. The application for postponement was considered by Regional Employment Judge Foxwell on 30 September and was rejected on the basis of that the Claimant had not given a clear and sufficient reason for not being able to attend the jurisdiction hearing. Following Judge Foxwell's rejection of the application for a last-minute postponement, the Claimant e-mailed the Tribunal copying in the Respondent to confirm, '*I am not asking the tribunal to postpone the'* hearing…. *'I'm informing the tribunal that I won't be able to make it to the video link'*…. I have mentioned '*earlier to the tribunal that I won't be able to make it to Watford'*.

The Law

The Statute

8. The material parts of the Section 23 ERA and Regulation 30(2) WTR relating to claims for breach of contract and unpaid holiday pay are as follows:

> (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/when the payment should have been made, 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…

A two-stage test

9. Where a claim is presented outside the period of 3 months it is necessary to ask firstly whether it was not reasonably practicable to present the claim in time and, only if it was not, go on to consider whether it was presented in a reasonable time thereafter. The two questions should not be conflated. There is no general discretion to extend time and the burden of proof rests squarely on the Claimant to establish that both limbs of the test are satisfied.

The meaning of "reasonably practicable"

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

11. **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 injection of the qualification of reasonableness requires the answer to be given against the background of the surrounding circumstances and the aim to be achieved.

"Reasonable ignorance".

12. The question of whether it is open to an employee ignorant of her rights to rely upon 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 said the following: *"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 time."*

13. In **Wall's Meat Co Ltd v Khan [1978] IRLR 499** Brandon LJ dealt with the issue of ignorance of rights as follows: *"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."

14. In those and in subsequent cases it has been held that the question of whether bringing proceedings in time was not reasonably practicable 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**. A further proposition can also be gleaned from those authorities. Where an employee is aware that a right to bring a claim exists it will be considerably harder to show that they ought not have taken steps to ascertain the time limit within which such claims should be presented.

A reasonable period thereafter

15. 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 see **Westward Circuits Ltd v Read [1973] ICR 301, NIRC**.

16. In **Cullinane v Balfour Beatty Engineering Services Ltd UKEAT/0537/10** the then president of the EAT said: *"Ms Hart pointed out that the question which arises under the second stage in s 139(1)(b) is couched simply in terms of what further period the tribunal would regard as "reasonable", and not, like the question under the first stage, in terms of reasonable practicability. She submitted that it followed that the "Dedman principle" – namely that for the purpose of the test of reasonable practicability an employee is affixed with the conduct of his advisers (see, for the most recent review of the case law, Entwhistle v Northamptonshire County Council (2010) UKEAT/0540/09/ZT, [2010] IRLR 740) – does not fall to be applied. She pointed out that that principle is a consequence of the ultimate test being one of practicability (not even, be it noted, when the test was first formulated, reasonable practicability), and that the consideration of what further period was "reasonable" did not require so strict an approach. She made it clear that she was not saying that the fact that a Claimant had been let down by his advisers was decisive of the question of reasonableness at the second stage, but she submitted that it must be a relevant consideration. [16] I accept the validity of the formal distinction advanced by Ms Hart, but I do not believe that it makes any real difference in practice as regards the question of the relevance of the culpability of the Claimant's legal advisers. The question at "stage 2" is what period – that is, between the expiry of the primary time limit and the eventual presentation of the claim – is reasonable. That is not the same as asking whether the Claimant acted reasonably; still less is it equivalent to the question whether it would be just and equitable to extend time. It requires an objective consideration of the factors causing the delay and what period should reasonably be allowed in those circumstances for proceedings to be instituted – having regard, certainly, to the strong public interest in claims in this field being brought promptly, and against a background where the primary time limit is. If a period is, on that basis, objectively unreasonable, I do not see how the fact that the delay was caused by the Claimant's advisers rather than by himself can make any difference to that conclusion."*

17. What I take from these authorities is that, in assessing whether proceedings have been brought within a reasonable period after the expiry of the original time limit, it is necessary to have regard to all relevant matters including, where appropriate, the factors that made it not reasonably practicable to present the claim in time. Whether they remained operative may be an important matter.

18. The pausing of time for ACAS EC under s.207B(3)(a) and (b) ERA will apply in all cases where the primary time limit has not already expired. In this case, Day A was 24 September 2021 which was the commencement of the ACAS pre claims conciliation process by the Claimant. Day B was the receipt of the ACAS Certificate on 30 September 2021 and the one-month extension extended the primary time limit to 30 October 2021.

Conclusion and Findings

19. In respect of the first issue, I had to consider whether the Claimant was asking me to review Judge Foxwell's refusal to permit a postponement of this jurisdiction hearing. I considered the documents referenced in the facts section of this judgement in coming to my conclusion. I noted that Claimant applied originally for a postponement of the jurisdiction hearing on 26 September saying that she could not attend because she had a family emergency in her home country that being the reason for her not being able to attend the hearing either remotely or in person. The Respondent objected to this late minute application citing that the Claimant did not set out the exceptional circumstances that she needed to do for the Tribunal to grant a last-minute postponement of this hearing. For example, she had not set out to the nature of the family emergency, what country she was proposing to be in and why she could not attend remotely from that country. On 30 September, Judge Foxwell refused the application for a postponement stating that the Claimant did not give clear and sufficient reasons for not being able to attend the remote hearing from abroad. Following the refusal, the Claimant wrote to the Tribunal by e-mail on 30 September in respect of the refusal of her request confirming that she was not asking the Tribunal to postpone the hearing but that she was merely informing the Tribunal that she would not be in attendance at the hearing either personally or remotely.

