THE INDUSTRIAL TRIBUNALS

CASE REF: 17971/18

CLAIMANT: **Luka Grzincic**

RESPONDENT: **MPA Recruitment 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 unfair dismissal 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: **Employment Judge Sheehan**

Members: **Mr I Carroll**
Mr I Rosbotham

Appearances:

The claimant appeared and represented himself.

The respondent appeared was represented by Ms Leona Gillen, Barrister at Law, instructed by J Fahy and Co, Solicitors.

REASONS

1. This was a Pre–Hearing Review to determine, as directed following the Case Management Discussion held on 29 April 2019, "whether the claim for unfair dismissal was within time and, if not, whether the time should be extended accordingly?"

2. By claim received in the Office of Industrial Tribunal and Fair Employment Tribunal (OITFET) on 3 December 2018, the claimant made a claim, as a worker providing services, that the respondent had unfairly ended his employment on 10 August 2018. He contended the termination of his employment was unfair as he had made no request for termination in writing to the respondent.

3. The respondent filed a response which denied that the claimant was dismissed. The respondent contended the claimant brought his contract to an end by informing the respondent company he would not be available for future shifts and requested all holiday pay owing to him. The respondent paid all monies owed to the claimant on 10 August 2018. The respondent issued a P45 to the claimant on

13 August 2018. The last shift worked by the claimant was on the weekend ending 29 July 2018.

4. The claim form concerned a claim for unfair dismissal which required the tribunal, in this pre-hearing review, to determine the date the claimant's contract with the respondent ceased to exist as that date would be the "effective date of termination" for the purposes of establishing whether the claim was in time or not.

5. The tribunal heard oral evidence from the claimant and from the respondent's representatives, Ciara Campbell (Operations and Compliance Manager of Healthcare Division) and Paul McHugh (Managing Director of the respondent company). A considerable number of documents were opened to us in the course of the hearing, amounting to over 87 pages and which were identified as R1 and C1 to C8. The tribunal struggled at times to obtain from the claimant a clear and coherent factual history as to what exactly he told the respondent regarding his intentions to complete future work placements in early August 2018. The claimant was vague about when documents, including the original P45 issued by the respondent was received by him. The claimant failed to convince any of the tribunal members that he was unaware of a P45 signifying termination of employment. In consequence of the oral and documentary evidence adduced at hearing, the tribunal made the following findings of fact, upon the balance of probabilities:-

5.1 The respondent company operates as an employment business as defined in the Employment Agencies Act 1973 or the Employment (Miscellaneous Provisions) (Northern Ireland) Order 1981. The respondent supplies individuals to work temporarily for and under the supervision and direction of hirers. These individuals are pay rolled through the respondent company.

5.2 The claimant was registered with the respondent as a Temporary Agency Worker (Healthcare) and had signed a Contract for Services which was dated 18 May 2016 (R1 page 1). Paragraph 16 of that contract provides "there is no notice required for (a) the temporary worker to terminate the employment and (b) MPA to terminate the temporary workers employments. However MPA will endeavour to give the temporary worker at least one days notice and would appreciate if the temporary worker would return this gesture".

5.3 The parties were in agreement that there was no obligation on the respondent to offer or on the claimant to accept work shifts (paragraph 15 of the Contract) but when shifts were offered and accepted they were paid at an agreed hourly rate with agreed deductions being made in relation to PAYE and National Insurance contributions, Class 1.

5.4 Paragraph 20 of the contractual document made clear that the claimant was entitled to 28 days annual leave which included 4 nominated bank holidays. Workers were required to give one week's notice of holiday leave. The same paragraph provided it was only "when a temporary worker was leaving MPA and claims their P45, holiday pay will be paid into the temporary workers nominated bank or building society account on the day that the P45 is issued".

5.5 The claimant prior to his contract with the respondent company had worked under a similar contractual arrangement with Four Seasons Health Care, also an agency placing workers in the Healthcare field. The claimant received a P45 from Four Seasons when his employment ended with that agency.

5.6 In July 2018 the claimant took a decision to seek additional or lengthier working hours with another agency, in particular Premiere People. At the same time as he applied to Premiere People he made a unilateral decision to cease to accept shifts from the respondent while seeking employment with this other agency. The claimant gave different versions of what he told the respondent company when he visited Kerry Anderson in August 2018. These ranged from indicating "I didn't intend to work for MPA while searching for another employer to give additional hours, to going to Premiere and wanted all holiday pay to be released" and lastly "advised Kerry Anderson I didn't have enough hours and so looking for other or more hours with Premiere People but would not do so in MPA uniform". By emails written on 9 January 2019 the claimant denied to his trade union representative that he told Kerry Anderson he was leaving the agency but accepting he told her he didn't have enough hours and "will seek elsewhere for more hours" (C7). No other discussion was entered into with any staff member of the respondent company other than Kerry Anderson. There was no dispute by the claimant that he did request all outstanding holiday pay. Kerry Anderson clearly interpreted the information received as a resignation and requested payroll staff, on 5 August 2018, to issue in respect of the claimant a P45 and all holiday pay (R1, page 9).

5.7 The respondent company issued the P45 to the claimant in the following pay period, week ending 10 August 2018. The P45 (C1) records the last day of employment with the respondent as 10 August 2018. It was dated 13 August 2018, which is a Monday. The holiday pay furnished to the claimant amounted to £742.98 (R1, page 2). The claimant made no contact with the respondent on receipt of that document nor did he challenge the respondent company about its issue.

5.8 The claimant for some time following receipt of the P45 continued to be notified by the respondent's group text of available shift work. However the claimant did not respond or apply for any of those shifts. The claimant was registered for job seeker's allowance/Universal Credit from 24 September 2018. The claimant received an email on 26 October 2018 notifying him of no payment made to his pension account with NEST, the workplace pension scheme established by the government (C6). These communications were due to a failure by the respondent to update group distribution lists or a time lag in updating their employment records. It was indisputably clear that the last payment of wages made to the claimant occurred on 10 August 2018. The last payment to the claimant's NEST account was also made on 10 August 2018.

5.9 The claimant's "Looking for Work" record (C5) indicates repeated contact with Premiere People from 26 September 2018 onwards. The first entry, on 26 September 2018, includes a note that references were still awaited. This booklet also records the claimant undertaking induction training with Premiere People on 16 November 2018. It notes the claimant completed his first shifts with Premiere People from 23 November 2018 onwards. The claimant continued claiming universal benefit/jobseekers allowance until 2 January 2019. There is no mention on the "Looking for Work" record of seeking or receiving details of shifts from the respondent company.

5.10 The claimant when undertaking induction and contractual formalities with Premiere People on 16 November 2018 was informed that any termination or resignation would be required to be in writing. On 19 November 2018, as recorded in the claimant's Looking for Work" record (C5) a query was raised by the claimant regarding his employment status with the respondent company. On that date the

claimant requested a new P45 be issued with a different leaving date, namely 19 November 2018.

5.11 The claimant claimed he was unable to recollect when he received the P45 issued on 13 August 2018. The claimant's suggestion that it was maybe late August 2018 was not found credible by the tribunal. The tribunal accepted the respondent's evidence that it was posted first class and accordingly was satisfied that the P45 would have been received before 17 August 2018.

5.12 The claimant did not complete a claim form and submit same to the Employment Tribunal until 3 December 2018.

5.13 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

6. The power or jurisdiction for a tribunal to hear claims for unfair dismissal which are submitted outside the three month prescribed time period is found within Article 145 (2) of the Employment Rights (Northern Ireland) Order 1996 (referred to as the 1996 Order). It provides an Industrial Tribunal shall not consider a complaint *unless it is submitted to the tribunal before the end of the period of three months beginning with the effective date of termination, 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*.

6.1 Article 145 (2) (b) of the 1996 Order essentially provides a discretion for the tribunal to consider the complaint received by the tribunal office outside the 3 month period only if, firstly, 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. If the claimant satisfies the tribunal on that first point, then the tribunal must also be satisfied that the time within which the claim was in fact presented was reasonable. The effective date of termination is defined by Article 129 of the 1996 Order. In summary, so far as this claim is concerned, it provides the date of termination will be either the date when notice of termination, if given, expires or if employment is terminated without notice, the date on which the termination takes effect.

Relevant Case Law

6.2 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".

6.3 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***.

6.4 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.

6.5 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***.

6.6 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).

6.7 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

7.1 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 consider if the subsequent period it took for the claim to be presented was in the tribunals view a "reasonable" period.

7.2 The tribunal gave weight to the fact that the claimant had previous experience of receiving a P45 when he resigned from his employment with Four Seasons Health Care. The tribunal accepted the respondent's evidence that the claimant was a valued worker and they would not have unilaterally chosen to end his employment. This was reflected by their offer to reemploy him evidenced in emails produced by the claimant to the tribunal. This offer was made to his trade union representative when the respondent company was contacted regarding the claimant's request for a replacement P45 with a termination date in November 2018.

7.3 The tribunal were satisfied on the balance of probabilities that the claimant indicated to Kerry Anderson that he was unhappy with the level of hours being offered by the respondent company, that he intended to seek work with Premiere People and he did not intend to work for MPA while he sought work with Premiere People.

7.4 The claimant was contractually required to give one week's notice of holiday leave. No request or notice to take leave occurred at any time during the conversation with Kerry Anderson. The tribunal noted the claimant did not indicate to Kerry Anderson that his intention not to accept shifts from the respondent was for a temporary period or a specific time limited period. The claimant's request to receive all monies owing in respect of accrued holiday pay instead of requesting holiday leave, accompanied by his statements about requiring more hours than the respondent provided and seeking work elsewhere supported the conclusion drawn by Kerry Anderson that the claimant was communicating his resignation from the respondent company. The tribunal accepted Kerry Anderson, as a Branch Manager, would know the claimant's contract provided it was only when a P45 was requested would payment be made in respect of holiday leave on the day the P45 is issued (paragraph 21, R1, page 1).

7.5 The tribunal did not find the claimant credible in his assertion that he did not know the difference between a P45 and a P60. His assertion was undermined by the clear evidence that when he resigned from Four Seasons he received a P45. The tribunal found it noteworthy that the claimant made no dispute about the P45 until taking up employment with Premiere People on 16 November 2018. It is clear from the contractual agreement neither the claimant nor the respondent had to place in writing any notice of termination of the contractual relationship. The tribunal was satisfied the claimant knew his employment was ended with the respondent company when he received the P45.

7.6 The tribunal concluded that the verbal communication between the claimant and Kerry Anderson in early August was a resignation without notice to the respondent. However none of the parties could assist the tribunal in determining the exact date this conversation took place. The claimant's last shift worked with the respondent was on weekend of 29 July 2018. The claimant called into the office, sometime after that last shift, to speak with Kerry Anderson. There is documentary evidence that on 5 August 2018 payroll was requested to create a P45 and all holiday pay in respect of the claimant. Arguably the effective date of termination, being the date the claimant resigned and the resignation was accepted by the respondent occurred on or before 5 August 2018, both the claim form and response filed with OITFET record 10 August 2018 as the claimant's last date of employment. In light of all the evidence, including the consensus between the parties as to the last date of work with the respondent company, the tribunal decided to treat the last day of payment, namely, 10 August 2018 as the effective date of termination.

7.7 The P45 was posted first class on 13 August 2018. All the evidence available indicates the claimant received that P45 before 17 August 2018. It is equally clear the claimant raised no issue with the respondent about the P45 until the 19 November 2018. No evidence was provided that the claimant made any enquiry between the 17 August 2018 and the 19 November 2018 regarding his rights in respect of the P45, even though he was a member of a trade union. Even if the tribunal had accepted the claimant had not intended to resign in early August 2018, it is clear the claimant knew, most likely upon receipt of the P45, before or by the 16 August 2018 that the respondent considered he had resigned from his employment. The 3 month time period running from that date would have expired by 15 November 2018.

7.8 The tribunal having concluded the 3 month time period ran from 10 August 2018, the agreed effective date of termination, any claim had to be submitted to the Office of Industrial Tribunal and Fair Employment Tribunal by 9 November 2018. The claim was not submitted to that office until 3 December 2018.

7.9 The tribunal then considered whether it was reasonably practicable or feasible for the claimant to have submitted his claim by 9 November 2018. The burden of proving that it was not reasonably feasible to present the claim in time rests on the claimant. The tribunal was not made aware of any reason why the claimant did not challenge the P45 when he received it in August 2018. There was a complete lack of explanation for why he did not press to be reinstated on the respondent's books if the claimant considered an error genuinely had been made by the respondent. At a time when claiming financial support from the public purse the claimant failed to initiate contact regarding potential shift work notified in group texts until early October 2018. The claimant was a member of a trade union and he did not consult them until sometime after 19 November 2018. The emails exchanged with the trade union indicate his concern was to obtain the reissue of a P45 with a last date of working in November 2018 and a possible claim for unfair dismissal.

7.10 The tribunal concluded the primary reason the claim was in fact not submitted within the three month period was because the claimant had no intention of challenging the P45 until he was advised on 16 November 2018 that his new agency required any notice of termination to be in writing. It is clear from the "Looking for Work" record that the claimant was busy chasing up references to submit to Premiere People as well as receiving benefits throughout September 2018 to January 2019. The tribunal is satisfied that the claimant initiated this claim on the erroneous belief that "in law he must sign a termination request". However at no time was any such law identified or referred to during the tribunal hearing. In light of the promptness of contact with his trade union following 19 November 2018, it is difficult to avoid concluding that had the claimant considered in August 2018 he was unfairly dismissed and wished to challenge that dismissal he could and would have done so through contacting his trade union.

7.11 The tribunal is aware that 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***.

7.12 The claimant had the services of a trade union available to him if he did not know of his right to claim. As stated in ***Wall's Meat Co Ltd v Khan*** "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". The tribunal concluded the assertion by the claimant that he did not understand the P45 as signifying his employment was terminated was totally unbelievable. Once that conclusion was made the absence of any evidence regarding the claimant's action to challenge or correct the position with the respondent meant the claimant could not provide "just cause or excuse" for not submitting the claim before 9 November 2018. Accordingly the tribunal is not satisfied on the evidence presented that it was not reasonably practicable for the claimant to present his claim within the prescribed time and the claim is dismissed for want of jurisdiction.

Employment Judge:

Date and place of hearing: **14 May 2019, Belfast.**

Date decision recorded in register and issued to parties: