EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 8000554/2023 Preliminary Hearing by Cloud Video Platform at Edinburgh on 2 April 2024

Employment Judge: M A Macleod

Dax MacPherson	**Claimant** **In Person**
NIC Services Group Limited	**Respondent** **Represented by** **Mr M Briggs** **Advocate**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that the claimant's claims are dismissed for want of jurisdiction, being time-barred.

REASONS

1. The claimant presented a claim to the Employment Tribunal on 1 November 2023, in which he complained that the respondent had unfairly dismissed him and discriminated against him on the grounds of disability.

2. The respondent submitted an ET3 in which they resisted the claimant's claims, and argued that the Tribunal lacked jurisdiction to hear the claims on the basis that they were presented out of time.

3. A Preliminary Hearing was listed to take place by Cloud Video Platform on 2 April 2024. The claimant appeared on his own behalf, and the respondent was represented by Mr Briggs, advocate.

4. The claimant gave evidence on his own account.

5. A bundle of productions, which lacked numbering, was presented to the Tribunal and referred to in the course of the Hearing.

6. Based on the evidence led and information presented, the Tribunal was able to find the following facts admitted or proved.

Findings in Fact

7. The claimant, whose date of birth is 14 January 1972, was employed by the respondent as a Store Support Supervisor from 17 August 2017 until his employment ended on 6 July 2023.

8. Following the termination of his employment, which was the result of his dismissal by the respondent on the grounds of his conduct, the claimant "vigorously appealed" against the decision.

9. On 21 October 2023, the claimant notified ACAS of his intention to submit an Employment Tribunal claim in relation to his dismissal, and on 23 October 2023, ACAS issued the Early Conciliation Certificate to him by email.

10. The claimant then presented his claim to the Employment Tribunal on 1 November 2023.

11. After his dismissal, the claimant felt that he had been treated unfairly, and that he had been dismissed without any evidential basis for the decision. He immediately submitted an appeal against that decision. The appeal hearing

took place on or around 17 October 2023, and the conclusion was that the dismissal was upheld by the respondent.

12. Prior to his dismissal, the claimant had submitted 2 grievances to the respondent, one on 25 May 2023 and the other before his employment ended, but after May 2023.

13. On 15 June 2023 (80), the claimant wrote to Laura Rosenberg of the respondent by email, asking for the ideology behind parts of his grievance not being resolved, and confirmed that *"I am awaiting responses from both my union and my employment lawyer in regards to this."* The claimant accepted that he had by that date contacted an employment lawyer, but denied that he had ever given instructions to an employment lawyer to act on his behalf.

14. The claimant's evidence before me was that as a former policeman, who had been responsible for attending court on a number of occasions, he had an understanding of criminal law, but did not know, when he was dismissed, that he could take a claim to an Employment Tribunal in respect of unfair dismissal or discrimination. He found out that he could make such a claim about a month after his dismissal when he spoke to a former colleague who had been through their own Employment Tribunal process and told the claimant about it. What he was told was that if he disagreed with the dismissal, he could approach a solicitor or ACAS. He understood that he had to wait until the matter was fully closed, and in this case, await the outcome of the appeal hearing. He said that he was unaware of the danger that his claim may be time-barred.

15. The claimant hoped that there was a prospect that he might be reinstated into another sector by the respondent following appeal. He approached "4 or 5" employment lawyers, but said that he found that they either did not practise employment law or asked him to pay exorbitant fees, which he had no way of paying. He did approach UNITE, the trade union which he had joined not long before after the internal investigation, and said that they advised him to wait until the appeal was concluded before he presented his

claim to the Employment Tribunal. He was unable to identify the name of the person in the UNITE office in Edinburgh with whom he spoke.

16. He received the appeal outcome on 11 October 2023, and submitted his claim on 1 November 2023. The reason why he did not submit the claim before 1 November was that he had obtained new employment, and was attending training in Essex. He also had the response to a subject access request he had made to the respondent, but required to go through everything that had been sent to check what had been redacted.

17. He returned from Essex on or around 13 November 2023.

18. Following presentation of the claim, the claimant contacted Thompsons and spoke with an employment lawyer, who emailed him in order to obtain copies of the ACAS certificate and certificate number, together with the form lodged with ACAS (95).

19. At no stage did the claimant carry out any personal internet searches in order to find out about time limits for submitting a claim to the Tribunal. He said that he relied upon the information and advice which he had received. However, he has since googled for time limits and has found out the necessary information.

Submissions

20. For the respondent, Mr Briggs submitted that the 2 claims made – unfair dismissal and disability discrimination – both flowed from the same date, namely the dismissal date, 6 July 2023.

21. He argued that, with regard to the unfair dismissal claim, there was no evidence presented which would indicate that it was not reasonably practicable for the claimant to have presented his claim in time. He maintained that at its highest the conversation with ACAS simply meant that he should get back in touch with them once the appeal was concluded.

22. Further, there was no explanation as to why it took a further period until 1 November for the claimant to present his claim to the Tribunal.

23. So far as the discrimination claim is concerned, Mr Briggs also argued that it was for the claimant to prove that it would be just and equitable for the Tribunal to extend the time limit for presentation of this claim. It would not, in his submission, but just and equitable to do so in this case. The claimant simply tried to blame ACAS or employment lawyers for their failings.

24. Mr Briggs accepted that the prejudice to the respondent would not be extreme if the Tribunal were to extend time. He also encouraged the Tribunal to have regard to the merits of the claim, which is a very weak claim. There is nothing pled by the claimant which would amount to a stateable discrimination claim.

25. The claimant made a short submission in response. He disagreed strongly with Mr Briggs' submission, and said that he would have strong evidence to support his discrimination and unfair dismissal claims. He said that while ignorance of the law is no excuse, but he was unaware of the time limits, and was looking for work.

The Relevant Law

26. Section 111(2) of the Employment Rights Act 1996 provides:

> *"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."*

27. What is reasonably practicable is essentially a question of fact and the onus of proving that presentation in time was not reasonably practicable rests on the claimant. "That imposes a duty upon him to show precisely why it was that he did not present his complaint." (**Porter v Bandridge Ltd [1978] ICR 943**).

28. The best-known authority in this area is that of **Palmer & Saunders v Southend-on-Sea Borough Council 1984 IRLR 119**. The Court of Appeal concluded that "reasonably practicable" did not mean reasonable but "reasonably feasible". On the question of ignorance of the law, of the right to make a complaint to an Employment Tribunal and of the time limits in place for doing so, the case of **Porter (supra)** ruled, by a majority, that 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." On ignorance of time limits, the case of **Trevelyans (Birmingham) Ltd v Norton EAT 175/90** states that when a claimant is aware of their right to make a claim to an employment tribunal, they should then seek advice as to how they should go about advancing that claim, and should therefore be aware of the time limits having sought that advice.

29. Section 123(1) of the Equality Act 2010 provides that:

"Proceedings on a complaint within section 120 may not be brought after the end of –

(a) the period of three months starting with the date of the act to which the complaint relates, or

(b) such other period as the employment tribunal thinks just and equitable."

30. I had regard to the case of **British Coal Corporation v Keeble [1997] IRLR 336**, which is authority for the proposition that the Tribunal should consider the prejudice which each party would suffer. There is very little prejudice for the respondents in receiving the claim two days after the deadline, and there is no prejudice in terms of the collection of evidence or witnesses. There would be significant prejudice if the claims were held to be out of time. Factors which the Tribunal require to consider are set out in that case, including the length and reason for the delay, the extent to which the cogency of the evidence is likely to be affected by the delay, the extent to which the party sued had cooperated with any requests for information, the promptness with which the plaintiff had acted once he or she knew of the facts giving rise to the cause of action and the steps taken by the plaintiff to obtain appropriate professional advice once he or she knew of the possibility of taking action.

31. I also considered the proposition that the fault of legal advisers should not be visited upon the claimant in an assessment of what is just and equitable in all the circumstances (**Chohan v Derby Law Centre [2004] IRLR 685**).

30. Finally, I take into account the case of **Robertson v Bexley Community Centre t/a Leisure Link 2003 IRLR 434, CA**, in which the court affirmed that time limits are to be adhered to unless there are good reasons to extend them, in the just and equitable jurisdiction, and that there is no presumption that time will be extended. The exercise of the discretion is still the exception rather than the rule.

Discussion and Decision

31. I take the two claims separately, on the basis that different considerations apply.

32. It is necessary, however, to confirm that the claim was in fact presented out of time. The claimant was dismissed without notice with effect from 6 July 2023. He should therefore have presented his claims to the Tribunal by no later than 5 October 2023. He contacted ACAS to commence the early conciliation process on 21 October 2023, and therefore obtains no benefit from the extension of time granted through that process, since he did not commence the process within the statutory timescale.

33. He presented the claim on 1 November 2023, some 4 weeks out of time.

34. With regard to the unfair dismissal claim, the question is whether or not it was not reasonably practicable for the claimant to have presented his claim in time. The claimant's reasoning for the delay was a little unclear, but he appeared to rely upon several factors: his own ignorance of the time limits, the advice he was given by ACAS and UNITE, and the requirement to await the outcome of the appeal process.

35. The claimant's ignorance must be considered in context. The claimant is an intelligent individual, with considerable experience of the law and courts in his duties as a police officer. While his experience was of criminal law and

the criminal courts, it would be wrong to see the claimant as someone for whom time limits and the requirements of the Tribunal were outwith the reasonable scope of his knowledge. Even if he did not know about the time limits himself, it would have been a matter of minutes to have conducted an internet search to find out about time limits. He gave evidence to the effect that he had done so without difficulty after submitting his claim to the Tribunal. It was not reasonable, in my judgment, for the claimant simply to rely upon his own knowledge and do nothing to investigate the matter for himself. He had access to the internet and some understanding of the law. He spoke to a former colleague who had been through the process and gleaned some knowledge within a month of his dismissal.

36. The claimant gave evidence to the effect that both ACAS and UNITE had misled him about time limits. He was unable to identify the name of any individual with whom he had spoken, and therefore it is not clear what precise advice he was given. To advise an individual to await the outcome of an appeal process is not necessarily the same as saying that that means the statutory time limit does not apply. I am not prepared to accept the claimant's evidence on this, as it was unclear and further strikes me as unlikely that a trade union and ACAS would both give the claimant erroneous advice. Even if they had, the responsibility for presenting the claim is his own, and it may be that the claimant can have recourse to a remedy against either organisation in the event that he can demonstrate that he was incorrectly or negligently advised.

37. There was nothing preventing the claimant from presenting his claim within the 3 month time limit. He chose not to present the claim on the basis of an incorrect understanding of the law, or perhaps ignorance of the law. He was not unwell, nor was he otherwise incapable of putting his claim together. He did so at the point when he did choose to act upon his claim, on 1 November 2023.

38. Accordingly it is my conclusion that it cannot be said that it was not reasonably practicable for the claimant to have presented his claim in time in this case, and the claim for unfair dismissal is therefore dismissed for

want of jurisdiction. Even if the claimant had demonstrated that it was not reasonably practicable for him to have presented his claim within three months of his dismissal, I would not have been satisfied that the claim was presented within such further time as was reasonable, since approximately 3 to 4 weeks passed before he presented his claim to the Tribunal after his appeal was concluded, and no reason was given other than that he was away in Essex on training. That explanation is simply illogical, however, on the basis that on his own evidence, he remained in Essex until 13 November, so he was able to present the claim while he was in Essex on training. There is simply no good reason advanced by the claimant as to why he could not have presented his claim in time.

39. As to the discrimination claim, the same time limits apply, and therefore the Tribunal must consider whether or not the claim was presented within such time as the Tribunal considers just and equitable. This is a broader discretion available to the Tribunal, but must still be considered to be the exception rather than the rule, given that the Tribunal time limits are in place for a reason.

40. The delay was one of approximately 4 weeks following the conclusion of the appeal process, which is the point which the claimant was awaiting. The explanation was partly that the claimant was going through documentation provided under a subject access request, and partly that he was away on training in Essex. Neither provides a good explanation for the delay.

41. I accept Mr Briggs' concession that the cogency of the evidence is unlikely to be affected by the length of the delay, of itself. However, the claimant's failure to take steps to investigate and establish for himself the time limit required in Employment Tribunals, especially once he had been alerted to the possibility of making such a claim, created the delay and caused the claimant to be late in making his claim.

42. Fundamentally, however, I accept Mr Briggs' submission that there is no reason put forward by the claimant which would make it just and equitable to favour the extension of time here. I acknowledge that the prejudice to the

claimant is greater on refusal than it would be to the respondent if the matter were allowed to proceed, but that is simply on the basis that if the claim is dismissed, it deprives the claimant of the opportunity to proceed with his claim. However, any claimant whose claim is dismissed on the grounds of time bar is likely to feel frustrated by their inability to proceed with the claim, but that does not mean that the Tribunal requires to allow it even though late. The reality here is that the Tribunal requires to consider a number of factors, and in this case, the fact that the claim was presented late without good reason having been advanced by the claimant for the lateness is the primary reason why the claim should not be allowed to continue.

43. It is accordingly my judgment that it is not just and equitable to extend the time for presenting this claim to the point where it would be permitted to continue, and that the Tribunal lacks jurisdiction to hear the discrimination claim made by the claimant. As a result, that claim is also dismissed.

Employment Judge: **M Macleod**
Date of Judgment: **17 April 2024**
Entered in register: **18 April 2024**
and copied to parties