20. In these circumstances, and on the basis of the Claimant's email to the Tribunal of 30 September confirming that she was not making an application for a postponement but merely informing the Tribunal that she would not be attending personally or by way of remote CVP link, I was satisfied that the Claimant was not asking for a review of the postponement application. She was merely informing the Tribunal that she would not be in attendance at the hearing and was relying on the evidence adduced in the Claim Form and her email of 19 September 2024 as to the reasons for the late submission of her Claim Form.

21. In respect of the second matter before me, I had to be satisfied that I could deal with the jurisdiction issue before me in the absence of the Claimant pursuant to rule 47 of the Employment Tribunal Rules Procedure 2013. This rule confirms that the Tribunal may proceed with the hearing in the absence of a party but before doing so it shall consider the full information which is available to it about the reasons for the party's absence. In relation to this, I noted that the Claimant had indicated that she was not going to be in attendance at the hearing either remotely or in person. She had prior to this notification provided an explanation for the late submission of her Claim Form both in the form itself and in her e-mail of 19 September 2024 which is referenced in the facts section of this judgement. I was satisfied that I could proceed in her absence based on the explanation

for the late submission of the Claim Form in both documents referenced above. She had set out in writing why the Claim Form was submitted four months outside the primary time limit and why she had only started the ACAS early conciliation process on 15 January 2024 concluding on 16 January 2024 on which date she also filed to Claim Form at the Tribunal. I was satisfied I had enough evidence from her to fairly and reasonably determined the issue before me, namely whether it was reasonably practicable for the Claim Form to be presented in time.

22. The final issue for me was to consider whether the Tribunal had jurisdiction to hear the claim on the basis that it was presented four months outside the primary time limit expired on 13 September 2023. In relation to the test in section 23 ERA and Regulation 30(2) WTR, the question for me to determine at stage one was where a claim was presented outside the period of 3 months, I had to ask whether it was not reasonably practicable to present the claim in time and, only if it was not, go on to consider whether it was presented in a reasonable time thereafter. The two questions should not be conflated.

23. Although I have every sympathy for the Claimant as a litigant in person in not fully understanding the process and procedure in making a claim to the Employment Tribunal, I do not find that her ignorance of such process was a good reason for her presenting her claim to the Tribunal over four months out of time. It was incumbent upon the Claimant to take appropriate advice from either a Citizens Advice Bureau, Law Centre or legal aid solicitor to ascertain what rights she had following her dismissal and the time limits that applied to the lodging of Employment Tribunal claims. Furthermore, such information is readily available to litigants in person online through popular search engines such as Google that clearly set out the process that must be followed in respect of making a Tribunal claim typically within three months on the effective date of dismissal or within three months of the last date that payment of a contractual sum was due. In the Claimant's case that date was 14 June 2023, and she was required to commence the early conciliation process by no later than 13 September 2023. In fact, the Claimant says that she filed a Claim Form at the Tribunal without first completing the early conciliation process and without an ACAS certificate confirming the same. As a consequence, this form was rejected. Following her contacting the Tribunal to take advice, she did complete the early conciliation process and eventually managed to file a second Claim Form at the Tribunal on 16 January 2024. By her own admission, the mistakes that she made were due to her not fully understanding what she was supposed to be doing. The fact that she did not know what she was supposed to be doing was down to her own ignorance in not obtaining relevant advice or making reasonable enquiries herself after her dismissal on 14 June 2023. Unfortunately for her, ignorance of the process for correctly filing the Tribunal claim does not come amount to it not being reasonably practicable or feasible for her to have lodged her claim within time. She did not outline any other impediments to her not being able to lodge the Claim Form in time other than her ignorance of the law. Therefore, in such circumstances, I find that it was reasonably practicable for her to have made her claim within time by completing the ACAS early conciliation process prior to the expiry of the primary time limit on 13 September 2023.

24. Although strictly speaking, as I have found that it was reasonably practicable for the Claimant to have made her claim to the Tribunal within time, I do not have to deal with Step 2 of the process. That is, was the Claim Form presented within a reasonable time after the expiry of the primary three month period. As to this matter, the Claimant does not take the matter any further forward as she does not offer any further explanation of why she presented the Claim Form on 16 January 2024 over four months after 13 September

2023. The most she says is that she was not fully aware of the procedure as a litigant in person. In such circumstances, even if I was required to deal with this question (which I am not) she has not discharged the burden of proof that is on her to adduce evidence as to why the Claim Form was submitted on 16 January 2024. Therefore, as she has not discharged the burden on her, I am also not satisfied that the Claim Form was presented within a reasonable time of the original time limit expiring.

25. In conclusion, the Claimant's claims for unpaid holiday pay and breach of contract was presented out of time and the Tribunal has no jurisdiction to hear them. Accordingly, the claim must be struck out.

Employment Judge Hallen
Dated: 2 October 2024

JUDGMENT & REASONS SENT TO THE PARTIES ON
Date: 23 November 2024

T Cadman
FOR THE TRIBUNAL OFFICE