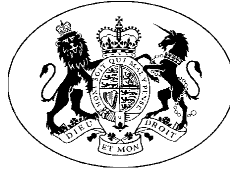

EMPLOYMENT TRIBUNALS

Claimant: Mr A. Jeganathan

Respondent: Westfield (T) Hairdressing Limited t/a Toni & Guy

Heard at: London Central (CVP) **On:** 21 February 2022

Before: Tribunal Judge Peer acting as an Employment Judge

Representation
Claimant: In person
Respondent: Mr Craig Ludlow of Counsel

JUDGMENT

1. The judgment of the tribunal is that the claimant's claims for unfair dismissal, notice pay and holiday pay were presented out of time so that it does not have jurisdiction to hear them. Accordingly, the claims are dismissed.

2. The tribunal is satisfied that the claim for redundancy pay was presented in time and the tribunal has jurisdiction to hear it.

3. The claimant's claim for unlawful deduction from wages is dismissed upon withdrawal.

4. The respondent's application to strike out or impose a deposit order on the claim for redundancy pay is refused.

REASONS

1. A request for written reasons having been made in accordance with Rule 62(3) of the Employment Tribunal Rules of Procedure 2013 at the hearing where reasons for the above judgment were given orally, the Tribunal provides the following:

The hearing

2. The claimant, Mr A. Jeganathan, represented himself at the hearing but had

received some legal advice and assistance in advance from Linder Myers Solicitors who had prepared written submissions on his behalf which were available to me at the hearing.

3. The respondent was represented by Mr Craig Ludlow of Counsel instructed by Worknest Law. Counsel provided a detailed skeleton argument.

4. The purpose of the open preliminary hearing on 21 February 2022 was, as directed by Employment Judge Elliott, to consider:

    (i) Whether the claims are in time bearing in mind the statutory time limits.
    (ii) Whether the claims should be struck out as having no reasonable prospect of success.
    (iii) Whether the Claimant should pay a deposit not exceeding £1000 as a condition of continuing to advance any allegations or argument on grounds that the claim has little reasonable prospect of success.

5. I had before me a paginated bundle indexed to 115 pages including the claim and response, claimant's contract of employment, copy documents including copy emails, screenshots of email accounts, bank statement of the claimant, redundancy confirmation letter dated 11 December 2020, financial statement and claimant's payslips.

6. I had a witness statement from the claimant. I had a witness statement from Mr Stephen Richardson, respondent's Head of Human Resources, signed and dated 18 February 2022. The claimant and Mr Richardson gave oral evidence to the tribunal on affirmation.

Findings of fact

7. The claimant was employed by the respondent, a hairdressing salon, initially as a stylist and thereafter further to promotion as an Art/Style Director. The claimant commenced employment in August 2011.

8. The claimant's contract of employment contains a clause setting out commission based pay and a provision to top up pay to national minimum wage (NMW) rates if necessary. From March or April 2020, the claimant was paid furlough pay.

9. On 27 November 2020, the claimant was informed that he was at risk of redundancy. On 2 December 2020, the claimant attended a first consultation meeting. An email sent after that meeting encouraged the claimant to think about ideas to avoid the need for the proposed redundancy.

10. On 10 December 2020, the claimant attended a second consultation meeting. There was no dispute between the parties that a transcript of that meeting in evidence was accurate. At the meeting, Mr Richardson, stated to the claimant that he would 'send you an outcome letter confirming the outcome of the process and unfortunately confirming that your position is now redundant. I'll send you through the figures as well, what your entitled to'. A video of the 10 December 2020 virtual meeting was in evidence. Mr

Richardson referred to notice pay, redundancy pay and outstanding furlough pay as components of the claimant's entitlement.

11. I find that Mr Richardson clearly communicated to the claimant on 10 December 2020 that his employment was terminated when he stated that the claimant's position was now redundant. I find that Mr Richardson in referring to confirming the outcome by letter together with figures was clearly communicating that payments including pay in lieu of notice would be made to the claimant as his employment had ended.

12. During the meeting, the claimant and Mr Richardson discussed various matters including the claimant raising his concerns about his finances and stating that he didn't think it would get to this point. The claimant expressed concern as to whether he would make it through the next few months. There was discussion about whether things might pick up in the Spring or the New Year and that the claimant should stay in touch. Mr Richardson said, 'we would love to talk to you next year'. The meeting ended in an amicable tone with the claimant expressing thanks to Mr Richardson for how helpful he had been.

13. I find that the claimant knew his employment was terminated at this meeting. The whole tone of the meeting was to the effect that the employment relationship had ended. I do not find there is a basis for the claimant to think that his employment would end at a point in the future although I accept that the claimant expected to receive written confirmation of the redundancy together with consequent payments.

14. Mr Richardson told me that on 11 December 2020 he sent by email a letter dated 11 December 2020 confirming the outcome of the meeting on 10 December 2020 ("redundancy confirmation letter") and a financial statement.

15. The claimant told me that he did not receive the email sent on 11 December 2020. The claimant said he had received a number of other emails from the respondent, including Mr Richardson, during December 2020 which related furlough pay that he was owed for September to December 2020. The claimant had used the same email address throughout and that address was the one used by the respondent at all times. I find that the claimant did receive the email sent 11 December 2020.

16. On 29 December 2020, the amount of £5,861.47 was received in the claimant's bank account. This amount is shown on a copy payslip for December 2020 which itemises the payments made as being for November Furlough, redundancy pay and notice pay.

17. I find that the respondent has paid £3,121.92 in respect of pay in lieu of notice and £3,121.92 in respect of a redundancy payment subject as applicable to the usual deductions in respect of National Insurance and tax. The respondent calculated these amounts based on a weekly pay of £346.88 representing a 40 hour working week paid at NMW rates and an entitlement to 9 week's pay. The claimant says that a week's pay should be calculated based on his average earnings for a reference period prior to when he was placed on furlough pay.

18. The claimant told me he did not receive any payslips after September 2020. The claimant also says that he was not able to access any of his payslips online using his password. The claimant explained in evidence that he understood the amount paid into his bank account on 29 December 2020 was the furlough pay he was due.

19. On 29 January 2021, the claimant received an email with his P45 attached. The P45 records a leaving date of 10 December 2020.

20. The claimant said he had never seen a P45 before and I am prepared to accept that is the case as he is reasonably young and had been employed by the respondent for a lengthy period of time of nearly a decade. The claimant was a valued employee. The discussion on 10 December 2020 covered the difficult circumstances in which good performers, the inference being persons such as the claimant, were being made redundant. I find that the P45 document is clear on its face as related to the leaving of employment and records a leaving date of 10 December 2020. I find that the claimant knew this document indicated his employment had terminated on 10 December 2020 not least because he had already been told that it had terminated on that date.

21. On 1 February 2021, the claimant sent an email to the respondent setting out that the P45 was confusing and he had not received his pay for January. In his email, the claimant refers to conversations in December about redundancy but that as far as he knew he was to receive an email outlining his notice and details regarding redundancy but had not received anything. Mr Richardson replied to the claimant on 1 February 2021 and re-sent the redundancy confirmation letter and financial statement. His email referred to his final payslip with the redundancy and other payments due and offered to follow this up with payroll if the claimant had not received the same. The claimant says he did not receive this reply. I find that the claimant received this reply.

22. I have found that the claimant was told on 10 December 2020 that his employment had ended but if he was confused and thought he was either in a notice period or still employed, this formal document clearly indicated the contrary. I find it reasonable that the claimant would expect to receive the written confirmation of outcome that Mr Richardson had said he would send. I find it reasonable that if the claimant had not received the written confirmation, he might be somewhat confused. However, I also find that in all the circumstances the claimant had awareness that he was no longer employed given the meeting on 10 December 2020 and the P45 served to further confirm that for the claimant. Mr Richardson's email of 1 February 2021 also confirmed this.

23. I find that Mr Richardson sent the emails of 11 December 2020 and 1 February 2021 setting out the termination on 10 December 2020. On this basis, the time limit for bringing the claims other than the claim for redundancy pay expired on 9 March 2021.

24. On 18 May 2021, the claimant sent an email timed 1303 to the respondent. In his email, the claimant set out that his understanding that he was still employed by the respondent as he had not been informed otherwise. The claimant set out that he had taken legal advice regarding the matter and

had been advised that no formal redundancy process had been completed nor even followed and referred to being owed 5 months furlough pay, the last payment having been made on 29 December 2020. Mr Richardson replied at 1324 setting out that he was sending the redundancy confirmation letter and financial statement for the third time. The email also contained the link to a video of the meeting on 10 December 2020. The claimant accepted in evidence that he received this email.

25. The claimant explained that the reference to legal advice was because he had been in contact with ACAS and this contact had been from October 2020 through to 2021. The initial contact was in relation to a disciplinary matter which arose in October 2020 but was dropped because it became clear that the claimant had authorisation for leave taken in September 2020.

26. The claimant said that it was when he received the email on 18 May 2021 with the redundancy confirmation letter and financial statement that he considered he had been dismissed.

27. The claimant commenced the early conciliation through ACAS. He was given an ACAS certificate (number R144251/21/80) which confirms that the early conciliation process was initiated on 6 June 2021 and the certificate was issued on 18 July 2021. The certificate gives the name of the prospective respondent as “Mascolo Ltd”.

28. On 13 August 2021, five months after the expiry of the time limit, the claimant presented his claim form. The claim form gave the name Stephen Richardson for the respondent and rather confusingly indicated that his employment was continuing. The claim form was initially rejected by the tribunal as the name for the respondent on the claim form did not match the name used in early conciliation. On 6 September 2021, the claimant clarified matters. After reconsideration, the claim was accepted by the tribunal and the claim form treated as received on 6 September 2021.

29. The claim form sets out claims for:

- Unfair dismissal further to the claimant’s dismissal for reason of redundancy (section 111, Employment Rights Act 1996);
- Notice pay;
- Holiday pay (regulation 30, Working Time Regulations 1998); and
- A redundancy payment (section 164, Employment Rights Act 1996).

30. On 15 October 2021, the respondent presented its response form providing the name of the respondent as Westfield (T) Hairdressing Limited t/a Toni & Guy. This entity is taken to be the proper respondent to the claims. Westfield Hairdressing appears on the claimant’s payslips.

31. The respondent resists all the claimant’s claims on the basis that all the claims save for the claim for a redundancy payment have been presented out of time and the tribunal has no jurisdiction to consider them. The respondent says the redundancy payment has been paid in full.

32. The respondent applied for the claims to be struck out as having no reasonable prospect of success or, in the alternative, subject to deposit

orders as a condition of continuing any allegation or argument on the grounds the claim has little reasonable prospect of success.

33. In his written submissions, the claimant contended that properly construed his claim form contained a claim for unlawful deduction from wages due to non-payment of furlough pay for a period between September and December 2020 and in the alternative sought permission to amend his claim form to include a claim for such sums.

34. The respondent stated that he had calculated the furlough pay due for the period in question between September 2020 and 10 December 2020 as £4,307.75 gross and further to deductions the amount of £2,803.89 had been transferred to the claimant's solicitors. After confirming the position with his solicitors, the claimant stated that he no longer wished to pursue any claim for such sums.

The law

35. The normal time limit for presenting a claim for unfair dismissal to a tribunal is set out in 111(2)(a) & (b) of the Employment Rights Act 1996 (ERA).

36. Section 111(2)(a) provides that a tribunal shall not consider a claim of unfair dismissal unless it is presented before the end of the period of three months beginning with the effective date of termination.

37. In a case where an employee is dismissed without notice or with a payment in lieu of notice, the effective date of termination is the date on which that termination takes effect (section 97(1)(b), ERA 1996).

38. Section 111(2)(b) provides an exception to the normal time limit. There are two limbs to this test. Accordingly, a tribunal may consider a claim presented outside the normal time limit, if it is satisfied that:

    - it was not reasonably practicable for the claim to be presented within the normal time limit; and

    - the claimant has presented it within such further period as the tribunal considers reasonable.

39. A claim for notice pay must be presented within the period of three months beginning with the effective date of termination of the contract giving rise to the claim or where the tribunal considers it is not reasonably practicable for the claim to be presented within the normal time limit within such further period as the tribunal considers reasonable (Article 7 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994).

40. A claim for holiday pay must be presented before the end of the period of three months beginning with the date on which it is alleged that the exercise of the right should have been permitted or payment made or where the tribunal considers it is not reasonably practicable for the claim to be presented within the normal time limit within such further period as the tribunal considers reasonable (Regulation 30(2) of the Working Time Regulations 1998).

41. In relation to the right to a redundancy payment, the normal time limit is before the end of a period of six months beginning with the relevant date (section 164, Employment Rights Act 1996). The relevant date is either the date on which notice expires where the contract is terminated with notice or, where the contract is terminated without notice, the date on which the termination takes effect (section 145, Employment Rights Act 1996).

42. Section 162 of the ERA provides how to calculate the amount of a redundancy payment to arrive at a certain number of 'week's pay'. Section 220 to 229 of the ERA provides how to calculate a 'week's pay'.

43. The normal time limit is extended by section 270B of the Employment Rights Act 1996 to take account of the obligation to enter into early conciliation facilitated by ACAS and applies in every case to 'stop the clock' during the conciliation period. An additional extension applies in certain circumstances, where the limitation date calculated under section 207B(3) falls within the period one month after the end of conciliation. The additional extension therefore did not apply in this case.

44. The burden of proof for establishing that it was not reasonably practicable to present the claim in time is on the claimant. Case law (*Marks & Spencer plc v Williams-Ryan* [2005] EWCA Civ 470) confirms that the tribunal can take into account various factors such as:

- the substantial cause of the claimant's failure to comply with the time limit;
- whether and when the claimant knew of their rights, including whether the claimant was ignorant of any key information;
- whether the claimant had been advised by anyone and the nature of the advice given;
- whether there was any substantial fault on the part of the claimant or their adviser which led to the failure to present the complaint in time.

45. As confirmed in *Marks & Spencer plc v Williams-Ryan* a claimant's ignorance of the right to bring a claim or of the time limit or procedure for making a claim, will not automatically lead to a finding that it was not reasonably practicable for the claimant to present the claim in time. Where ignorance is a factor, the tribunal needs to be satisfied that the claimant's ignorance was reasonable in all the circumstances.

46. As set out in *Machine Tool Industry Research Association v Simpson* 1988 ICR 558 (CA), where reliance is placed on ignorance of a key fact the claimant must establish:

- that the ignorance of the fact relied upon was reasonable;
- that knowledge had been gained outside the time limit that was reasonably and genuinely believed to be crucial to the case and give grounds for a claim, and
- gaining this knowledge was crucial to the decision to bring the claim.

47. The 'Dedman principle' from the case of *Dedman v British Building and Engineering Appliances Ltd* [1974] 1 WLR 171 provides that if a claimant goes to a 'skilled adviser' and that adviser makes a mistake such as a

mistake about time limits, the claimant is caught by the mistake. The remedy is against the advisers.

48. The case law shows that a claimant is not automatically prevented from showing that it was not reasonably practicable to present their claim in time when they have been in receipt of bad advice. ACAS advisers have been held to be 'skilled advisers'.

49. If the claimant satisfies the tribunal that the first limb of the relevant exception is met or rather that it was not reasonably practicable to present the claim in time, the tribunal must then proceed to consider whether it was presented within a reasonable time thereafter. This is a matter for the tribunal (*Wall's Meat Co Ltd v Khan* [1978] IRLR 499, [1979] ICR 52, CA) bearing in mind the length of and circumstances of the delay.

50. Under Rule 37 (Striking out), the tribunal may strike out all or part of a claim at any stage of the proceedings provided one of the stipulated grounds is made out such as the ground that the claim has no reasonable prospect of success.

51. Under Rule 39 (Deposit orders), if, at a hearing, the tribunal considers any specific allegation or argument has little reasonable prospect of success, it may make an order requiring a party to pay a deposit not exceeding £1000 as a condition of continuing to advance that allegation or argument.

Conclusions and analysis

52. There is no dispute that the claimant was dismissed for reason of redundancy. The parties dispute when that dismissal took effect and therefore what the effective date of termination was for the purpose of calculation of time limits.

53. As noted above, I have found as a matter of fact that at the meeting on 10 December 2020 there was a clear communication to the claimant that his position was now redundant thus his employment was ending with immediate effect and without notice. The claimant was told payments such as notice pay and redundancy pay would be calculated and paid and he would receive confirmation of the outcome of the meeting. In accordance with section 97(1)(b), where dismissal is without notice or with pay in lieu of notice, the effective date of termination is the date on which that termination takes effect.

54. Accordingly, I conclude that the effective date of termination is 10 December 2020.

55. The normal time limit to present the claims for unfair dismissal was therefore 9 March 2021. The claims for notice pay and holiday pay were also subject to this normal time limit.

56. The claimant's ignorance did not on his case relate to the time limit itself but rather was based on his alleged understanding that he was either in a period of notice or remained employed until 18 May 2021 and he understood he was dismissed only on that date. The claimant's written submissions place reliance on *Geys v Societe Generale, London Branch* 2013 ICR 117, SC on

the basis that notice of termination must be clear and unambiguous as to when the employment relationship is to terminate and that, as submitted, at no stage during the meeting was the claimant informed when his employment would terminate. The claimant makes a technical argument which does not fit with the circumstances of this case and his clear understanding at the time.

57. I have found that termination was without notice and there was a clear communication to that effect. The claimant was told the outcome would be confirmed in writing and the claimant himself referred to waiting for confirmation. In other words, the respondent was to have confirmed in writing what had occurred. Even if it was reasonable to regard himself as remaining employed until a notice period expired, I find that it was not reasonable for the claimant to consider that notice period would endure beyond a few months and certainly not for a period of five months.

58. In any event, I have found as a matter of fact that the claimant had awareness on 29 January 2021 when he received the P45 or shortly thereafter that his employment was recorded as having ended on 10 December 2020. The claimant emailed the respondent about this matter but the claimant says he did not receive the reply sent on 1 February 2021. I have found that he did. The claimant did not communicate with the respondent at all thereafter or until 18 May 2021 which is not consistent with him waiting for confirmation about the future of his employment.

59. In so far as the claimant relies upon acting on advice with regard to not filing his claim within the normal time limit, the claimant's email of 18 May 2021 refers to having taken 'legal advice' and been advised that no formal redundancy process had been followed or completed and he was owed five months' pay. The claimant was of course fully aware that there had been redundancy consultation meetings and as such a position that no redundancy process had been followed at all is without real foundation. The claimant clarified in his oral evidence that the reference to legal advice was because he had contact with ACAS from October 2020 and into 2021. ACAS is not a source of legal advice. He said his initial contact was in relation to the disciplinary matter which was resolved by the end of October 2020. There was no clear evidence of advice that influenced the claimant not to present his claim at any point before the expiry of the normal limit on 9 March or evidence that in circumstances where the claimant was acting on advice the Dedman principle should not apply.

60. If the claimant was in contact with ACAS during this time, he was clearly capable of taking steps regarding his rights and there was no explanation put forwards as to why it was not reasonably practicable to file any claim at this point and before 9 March 2021.

61. In evidence, the claimant accepted that if the effective date of termination was held to be 10 December 2020, then it would have been reasonably practicable for him to have filed his claim within the normal three month time limit.

62. I find that it was reasonably practicable for the claimant to have filed his claims for unfair dismissal, notice pay and holiday pay within the normal time limit.

63. In those circumstances, I do not strictly need to consider the second limb of the exception to the normal time limit or rather whether the claim was in any event filed within such further time period as the tribunal considers reasonable. The claimant certainly had awareness of the end of his employment being the fact on which his claim is based by the end of January 2021 and said he was in contact with ACAS during this time and from late 2020. The normal time limit laid down by parliament is a period of three months. The claimant did not file his claim for more than two months after the normal time limit expired. For completeness, I record that I have concluded that the claim was not presented within any such further time period as was reasonable.

64. As the claim for unfair dismissal, holiday pay and notice pay was presented out of time the tribunal does not have jurisdiction to hear it.

65. The claimant's claim for a redundancy payment is however filed in time on the basis that early conciliation commenced on 6 June 2021 within the normal six month time limit and receipt of the claim by the tribunal on 6 September 2021 is consistent with the early conciliation time provisions. The respondent accepts the claim is on time but submits that the claimant has been fully paid his redundancy payment and the claim should be struck out as having no reasonable prospects of success or subject to a deposit order.

Applications for strike out/deposit orders

66. I have discretion as to whether or not to strike out the claim for a redundancy payment. In exercising that discretion, I take account of the fact that strike out is a draconian measure and the balance of prejudice.

67. I find that there are not no reasonable prospects of success for the claimant in relation to the claim that he be paid his full redundancy payment. The respondent based the calculation as to a week's pay on NMW rates. The claimant was an Art/Style Director. The contract of employment clause relating to pay refers to commission based pay and the claimant would have likely received a greater amount in commission than other stylist colleagues who were not operating at his level or charged out at his rates.

68. The ERA sets out how to calculate a week's pay and I find there are prospects that the claimant can show that a week's pay properly calculated is greater than the NMW rate. The claimant claims £425.40 as a week's pay for this purpose as set out at paragraph 17 of his witness statement. The payslips showing the claimant's pre-furlough pay from December 2019 were in the bundle.

69. Accordingly, I decided not to exercise my discretion to strike out the redundancy payment claim.

70. I also decided that it would not be appropriate to impose a deposit order in an amount not exceeding £1000 as a condition of the claimant continuing with his allegation that there is a shortfall in the amount of redundancy pay he has been given by the respondent. I consider that there are more than little reasonable prospects of success of the claimant showing he has not

been paid the redundancy payment to which he is entitled in full and in all the circumstances it would be disproportionate to impose a deposit order as a condition of the claim continuing to hearing.

Tribunal Judge Peer acting as an Employment Judge

Date 5 March 2022

JUDGMENT & REASONS SENT TO THE PARTIES ON

07/03/2022

FOR THE TRIBUNAL OFFICE