THE INDUSTRIAL TRIBUNALS

CASE REF: 1098/19

CLAIMANT: **Alan Bothwell**

RESPONDENT: **J & M Crawford Limited**

DECISION ON A PRE HEARING REVIEW

The decision of the tribunal on the Pre-Hearing Review is the claimant's claim in respect of holiday pay based on the Working Time Regulations was outside the statutory time limit of three months. The claimant failed to satisfy the tribunal that it was not practicable to lodge the relevant claim within the 3 month time limit. Accordingly the claim is dismissed for want of jurisdiction.

Constitution of Tribunal:

Employment Judge (sitting alone): **Employment Judge Sheehan**

Appearances:

The claimant appeared and represented himself.

The respondent appeared and was represented by Mr John Crawford, a Director of the respondent company.

REASONS

1. This was a Pre–Hearing Review to determine, as directed following the Case Management Discussion held on 4 April 2019, whether it had been reasonably practicable for the claimant to bring his claim in respect of holiday pay within the statutory time limit of three months and, if not, whether the claimant had brought the relevant claim within such further period as was reasonable.

2. By claim received in the Office of Industrial Tribunal and Fair Employment Tribunal (OITFET) on 28 December 2018, the claimant made claims against the respondent, concerning holiday pay from when the employment commenced in 2017 to its termination.

3. The respondent's response accepted the claimant was an employee. It described the claimant as suiting "himself when he wanted to work, didn't turn into work, that the claimant was employed as a part time driver when work was available". In respect of earnings the respondent described the claimant as having variable working hours per week and was only paid by the hour when working in the Republic of Ireland and Northern Ireland. When delivering loads from the

respondent's base in Northern Ireland to England, Wales or Scotland the claimant was paid a fixed sum for the task as opposed to an hourly rate for the hours worked. The respondent queried whether the claim was in time.

4. The claim form included claims concerning holiday pay in the first and second year of the claimant's employment with the respondent. This required the tribunal to determine whether the claim concerned alleged breach of contract and/or the Working Time Regulations. The issues to be determined included (a) what was the claimant's holiday year, (b) what was the relevant date when the claimant exercised his right to paid holiday leave (c) what was the date employment ceased and (d) what was the date the claimant became aware that the respondent failed to provide money in lieu of outstanding holiday entitlement at the end of the claimant's employment.

EVIDENCE

5. The tribunal heard oral evidence from the claimant and from the respondent's representative, John Crawford, a Director of the respondent. The tribunal struggled at times to obtain from either witness a clear and coherent factual history of the working relationship between the claimant and the respondent company. John Crawford was unconvincing in regard to records maintained by the company to ensure legal obligations regarding minimum wage and holiday entitlement were satisfied. At the same time the claimant gave three different versions of what he told the ACAS staff regarding his working location with two versions clearly contradicted by documents issued to the claimant by ACAS personnel.

FINDINGS OF FACT

6. In consequence of the oral and documentary evidence adduced at hearing, the tribunal made the following findings of fact, upon the balance of probabilities:-

6.1 The parties did not agree when employment commenced, so the tribunal relied on a hand written wages record which indicated the first pay week was week 15 of the tax year 2017 to 2018, to conclude that the claimant's employment commenced on 17 July 2017. The claimant was employed as a lorry driver delivering loads mainly cross channel to locations in England but also to locations within the Republic of Ireland and Northern Ireland. The claimant did not have specified contractual hours per week. At the time of termination of his employment the claimant was paid by the hour for deliveries in Ireland, North or South, but was paid an agreed fixed sum of money and an overnight allowance for deliveries from Northern Ireland to Scotland, Wales or England.

6.2 No Statement of Main Terms and Conditions or other contractual documents was ever provided by the respondent company. Both parties agreed that it was indicated to the claimant at the outset of the contractual relationship that if the respondent had no immediate work to offer the claimant, the claimant would not be paid. The claimant accepted this arrangement when it occurred for a small number of weeks in 2017. Accordingly as there was no contractual holiday year, the holiday year would be governed by legislation.

6.3 The respondent company is a family owned company with full time employees in the factory. The respondent employed two full time drivers and two designated part time drivers. The claimant fell within the part time group. John Crawford's wife and

son, Jonathan Crawford, worked in the company as well. His wife worked in the office and Jonathan was responsible for the organisation of the lorry drivers and the allocation of loads for delivery.

6.4 The respondent company gave no indication during evidence whether the claimant was a mobile worker within the Working Time (Northern Ireland) Regulations 2016 or the Road Transport (Working Time) Regulations (Northern Ireland) 2005 (as amended). However entitlement to paid annual leave of 28 working days extends to workers who are subject to the Road Transport Directive.

6.5 The respondent accepted that no payment was made in 2018 in respect of any holiday entitlement accrued. The only paid holiday leave availed of by the claimant at the time of termination of his contract with the respondent company occurred on 12 July 2018.

6.6 The respondent accepted no calculation was made of the hours worked by the claimant during the relevant holiday year period. The respondent by the date of hearing had not furnished to the claimant a P45 or a P60 for the tax year completed on 4 April 2019.

6.7 From 5 April 2018 the company ceased to provide a pay slip to the claimant that detailed the number of hours worked and the hourly rate of pay accrued for that pay period. The respondent continued to provide pay slips with these details to the factory workers. No evidence was provided that a separate record of the claimant's hours worked was maintained by the respondent.

6.8 The claimant took a month off work in April 2018, on leave, as he wished to spend time with visiting relatives. No payment was made to the claimant during that leave. When the claimant returned from the leave an increase in the rate of pay to be tendered for delivery of loads to England, Wales or Scotland was agreed taking the fixed sum payment from £100 to £120.

6.9 The claimant received paid leave on 12 July 2018. No other leave was taken or requested before the claimant was certified as unfit for work on 20 July 2018. A series of unfit to work notes covering the period 20 July 2018 to 14 September 2018 was submitted to the respondent. On 14 September 2018 a conversation took place between the claimant and John Crawford regarding the claimant returning to work on Monday 17 September 2018 to deliver a load to a location in England.

6.10 The claimant, following the conversation with John Crawford on 14 September, requested from Jonathan Crawford 4 weeks leave commencing on 17 September 2018. Neither party made a record of any conversation held on 14 or 15 September 2018. Texts evidenced by the claimant led the tribunal to conclude the respondent refused the leave request. The respondent insisted the claimant must attend work on 17 September 2018 and the "company would take it you have resigned" if no response by 2.30 pm indicating the claimant would be picking up the load on Monday 17 September 2018. The claimant did not indicate he would attend but did enquire about outstanding holiday pay that same day.

6.11 The claimant did not report for work on 17 September 2019 and no further contact occurred with the respondent company in September 2018. A wages lodgement, equating to the statutory sick payments made in the preceding weeks, was made to

the claimant's bank account on 21 September 2018. No pay slip was issued to the claimant in respect of that wages payment.

6.12 On 21 September 2018 the claimant knew from his bank account that no payment in respect of holiday pay accrued had been made.

6.13 The claimant produced medical evidence that he was dyslexic and requires help with reading. The claimant relied on a particular friend, a relative, to assist him in preparing letters and the claim form sent in regard to this dispute over holiday pay. The claimant also relied on this friend to assist him in understanding documents forwarded to him. The claimant confirmed his friend did look at the guidance.

6.14 On 15 October 2018 the claimant accessed a Gov.UK website to inform himself as to his entitlements for paid holiday leave. The claimant sent a registered letter to the respondent company dated 25 October 2018. The letter sought holiday pay owed and also queried whether the claimant had been paid in accordance with minimum wage regulations. The respondent company refused to sign for the letter when delivery was attempted on 26 October 2018. No explanation for the failure to sign for a registered letter was provided.

6.15 An accountant employed by the claimant to complete his tax returns had mentioned ACAS to the claimant. The claimant contacted the ACAS helpline on 3 November 2018. An early conciliation form was completed by the claimant and acknowledged by ACAS on 6 November 2018. The claimant, at that time, was unaware that ACAS had no remit within Northern Ireland. ACAS forwarded a number of links to the claimant following his call to their helpline. These links included the ACAS early conciliation guidance as well as a link to Employment Tribunal Guidance.

6.16 The ACAS website does not specifically state that the services provided do not extend to Northern Ireland. There is no reference or link provided to the equivalent organisation operating in Northern Ireland, the Labour Relations Agency. The guidance documents provided by ACAS make specific reference only to England, Wales and Scotland. The Employment Tribunal guidance makes reference only to England, Wales and Scotland. The Tribunal guidance document has a specific section that draws a reader's attention to the limited circumstances where dual jurisdiction might apply, as between England and Wales or Scotland. No reference to Northern Ireland is made in either the ACAS or the Employment Tribunal guidance. The helpline numbers provided are for phone numbers in England, Wales and Scotland.

6.17 The claimant gave three different versions of what ACAS was told regarding his employment history with the respondent. The claimant's evidence that ACAS only became aware that the claimant was resident in Northern Ireland on 18 December 2018 was not credible given the letter from ACAS dated 6 November 2018 (B2) and the certificate of early conciliation issued on 6 December 2018 attached to an email (B3). Both documents were addressed to the claimant's residence in Northern Ireland and also detailed the respondent's business address in Northern Ireland.

6.18 The tribunal concluded that ACAS had been advised by the claimant that he had worked in England for the respondent without mention of working in Northern Ireland or the Republic of Ireland.

6.19 The letter emailed from ACAS (B2) advised it was necessary to lodge a claim with the tribunal before the three month time limit expired. It also stated that responsibility to ensure any tribunal claim is submitted in time fell on the claimant. Another email on 11 December 2018 from ACAS (B3) advised the claimant again it was his responsibility to make a claim within the time limits. The email (B3) indicated more information could be found on the Employment Tribunal website.

6.20 The claimant did not complete a claim form and submit same to the Employment Tribunal until 18 December 2018. No reason was provided for the lack of action between 11 December and 18 December 2018. By letter 20 December 2018 the Employment Tribunal Central Office for England and Wales returned the application advising the application was outside their jurisdiction. The letter advised the claimant he needed to send the claim to the Industrial Tribunal office in Belfast. The full address for that Belfast office as well as a phone number was provided. The claimant received this communication on 22 December 2018.

6.21 The claimant knew it was necessary for the claim to be submitted by 20 December 2018 as an ACAS worker had mentioned that date to him. No attempt to communicate with the Tribunal office in Belfast by telephone to access information as to the quickest means of resubmitting the claim was made by or on behalf of the claimant. No new claim form was downloaded from or completed on the Industrial Tribunal website. The same claim form which had been returned by the Employment Tribunal for England and Wales was sent by post and received on Friday 28 December 2018 by the Tribunal office in Belfast.

6.22 The tribunal does not need to make any other findings of fact for the purposes of reaching a decision in the case.

THE APPLICABLE LAW

7. Mobile workers in road transport are covered by the Road Transport Directive (2002/15/EC). This Directive affects mobile workers who are participating in transport activities covered by the Community Drivers' Hours Regulation (EC No. 561/06). A 'mobile worker' is defined in the Regulations as any worker employed as a member of travelling or flying personnel by an undertaking which operates transport services for passengers or goods by road or air. This includes drivers, members of the vehicle crew and any others who form part of the travelling staff. These workers are excluded from a number of the limits and entitlements in the Regulations such as: i) the 48-hour week; (ii) length of night work; (iii) monotonous work; (iv) daily rest; (v) weekly rest; and (vi) rest breaks. Such workers who are not already covered by the Civil Aviation or Road Transport Directives are excluded from certain provisions within the Working Time Regulations (Northern Ireland) 2016 such as: length of night work, daily rest, weekly rest and rest breaks. However it is clear that under both regulations a worker is entitled to 28 days annual leave entitlement or pro rata entitlement if a part time worker.

7.1 Where a worker has not received holiday pay owing, a worker may potentially bring a claim for breach of the Working Time Regulations (Northern Ireland) 2016 (Regulation 15 to 17) and/or for an unauthorised deduction of wages contrary to Article 45 (1) of the Employment Rights (Northern Ireland) Order 1996. If the claimant's employment is ended they may, as the claimant as done in this case bring a breach of contract claim in the Employment Tribunal, under Article 3 of the

Industrial Tribunals Extension of Jurisdiction Order (Northern Ireland) 1994, for the breach of their contractual right to holiday pay.

7.2 Leave to which a worker is entitled may only be taken in the leave year in which it is due and not be replaced by a payment in lieu except where the worker's employment is terminated (Regulation 15 (5) The Working Time Regulations (Northern Ireland) 2016).

7.3 Compensation, by way of a payment in lieu of leave accrued but not taken by the date the worker's employment is terminated is allowed under Regulation 17 (2) The Working Time Regulations (Northern Ireland) 2016. In the absence of a contractual agreement the amount of money to be paid is calculated in accordance with Regulation 17 (3).

7.4 The issue of what happens to annual leave when an employee is on sick leave came before the European Court of Justice on a referral by the House of Lords in ***Stringer and Others v HM Revenue and Customs and Schultz-Hoff v Deutsche Rentenversicherung Bund [2009] IRLR 214 ECJ***.

7.5 Harvey on Industrial Relations and Employment Law at C1 [172] summarises the outcome as follows:-

> *"The principal conclusions reached by the Court are that:*
>
> - *the right to annual leave continues to accrue during sick leave;*
> - *the Directive does not prohibit national legislation providing that annual leave cannot be taken during sick leave, but nor does it require that national legislation should permit this;*
> - *any leave that a worker was unable to take because of being on sick leave can be taken on his or her return to work, notwithstanding that this may be in a later leave year;*
> - *leave entitlement may not be replaced by a payment in lieu unless the employment is terminated before the worker has the opportunity to take his or her leave and*
> - *if payment in lieu is payable, it is to be paid at the rate in which the leave would have been remunerated if taken as leave."*

7.6 Article 45(3) of the Employment Rights (Northern Ireland) Order 1996, (the 1996 Order) addressing claims for unlawful wages deductions provides: "*Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion*". The Court of Appeal for England and Wales in the case of ***Delaney v Staples (t/a De Montfort Recruitment) [1991] ICR 331***, held that there was no valid distinction to be drawn between a deduction from a sum due, and non-payment of that sum, as far as the relevant statutory provision was concerned.

7.7 Wages is defined within the Working Time Regulations (Northern Ireland) 2016 by reference to Articles 17 to 20 of the 1996 Order. Article 59 of the 1996 Order provides that the definition of "wages", in relation to a worker, means: "... *any sums payable to the worker in connection with his employment, including - (a) any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise*...", subject to certain statutory exceptions which do not apply to the facts of this case.

7.8 Regulation 43 (2) of the Working Time Regulations (Northern Ireland) 2016 provides that an Industrial Tribunal shall not consider a complaint under this Regulation unless it is presented before the end of the period of three months beginning with the date on which it is alleged that the exercise of their 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 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.

7.9 The time limit for lodging a complaint for alleged breach of contract under the Industrial Tribunals Extension of Jurisdiction Order (Northern Ireland) 1994 (the 1994 Order) is contained within Article 7 of that Order and is in similar terms to Regulation 43 (2) of the Working Time Regulations (Northern Ireland) 2016. The three month period starts to run from the "the effective date of termination of the contract giving rise to the claim or, where there is no effective date of termination, within the period of three months beginning with the last day upon which the employee worked in the employment which has terminated or, 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".

7.10 Article 55 (2) of the 1996 Order provides that an Industrial Tribunal shall not consider a complaint under Article 45 (unlawful deduction of wages) unless it is presented to the tribunal before the end of the period of three months beginning with the date of payment of the wages from which the deduction was made or before the end of the period of three months beginning with the date of the last payment received. Article 55 (4) provides a similar discretion for the tribunal to consider the complaint only if the tribunal is satisfied that it was not reasonably practicable for the complaint to be presented before the end of the relevant period of three months and the complaint was presented within such further period as the tribunal considers reasonable.

7.11 The power or jurisdiction for a tribunal to hear claims for unfair dismissal which are submitted outside the three month prescribed time period is in similar terms to Regulation 43 (2) of the Working Time Regulations (Northern Ireland) 2016. It can be found within Article 145 (2) of the Employment Rights (NI) Order 1996. A consequence of the similarity of the provisions is that while most of the relevant case law has arisen in respect of unfair dismissal claims, the principles established under that case law have equal relevance when determining claims submitted under the Working Time Regulations or the 1994 Order.

RELEVANT CASE LAW

7.12 The question of whether it had been "reasonably practicable" for the claim to have been lodged within three months is fact specific. The leading authority is ***Palmer v Southend on Sea Borough Council [1984] 1 All ER 945***. The Court of Appeal for England and Wales determined in that case that the tribunal should ask itself whether it had been reasonably "feasible" to have presented the claims in time. It is necessary for the tribunal to answer that question "against the background of the surrounding circumstances and the aim to be achieved". Although the overall period is to be considered, "attention will in the ordinary way focus upon the closing rather than the early stages" – see ***Schultz v Esso Petroleum Ltd [1999] 3 All ER 338***. Typically the passage of Lord Denning's judgment in ***Wall's Meat Co Ltd v Khan [1978] IRLR 499*** is relied on:

> *"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".*

7.13 The burden of proving this is on the claimant (***Porter v Bandridge Ltd [1978] IRLR 271***). The test is not one of reasonableness, the test of reasonable practicability requires a stricter interpretation – see ***London Underground Ltd v Noel [1999] IRLR 621***.

7.14 The tribunal must 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 the complaint before proceeding to consider whether any extension is appropriate (see ***Taylorplan Services Ltd v Jackson [1996] IRLR 184, EAT***). Once the tribunal is satisfied that it was not reasonably practicable for the claim to be submitted within the prescribed three month period does the tribunal proceed to consider whether a claim was presented within a reasonable period after the expiry of those three months.

7.15 In determining whether a claim was presented within a reasonable period after the expiry of the prescribed three month time limit, the tribunal does not have carte blanche to entertain a claim "however late it was presented" (***Westward Circuits Ltd v Read [1973] 2 All ER 1013***). The tribunal must have due regard to the circumstances of the delay and exercise its discretion reasonably – see Lord Denning MR in ***Wall's Meat***.

7.16 The case law dealing with this issue does not purport to lay down any particular time as being reasonable but claimants are expected to make their applications as quickly as possible once the obstacle that prevented them making their claim in time has been removed. The focus of the tribunal should not be on the length of the delay "to the exclusion of a proper consideration of all the relevant circumstances in which the delay occurred" – see ***Marley (UK) Ltd v Anderson [1994] IRLR 152***. A proper consideration of all the relevant circumstances includes a need for investigation, throughout the period of delay, as to the actual knowledge the claimant had as to his rights and "what knowledge he should have had if he had acted reasonably in all the circumstances" –see ***Northumberland County Council v Thompson (EAT/209/07, [2007] All ER (D)*** 95 (Sep), per Silber J).

7.17 The test to be applied as to whether the further period is reasonable 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 to the "strong public interest" in claims being brought promptly when the primary time limit is three months – see ***Cullinane v Balfour Beatty Engineering Services Ltd*** (***UKEAT/0537/10, 5 April 2011*****,** unreported).

THE TRIBUNAL'S DETERMINATION

8. This tribunal is concerned with determining whether the claimant's claim was submitted within the three month time period prescribed and if not, is the tribunal satisfied it was not reasonably practicable for the claimant to submit his claim before the end of the relevant three month period. Only if the tribunal is satisfied on this first matter would the tribunal have to then consider if the subsequent period it took for the claim to be presented was in the tribunal view a "reasonable" period.

8.1 As no contractual agreement was made with the claimant concerning paid annual leave the claimant's relevant holiday years ran from 17 July 2017 to 16 July 2018 and from 17 July 2018 to when his employment came to an end. The tribunal first addressed the leave year ending on 16 July 2018. There was no evidence of any sickness having prevented the claimant availing of his leave in the holiday year 2017 to 2018. Regulation 15 requires leave to be taken in the leave year in respect of which it is due. Monetary compensation cannot be paid in lieu of leave unless employment is terminated in that holiday year. Accordingly the claim in respect of the claimant's first year leave is outside the tribunal's jurisdiction under the Working Time Regulations (Northern Ireland) 2016.

8.2 There had been paid leave provided to the claimant on the week covering Christmas 2017 to the New Year 2018. The tribunal calculated that at best two weeks leave might have accrued to the claimant given the part time nature of his employment. The tribunal considered the claim for non-payment when on leave in April 2018 could be considered as a claim for an unlawful deduction of wages in light of Article 59 of the 1996 Order and ***Delaney v Staples*** case. The claim was required to be submitted within 3 months from the end of the week when the last payment should have been made in respect of the leave taken. It appeared to the tribunal that claim should have been exercised by 14 July 2018. The claimant took no action to communicate with the respondent in respect of this non-payment until at the earliest in the letter dated 25 October 2018. No evidence was provided that the claimant made any enquiry as to his rights in respect of the unpaid leave for the earlier holiday year. The tribunal was satisfied it was reasonably practicable for the claimant to have initiated a claim in respect of unpaid wages within the three month time period if he had taken steps to ascertain what was necessary to pursue such a claim. Accordingly any claim under the 1996 Order for unlawful deduction of wages is outside the jurisdiction of this tribunal.

8.3 The second claim concerned compensation in respect of holiday leave not availed of in the holiday year commencing on 17 July 2018. The claimant was absent from work from 20 July 2018 until 14 September 2018. It is clear from the decision in ***Stringer*** that holiday leave continues to accrue during sickness absence. The tribunal found the claimant accrued holiday entitlement from 16 July 2018 until the employment ended on 17 September 2018. The respondent treated the claimant's failure to report for work as an act of resignation by the claimant which it accepted.

8.4 The copy bank statement produced by the claimant made clear the respondent only lodged statutory sick pay to the claimant's bank account in the final wages payment received on 21 September 2018. It was clear to the tribunal that no calculation had ever been made by the respondent of the hours worked by the claimant during the 12 week period predating 17 September 2018 to determine the "week's wages" in accordance with Articles 17 to 20 of the 1996 Order.

8.5 The critical date for time to run under the contractual jurisdiction of the tribunal, set out in the 1994 Order, is the last date the claimant worked. The claimant resigned on the 17 September 2018. The complete absence of any contractual agreement regarding holiday leave led the tribunal to conclude that any determination on the preliminary issue of jurisdiction should be governed by the Working Time Regulations (Northern Ireland) 2016, as that legislation governed the amount of leave the claimant could avail or accrue. As this claim concerned a failure to pay compensation as required under Regulation 17, time started to run from the date on which it is alleged the payment should have been made, namely 21 September 2018 (see Regulation 43(2) (a) Working Time Regulations (Northern Ireland) 2016). On that basis any claim for compensation in respect of the annual leave year 2018 to 2019 had to be submitted to the Office of Industrial Tribunals and Fair Employment Tribunal by 20 December 2018. The claim was not submitted to that office until 28 December 2018.

8.6 The tribunal then considered whether it was reasonably practicable or feasible for the claimant to have submitted his claim by 20 December 2018. The tribunal took into account the claimant's dyslexia but on his own evidence he knew that the time limit was 20 December 2018. From October 2018 he had a relation to assist him in the pursuit of this claim with the reading and writing of documents. The burden of proving that it was not reasonably feasible to present the claim in time rests on the claimant.

8.7 The claimant was clearly aware of his right to make a claim. The claimant was not familiar with the method or procedure for making the claim. The tribunal focused on the closing stages of the three month period, in particular, the actions and knowledge of the claimant from 6 to 20 December 2018.

8.8 The claimant was aware from emails on 6 December and 11 December that it was his responsibility to have the claim submitted in time. No reason for delaying in completing the claim form from those dates until 18 December was given to the tribunal even though the claimant knew the time limit expired on the 20 December 2018.

8.9 The tribunal concluded the primary reason the claim was in fact not submitted within the three month period was because the claimant, in error, submitted his claim to the Employment Tribunal in England and Wales, two days before the time limit would expire. The tribunal was satisfied, on the balance of probabilities, that had the claimant not muddied the waters with ACAS by failing to mention working in Northern Ireland or the Republic of Ireland, he would likely have been advised early on that his claim was outside the scope of ACAS and the Employment Tribunal. It is difficult to avoid concluding, in light of the contents and promptness of the letter issued on 20 December 2018, earlier submission of his claim would have resulted in being referred earlier to the Office of the Industrial Tribunals and Fair Employment Tribunal. An enquiry with any Employment Tribunal helpline would probably have had a similar result.

8.10 The tribunal considered whether the claimant or his relation could not reasonably be expected to have realised that the Employment Tribunal in England and Wales was not the correct tribunal. The tribunal noted the total lack of any reference to Northern Ireland on the ACAS website, the Early Conciliation Guidance or the Employment Tribunal Guidance. There was no Northern Ireland designated helpline telephone number in the Employment Tribunal guidance. The tribunal considered whether it was making adequate allowance for the difficulty the claimant faced in having to rely on another to read and inform him of the documents provided by or on the ACAS website. There was a clear assertion that the relation had read the guidance documents. The guidance highlighted a very limited dual jurisdiction arising between England, Wales and Scotland. Accordingly the tribunal concluded it was not unreasonable to expect the reader to make some enquiry or check through the Helpline numbers provided in those circumstances.

8.11 The tribunal is concerned and disturbed by the dismissive attitude displayed by the respondent company to a number of legal obligations. These include the obligation to provide all employees, whether full time or part time, (a) with a Statement of Main Terms and Conditions of Employment. In addition the changes made regarding pay slips from 5 April 2018, changes that undermined the ability of the claimant to calculate accrued holiday entitlement showed a total disregard for the rights of this employee. The respondent's claim to be unaware of the company's legal obligation to provide such details to all employees lacked credibility. The tribunal formed the view that the respondent's lack of any action to comply with these legal obligations, despite repeated enquiry from the claimant about paid holiday leave or to provide final wages slip or P45 indicated a blatant disregard for the law.

8.12 Previous courts have recognised that at times the result of applying the reasonably practicable test can be hard on a claimant as the test is not one of what is just and equitable or even one of reasonableness. The test of reasonable practicability requires a stricter interpretation - see ***London Underground Ltd v Noel***. This claimant knew of his right to claim so making it more difficult for him to avail of the "escape clause" as described by Brandon LJ in the ***Walls Meat*** case. Brandon J recorded that "it may in general be easier for a complainant to avail himself of the "escape clause" on the ground that he was reasonably ignorant of his having a right at all, than on the ground that, knowing of the right, he was reasonably ignorant of the method by which, or the time limit within which, he ought to exercise it." The absence of any evidence regarding the claimant's actions, post 11 December 2018, to provide in the words of Lord Denning in the ***Walls Meat*** case "just cause or excuse" for not submitting the claim before 18 December 2018 was unhelpful. The tribunal on all the evidence presented before it was not satisfied that it wasn't reasonably practicable for the claimant to present his claim within the prescribed time.

8.13 In the event that the tribunal, is wrong in its conclusion that the claimant did not provide just cause or excuse for his ignorance of the correct method for enforcing his claim, the tribunal went on to consider if they had been satisfied it was not reasonably practicable for the claim to be submitted within time, would the tribunal consider the claim was submitted within a reasonable period after the 20 December 2018. The case law does not purport to lay down any particular time as being reasonable but claimants are expected to make the application as quickly as possible.

8.14 The tribunal took note of ***Adams v British Telecommunications plc [2017] ICR 382, EAT***, where that claimant submitted a claim form in time which was rejected for an error on the form. By the time the claim was resubmitted it was outside the prescribed 3 month time period. The new claim was two days out of time. The Employment Appeal Tribunal stated the correct approach to adopt was to focus on the submission of the second claim and the state of mind of the claimant, viewed objectively.

8.15 In regard to the second claim made by the claimant the tribunal took account of the following facts:- (a) by the time the claim form was returned to the claimant, he knew his claim was out of time; (b) the letter from the Employment Tribunal was brief and clear in its content; (c) the letter was within the reading capability of the claimant, (d) two modes of communication were provided on the face of the letter for submission of the claim to the correct organisation; (e) the claimant received the letter on Saturday 22 December 2018 yet did not use the telephone contact details provided on Monday 24 December to ascertain the quickest method for resubmitting the claim; (f) the claimant was aware that posting would place the letter within Christmas mail potentially adding to delay and (g) the claim form submitted, being the actual form already sent to the Employment Tribunal, provided no cause for any additional delay. The tribunal against this background did not consider the claimant had acted very promptly when he discovered his mistake. Had the claimant contacted the tribunal office, by using the telephone details provided, he could have been informed of a number of options for submission of claims. These include hand delivery, by fax, email or completing a claim form on line. The tribunal would not have been satisfied, had it been required to consider the issue, that the submission of the claim on 28 December 2018 was a “reasonable” period after the expiry of the prescribed three months.

Employment Judge:

Date and place of hearing: 15 May 2019, Belfast.

Date decision recorded in register and issued to parties: