

THE INDUSTRIAL TRIBUNALS AND FAIR EMPLOYMENT TRIBUNAL

CASE REF: 1622/21

CLAIMANT: Ross Fay
RESPONDENT: Department of Finance

JUDGMENT ON A PRELIMINARY ISSUE (JURISDICTION)

The judgment of the tribunal is that the claimant's claim in respect of unfair dismissal was not presented within time. However, the tribunal finds that it was not reasonably practicable for the claimant to have presented his claim before 12 December 2019 but the claimant did present his claim within a further reasonable period of time thereafter. The tribunal therefore has jurisdiction to hear the claimant's unfair dismissal claim.

SUMMARY

1. The tribunal finds that the claimant's effective date of termination (EDT) was 12 September 2019.
2. The tribunal finds that the claimant's claim of unfair dismissal was not presented before the end of the three months beginning with the EDT (i.e. 12 December 2019).
3. The tribunal finds that the claimant's claim was presented on 2 December 2020.
4. The tribunal finds that it is satisfied that it was not reasonably practicable for the claimant's complaint to be presented before the end of the statutory time period (i.e. 12 December 2019).
5. The tribunal finds that the claimant's claim was presented within a reasonable period of time thereafter.

CONSTITUTION OF TRIBUNAL

Employment Judge (sitting alone): Employment Judge Sturgeon

APPEARANCES:

The claimant appeared and was self-representing.

The respondent was represented by Ms L Gillen, of Counsel, instructed by Ms J McCroskery of the Departmental Solicitor's Office.

BACKGROUND

1. The claimant currently has a claim for disability discrimination ongoing in the Tribunal (case reference number 5582/19). That claim was presented on 13 February 2019 and a response lodged on 12 April 2019.
2. Case management discussions (as they were called prior to the introduction of the Industrial Tribunals and Fair Employment Tribunal (Constitution and Rules of Procedure) Regulations (NI) 2020)), in relation to case reference number 5582/19, were listed on 13 June 2019, 19 September 2019 and 9 January 2020. The claimant failed to attend any of these case management discussions.
3. Due to the claimant's failure to attend these case management discussions, a preliminary hearing was listed for 9 April 2020 to determine whether any part of the claimant's claim should be struck out on the ground that it had no reasonable prospect of success or whether the claimant should be ordered to pay a deposit, of an amount not exceeding £500.00, before being permitted to proceed with his claim.
4. That preliminary hearing, listed for April 2020, however, was postponed as a result of the Covid-19 pandemic.
5. A further review case management preliminary hearing was listed on 18 August 2020. The claimant attended this hearing. At this hearing, the Vice-President directed the claimant to provide written medical evidence explaining why he failed to attend previous Case Management Discussions, on 13 June 2019, 19 September 2019 and 9 January 2020, by 13 October 2020.
6. At a case management preliminary hearing on 3 November 2020, the Vice-President ruled that this medical evidence was sufficient to explain the claimant's non-attendance at previous case management preliminary hearings.
7. At the case management preliminary hearing on 3 November 2020, the claimant appeared to be under the impression that his claim for disability discrimination (case reference number 5582/19) also included a claim for unfair dismissal. It was explained to the claimant that his claim of 5582/19 contained only a claim for disability discrimination and did not include a claim relating to his dismissal which did take effect on 12 September 2019.
8. Accordingly, the claimant was directed, within 6 weeks of 3 November 2020, to either:
 - (i) lodge a new tribunal claim alleging unfair dismissal and dismissal contrary to the Disability Discrimination Act 1995 and apply for an extension of the statutory time limit for that lodgement, or
 - (ii) apply in writing to amend the original claim to include a claim of alleged unfair dismissal and dismissal contrary to the Disability Discrimination Act 1995 and apply for any necessary extension of the statutory time limit.
9. The claimant presented his second complaint (i.e. case reference number 1622/21), for unfair dismissal, to the Industrial Tribunal on 2 December 2020. As the claimant

was dismissed on 12 September 2019, but did not lodge his unfair dismissal claim until some 15 months later on 2 December 2020, this claim was, on the face of it, lodged almost 12 months outside of the statutory time limit.

10. In his second complaint, the claimant also made a further complaint of disability discrimination.
11. The respondent presented its response on 22 February 2021. It resisted the claimant's claim and contended that the claimant was dismissed under the respondent's inefficiency sickness absence policy. The respondent contended that the claim was presented outside the statutory time limit.
12. At a further case management preliminary hearing on 12 May 2021, on the application of the respondent, I directed that the claimant's second claim (i.e. case reference number 1622/21) should be listed for a further preliminary hearing to establish whether or not this claim had been lodged on time.

THE RELEVANT STATUTORY PROVISIONS

Unfair Dismissal

13. The law in relation to the period for presenting a claim of unfair dismissal is set out in Article 145 of the Employment Rights (Northern Ireland) Order 1996 as follows:

"145(2) Subject to the following provisions of this Article, an industrial tribunal shall not consider a complaint under this Article 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.*

THE ISSUES

14. The issues to be determined at this Preliminary Hearing were as follows:-
 - (i) When was the effective date of the claimant's termination of employment (*Article 145(2)(a) of the Employment Rights (NI) Order 1996*)?
 - (ii) Whether the claimant's claim of unfair dismissal was presented to the tribunal before the end of the period of three months beginning with the effective date of termination (*Article 145(2)(a) of the Employment Rights (NI) Order 1996*)?
 - (iii) If not, whether it was reasonably practicable for the claimant to have presented his claim before the end of that period of three months (*Article 145(2)(b) of the Employment Rights (NI) Order 1996*)?

- (iv) If not, whether the claimant presented his claim within a further reasonable period (*Article 145(2)(b) of the Employment Rights (NI) Order 1996*)?

SOURCES OF EVIDENCE

15. The tribunal considered the claim form and the response form. The tribunal also heard sworn oral evidence (both direct and through cross examination) from the claimant. In addition, the tribunal also considered the following relevant documentation referred to in the course of the hearing:-
- i. An email from the claimant dated 4 June 2021;
 - ii. A medical note from Dr Melissa Wiley dated 28 May 2021.

Furthermore, the tribunal also had regard to the written submissions of the respondent and the oral submissions of both parties.

ISSUE 1 : When was the effective date of the claimant's termination of employment (*Article 145(2)(a) of the Employment Rights (NI) Order 1996*)?

16. The first issue which to be determined, by this tribunal, was the effective date of termination (EDT).
17. In Harvey on Industrial Relations and Employment Law, it is stated at section Q, paragraph 97:-

Date on which the termination by letter takes effect

Where dismissal is communicated to the employee in a letter, the contract of employment does not terminate until the employee has actually read the letter or had a reasonable opportunity of reading it; the effective date of termination is not retroactive to the date that the letter written, posted or delivered, but is the date when the employee either does read the letter or reasonably had the opportunity of knowing about it: ***Brown v Southall and Knight [1980] IRLR 130, [1980] ICR 617, EAT***. This was taken further (and actual receipt stressed) in ***McMaster v Manchester Airport plc [1998] IRLR 112, EAT*** where it was held that there is no place for the doctrine of constructive notice, except perhaps where the employee deliberately fails or refuses to read the letter. *Brown* and *McMaster* were approved by the Supreme Court in ***Gisda Cyf v Barratt [2010] UKSC 41, [2010] IRLR 1073, [2010] ICR 1475***, SC, where it was added that in applying the 'secondary' test (when the employee had had a reasonable opportunity to read the letter) a subjective approach is to be taken (not a narrower 'practically feasible' approach), taking into account the claimant's circumstances and being 'mindful of the human dimension in considering what is or is not reasonable to expect of someone facing the prospect of dismissal from employment. To concentrate exclusively on what is practically feasible may compromise the concept of what can realistically be expected'. Where however the employee is informed through a third party(eg the solicitor acting in the case) that he or she is dismissed, that actual knowledge is sufficient under ***Gisda Cyf***, even if the formal letter of dismissal arrives later: ***Robinson***

RELEVANT FINDINGS OF FACT AND CONCLUSIONS

18. The effective date of termination was not in dispute between the parties. It was agreed by both parties that the claimant's employment ended on 12 September 2019.

ISSUE 2 : Was the claimant's claim of unfair dismissal presented to the tribunal before the end of the period of three months beginning with the effective date of termination (Article 145(2)(a) of the Employment Rights (NI) Order 1996)?

RELEVANT FINDINGS OF FACT AND CONCLUSIONS

19. As the tribunal has concluded, at paragraph 19 above, that the EDT was 12 September 2019, the claimant had until 12 December 2019 to present his claim for unfair dismissal to the tribunal. However, the claim form was not presented until 2 December 2020, almost one year out of time. This tribunal therefore concludes that the claimant's claim of unfair dismissal was not presented to the tribunal before the end of the period of three months beginning with the effective date of termination.

ISSUE 3 : If the claimant's claim of unfair dismissal was not presented to the tribunal before the end of the period of three months beginning with the effective date of termination, was it not reasonably practicable for the claimant to have presented his claim before the end of that period of three months (Article 145(2)(b) of the Employment Rights (NI) Order 1996)?

THE RELEVANT LAW

20. In **Harvey** on Industrial Relations and Employment Law, Section P1, paragraph 346, it is stated as follows in relation to the 'reasonably practicable' test:-

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There are two limbs to this formula. First, the employee must show that it was not reasonably practicable to present his claim in time. The burden of proving this rests firmly on the applicant (*Porter v Bandridge Ltd* [1978] IRLR 271, [1978] ICR 943, CA). Second, if he succeeds in doing so, the tribunal must be satisfied that the time within which the claim was in fact presented was reasonable (see para [209] below).

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It is important to bear in mind that the question of what is or is not reasonably practicable is essentially one of fact for the employment tribunal to decide, and the appellate courts will be slow to interfere with the tribunal's decision (*Palmer and Saunders v Southend-on-Sea Borough Council* [1984] 1 All ER 945, [1984] IRLR 119, CA, *Wall's Meat Co Ltd v Khan* [1979] ICR 52, CA, *Riley v Tesco Stores Ltd* [1980] IRLR 103, [1980] ICR 323, CA). The tribunal must, however, address its mind to the question of reasonable practicability, where this is the test, and not simply state that it has a

'discretion to extend time', and must, moreover, make a precise finding as to the nature of the complaint in question, and as to the relevant starting date of the limitation period governing it before proceeding to consider whether any extension is appropriate (see ***Taylorplan Services Ltd v Jackson* [1996] IRLR 184, EAT**).

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The leading authority on the subject is the decision of the Court of Appeal in ***Palmer and Saunders v Southend-on-Sea Borough Council* [1984] 1 All ER 945, [1984] IRLR 119, [1984] ICR 372, CA**. In that case, May LJ, who gave the judgment of the court, undertook a comprehensive review of the authorities, and concluded that the liberal construction was easier to state than to apply in practice. What he proposed was a test of '*reasonable feasibility*'. He explained his reasoning as follows ([1984] ICR at 384, 385):

"[W]e think that one can say that to construe the words "reasonably practicable" as the equivalent of "reasonable" is to take a view that is too favourable to the employee. On the other hand, "reasonably practicable" means more than merely what is reasonably capable physically of being done—different, for instance, from its construction in the context of the legislation relating to factories: compare ***Marshall v Gotham Co Ltd* [1954] AC 360, HL**. In the context in which the words are used in the 1978 Consolidation Act, however ineptly as we think, they mean something between these two. Perhaps to read the word "practicable" as the equivalent of "feasible" as Sir John Brightman did in [*Singh v Post Office* [1973] ICR 437, NIRC] and to ask colloquially and untrammelled by too much legal logic—"was it reasonably feasible to present the complaint to the [employment] tribunal within the relevant three months?"—is the best approach to the correct application of the relevant subsection."

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The possible factors are many and various, and, as May LJ stated in ***Palmer and Saunders***, cannot be exhaustively described, for they will depend on the circumstances of each case. The learned judge nevertheless listed a number of considerations, collated from the authorities, which might be investigated (see [1984] IRLR at 125, [1984] ICR at 385). These included the manner of, and reason for, the dismissal; whether the employer's conciliatory appeals machinery had been used; the substantial cause of the claimant's failure to comply with the time limit; whether there was any physical impediment preventing compliance, such as illness, or a postal strike; whether, and if so when, the claimant knew of his rights; whether the employer had misrepresented any relevant matter to the employee; whether the claimant had been advised by anyone, and the nature of any advice given; and whether there was any substantial fault on the part of the claimant or his adviser which led to the failure to present the complaint in time.

RELEVANT FINDINGS OF FACT AND CONCLUSIONS

21. The legal authorities, at paragraph 20 above, are clear that it is for the claimant to persuade the tribunal that it was not reasonably feasible for him to present his claim for unfair dismissal within the three month time limit.
22. In light of the fact that the EDT is 12 September 2019, the claimant had until 12 December 2019 to lodge his claim within the statutory time limit. However, the claimant did not lodge his claim until 2 December 2020, almost 12 months out of time. The claimant's explanation for not lodging it until 2 December 2020 was as follows:
 - i. that he was significantly mentally unwell in 2019. The claimant presented evidence, a report from a consultant psychiatrist, Dr Melissa Wylie, dated 28 May 2021, confirming this. This report confirmed that the claimant required admission to the Home Treatment Team for a five week period between June and July 2019 and that it is likely this would have had an impact on his ability to organise and process a dismissal claim at this stage;
 - ii. he believed that his claim of disability discrimination (case reference number 5582/19), already lodged with the tribunal, could cover his dismissal claim. He was not aware that he had to lodge a separate claim to cover his unfair dismissal claim until the Vice-President informed him of this on 3 November 2020;
 - iii. he had no legal background and therefore did not understand that his first claim wouldn't cover all his complaints;
 - iv. the Covid-19 pandemic occurred during the first half of 2020 and so he wasn't able to speak to anyone to get help or advice about his claim;
 - v. once the Vice-President informed him, at a case management preliminary hearing, on 3rd November 2020, that he should lodge a separate unfair dismissal claim within 6 weeks, he did so promptly.
23. The respondent contended that it was reasonably practicable for the claimant to lodge his claim, within the relevant timeframe, for the following reasons:
 - i. the claimant had lodged his previous claim of disability discrimination on 13 February 2019 and therefore had had the benefit of legal advice previously and so ought to have been aware of tribunal process and time limits;
 - ii. ignorance of legal rights/time limits is not sufficient to set aside statutory time limits;
 - iii. while sympathetic to the claimant's mental health problems, his treatment with the Home treatment team took place in June and July of 2019 but the statutory time limit for him to lodge his claim was not until December 2019 when his mental health was starting to stabilise.
24. Having listened to the reasons put forward by the respondent as to why it was reasonably practicable for the claimant to lodge his claim within the statutory time-

limit, and the claimant's explanation as to why it was not reasonably practicable for him to do so, the claimant has persuaded me that it was not reasonably practicable for him to lodge his claim within the statutory time limit. My principle reasons for reaching this conclusion are as follows:

- i. the claimant's medical evidence from Dr Melissa Wylie (a report dated 28 May 2021) clearly confirmed that the claimant required care from the Home Treatment teams for a five week period between June and July 2019. This treatment would have required the claimant to receive treatment at home on a daily basis. This treatment would have coincided with the period of time leading up the claimant's dismissal.
- ii. The medical evidence also confirmed that, on discharge, the claimant's diagnosis was a "*manic psychosis*" and that he had "*no insight and was unwell.*" This would also have had an impact on his ability "*to organise and process the dismissal claim.*"
- iii. The medical evidence further confirmed that the claimant's condition "*progressively stabilised....as he progressed into 2020/2021.*"
- iv. In light of this medical evidence, the tribunal is satisfied that the claimant was not functioning mentally during the period of time coinciding with his dismissal and therefore would not have been in a mentally fit state to realise that he had to present a new claim for unfair dismissal.

ISSUE 4 : If the tribunal is satisfied that it was not reasonably practicable to present his claim within the statutory time limit, did the claimant present his claim within a further reasonable period thereafter (*Article 145(2)(b) of the Employment Rights (NI) Order 1996*)?

THE RELEVANT LAW

25. In **Harvey** on Industrial Relations and Employment Law, Section P1, paragraph 346, it is stated as follows in relation to the 'reasonably practicable' test:-

(iii) Reasonable time

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Where the claimant satisfies the tribunal that it was not reasonably practicable to present his claim in time, the tribunal must then proceed to consider whether it was presented within a reasonable time thereafter. Although, as Lord Denning MR pointed out in the ***Wall's Meat*** case, this is 'very much a matter for the [employment] tribunal', the tribunal must nevertheless exercise its discretion reasonably and with due regard to the circumstances of the delay. The discretion does not give carte blanche to a tribunal to entertain a claim 'however late it was presented' (***Westward Circuits Ltd v Read [1973] 2 All ER 1013, [1973] ICR 301, NIRC***).

RELEVANT FINDINGS OF FACT AND CONCLUSIONS

26. In light of the tribunal's finding that it was not reasonably practicable for the claimant to lodge his claim within the time limit, the tribunal must now consider whether the claimant lodged his claim form within a reasonable time period thereafter. The legal authorities are clear that this decision is very much at the discretion of the tribunal.
27. The closure of the tribunal building, in the spring of 2020, delayed the progress of a significant number of tribunal claims. Consequently, the claimant's disability discrimination claim was scheduled for a case management preliminary hearing on 18 August 2020. The claimant attended this CMPH by telephone. It was explained to the claimant, on this occasion, that his claim of disability discrimination did not include a claim for unfair dismissal as the dismissal had taken place some seven months after the date of disability discrimination tribunal claim.
28. At this CMPH, the Vice-President directed that the claimant provide, by 13 October 2020, medical evidence stating:
 - (i) why he failed to attend previous hearings on 13 June 2019, 19 September 2019 and 9 January 2020; and
 - (ii) whether the claimant is currently able to attend a full hearing of this matter and to participate in that hearing and, if not, when the claimant would be ready to attend and participate in such a hearing.
29. The claimant was informed that a further CMPH would take place on 3 November 2020 to assess this medical evidence and to consider whether the claimant's claims should be struck out given the claimant's failure to attend previous CMPHs.
30. At this CMPH, on 3 November 2020, the Vice-President expressed concern that the claimant did not seem to understand that the claimant's claim of disability discrimination did not include a claim for unfair dismissal and that the claimant would proceed to the full hearing in the inaccurate belief that both claims would be heard at the full hearing.
31. At this CMPH, the Vice President also noted that the claimant did not seem to appreciate that a statutory tribunal can only deal with claims which are properly made before it.
32. Accordingly, the claimant was directed, within six weeks, to either:-
 - (i) lodge a new tribunal claim alleging unfair dismissal and dismissal contrary to the Disability Discrimination Act 1995 and apply for an extension of the statutory time limit for that lodgement; or
 - (ii) apply in writing to amend the original claim to include a claim of alleged unfair dismissal and dismissal contrary to the Disability Discrimination Act 1995 and apply for any necessary extension of the statutory time limit.
33. The date of this hearing was 3 November 2020 and the date of the record of proceedings, issued to the claimant, was 12 November 2020.

34. Upon being notified that he had to take these steps, within six weeks, the claimant duly submitted a second claim, on 2 December 2020, alleging unfair dismissal against the respondent.
35. The claimant lodged his unfair dismissal claim therefore within the timeframe directed by the Vice President.
36. This tribunal therefore concludes that the claimant has lodged his claim for unfair dismissal within a reasonable time period after the statutory time limit. I make this decision for the following reasons:
 - (i) the claimant's evidence, which was confirmed by the medical report of Dr Melisa Wylie, was that he started to "function" again in the latter part of 2020;
 - (ii) while the claimant was informed at a CMPH, on 18 August 2020, that his existing claim form did not include a claim for unfair dismissal, the claimant was not expressly told of his options on how to lodge a new unfair dismissal claim until the CMPH on 3 November 2020. Mindful that a tribunal cannot provide advice to any party at a hearing, a tribunal must also be aware of its "*overriding objective*" which is to ensure that parties are on an equal footing. Given that the claimant is a litigant in person, with significant mental health issues, and mindful of the Court of Appeal decision in **Galo v Bombardier Aerospace UK [2016] NICA 25**, a tribunal would have been failing in its duty not to assist the claimant in telling him how to lodge a claim for unfair dismissal;
 - (iii) as soon as the claimant was told how to lodge an unfair dismissal claim, he did so promptly and within the 6 weeks directed by the Vice-President;
 - (iv) the tribunal must also factor in the delay caused to proceedings by the Covid-19 pandemic. If there had been no enforced period of lockdown in the spring of 2020, the CMPH of 18 August 2020 would have been held at an earlier stage and the directions made by the tribunal, at that CMPH, would have been carried out earlier also resulting therefore in an earlier lodgement of the unfair dismissal claim;
 - (v) the tribunal was told by the respondent that it would suffer prejudice, if the claimant was permitted to continue with his unfair dismissal, as the respondent would now be forced to call witnesses to recollect events which have happened almost three years ago now. However, the tribunal considers that the claimant will suffer greater prejudice if it is not allowed to continue with his unfair dismissal claim.

SUMMARY

37. The legal authorities are clear that time limits are strict in these cases and the burden is on the claimant to persuade the tribunal that it was not reasonably practicable for him to present his claim within the time limit and, if not, whether the claimant presented his claim within a further reasonable period thereafter.

38. In the circumstances of this case, I find that the EDT was the 12 September 2019 and that the claim form lodged on 2 December 2020 was almost 12 months late. For the reasons outlined at paragraph 24 above, it was not reasonably practicable for the claim form to be lodged within the time limit but the claim form was lodged within a further reasonable period of time thereafter (see paragraph 36).
39. Accordingly, this claim will now be consolidated with the claimant's existing disability discrimination claim and the parties will be notified of a CMPH, in due course, so that the matter can be case managed for a full hearing subject to any renewed application for a preliminary hearing to consider the imposition of a deposit.

Employment Judge:

Date and place of hearing: 18 June 2021, Belfast.

This judgment was entered in the register and issued to the parties on: