EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4109646/2021

Preliminary Hearing held remotely on 31 January 2022

Employment Judge A Kemp

Mr R Kenna	**Claimant** **Represented by:** **Ms N Maguire and Mr R Crombie** **Student Advisers**
1st Homecare Ltd	**Respondent** **Represented by:** **Mr T Muirhead** **Tribunal Advocate**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The claimant's claims are not within the jurisdiction of the Employment Tribunal and the Claim is dismissed

REASONS

Introduction

1. This Preliminary Hearing was arranged to address issues of jurisdiction and whether to allow an amendment to the claim sought by the claimant. The Claim as originally made was one for unfair dismissal under section 98 of the Employment Rights Act 1996 ("the Act"), breach of contract, holiday pay, arrears of pay, and for sex discrimination under the Equality Act 2010. The claims for holiday pay, arrears of pay and of sex

discrimination were earlier withdrawn. The claim of breach of contract was not insisted on before me, and did not feature in the written submission for the claimant referred to below. That therefore left the claim for unfair dismissal.

2. The claimant further seeks to amend the claim to add a claim for automatically unfair dismissal for having made protected disclosures under section 103A of the Act.

3. There have been two earlier Preliminary Hearings, on 15 July 2021 and 2 November 2021. Initially the claimant acted for himself, but latterly he benefitted from assistance from student advisers. They represented him at the hearing before me. Mr Muirhead represented the respondent.

4. The respondent sought a Preliminary Hearing arguing that the Tribunal did not have jurisdiction for the claims as they were time-barred. The respondent also opposed the amendment. For that to be considered the Claim made initially must be within the jurisdiction of the Tribunal. That issue was therefore addressed first.

Evidence

5. The claimant was the only person to give evidence. A Bundle of Documents had been prepared by the parties. Most of it was referred to during the hearing.

6. The hearing took place by Cloud Video Platform in accordance with the Note from the last Preliminary Hearing. It was conducted successfully on that basis.

Issues

7. The hearing considered the following issues:

   (i) whether or not it was reasonably practicable to have presented the Claim within the primary time limit in section 111 of the Act, having regard also to the provisions on early conciliation,

(ii) where it was not reasonably practicable to have done so within the primary time limit whether the claim was presented within a reasonable period of time and,

(iii) If the claim was in the jurisdiction of the Tribunal, whether or not to allow the amendment application to add a claim under section 103A of the Act.

The facts

8. The claimant is Mr Richard Kenna.

9. The respondent is 1st Homecare Ltd

10. The claimant was employed by the respondent as a Carer from 10 May 2017.

11. In about March 2020 the claimant was assaulted at work, although there was no physical injury. The circumstances left him feeling anxious. He did not sustain a physical injury, and did not receive any medication after the assault.

12. The claimant suffered from sciatica which caused him back pain and left him for a number of weeks, on dates not given in evidence, with paralysis then weakness in his left side.

13. The claimant had a mobile telephone and an ipad. He used both devices to carry out searches on the internet from time to time. He also sent and received emails, made telephone calls on the mobile telephone, and carried out tasks such as booking holidays and others on the ipad.

14. The claimant attended an investigatory meeting with the respondent on 18 September 2020 to address allegations against him.

15. The claimant attended a disciplinary meeting with the respondent on 13 November 2020 in relation to the allegations

16. By letter dated 25 November 2020 the respondent summarily dismissed the claimant for what it considered to be gross misconduct. It stated that

he could appeal within five working days by email to Andrea Holden of the respondent.

17. That letter was emailed to the claimant that same day and also posted to him.

18. That was a time during restrictions imposed as a result of the Covid-19 pandemic. As a result the claimant very rarely went out.

19. Shortly after being informed of his dismissal the claimant carried out online searches, including as to an “instant dismissal”. He viewed pages with regard to remedies for dismissal, details of which were not given in evidence.

20. On 2 December 2020 the claimant emailed the respondent to challenge the dismissal, in terms which he believed was an appeal. He requested that it be forwarded to Andrea Holden.

21. The respondent replied to that message but the reply was not before the Tribunal. No appeal hearing was arranged, and no action taken on any appeal by the claimant.

22. On a date not given in evidence the claimant made a claim for state benefits. His claim for unemployment benefit was rejected.

23. The claimant contacted his General Practitioner with regard to a concern over his prostrate, and was referred for an ultrasound examination which took place on a date not given in evidence. It indicated that there was no issue with his prostrate, but the issue with it had caused him anxiety.

24. On dates not given in evidence he spoke with two persons at the Scottish Social Services Council, the regulator for those acting as carers. They gave him a measure of assistance following his dismissal, details of which were not given in evidence.

25. On dates not given in evidence the claimant contacted about four firms of solicitors to seek advice from them. He spoke to each firm for about five

to ten minutes. The details of what he was told by them were not given in evidence.

26. On a date or dates not given in evidence the claimant contacted ACAS with regard to his dismissal. He communicated with them by both email and telephone. Details of what he was told by them were not given in evidence.

27. The claimant commenced early conciliation with ACAS on 8 March 2021. The form he submitted to them to do so was not before the Tribunal.

28. An Early Conciliation Certificate was issued to the claimant on 19 April 2021. It was sent to him by ACAS by email.

29. The claimant thereafter contacted the Employment Tribunal office, on a date not given in evidence. He was sent an email, not before the Tribunal, with a link to the Claim Form. The claimant spent about two days completing the Claim Form online, doing so on his ipad.

30. The Claim Form included the claimant's name, address and date of birth, details of the respondent, details of the Early Conciliation certificate, the hours he worked, the gross and net pay, details of the claims then being made which were for unfair dismissal, sex discrimination, notice pay, holiday pay and arrears of pay, and commentary on those claims together with the remedy sought.

31. The Claim was presented to the Tribunal on 17 May 2021.

32. The claimant contacted his present advisers at the University of Strathclyde Law Clinic on 30 July 2021.

The claimant's submission

33. The following is a basic summary of the written submission very helpfully made by the claimant's advisers. The Claimant was unable to obtain legal advice due to illness and his financial situation. Due to ill health and his level of literacy, he was unable to understand the technicalities of the

tribunal process including time limits, without such advice. Particular reliance was placed on the authority of ***Hutton***, referred to below. A number of other authorities were referred to. The claimant struggled with the advice given to him, he had health issue, there was a lack of legal advice and he had limited reading capabilities. He was ignorant of time-limits, and it was not reasonably practicable to have commenced early conciliation timeously. The Claimant's mental and physical health along with his ignorance of the entire process was a barrier to his commencing the claim on time . He was unrepresented and was struggling to understand the process. Notwithstanding this, he was late in starting early conciliation by a relatively short duration of what was said to be ten days. That did not cause prejudice to the respondent.

The respondent's submission

34. The following is a brief summary of the oral submission Mr Muirhead made. He argued that the claimant did not have the benefit of the early conciliation extension as the claim was presented outside the time-limit. The test was of reasonable practicability and the onus was on the claimant. A failure to make reasonable enquiries was not sufficient. The claimant was computer literate to an extent. He checked what he needed to do online. He claimed benefits and it was in judicial knowledge that there was a source of advice when doing so, and his evidence that he had not received advice should not be accepted. Solicitors firms were also a source of advice, and the claimant would have been given advice about making claims and timelimits. He accepted that he had probably spoken to ACAS before 8 March 2021. They would also have given him that advice. There was no evidence from his GP or otherwise about mental of physical health, but it was not something that prevented the claim being made. He could not seek legal advice because of financial constraints but many people are in that position. He could have gone to the Citizens' Advice Bureau or other organisations. Separately he had waited almost a month from the EC Certificate to present the Claim and had not explained why that was. He invited me to dismiss the Claim.

The law

35. Section 111 of the 1996 Act provides as follows, so far as relevant to this Claim:

> "**111 Complaints to employment tribunal**
>
> (1) A complaint may be presented to an employment tribunal against an employer by any person that he was unfairly dismissed by the employer.
>
> (2) Subject to the following provisions of this section, an employment tribunal shall not consider a complaint under this section unless it is presented to the tribunal—
>
> (a) before the end of the period of three months beginning with the effective date of termination, or
>
> (b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.
>
> (2A) Section 207B (extension of time limits to facilitate conciliation before institution of proceedings) applies for the purposes of subsection (2)(a)."

36. Before proceedings such as those in this case can be taken in an Employment Tribunal, prospective claimants must first contact ACAS and provide it with certain basic information to enable ACAS to explore the possibility of resolving the dispute by conciliation (Employment Tribunals Act 1996 section 18A(1)). This process is known as 'early conciliation' (EC), with the detail being provided by regulations made under that section, namely, the Employment Tribunals (Early Conciliation: Exemptions and Rules of Procedure) Regulations 2014 SI 2014/254. They provide in effect that within the period of three months from the effective date of termination of employment EC must start, doing so then extends the period of time bar during EC itself, and that period is then extended by a further month for the presentation of the Claim Form to the Tribunal. If

the Early Conciliation is not commenced within the statutory period that extension of time during EC and for a month after the certificate is issued does not apply.

37. The question of what is reasonably practicable is explained in a number of authorities, particularly ***Palmer and Saunders v Southend on Sea Borough Council [1984] IRLR 119,*** a decision of the Court of Appeal in England. The following guidance is given:

> "34. In the end, most of the decided cases have been decisions on their own particular facts and must be regarded as such. However, we think that one can say that to construe the words "reasonably practicable" as the equivalent of "reasonable" is to take a view too favourable to the employee. On the other hand, "reasonably practicable" means more than merely what is reasonably capable physically of being done. … Perhaps to read the word "practicable" as the equivalent of "feasible", as Sir John Brightman did in Singh's case and to ask colloquially and untrammelled by too much legal logic, 'Was it reasonably feasible to present the complaint to the Industrial Tribunal within the relevant three months?' is the best approach to the correct application of the relevant subsection.
>
> 35. What however is abundantly clear on all the authorities is that the answer to the relevant question is pre-eminently an issue of fact for the Industrial Tribunal and that it is seldom that an appeal from its decision will lie. Dependent upon the circumstances of the particular case, an Industrial Tribunal may wish to consider the manner in which and reason for which the employee was dismissed, including the extent to which, if at all, the employer's conciliatory appeals machinery has been used. It would no doubt investigate what was the substantial cause of the employee's failure to comply with the statutory time limit, whether he had been physically prevented from complying with the limitation period for instance by illness or a postal strike or something similar. […] Any list of possible relevant considerations, however, cannot be exhaustive, and, as we have stressed, at the end of the day the

> matter is one of fact for the Industrial Tribunal, taking all the circumstances of the given case into account."

38. The burden of proof is on the claimant to prove that it was not reasonably practicable to present the complaint in time: ***Porter v Bandridge Ltd [1978] IRLR 271.***

39. In ***Asda Stores Ltd v Kauser UKEAT/0165/07***, a decision of the Employment Appeal Tribunal, Lady Smith at paragraph 17 commented that it was perhaps difficult to discern how:

> "'reasonably feasible' adds anything to 'reasonably practicable', since the word 'practicable' means possible and possible is a synonym for feasible. The short point seems to be that the court has been astute to underline the need to be aware that the relevant test is not simply a matter of looking at what was possible but asking whether, on the facts of the case as found, it was reasonable to expect that which was possible to have been done."

40. In ***Marks and Spencer plc v Williams-Ryan [2005] IRLR*** 562 the Court of Appeal set out the issues to consider when deciding the test of reasonable practicability, which included (i) what the claimant knew with regard to the time-limit (ii) what knowledge the claimant should reasonably have had and (iii) whether he was legally represented.

41. In ***Lowri Beck Services Ltd v Brophy [2019] EWCA Civ 2490***, the Court of Appeal stated that the test of reasonable practicability should be given a liberal interpretation in favour of the employee, citing ***Williams-Ryan***.

42. Ignorance of a time limit has been an issue addressed in a number of cases. In ***Wall's Meat Co Ltd v Khan [1979] ICR 52*****,** the test which Lord Denning had earlier put forward in another case was re-iterated as -

> "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'.'

43. The editors of Harvey on ***Industrial Relations and Employment Law*** make the following comments at paragraph P1.207(2):

> "As the courts have pointed out, with the widespread public knowledge of unfair dismissal rights, it is all the time becoming more difficult for an employee to successfully plead ignorance: see, for example, ***Riley v Tesco Stores Ltd [1980] ICR 323*** at 328, 329, 335, ***Wall's Meat Co Ltd v Khan***, above. If this was the case in the 1980s, it applies with significantly more force now: with increasing discussion, advertisement and coverage of employment rights and litigation in the media, coupled with the ease of searching for information online, the cases of justifiable ignorance will be fewer and fewer."

44. In ***Kauser*** the EAT stated the following on the facts of that case, where the claimant claimed that she had been very stressed during the relevant period as to timebar:

> "There is no finding of illness or incapacity. The circumstances are not comparable, for instance, to those of the Claimant who fell ill seven weeks into the three month period, in the case of ***Schulz v Esso Petroleum Co Ltd [1999] ICR 1202***. It cannot be sufficient for a Claimant to elide the statutory time limit that he or she points to having been "stressed" or even "very stressed". There would need to be more."

45. In ***Norbert Dessentrangle Ltd v Hutton UKEATS/0011/13*** the EAT refused an appeal where a claimant's evidence that he had been so incapacitated that he it had not been reasonably practicable to have presented a Claim in the statutory time-limit, even though the only evidence of that came from the claimant, with no support from any medical evidence. The EAT President indicated that his own view was that the statutory test had not been met, but that the decision was not a perverse one in that it had been open to the Employment Judge to accept the

claimant's evidence as to the level of incapacity from which he had suffered at the material time.

Observations on the evidence

46. I was concerned over the reliability of the claimant's evidence in a number of respects. I was concerned in particular at how little detail was before me on what happened in the crucial periods from 25 November 2020 the date of dismissal to 8 March 2021, when Early Conciliation started, and then from 19 April 2021 to 17 May 2021 being from the date of the certificate to the presenting of the Claim. The claimant said that he could not remember which internet pages he had looked at, for example, and apart from a search on "instant dismissal" did not say what searches he had made; he did not say what comments had been made to him by ACAS, or the four firms of solicitors he sought advice from, or those to whom he applied for benefits, or those at the SSSC. He did not produce the email from the Tribunal he spoke to in evidence, sending him a link to the Claim Form. He did not produce any GP report, letter or records, or any other evidence supporting the position with regard to his evidence as to his medical condition. His answers were vague on several occasions, and at times inconsistent. There were other aspects of his evidence that I comment on further below.

Discussion

47. The first issue I shall address is in relation to jurisdiction for the unfair dismissal claim under section 98 of the Act. The effective date of termination was, as stated, 25 November 2020. Early conciliation ought to have been commenced by 24 February 2021. It was not commenced until 8 March 2021, which is twelve days late. The question is whether the claimant has established that it was not reasonably practicable for him to have done so by 24 February 2021.

48. I shall comment first of all on the physical and mental health issues. There was an absence of any supporting evidence for that, either written or otherwise. That is not necessarily a bar to the claimant succeeding on the issue but is relevant in this case as I was concerned that the evidence

given by the claimant was at times inconsistent. The claimant spoke to an assault on him in March 2020 which he said caused him mental health issues, but accepted that he had not received any medication for that. He said initially in cross examination that he had been in bed with sciatica for 12 weeks, but that was not accurate, as he later accepted when that was put to him. He had had sciatica, but not so severely as to be bedridden for such a period, and no detail of when that took place was given. I appreciate that concerns over his prostrate added to the levels of stress and anxiety, but the ultrasound showed that there was in fact no risk to him, and when that took place was not given in evidence. I considered overall that the claimant exaggerated to an extent his physical and mental health issues in evidence. The claimant exaggerated his evidence in other respects. For example he said that he was computer illiterate but accepted that he had both a mobile telephone and ipad, which he used for internet searches and for example for booking holidays, as well as making telephone calls to a number of parties. That alone indicates at least a degree of competence at using such electronic devices, and carrying out internet searches and research and that he was not computer illiterate. In cross examination he also accepted that it was not his health that had been the issue for him but the lack of legal advice, which appeared to me inconsistent with how he had initially described his position.

49. Whilst each case is dependent on its own facts, I considered that the facts in this case were not broadly the same as those found to have applied in ***Hutton***. There the Employment Judge accepted the claimant's evidence as to the degree to which the claimant was incapacitated during the material period, and held that the statutory test was met. Even in that situation the EAT indicated that contrary views could be held. The claimant also founded on a decision of the Employment Tribunal in ***Ms F Grabe v The Untied Reformed Church: 2204367/2012.*** As a Tribunal decision it is of persuasive authority only, and in that case the facts were again very different from those in this case. There the Judge found that the situation had been "disabling" for the claimant. In both that case and that of ***Hutton***, the claimant had regularly found difficulty in getting out of bed to attend to normal affairs. I did not consider that the authorities relied on by the claimant were sufficiently similar on their facts to those in the present case,

so as to lead me to the conclusion that the claimant had met the onus of proof on him.

50. The second issue he founded on was his attempts to seek advice from others which he said failed. I do appreciate that he did not secure legal advice until after the material periods, and that he did try to do so. He was at best vague however on the details of what was said to him by others with whom he had had conversations, including ACAS, about four firms of solicitors, those at the Benefits Agency, two persons at the SSSC and the Tribunal itself. I was concerned at how that evidence was given. He said that he had been given "bits and bobs of advice". It appeared to be accepted from that that some advice had been given, not that it was none, but what it was, from whom, and when he did not say. When asked if he had been aware of his options prior to being dismissed he said "Not really". That was a somewhat ambiguous answer. He did know enough to carry out internet searches, he did later contact ACAS for EC, and he did himself prepare and submit the Claim Form. Why he commenced EC when he did was not properly explained in evidence, nor why he could not have done so twelve or more days earlier than he did.

51. The claimant was also vague about what efforts he did make to find out about making claims and the process to do so including as to time limits. He accepted that he had the ability to carry out internet searches, and that he had done so, but he was not clear on what he had done in that regard. I consider that the claimant had sufficient ability to carry out an effective search of his rights on dismissal, together with the process that must be followed including EC, and that any reasonable search would quickly have led him to know firstly of the right to claim unfair dismissal, and secondly the time-limit to do so both to start Early Conciliation and then to make a Claim to the Tribunal. That is further evidenced by the very fact that he did contact ACAS to commence Early Conciliation, and did so successfully. Early Conciliation started on 8 March 2021. He said in evidence that his medical condition continued throughout the period from dismissal to the presentation of the Claim. What he has not explained in a way I consider sufficient is why he did not start the Early Conciliation he did undertake within the statutory period, which is to say twelve or more days earlier. His

argument was that he did not know what to do, and did not properly understand the process. I did not consider that reliable for the reasons I address below.

52. I did take account of a number of difficulties that the claimant spoke to. Firstly these events occurred during a pandemic, when seeking advice is more difficult. Very many people however also face the same issues and make timeous claims. The claimant was able to use a telephone and ipad for communicating, and for researches. Secondly the claimant sought advice from solicitors' firms, but did not have the financial resources to instruct them. There may have been firms willing to act under legal advice and assistance but I appreciate there are limits to the numbers of firms doing so, and do not consider that the claimant was at fault for not identifying one. He did not secure independent legal representation during the period in issue in these proceedings, and he was therefore a party litigant during that period. That is one factor in his favour. But it is not sufficient by itself, he did speak to a number of others about matters, and the difficulties from not having a solicitor to act for him were far from insuperable. As the case law indicates, making some form of investigation into the provisions as to making claims and time-limits to do so is to be expected, unless that itself is not reasonable. He could have tried other sources of advice as the respondent suggested, but again I do not consider that his not doing so is to be held against him. Whilst I appreciate that those in the claimant's position face greater difficulties than those able to instruct a solicitor I do not consider that that by itself is sufficient. He said that he was not able to understand the advice given to him or the internet pages, that he could not concentrate for more than ten minutes, and that it was all "gobbledegook" to him. Again I considered his evidence on this to be exaggerated. He was not as computer illiterate as he said he was in evidence as addressed above. The Claim Form he completed did not support his arguments on this either. The details of the grounds for the claims made were very brief and far from adequate, but that is not infrequently the case and the essential matters, including for example the early conciliation reference number which is not always correctly stated, was accurately set out. He was able to identify that he wished to pursue a number of different claims, and set out the details referred to above

accurately. That all indicates a degree of understanding greater than that which he claimed that he had, in my judgment. there was no medical evidence of a general lack of cognitive ability or something similar to that. Thirdly his email of 2 December 2020 was, I consider, an appeal, and the respondent did not fully respond to it, or arrange an appeal hearing. He did not however argue that he was waiting for the outcome of that process before enquiring about making a claim, for example.

53. I considered, taking account of all the circumstances, whether the claimant had established that it was not reasonably practicable for him to have commenced the Claim timeously, but concluded that he had not, and on that basis the Tribunal does not have jurisdiction on the first “limb” of the statutory test.

54. The next issue does not strictly arise, but was whether the Claim Form was presented within a reasonable period of time after it did become reasonably practicable to have done so. In this case the Early Conciliation Certificate was issued on 19 April 2021. He had had discussions with ACAS during the period of early conciliation as he accepted. Whilst he did not explain the detail of those discussions, and said that he had not understood them, I was concerned by that evidence. I would expect ACAS to have told him both that his commencement of early conciliation was late, and that he now needed to present the Claim as soon as he could. He denied that in evidence, but no detail was given on what was said, and I did not consider his evidence in this regard to be reliable. He accepted that he had had, as he put it, bits and bobs of advice, but did not articulate at all what that was. There appeared to me to be a lack of candour in his evidence in this regard. It appears to me to be more likely that the claimant was informed that his Claim may be timebarrred when in discussion with ACAS and that the Claim Form required to be submitted without any delay.

55. Even if that advice had not been given by ACAS, further internet searches on what to do, how and by when were reasonably required at the stage of the EC Certificate being given, if advice could not be found elsewhere. By that time, at the very latest, it ought to have been clear that the Claim was required, there being no effective reply to his email of 2 December 2020 and much time having passed, with early conciliation having not

succeeded in resolving matters, and the Claim Form needed to be submitted very quickly, essentially within a small matter of days, unless there was a good reason that that could not be done. The claimant does not have the benefit of the extension to timebar by the Regulations as early conciliation was not commenced timeously. He is not therefore entitled in law to wait for another month.

56. No good reason was given by the claimant for that period of 28 days before the Claim was presented. He explained that about two days was taken in completing the Claim Form, but the claimant did not offer any explanation as to the time taken in say the three weeks or so after his receipt of the Early Conciliation certificate. He did contact the Tribunal and was given a link to the Claim Form but that email was not before me, such that the date on which that occurred is not known, but it seems likely to have been only a few days before the Claim was presented – that at least was his own evidence on that. That lack of explanation of what was done in the period of about three weeks from the date the Early Conciliation Certificate was emailed to him is I consider contrary to his being able to show that the Claim was presented within a reasonable period of time. I appreciate that he did not have legal advice at that stage, but that does not mean that he succeeds on this aspect. I concluded from the evidence before me that the Claim was not presented within a reasonable period of time in this regard, and that even had the claimant met the first limb of the test he failed at the second.

57. I must conclude that the unfair dismissal claim is not within the jurisdiction of the Tribunal. It must be dismissed as a result. I appreciate that that will seem to be a harsh outcome for the claimant, but it is the conclusion to which I am driven by the law and the circumstances before me given the evidence I heard.

58. The claimant mentioned on a number of occasions in his evidence his desire to make a claim for what he described as an assault on him in March 2020 when at work. He was not cross examined about that, and I accepted his evidence on that particular matter for the purposes of the claim before me. It is competent to pursue a personal injury claim in some circumstances but that requires to be pursued in court, not the

Employment Tribunal. I do not suggest that he should do so, but it is an avenue that is open to him to explore if he wishes, as is a claim for breach of contract. Both claims are capable of being pursued in a court where different time-bar provisions apply, and the dismissal of the claims before me may not affect that.

59. That I dismiss the claim is despite the helpful written submission by the claimant's representatives. It was comprehensive and of a high standard, particularly for those at the stage of being student advisers, and they are to be commended for the work that they did in relation to that.

Amendment

60. In light of the findings above I do not require to address the proposed amendment. I shall however add some brief comments about it. A claim of automatically unfair dismissal under section 103A of the Act is one that is regulated by the same time-bar provisions under section 111 as that for unfair dismissal under section 98. There is authority from the EAT that adding a claim under section 103A is not adding an entirely new claim to one for unfair dismissal under section 98, as that is a claim within the ambit of the claim of unfair dismissal. In ***Pruzhanskaya v International Trade & Exhibitors (JV) Ltd UKEAT/0046/18*** an unfair dismissal claim was commenced in time, and the claimant sought to add by amendment a claim under section 103A. The EAT said this in relation to that section:

> "It does not create a separate head of complaint to which a separate time limit applies. It is an aspect of the right not to be unfairly dismissed under Part X of the 1996 Act. The Claimant had brought an in-time complaint of unfair dismissal; I do not think that alleging a further potential reason for dismissal, whether it be an "ordinary" reason such as conduct or an "automatic" reason such as the making of a protected disclosure, involves a new complaint with a new time limit."

61. That is an authority that supports the view that the amendment would have been allowed if the Tribunal had jurisdiction over the Claim before it for unfair dismissal under section 98. The claims for unfair dismissal under

sections 98 and 103A both fall to be treated in the same manner as to jurisdiction, and the section 103A claim even if allowed by amendment would also be outwith the jurisdiction of the Tribunal because of section 111. As the claim that was before the Tribunal is outwith its jurisdiction there is no Claim left to amend in any event, which is why the matter of amendment does not arise.

Conclusion

62. The claimant's claims are not within the jurisdiction of the Employment Tribunal and the Claim must therefore be dismissed.

Employment Judge: Sandy Kemp
Date of Judgment: 04 February 2022
Entered in register: 07 February 2022
and copied to parties