

THE INDUSTRIAL TRIBUNALS AND FAIR EMPLOYMENT TRIBUNAL

CASE REF: 1836/20

CLAIMANT: Norman Walker

RESPONDENT: Four Seasons Health Care (NI) Ltd

JUDGMENT OF A PRELIMINARY HEARING (JURISDICTION)

The judgment of the tribunal is that the claimant's claim in respect of unfair dismissal was not presented within time. The tribunal therefore does not have jurisdiction to hear the claimant's claim and the claim is dismissed.

Summary

1. The tribunal finds that the claimant's effective date of termination (EDT) was 19 August 2019.
2. The tribunal finds that the claimant's claim of unfair dismissal was not presented before the end of the three months beginning with the EDT (i.e. 19 November 2019).
3. The tribunal finds that the claimant's claim was presented on 3 December 2019 and was therefore fourteen days out of time.
4. The tribunal finds that it is not satisfied that it was not reasonably practicable for the claimant's complaint to be presented before the end of the statutory time period (i.e. 19 November 2019).

CONSTITUTION OF TRIBUNAL

Employment Judge (sitting alone): Employment Judge Sturgeon

APPEARANCES:

The claimant appeared and was self-representing.

The respondent was represented by Mrs S Murphy of Murphy Solicitors.

BACKGROUND

1. The claimant presented his complaint to the Industrial Tribunal on 3 December 2019. In that complaint, he alleged that he had been unfairly

dismissed. The respondent presented its response on 24 February 2020. It resisted the claimant's claim and contended that the claimant was fairly dismissed, on the grounds of some other substantial reason, on 5 November 2018. The respondent contended that the claim was presented outside the statutory time limit.

THE RELEVANT STATUTORY PROVISIONS

2. The law in relation to the period for presenting a claim of unfair dismissal is set out in Article 145 of the Employment Rights (Northern Ireland) Order 1996 as follows:

“145(2) Subject to the following provisions of this Article, 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.*

THE ISSUES

3. The issues to be determined at this Preliminary Hearing were as follows:-
- (i) When was the effective date of the claimant's termination of employment (*Article 145(2)(a) of the Employment Rights (NI) Order 1996*)?
 - (ii) Whether the claimant's claim of unfair dismissal was presented to the tribunal before the end of the period of three months beginning with the effective date of termination (*Article 145(2)(a) of the Employment Rights (NI) Order 1996*)?
 - (iii) If not, whether it was reasonably practicable for the claimant to have presented his claim before the end of that period of three months (*Article 145(2)(b) of the Employment Rights (NI) Order 1996*)?
 - (iv) If not, whether the claimant presented his claim within a further reasonable period (*Article 145(2)(b) of the Employment Rights (NI) Order 1996*)?

SOURCES OF EVIDENCE

4. The tribunal considered the claim form and the response form. The tribunal also heard sworn oral evidence (both direct and through cross-examination) from the claimant. In addition, the tribunal considered the following relevant documentation referred to in the course of the hearing:
- (i) a letter to the claimant from the respondent of 5 November 2018 (“the dismissal letter”); and
 - (ii) various email correspondence between the parties in January 2021.

ISSUE 1 : When was the effective date of the claimant's termination of employment (Article 145(2)(a) of the Employment Rights (NI) Order 1996)?

5. The first issue to be determined, by this tribunal, was the effective date of termination (EDT).

RELEVANT LAW

6. In Harvey on Industrial Relations and Employment Law, it is stated at section Q, paragraph 97:-

Date on which the termination by letter takes effect

Where dismissal is communicated to the employee in a letter, the contract of employment does not terminate until the employee has actually read the letter or had a reasonable opportunity of reading it; the effective date of termination is not retroactive to the date that the letter written, posted or delivered, but is the date when the employee either does read the letter or reasonably had the opportunity of knowing about it: ***Brown v Southall and Knight [1980] IRLR 130, [1980] ICR 617, EAT***. This was taken further (and actual receipt stressed) in ***McMaster v Manchester Airport plc [1998] IRLR 112, EAT*** where it was held that there is no place for the doctrine of constructive notice, except perhaps where the employee deliberately fails or refuses to read the letter. *Brown* and *McMaster* were approved by the Supreme Court in ***Gisda Cyf v Barratt [2010] UKSC 41, [2010] IRLR 1073, [2010] ICR 1475, SC***, where it was added that in applying the 'secondary' test (when the employee had had a reasonable opportunity to read the letter) a subjective approach is to be taken (not a narrower 'practically feasible' approach), 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. To concentrate exclusively on what is practically feasible may compromise the concept of what can realistically be expected'. Where however the employee is informed through a third party(eg the solicitor acting in the case) that he or she is dismissed, that actual knowledge is sufficient under ***Gisda Cyf***, even if the formal letter of dismissal arrives later: ***Robinson v Fairhill Medical Practice UKEAT/0313/12*** (20 November 2013, unreported).

RELEVANT FINDINGS OF FACT AND CONCLUSIONS

7. The tribunal has made the following relevant findings of fact and conclusions in relation to issue one:
- 7.1 The claimant commenced employment as a nurse in clinical lead at Four Seasons Healthcare on 10 January 2017.
- 7.2 The claimant was suspended on full pay, by the respondent, on 20 June 2018 as a consequence of serious allegations made against him in the course of his work. Such allegations were referred to the statutory authorities. The claimant was arrested by the PSNI, as a result of the investigations, and released

on police bail while further investigations were made. It was a condition of the claimant's bail that he should not attend work premises while these further investigations were being carried out.

- 7.3 During the period while an investigation was being conducted by the statutory authorities, the respondent was advised that it would not be appropriate for it to trigger its own internal investigation into the circumstances of the allegations on the basis that such an investigation may compromise the external investigation.
- 7.4 The claimant was invited to attend a meeting with the respondent, on 17 October 2018, to consider if it was reasonable to continue to employ the claimant on the basis that he was not able to attend work and carry out his duties while an external investigation was going on. The claimant was advised that, if it was determined that it was not reasonable to continue the employment relationship, he may be dismissed with notice.
- 7.5 The claimant did not attend this meeting.
- 7.6 In the interests of providing the claimant with a further opportunity to explain his position, the respondent organised another meeting for 24 October 2018.
- 7.7 The claimant only became aware of this scheduled meeting of 24 October 2018 the day before, i.e. 23 October 2018, when two staff came to his home address and informed him that he had to respond and attend a meeting the next day to discuss his ongoing employment situation.
- 7.8 The claimant did not attend this meeting on 24 October 2018 as he believed that, in doing so, it would breach his bail conditions.
- 7.9 The outcome of the meeting of 24 October 2018 was that the claimant's employment was terminated with notice.
- 7.10 The claimant was sent a dismissal letter on 5th November 2018. This letter confirmed that the claimant would be paid notice pay and any accrued but untaken holiday pay.
- 7.11 There is a dispute between the parties as to whether or not the claimant received this dismissal letter of 5 November 2018.
- 7.12 The claimant submitted he didn't receive the dismissal letter. The claimant submitted that he only became aware of his dismissal when he received a letter, from the respondent, on 19 August 2019 (see 7.20 below), informing him that a management meeting had taken place on 24 October 2018 at which a decision had been made to terminate his employment on 5 November 2018.
- 7.13 Under cross-examination, the claimant accepted that he received no further wages payment from the respondent after December 2018. When questioned as to whether or not he found this odd, the claimant submitted that he believed this was because his payment of wages, while on suspension, became exhausted in December 2018 and that further wages payments would resume whenever the claimant could resume work again for the respondent.

