

# THE INDUSTRIAL TRIBUNALS

CASE REF: 13020/18

**CLAIMANT:** Ian David Graham

**RESPONDENT:** Leisure Tours NI Limited

## DECISION

The unanimous decision of the tribunal is that the tribunal does not have statutory jurisdiction to hear and to determine the claimant's claims and these claims are dismissed, without further Order.

### Constitution of Tribunal:

**Employment Judge:** Mr J V Leonard

**Members:** Mrs N Wright  
Mr W McCreight

### Appearances:

**The claimant was self-represented.**

**The respondent was represented by Mr Moore of Copacetic Business Solutions Limited.**

## BACKGROUND

1. The claimant, by claim form dated 7 September 2018 and received by the Office of Tribunals on that date, claimed against the respondent unfair dismissal, unpaid notice pay, unpaid holiday pay and arrears of pay. In the claim form the claimant indicated that his employment had ended on 12 March 2018. In response to the claim, the respondent's representative took a number of issues with the claim and, materially, contended that the claimant's claims were significantly out of time as they had been received by the Office of Tribunals on 7 September 2018; it was contended that the claimant had resigned his position of employment with the respondent on 12 March 2018.
2. The case was subject to case management and a Case Management Discussion was held by telephone conferencing on 21 January 2019. On that occasion, amongst other matters, the respondent's representative raised the issue that the claimant's claims were out of time. The Employment Judge dealing with the matter in the Case Management Discussion did not list the case for a pre-hearing review to consider whether the claimant's claims had been presented outside the requisite time period but did direct that the issue could be considered by the tribunal hearing the claim (along with any other pertinent matters as applicable).

3. At the outset of the oral hearing, the respondent's representative raised the time issue. The tribunal heard evidence from the claimant concerning that discrete issue in order to determine if the tribunal had proper jurisdiction to proceed to hear and to determine the claimant's claims, such as were set forth in the claim form.

## **THE EVIDENCE AND SUBMISSIONS CONCERNING THE TIME AND TRIBUNAL JURISDICTION ISSUE**

4. In consequence of the oral and documentary evidence adduced, the tribunal upon balance of probabilities made the following determinations of fact, pertinent to the discrete issue of the tribunal's jurisdiction, requiring determination.
  - 4.1 The claimant was employed by the respondent. The tribunal in this decision does not need to address any specific evidence regarding the employment save to say that the claimant resigned his position with the respondent, with effect from 12 March 2018. That material date is agreed, in common between the claimant and the respondent's representative on behalf of the respondent.
  - 4.2 The claimant submitted a claim form dated 7 September 2018. The claim form was stamped, as received by the Office of Tribunals on 7 September 2018. Accordingly, it is the case that a considerable period of time had passed between the date of the claimant's resignation from employment and consequent termination of the employment contract and the date of the claim being received by the Office of Tribunals. That time is well in excess of the statutory period of three months, to which period the tribunal shall refer below.
  - 4.3 Exercising an inquisitorial approach, which it is entitled to do, the tribunal explored with the claimant in his oral evidence any reason or reasons for his delaying the submission of the claim against the respondent. The claimant maintained that, firstly, he was not aware of any time limitation attaching to employment claims. Secondly, after termination of this employment with the respondent, the claimant states that he gained new employment with a transportation company and the nature of that employment meant that the claimant travelled outside Northern Ireland. It is understood that this travelling involved overnight stays in hotel accommodation in England or Scotland. The claimant indicated that this was quite a demanding job but he did concede that he had regular work breaks which he spent at home. Thirdly, the claimant's mother with whom he lived unfortunately had a fall in early April 2018 and then had to be admitted to the hospital in that month. The claimant indicated that he devoted a lot of time to caring responsibilities for his mother, this responsibility being shared with the claimant's sister. The claimant indicated that his mother's health deteriorated and she unfortunately passed away at the end of June 2018. The claimant indicated that these matters took a toll upon his own health and well-being, but that he had not attended his General Practitioner concerning ill-health until December 2018. That is some time after submission of the claim form. There was no medical evidence produced to the tribunal regarding any health-related issues which might have prevented the claimant from completing his claim in a timely manner.
  - 4.4 Further evidence emerged both in evidence-in-chief and also in response to cross-examination questions from the respondent's representative. The claimant did confirm that he had had access to IT facilities at home and that he had a mobile

telephone which the tribunal believes had access to email and Internet facilities. The claimant accordingly, it appears, had laptop facilities and Internet access in his home and also possibly on his mobile telephone. When questioned about his use of this, the claimant asserted that he only occasionally checked e-mails and certainly did not do this on a daily basis. Materially, he denied conducting any research concerning employment law at the relevant time (from the time of termination of the contract with the respondent and in the weeks thereafter up to the expiry of the relevant three months' period). Specifically the claimant denied knowledge of anything which would have alerted him to statutory time limitations. The claimant confirms that he has endeavoured to seek advice from a firm of solicitors (unidentified) in March 2018 but that only the topic of fees had been discussed and he did not proceed on that account. He maintained that he received no advice whatsoever from the solicitors, including any advice regarding time limitations. The claimant did apparently have some assistance from a Mr Clarke who appears to have assisted the claimant with a letter which he sent to the respondent dated 27 March 2018. That letter comprised a detailed claim for constructive dismissal and non-payment of wages, with a lengthy list set out in the letter of all hours worked during a specified period where the claimant asserted he had not been paid. This letter concludes with the following sentence: "*If I don't receive this (a reference to outstanding claimant entitlements) within the next 7 days I will seek compliance through the employment appeal tribunal*". That letter was sent by the claimant to the respondent. It is therefore evidently the case that the claimant had some manner of formal employment claim for redress very much in mind at this time, that is to say in late March 2018, when the letter was dispatched to the respondent. When questioned about this, the claimant was quite insistent that Mr Clarke at no time had any conversation with him or afforded him any advice whatsoever concerning statutory time limitations in regard to employment claims. He also denied seeking any further advice, including from any advice-giving agency.

## **THE LAW**

5. In this matter, the pertinent law concerning the discrete focus of the tribunal relates to time limitation and to the fundamental issue of the tribunal's statutory jurisdiction to hear and to determine the claimant's claims. As mentioned, the claimant's claims are identified in the claim form, as received by the Office of Tribunals on 7 September 2018, as: firstly, unfair dismissal, secondly notice pay, thirdly, holiday pay and fourthly and finally, arrears of pay. In respect of each of these statutory jurisdictions a time limit of three months running from the occurrence of the act complained of applies, as will be seen from the provisions mentioned below.

### **The Statutory Provisions in Regard to Time Limitation**

#### **The Employment Rights (Northern Ireland) Order 1996**

##### **Wages Deductions**

##### ***Complaint to an industrial tribunal***

**55.—(1) A worker may present a complaint to an industrial tribunal—**

- (a) *that his employer has made a deduction from his wages in contravention of Article 45 (including a deduction made in contravention of that Article as it applies by virtue of Article 50( 2)),*

.....

- (2) *Subject to paragraph (4), an industrial tribunal shall not consider a complaint under this Article unless it is presented before the end of the period of three months beginning with—*

- (a) *in the case of a complaint relating to a deduction by the employer, the date of payment of the wages from which the deduction was made,*

.....

- (4) *Where the industrial tribunal is satisfied that it was not reasonably practicable for a complaint under this Article to be presented before the end of the relevant period of three months, the tribunal may consider the complaint if it is presented within such further period as the tribunal considers reasonable.*

## **Unfair Dismissal**

### ***Complaint to an industrial tribunal***

**145.—**(1) *A complaint may be presented to an industrial tribunal against an employer by any person that he was unfairly dismissed by the employer.*

(2) *....., an industrial tribunal shall not consider a complaint under this Article 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.*

## **Working Time Regulations (Northern Ireland) 2016**

### **Holiday Pay**

#### ***Remedies***

**43.—**(1) *A worker may present a complaint to an industrial tribunal that the worker's employer—*

- (a) *has refused to permit the worker to exercise any right the worker has under—*

- (i) *regulation ..... 15 or 16;*

(2) ..... an industrial tribunal shall not consider a complaint under this regulation unless it is presented—

- (a) before the end of the period of three months..... beginning with the date on which it is alleged that the exercise of the right should have been permitted (or in the case of a rest period or leave extending over more than one day, the date on which it should have been permitted to begin) or, as the case may be, 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.

## **The Industrial Relations Extension of Jurisdiction Order (Northern Ireland) 1994**

### **Contract Claim for Outstanding Wages upon Termination of Contract**

#### ***Time within which proceedings may be brought***

*7. An industrial tribunal shall not entertain a complaint in respect of an employee's contract claim unless it is presented—*

- (a) *within the period of three months beginning with the effective date of termination of the contract giving rise to the claim;*
- (b) *where there is no effective date of termination, within a period of three months beginning with the last day upon which the employee worked in the employment which has terminated; or*
- (c) *where the tribunal is satisfied that it was not reasonably practicable for the complaint to be presented within whichever of those periods is applicable, within such further period as the tribunal considers reasonable.*

### **THE TRIBUNAL'S DETERMINATION OF THE ISSUE OF JURISDICTION**

6. As can be seen, the foregoing statutory provisions of the 1996 Order, the Working Time Regulations and the Industrial Relations Extension of Jurisdiction Order (Northern Ireland) 1994 provide (in relatively similar terms) for a period of three months from the relevant date to pursue a claim. In the case of a dismissal (constructive or otherwise) or other termination of the employment contract, the material date is the effective date of termination. Here, it appears to be common case between the parties that this material date was 12 March 2018, in regard to all statutory heads of claim. The tribunal finds that date to be the effective date of termination of contract and also the material date for the statutory provisions.
7. In this case the respondent's representatives, in the response, have identified the time limitation issue and have made a submission that the tribunal does not have

jurisdiction to hear any of the claimant's claims, amongst other matters, for the reason that the claimant's claims are significantly out of time.

8. There are potentially two stages in matters of this nature, the second of which stages is not required to be examined by the tribunal in this case, for the reasons indicated. Firstly, any claimant must show that it was not reasonably practicable to present his claim in time. The burden of proving this rests upon the claimant (see ***Porter v Bandridge Ltd [1978] IRLR 271, [1978] ICR 943, CA***). Second, if the claimant were to succeed in demonstrating this, the tribunal must be satisfied that the time within which the claim was in fact presented was reasonable. However, upon the facts of this case the tribunal is confined only to assessing the first stage: the issue of “reasonable practicability” concerning the presentation of the claim in time.
9. The question of what is or is not reasonably practicable is essentially one of fact for the employment tribunal to decide. There is authority that appellate courts shall be slow to interfere with the tribunal's decision in that regard (see ***Palmer and Saunders v Southend-on-Sea Borough Council, [1984] IRLR 119, CA, Wall's Meat Co Ltd v Khan [1979] ICR 52, CA, Riley v Tesco Stores Ltd [1980] IRLR 103, CA***). The tribunal must therefore address its mind to the question of reasonable practicability.
10. The leading authority on the subject is the decision of the Court of Appeal in ***Palmer and Saunders v Southend-on-Sea Borough Council [1984] IRLR 119, CA***. In that case, May LJ, who gave the judgment of the court, undertook a comprehensive review of the authorities, and concluded that the liberal construction was easier to state than to apply in practice. What he proposed was a test of '*reasonable feasibility*'. Here the Court of Appeal rejected the two possible extremes of construction: pure reasonableness and physical possibility. The relevant factors are many and various and (as was stated in ***Palmer and Saunders***) cannot be exhaustively described, for they will depend upon the circumstances of each case. However considerations might include the manner of and reason for any dismissal (in an unfair dismissal case); whether the employer's conciliatory appeals machinery had been used; the substantial cause of the claimant's failure to comply with the time limit; whether there was any physical impediment preventing compliance, such as illness, or a postal strike; whether, and if so when, the claimant knew of his rights; whether the employer had misrepresented any relevant matter to the employee; whether the claimant had been advised by anyone, and the nature of any advice given; and whether there was any substantial fault on the part of the claimant or his adviser which led to the failure to present the complaint in time. It is for the tribunal to consider and to evaluate the reasons put forward by the claimant.
11. Having carefully considered the account of matters put forward by the claimant in his evidence and, especially so, any reasons provided by him for his failure to submit the claim form in a timely manner, the tribunal observes nothing of such material significance as would have impeded the claimant in submitting his claim form in time. Certainly, there is no medical evidence of any disabling ill-health. The claimant appears to have been able to function normally and to perform in subsequent employment and indeed to engage in the task of writing a letter of claim to the respondent in the days shortly after the contract came to an end. There is no doubt that the claimant appears to have had a relatively demanding job following the termination of contract but he also was afforded free time, both during the

course of the working week for rest breaks and also at home. The claimant also had caring responsibilities, together with his sister, for his mother who then was taken into residential or hospital care and who regrettably subsequently passed away. There is no doubt that this was a difficult time for the claimant. However, the tribunal does not observe anything in all of this presenting an insurmountable or extremely difficult obstacle to the claimant in submitting a timely claim. It is noted that the claimant had IT access and indeed had some assistance from a Mr Clarke. This latter person appears to have been, to some degree, conversant with industrial relations matters, notwithstanding the claimant's denial that Mr Clarke afforded him any advice concerning time limitations. The claimant indeed mentioned that Mr Clarke had explained to him the concept of constructive dismissal. It is difficult to determine if the claimant had indeed no knowledge whatsoever about time limitation, notwithstanding his denial that he had insufficient information. The tribunal notes that access to employment law advice and information for anyone with IT facilities is readily available on the Internet and that the claimant had already indicated, at an early stage, an intention to make a claim against the respondent. However, giving the claimant the benefit of the doubt upon this issue, the claimant is still very considerably out of time, not just by a few days but by a number of months.

12. The test of what is, or is not, reasonably practicable, as the law currently stands, is a difficult threshold to attain and is quite different, for example, to the test to be applied in claims of unlawful discrimination. The matter is to be assessed not by what is just and equitable but rather by what is reasonably practicable - or reasonably feasible.
13. Considering all of the evidence and the pertinent facts, the tribunal's determination is that the claimant has failed to satisfy the tribunal that it was not reasonably practicable for the claimant to have presented his claim in time. For this reason, the claimant falls at this hurdle. Consequently the case does not meet the statutory thresholds mentioned in the provisions above. The tribunal has no jurisdiction to hear and to determine the claimant's claims, all of which are subject to a statutory limitation of three months. For these reasons, the claimant's claim is dismissed, in its entirety, without further Order.

**Employment Judge:**

**Date and place of hearing: 10 April 2019, Belfast**

**Date decision recorded in register and issued to parties:**