EMPLOYMENT TRIBUNALS

Claimant:	**Mr H S Uppal**		
Respondent:	**RDCP Care Limited**		
Heard at:	**Birmingham**	**On:**	**20 May 2022**
Before:	**Employment Judge Flood**		
Appearance:			
For the Claimant:	**In person**		
For the Respondent:	**Mr Mc Devitt (Counsel)**		
Interpreter:	**Ms Lall**		

PRELIMINARY HEARING
RESERVED JUDGMENT

1. The claimant's claim of unfair dismissal is **dismissed** as having been presented out of time. The claim was presented after the expiry of the statutory time limit. That time limit cannot be extended because it was reasonably practicable for the claimant to present his claim within the time limit.

REASONS

1. By a claim form presented on 11 June 2020 (early conciliation having taken place between 31 May and 1 June 2020), the claimant brought a complaint of unfair dismissal (under **section 98 of the Employment Rights Act 1996 ("ERA")**.
2. The case was listed for a preliminary hearing to consider the time points and this was later further clarified by Employment Judge Woffenden that the Tribunal would consider:

   "*was the unfair dismissal complaint presented outside the time limits in section 111(2) (a) and (b) of the Employment Rights Act 1996 and if so should it be dismissed on the basis the tribunal has no jurisdiction to hear it. dealing with this issue may involve consideration of subsidiary issues including whether it was not "reasonably practicable" for the unfair dismissal complaint to be presented within the primary time limit, what the effective date of termination was."*

3. The claimant gave evidence by way of his witness statements in response to cross examination and questions from the Tribunal. Ms A Bednarek gave evidence in the same manner on behalf of the respondent. I found both the claimant and Ms Bednarek to be entirely honest and straightforward in their evidence. I had before a bundle of documents prepared by the respondent, which also contained the contents of a separate bundle of documents that had been latterly put together by the claimant (I also had this bundle to ensure all documents were included). The claimant made an application to add some additional documents (copies of payslips) which were admitted with no objection being raised by the respondent. I also had a time calculations document which had been prepared by the respondent.
4. The parties and the Tribunal were ably assisted by Ms Lall, a Punjabi interpreter. Having finished evidence and submissions at just after 3pm, I adjourned the hearing for a reserved decision.

The Issues

5. In determining whether the claimant's complaint for unfair dismissal was presented within the time limit set out in **section 111(2)(a) & (b) of the ERA** involved considering *whether it was not reasonably practicable for a complaint to be presented within the primary time limit and if not, whether it was presented within a reasonable time thereafter*; so the issues to be determined were:
    a. What was the effective date of termination of the claimant's employment?
    b. Was the claim made to the Tribunal within three months (plus early conciliation extension) of the effective date of termination?
    c. If not, was it reasonably practicable for the claim to be made to the Tribunal within the time limit?
    d. If it was not reasonably practicable for the claim to be made to the Tribunal within the time limit, was it made within a reasonable period?

The relevant law

6. The relevant legal provisions were set out in an extract from the IDS Employment Law Handbook supplied by Mr Mc Devitt and as set out in summary below. I have considered primarily **section 111 (2) (a) and (b) of the ERA** and state that time can only be extended where the tribunal:

    "is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months"

    [and was presented to the tribunal*]*

    "within such further period as the tribunal considers reasonable"

7. The authorities on this provision are clear that the power to disapply the statutory time limit is very restricted. The statutory test is one of practicability. It is not satisfied just because it was reasonable not to do what could be done as per Bodha (Vishnudut) v Hampshire Area Health Authority [1982] ICR 200.
8. The onus of proving that presentation in time was not reasonably practicable lies on the claimant – Porter v Bandridge [1978]ICR 943.

9. There has to be some impediment, which reasonably prevents or interferes with the ability of the claimant to present in time as stated by the Court of Appeal in the case of Walls Meat v Khan 1979 ICR 52.

10. The issue is pre-eminently one of fact for the employment tribunal and that whether something is "reasonably practicable" is a concept which comes somewhere between whether it is reasonable and whether it is physically capable of being done - Palmer v Southend Council [1984] ICR 372.

Ignorance of rights

11. A claimant's ignorance of his or her rights may make it not reasonably practicable in exceptional circumstances but the claimant's ignorance must itself be reasonable. The correct test is not whether the claimant knew of his or her rights but whether he or she ought to have known of them – Porter v Bandridge (as above).

12. Where a claimant is generally aware of his rights, ignorance of a time limit will rarely be acceptable because if aware of rights, a claimant will generally be put on enquiry as to time limits – Trevelyans (Birmingham) Limited v Norton [1991] ICR, 488.

13. In Sodexo Health Care Services Ltd v Harmer EATA 0079/08, involved a claimant who wrongly assumed that a time limit did not start running until after the end of the appeal process. The Scottish EAT determined that it had been reasonably practicable for a complaint to be brought as the question to be determined was whether, in the circumstances, the employee was reasonably ignorant of the time limit. In Reed in Partnership Ltd v Fraine EAT 0520/10, a claimant who presented an unfair dismissal claim one day late, wrongly believing the time limit ran from the day after the effective date of termination, was found to be not reasonably ignorant of the start date of the limitation period. The EAT determined that the claimant had proceeded on a false assumption for which he had no basis and he had not been misled by the employer or any adviser and had made no enquiries.

Pursuing internal appeal proceedings

14. The existence of a contractual appeal procedures does not alter the effective date of termination – J Sainsbiury Limited v Savage ICR 1, CA.

15. The existence of a pending internal appeal does not of itself sufficient to justify a finding that it was not reasonably practicable to present a claim – Bodha v Hampshire Area Health Authority (as above).

16. Special circumstances which might justify delaying presenting a claim while an appeal was ongoing include where an employee was told by the employer to delay, pending the outcome of negotiations (Owen and anor v Crown House Engineering Ltd [1973] ICR 511) and where the employer had changed the appeal procedure and misled an employee (London Borough of Hackney v Allim EAT 158/93). An employer's behaviour, in combination with an internal appeal, might be sufficient to make it not reasonably practicable for a claim to be presented, where there was a suggestion (unchallenged) that an appeal outcome had been deliberately withheld – Maddison v B&M Retail Limited ET case number 2501529/15.

17. If a Tribunal finds that it was not reasonably practicable for a claimant to present a claim within the time period, it must go on to decided whether the

claim was then presented within a further reasonable period, which is a less stringent test. This is a matter of fact for the Tribunal but requires objective consideration of the factors causing delay and what period should reasonably be allowed in the circumstances – Cullinane v Balfour Beatty Engineering Services Limited EAT 0537/10. This assessment should be made against the general background of the primary time limit and the strong public interest in claims being made promptly – Nolan v Balfour Beatty Engineering Services Limited EAT 0109/11.

The relevant facts

18. The claimant had worked at the respondent since 19 July 2004 as a maintenance worker at the respondent's care home.

19. The claimant attended a disciplinary hearing on 30 July 2019 which considered allegations of failure to comply with health and safety checks and documentation and poor performance. The claimant complained about a delay in sending him the minutes of that meeting, but that is not relevant to the issues I had to determine today. The claimant was subsequently off sick. He was invited to and attended a disciplinary outcome meeting which took place on 3 January 2020. The minutes of that meeting were at pages 45-47 of the Bundle. These minutes record that at the conclusion of that meeting, the claimant was informed that the allegations against him had been upheld which "*constitutes gross misconduct under the company policy and HU will be leaving this employment"*. It further noted later that "*HU will receive formal letter stating the outcomes and termination of contract; HU will be given the opportunity to appeal in writing, if not satisfied with the outcomes".* The claimant who is a native Punjabi speaker was accompanied at the meeting with another Punjabi speaker, Jatinder, who was able to assist in translating. The claimant agreed in evidence today that he had been told his employment was terminated at this meeting and that he would be sent a letter. He also said that having been told he could have an appeal, that he was under the impression that he had to have some further warning and telling him he was dismissed was not enough. I find that the claimant was told that his employment had terminated on 3 January 2020.

20. The claimant was sent a letter dated 6 January 2020, which was sent on 8 January 2020 by recorded delivery (page 48-49 and page 22 claimant bundle) which confirmed the outcome of the disciplinary meeting on the two allegations made and stated: "*As a consequence, therefore, in constituting gross misconduct, you are being dismissed with immediate effect".* The letter confirmed that the claimant had the right to appeal in writing within 5 working days. The claimant received this letter on 10 January 2020. The claimant agreed that this letter informed he that he was being dismissed with immediate effect. He explained that he understood that because he had a right of appeal and was still waiting for the minutes of the meeting, that he still had a chance to work.

21. The claimant appealed against his dismissal by a letter dated 11 January 2020 which stated that he did "*not agree with the outcome of the disciplinary letter with reference to allegations 1 and 2"* (page 51-52). It went on to set out detailed grounds for appeal. The claimant also e mailed A Thomas at the respondent on 12 January 2020 asking for the minutes of the last meeting (page 28 claimant bundle). The appeal letter was received by the respondent

on 14 January 2020 and Ms Bednarek wrote to the Tribunal on 16 January 2020 to acknowledge receipt and to inform the claimant that she would be investigating his appeal, that he would be invited to attend an appeal hearing and that the appeal could take up to 28 days to conclude. The claimant received this letter on 17 February 2020 (page 30 claimant's bundle). Ms Bednarek wrote again to the claimant on 13 February 2020 to inform him that she had investigated his appeal and invited the claimant to attend an appeal meeting (page 54). This letter also enclosed copies of the meeting minutes. The claimant confirmed that he received that letter shortly after it was sent.

22. The claimant attended the appeal meeting chaired by Ms Bednarek on 26 February 2020. Ms Bednarek considered the appeal after that meeting and decided that it would be dismissed and the original decision to dismiss would stand. She told us that she prepared a letter dated 2 March 2020 confirming this decision (page 55-56) and sent this by recorded delivery to the claimant. She was asked by the claimant whether she had receipts to show that this was sent and answered that she did initially had the proof of posting receipt but had since destroyed this. The claimant said he did not receive this letter sent on 2 March 2020. I find that Ms Bednarek did sent this letter but also find that this letter was never received by the claimant. I found both the claimant and Ms Bednarek to be telling the truth. Ms Bednarek explained the fact that she had disposed of the postage receipt by stating that as 18 months had passed since the issue first came up when the respondent became aware that the claimant had brought a claim against them, she had disposed of the receipt as she did not think it necessary or appropriate to retain it. I accepted this explanation. I also entirely accepted that the claimant had for whatever reason not received this letter and this is borne out in later correspondence that he sends.

23. The claimant said that not having received an appeal outcome shortly after the hearing, that he telephoned the respondent to try to speak to Ms Bednarek in March and April 2020 to chase for a response. He was unable to confirm exactly when he did this and who he spoke to but said that his uncle assisted him and he was told that someone would call him back but they did not. He did not speak to Ms Bednarek and she also confirmed she had not been told that the claimant had telephoned her. I accepted both the claimant and Ms Bednarek's evidence on this matter. The claimant was asked why he did not write or e mail to chase a response but he said there had been no response, and it was during lockdown.

24. The claimant had received a number of payslips in between January and May 2020 which he produced at the hearing and were added into evidence. The claimant was paid the sum of £1,424.30 on 6 January 2020 for pay up to the termination of employment and accrued but untaken holiday pay. He was paid the sum of £208.60 on both 6 February and 6 March 2020 which was a refund of tax overpaid. He received two further payslips on 6 April and 6 May 2020 showing a nil payment. It was not clear why these last two payslips were issued nor why the p45 was not issued until 6 May 2020. Nonetheless it was clear that the employment did not receive his normal wages from 6 January 2020 onwards. The claimant did not attend for work during this period.

25. On 6 May 2020 the claimant was sent an e mail with a copy of his P45. This showed an employment termination date of 2 February 2020 (page 34, claimant bundle). The claimant confirmed that he then learned that his job had ended on 1 February 2020 but that he did not agree that this was correct. The claimant

wrote to Ms Bednarek on 9 May 2020 complaining that he had not received an appeal outcome (page 57). Ms Bednarek replied on her return from annual leave on 26 May 2020 and wrote that she was "perturbed" by the claimant's letter and stated that she had sent a letter on 2 March 2020 (page 36, claimant bundle). This letter included the original outcome letter and was received by the claimant on 28 May 2020.

26. The claimant had access to the internet throughout this period but did not take steps to research the position about how to bring his claim until he had been told the outcome of his appeal. His uncle helped him to research and to put his claim in, which he did on 11 June 2020. The claimant got in touch with ACAS and also the Job Centre in January 2020. He told them of his dismissal and that he was pursuing an internal appeal and thought that he would get his job back. When asked in cross examination the claimant said that he thought he had been suspended during this period and that he felt that it was the respondent who was at fault and was operating under this assumption. The claimant started his period of early conciliation on 31 May 2020 and this ended on 1 June 2020 when his early conciliation certificate was issued (page 13). He presented his claim on 11 June 2020 (pages 1-12) and this was served on the respondent on 3 September 2021 (15 months after the claim form had been presented).

Conclusion

27. I have approached each of the issues identified above in turn and my conclusions on each are set out below

a. What was the effective date of termination of the claimant's employment?

28. I conclude that the claimant's employment terminated on 3 January 2020 when he was informed at the disciplinary meeting that he had been dismissed. The words used by the dismissing officer at the meeting on that day as recorded in the minutes of that meeting were unambiguous and can be taken at face value. The claimant's suggestion that because he was also told that he had the right to appeal that this then meant the dismissal had not taken effect does not change the context or meaning of the clear words used and communicated to him. The subsequent written communication confirmed this decision.

b. Was the claim made to the Tribunal within three months (plus early conciliation extension) of the effective date of termination?

29. The claimant should have commenced early conciliation by 2 April 2020 (three months less one day later). It was not commenced until 31 May 2020 and the claim was not presented until 1 June 2020. The claim was therefore made 8 weeks and 3 days out of time and was not made within three months of the effective date of termination.

c. If not, was it reasonably practicable for the claim to be made to the Tribunal within the time limit?

30. The claimant has the burden of proof in showing that it was not reasonably practicable for his claim to have been presented in time. His submission on this is firstly that because he was pursuing an internal appeal that he remained employed (and not dismissed) until the appeal was concluded. I have addressed that point above but I also conclude that the claimant was operating under a mistaken belief that his employment either continued pending his

appeal being determined, or that he was entitled to await the outcome of that internal appeal before submitting his complaint to the Tribunal. It is clear that as at 6 May 2020 the claimant was aware that his appeal had not been successful, after the primary time limit had already expired. Following the guidance from the authorities above, the question for the Tribunal is whether the claimant's mistaken belief around continued employment pending an appeal was reasonable and that accordingly it was not reasonably practicable for a claim to have been presented in the primary time limit. The claimant suggests that because he exercised his right to appeal; attended an appeal meeting on 26 February 2020 and was still being issued with payslips that he was under the impression he was still employed and only realised he was not when the p45 was issued. He explained that he had worked for the respondent for many years, honestly and truthfully and was therefore under the impression that he would be given a warning and then reinstated to his position.

31. Mr McDevitt suggests that this was not a reasonable view for the claimant to have taken for three reasons: (1) he had been told he had been dismissed orally and in writing; (2) he had not been to work since he had been dismissed; and (3) he had not received any wages since he had been dismissed. The respondent points to the fact that the claimant had contacted ACAS early on in the process, in January 2020 and had the means and capability (with the assistance of the internet and his uncle) to investigate his rights and how to enforce them (including the applicable time limits). It is also pointed out that the claimant was not misled or deceived about his rights by the respondent and even if he did not know of his rights (including time limits applicable and the effect of an internal appeal) he ought to have known of these.

32. I have considered carefully all that the claimant has said but I prefer the submissions of the respondent on this point. Although I was content that the claimant's belief that he remained employed was genuine, I do not conclude that this was a reasonable view to have reached on objective grounds in these particular circumstances. This is not a case where ambiguous words were used either orally or in writing. The claimant agreed that he was told he was dismissed at the meeting and in the letter that followed. Despite this, he then operated on the basis that he would be successful at appeal and would return to work. The claimant received three letters following the termination of his employment on 3 January 2020, all of which read objectively clearly refer to the claimant's employment being at an end but that he had a right to appeal this decision. The claimant had contacted ACAS and been to the job centre very soon after the initial decision and had the ability to ask questions then and also to conduct research on the internet (with the assistance of his uncle) to find out the correct position about his employment status and so when he should submit his claim. It is of course unfortunate that the claimant did not receive the appeal outcome when it was sent and I can only conclude that this was lost in the post. However this does not change the underlying position that the claimant had been dismissed on 3 January 2020 and so the time limits started to run from that point. Had the claimant carried out reasonable investigation, he could have determined that this was the case and also found out that the pursuance of an internal appeal (although of course entirely within his rights and a reasonable step to take) did not mean he was absolved of the need to act promptly and to start proceedings within the relevant time limits.

33. I have sympathy for the claimant who has lost his employment after many loyal years of service, but I conclude that it was reasonably practicable for the claimant to have issued his claim in time. The mistaken belief he held is not sufficient to meet the test of being some impediment, which reasonably prevents or interferes with the ability of the claimant to present in time. The jurisdiction of the Employment Tribunal is strictly defined by legislation and can only hear claims that satisfy all the legal tests for such claims to be brought including time limits. Claims such as unfair dismissal have a particularly strict time limit with limited room for manoeuvre

34. I do not therefore need to consider the second arm of the test as to whether the claim was presented within such further time period as was reasonable. The claimant's claim for unfair dismissal is dismissed

Employment Judge Flood

23 May 2022

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