- 7.14 The respondent submitted the claimant did receive the dismissal letter. The respondent submitted that the dismissal letter was sent by post and email on 5 November 2018 and therefore the claimant was aware of the termination date when he received the letter and/or the email. The respondent also submitted that, as the claimant received no further wages after December 2018, this should have alerted the claimant to the fact that his employment had been terminated at the meeting on 24 October 2018.
- 7.15 Having considered and balanced both the oral and documentary evidence and the submissions of both parties in relation to this disputed point regarding the claimant's knowledge of his termination, the tribunal is satisfied, on balance, that the claimant did not receive notification of his dismissal by letter of 5 November 2018 and that he only became aware of his dismissal on 19 August 2019. The tribunal has reached this finding of fact for the following reasons:
- 7.15.1 the tribunal notes that the dismissal letter was sent to an address in Scotland (i.e. Kiloran, Main Street, Cairnryan, Stranraer, DG6 8QX). The tribunal finds it odd that neither the claimant nor the respondent provided an explanation to the tribunal as to why his address was in Scotland, at this time, despite the claimant working in Northern Ireland;
- 7.15.2 the dismissal letter also states that it was sent by email to the claimant. However, no evidence of this email was presented to the tribunal by the respondent;
- 7.15.3 the tribunal was not provided with any copy or confirmation email that the claimant received a P45 in or around November 2018.
- 7.16 The claimant received a call from the PSNI, on 10 May 2019, informing him that investigations had now been concluded and that there would be no prosecutions made against him.
- 7.17 A letter, to this effect, was sent to the claimant on 12 August 2019 from the Public Prosecution Service (PPS) confirming that there would be no further investigations.
- 7.18 Upon receipt of this letter from the PPS, the claimant, in consultation with his Union, made the decision to contact the respondent to enquire when he could now resume work. Having consulted with his Union, the claimant therefore sent a letter to the respondent informing them he was now available for interview, to discuss a return to work date, and he also sent them a copy of the letter from the PPS informing him that there would be no further prosecution. If the claimant had received the dismissal letter of 5 November 2018, it is unlikely that he would have taken these steps.
- 7.19 Thereafter, the claimant received a letter, on 19 August 2019, from the respondent, informing him that a management meeting had taken place on 24 October 2018 and that the outcome of the meeting was that his contract had been terminated on 5 November 2018.
- 7.20 The tribunal therefore finds that the effective date of termination of the claimant's employment is 19 August 2019 and not 5 November 2018.

- 7.21 The claimant informed his solicitor sometime after the 19 August 2019, but before the end of August 2019, that his contract had been terminated. His solicitor informed him that he could possibly be outside the three month time-limit for bringing an unfair dismissal claim. The claimant's solicitor suggested to the claimant that he take advice from a specialist employment lawyer.
- 7.22 The claimant spoke with the Citizens Advice Bureau and the Labour Relations Agency towards the latter half of August 2019. Both organisations told him that he must lodge a claim form within three months of the termination of his employment or, if that time limit had expired, as soon as possible thereafter.
- 7.23 A claim form, complaining of unfair dismissal, was received in the tribunal office on 3 December 2019 - almost thirteen months after the date of his dismissal, on 5 November 2018, and over three months after the claimant knew of his dismissal on 19 August 2019.

ISSUE 2 : Was the claimant's claim of unfair dismissal presented to the tribunal before the end of the period of three months beginning with the effective date of termination (*Article 145(2)(a) of the Employment Rights (NI) Order 1996*)?

RELEVANT FINDINGS OF FACT AND CONCLUSION

8. As this tribunal finds, at 7.20 above, that the EDT was 19 August 2019, the claimant had until 19 November 2019 to present his claim for unfair dismissal to the tribunal. However, the claim form was not presented until 3 December 2019 (see 7.23 above), 14 days later. This tribunal therefore concludes that the claimant's claim of unfair dismissal was not presented to the tribunal before the end of the period of three months beginning with the effective date of termination.

ISSUE 3 : If the claimant's claim of unfair dismissal was not presented to the tribunal before the end of the period of three months beginning with the effective date of termination, was it not reasonably practicable for the claimant to have presented his claim before the end of that period of three months (*Article 145(2)(b) of the Employment Rights (NI) Order 1996*)?

THE RELEVANT LAW

9. In **Harvey** on Industrial Relations and Employment Law, Section P1, paragraph 346, it is stated as follows in relation to the 'reasonably practicable' test:-

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There are two limbs to this formula. First, the employee must show that it was not reasonably practicable to present his claim in time. The burden of proving this rests firmly on the applicant (*Porter v Bandridge Ltd [1978] IRLR 271, [1978] ICR 943, CA*). Second, if he succeeds in doing so, the tribunal must be satisfied that the time within which the claim was in fact presented was reasonable (see para [209] below).

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It is important to bear in mind that the question of what is or is not reasonably practicable is essentially one of fact for the employment tribunal to decide, and the appellate courts will be slow to interfere with the tribunal's decision (***Palmer and Saunders v Southend-on-Sea Borough Council* [1984] 1 All ER 945, [1984] IRLR 119, CA, *Wall's Meat Co Ltd v Khan* [1979] ICR 52, CA, *Riley v Tesco Stores Ltd* [1980] IRLR 103, [1980] ICR 323, CA**). The tribunal must, however, address its mind to the question of reasonable practicability, where this is the test, and not simply state that it has a 'discretion to extend time', and must, moreover, make a precise finding as to the nature of the complaint in question, and as to the relevant starting date of the limitation period governing it before proceeding to consider whether any extension is appropriate (see ***Taylorplan Services Ltd v Jackson* [1996] IRLR 184, EAT**).

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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] 1 All ER 945, [1984] IRLR 119, [1984] ICR 372, 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*'. He explained his reasoning as follows ([1984] ICR at 384, 385):

"[W]e think that one can say that to construe the words "reasonably practicable" as the equivalent of "reasonable" is to take a view that is too favourable to the employee. On the other hand, "reasonably practicable" means more than merely what is reasonably capable physically of being done—different, for instance, from its construction in the context of the legislation relating to factories: compare ***Marshall v Gotham Co Ltd* [1954] AC 360, HL**. In the context in which the words are used in the 1978 Consolidation Act, however ineptly as we think, they mean something between these two. Perhaps to read the word "practicable" as the equivalent of "feasible" as Sir John Brightman did in [*Singh v Post Office* [1973] ICR 437, NIRC] and to ask colloquially and untrammelled by too much legal logic—"was it reasonably feasible to present the complaint to the [employment] tribunal within the relevant three months?"—is the best approach to the correct application of the relevant subsection."

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The possible factors are many and various, and, as May LJ stated in ***Palmer and Saunders***, cannot be exhaustively described, for they will depend on the

circumstances of each case. The learned judge nevertheless listed a number of considerations, collated from the authorities, which might be investigated (see **[1984] IRLR at 125, [1984] ICR at 385**). These included the manner of, and reason for, the dismissal; 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.

RELEVANT FINDINGS OF FACT AND CONCLUSIONS

10. The legal authorities, at paragraph 9 above, are clear that it is for the claimant to persuade the tribunal that it was not reasonably feasible for him to present his claim for unfair dismissal within the three month time limit.
11. In light of the fact that the EDT is 19 August 2019, the claimant had until 19 November to lodge his claim within the statutory time limit. However, the claimant did not lodge his claim until 3 December 2020, fourteen days later. The claimant's explanation for not lodging it until 3 December 2020 was as follows:
 - i. the claimant was concerned about the health of his wife, who was due to have a baby in November 2019. The claimant's baby arrived three weeks early on 23 October 2019. The claimant stated that his main priority, during this time period, was his wife and new daughter;
 - ii. the claimant informed the tribunal that this whole period (i.e. from the time he was suspended, in June 2018, until finding out about his dismissal in August 2019) was very upsetting and distressing for him and that he attended to matters only as and when he felt he could deal with them;
 - iii. the claimant informed the tribunal that he acted as quickly as he could in the circumstances;
12. While the tribunal has sympathy for the claimant and his circumstances at the time, the tribunal concludes that the explanation provided by the claimant has not persuaded the tribunal that it was not reasonably practicable for him to lodge his claim form within the time limit. The tribunal makes this conclusion for the following reasons:
 - i. the claimant confirmed, in evidence, that a solicitor made him aware of a three month time-limit, within which to bring a tribunal claim, either on or shortly after 19 August 2019 and certainly before the end of August 2019. The claimant therefore knew, very promptly, after finding out about his dismissal that there was a strict three month time limit within which to bring an unfair dismissal claim;

- ii. the claimant confirmed in evidence that he had been told of a three month time-limit, by the Labour Relations Agency (LRA), towards the latter half of August 2019;
- iii. the claimant was receiving the help and assistance of his Union throughout this time having been advised by his Union, in August 2019, to enquire when he could return to work;
- iv. the claimant was therefore well aware, by the end of August 2019, having had the benefit of Union advice, and having been told by both his solicitor and the LRA, that he had a three month time limit within which to bring an unfair dismissal claim;
- v. the claimant's wife gave birth to their first child, three weeks' early, on 23 October 2019. Notwithstanding this, the claimant still had until 19 November to lodge his claim but did not do so. The tribunal does not consider the early arrival of the claimant's baby a cogent reason for not presenting his claim form on time;
- vi. the claimant made reference to his own health issues in tribunal. However, the tribunal was presented with no medical evidence from the claimant as to why he could not pursue his claim by lodging a tribunal form particularly when the claimant had been made aware, by a solicitor, the LRA, Citizens Advice and his Union to move quickly to protect his position;
- vii. this is not a case where the claimant was ignorant of time limits as he confirmed that he was aware of his rights. He had access to and availed of advice but delayed in protecting his position.

ISSUE 4 : If the tribunal is satisfied that it was not reasonably practicable to present his claim within the statutory time limit, did the claimant present his claim within a further reasonable period thereafter (*Article 145(2)(b) of the Employment Rights (NI) Order 1996*)?

THE RELEVANT LAW

13. In **Harvey** on Industrial Relations and Employment Law, Section P1, paragraph 346, it is stated as follows in relation to the 'reasonably practicable' test:-

(iii) Reasonable time

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Where the claimant satisfies the tribunal that it was not reasonably practicable to present his claim in time, the tribunal must then proceed to consider whether it was presented within a reasonable time thereafter. Although, as Lord Denning MR pointed out in the **Wall's Meat** case, this is 'very much a matter for the [employment] tribunal', the tribunal must nevertheless exercise its discretion reasonably and with due regard to the circumstances of the delay. The discretion does not give carte blanche to a tribunal to entertain a

claim 'however late it was presented' (*Westward Circuits Ltd v Read* [1973] 2 All ER 1013, [1973] ICR 301, NIRC).

14. In light of the tribunal's finding that the claimant has not persuaded the tribunal that it was not reasonably practicable for him to lodge his claim form within the time limit, it is not necessary for this tribunal to make any finding in relation to this fourth issue.
15. However, even if the tribunal had been disposed to conclude that it was not reasonably practicable for his complaint to be presented before the end of the period of three months beginning with the effective date of termination, the tribunal would still have found that the claimant did not present his claim within a reasonable period thereafter. The tribunal would have made this finding as the claimant was well aware of the three month time limit having been told the time limit by a solicitor, the LRA and his Union. The claimant confirmed this in evidence. However, despite knowing of this time limit, the claimant still did not pursue lodging a claim with any great speed or diligence and he still waited a further fourteen days, beyond the statutory time limit, to lodge his claim.

SUMMARY

16. The legal authorities are clear that time-limits are strict in these cases and the burden is on the claimant to persuade the tribunal that it was not reasonably practicable for him to present his claim within the time-limit and, if not, whether the claimant presented his claim within a further reasonable period.
17. In the circumstances of this case, I find that the EDT was 19 August 2019, the claim form lodged on 3rd December 2019 was 14 days late, it was reasonable practicable for the claim form to be lodged within the time limit and the tribunal therefore declines to extend time.
18. As the claim was lodged outside the time-limit, the tribunal has no jurisdiction to entertain it and the claim is dismissed in its entirety.

Employment Judge:

Date and place of hearing: 14th January 2021, Belfast.

This judgment was entered in the register and issued to the parties on: