EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4114521/19

Held on 8 June 2020

Employment Judge: N M Hosie

Mr James Bingham	**Claimant** **In Person**
Highland Health Board	**Respondent** **Represented by** **Mr R Davies -** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is that: -

(i) the claim is out of time;

(ii) it was reasonably practicable to submit the claim in time; and

(iii) the claim is dismissed for want of jurisdiction.

REASONS

Introduction

1. James Bingham claimed that he was constructively and unfairly dismissed by the respondent, the Highland Health Board ("the Board"). The respondent denied the claim in its entirety and the respondent's solicitor also took the preliminary point that the claim was time-barred. It was agreed that the effective date of termination of the claimant's employment with the respondent was 30 June 2018. However, the claim form was not submitted until 18 December 2019, well outwith the 3-month period for submitting a claim of this nature.

2. It had been hoped to fix a Preliminary Hearing "in person" on 31 March 2020 to consider and determine the time-bar issue. However, that had not proved possible because of the Covid-19 pandemic. As it was not possible to predict with any certainty when it would be possible to conduct Hearings "in person", the parties agreed that the time-bar issue should be dealt with "on the papers", by way of written submissions.

3. Helpfully, the parties sent to the Tribunal, along with their submissions, a "Joint Inventory of Productions" ("P").

Claimant's Submissions

4. On 30 December 2019, in response to a request from the Tribunal, the claimant wrote to the Tribunal with his reasons for the late lodging of the claim form. I had regard to this when considering the issue. However, his principal submissions on the time-bar point are to be found in a document, comprising 26 numbered paragraphs, which he submitted to the Tribunal after it was agreed that the time-bar issue would be determined by way of written submissions. He submitted that it had not been *"reasonably practicable"* for him to submit his claim in time, *"because in 2018 the issue at the heart of a complaint to an Employment Tribunal appeared to have been decided by the Pensions Ombudsman.*

In late 2019 it came to light that NHS Highland had misrepresented the facts of the duty they owed to returning employees to inform on the pension rights of those employees. The Ombudsman's determination on this point was therefore based on incorrect information.

Accepting that misrepresentation may have been unintentional, it led the claimant to believe that there was no case to bring an Employment Tribunal in March 2018".

5. He submitted that when he was offered employment, on 6 December 2012 (P5/6), the respondent failed in its duty to bring to his attention two Circulars relating to changes in the NHS pension scheme which had been issued on 19 February 2009 and 8 May 2009 (P3/4).

6. The claimant further submitted that the respondent continued to deny such a duty "*throughout a long dispute spanning almost 5 years, taken to the Pensions Advisory Service and then to the Pensions Ombudsman*".

7. He referred, in particular, to the following excerpt from a letter which was sent to him by the respondent's Chief Executive on 29 August 2016: "*It is therefore not our duty or responsibility to disclose the potential punitive effect of the Public Pensions Act 2013 upon the future pensions value of prospective employees with preserved benefits returning to NHS employment.*"

8. The claimant submitted that the respondent continued to deny the duty to inform *"repeatedly and despite continuous challenge".*

9. While the claimant accepted that the Pensions Ombudsman *"found against him"*, he maintained that this decision, *"was based on the factual inaccuracy presented to her by NHS Highland".* The claimant referred to the following statement from the Ombudsman which he said, *"appeared to be a finding in law with respect to the responsibilities of an NHS employer towards returning employees": -*

> *"37 As an employer, there is no statutory obligation for NHS Highland to ascertain from prospective employees if they have preserved benefits in any NHS Scheme. It has an obligation to inform prospective employees of the option to join the Scheme and I find that it fulfilled this obligation when it provided Dr M with the Guide.*
>
> *40 I appreciate Dr M's frustration with the situation he now finds himself in. Nonetheless, I find no fault is attributable to the SPPA or NHS Highland as it is my view that they both fulfilled their duties to Dr M as a prospective employer and prospective member of the Scheme."*

10. While the claimant accepted that ignorance of facts is not a justification for failing to comply with Employment Tribunal time limits, he maintained that, *"the facts in question were misrepresented by NH Highland during the course of the Pensions Ombudsman investigation and were not readily available to employees".*

11. The claimant submitted that, as a result of the Ombudsman's decision, *"it did not appear reasonably practicable"* for him to pursue an Employment Tribunal case in 2018.

12. He submitted that, *"the Ombudsman's acceptance of the incorrect evidence from the respondent resulted directly in the claimant's ignorance of the right to make a claim to an Employment Tribunal. The grounds of that claim would have been that the terms and conditions in the claimant's contract had been misstated by omission, and that the terms actually offered had not been honoured".*

13. He further submitted that:- *"As a result of a conversation with Edward Mountain MSP in December 2019 the claimant undertook some further research which led to the discovery of Circulars 4 and 11. This changed the aspect of the case entirely. The claimant acted quickly, approaching ACAS the same day."*

14. In these circumstances, the claimant submitted the Tribunal could, *"grant an extension of time to allow an Employment Tribunal claim to proceed, according to the provisions of section 111(2)(b) of the Employment Rights Act 1996, on grounds that the respondent had previously incorrectly denied the existence of a duty they owed to the claimant, and that the respondent's actions led directly to the*

claimant's ignorance of a right to open a claim with the Employment Tribunal until December 2019".

Respondent's Submissions

15. The principal submissions by the respondent's solicitor comprise 7 pages. In support of his submissions he referred to the following cases:-

> ***Churchill v A Yeates & Sons Ltd*** [1983] IRLR 187
> ***Cambridge and Peterborough Foundation NHS Trust v Crouchman*** UKEAT/0108/09
> ***Teva (UK) Ltd v Heslip*** UKEAT/0008/09

16. He proposed the following factual findings:-

> *"The claimant brings a claim of constructive unfair dismissal.*
>
> *He alleges that at the time of being recruited, he was not told about the value of his pension, and was given misleading information by the respondent about his pension.*
>
> *He claims that he made the respondent aware that he could not stay in employment if the problem with his pension value could not be remedied.*
>
> *The claimant resigned by letter dated 26 March 2018, stating that his decision came in response to the final arbitration from the pensions ombudsman, which declined to offer any solution to his pension issues with the respondent.*
>
> *The letter of resignation also referred to "wider issues arising", which referred to the dangers of setting a precedent if the approach of the respondent was accepted.*
>
> *The claim form states that the reason for resigning was the failure by the respondent to resolve the pension issue.*
>
> *Employment ended on 30 June 2018 (this being the date stated in the ET1 form, and agreed by the respondent).*
>
> *At the time of resigning, the claimant was aware of the possibility of bringing a Tribunal claim, but decided not to do so because he did not think it would succeed.*

In due course, the claimant became aware of certain SPPA documents which led him to believe that the respondent had misled the Pensions Ombudsman.

This was not information which the claimant was aware of at the time of resigning. It was not part of the reason why he resigned.

Being in receipt of this new information, the claimant decided to raise a Tribunal claim of constructive dismissal."

17. The respondent's solicitor then made the following *"Submissions on the facts":-*

"In bringing a claim for constructive dismissal the claimant puts himself in a fundamentally different position from the claimants in the ***Churchill*** *and* ***Crouchman*** *line of cases.*

In a normal unfair dismissal claim, the employee is not necessarily aware of the full facts behind the decision of the employer to dismiss the employee. As a consequence, new facts can come to the attention of the employee after the dismissal, which could justify a claim.

However in a constructive dismissal claim, the employee requires to have identified a fundamental breach of contract ***at the time of resigning****, and must resign (at least in part) in response to that breach. Information related to a potential breach which is obtained* ***after*** *resignation is irrelevant, since it cannot be part of the reason why the employee resigned, and is certainly not "fundamental" (****Churchill****) to the bringing of the claim.*

The claimant in this case did not resign because he believed, at the time of resigning, that the respondent had misled the pensions ombudsman. That belief only formed later, once the relevant documents were obtained.

With reference to ***Crouchman****, the new facts (misleading of the Ombudsman) are not fundamental to the claim. They are irrelevant to it. They do not support the particular breach of contract in response to which the claimant resigned.*

Addressing the question of reasonable practicability, the claimant has not produced evidence which would explain why he did not bring a claim in time. If the fundamental breach of contract was the respondent failing to resolve the pension issue, (in circumstances where the Ombudsman had failed to offer a solution) and the claimant was aware of this at the time of resigning. He did not need further information before it was practicable to bring a claim.

I invite the Tribunal to conclude that the claim should be dismissed due to time bar."

Claimant's Response

18. The claimant responded to the respondent's submissions on 7 April, by way of an attachment to an email. He accepted the respondent's submissions "*up to their analysis beginning in the final paragraph of page 6".* He made the following further submissions: -

At the time of the claimant's resignation in 2018 he was clear that NHS Highland had failed to honour the terms of the contract offered in 2012. This is evident from the claimant's resignation letter. There had been a fundamental breach in the contract as it was described in the "Guide to the Scheme" issued at appointment.

There is no dispute that the "Guide to the Scheme" was misleading for employees in the claimant's situation. However the respondent successfully argued to the Pensions Ombudsman that the duty fell on the employee and not the employer to discover the discrepancy between the terms offered in the "Guide to the Scheme" and the actual terms offered.

*The respondent has argued that information obtained after resignation cannot be used retrospectively to establish grounds for a constructive dismissal case (**Churchill**). In this case the information obtained after resignation did not relate to the substance of the breach – the discrepancy between the terms offered in the "Guide to the Scheme" and the actual terms offered – but to the respondent's duty to enquire of and inform new employees on why their preserved pension benefits would not be treated in the way the "Guide to the Scheme" outlined.*

The claimant held throughout that there had been a breach of contract due to the respondent's omission at the time of his appointment. However the Pensions Ombudsman accepted evidence from the respondent, (which the claimant considers misleading) with respect to the duties of NHS employers. This evidence shaped the Ombudsman's decision on the duty of an NHS employer to disclose material facts and treatment of preserved pension benefits.

In the light of the Ombudsman's decision and in the absence of new evidence relating to the duty of NHS employers, the issue of the employer's duty to disclose appeared to have been decided, and it was not reasonably practicable in 2018 for the claimant to pursue a case at an Employment Tribunal.

The new evidence, in the form of Circulars 4 and 11, came to light in December 2019. It proved that the respondent had indeed had a duty to disclose the

discrepancy between the terms offered in the "Guide to the Scheme" and the actual terms offered.

The new facts (misleading of the Ombudsman) are not fundamental to the issue of whether the contract was breached. But they are fundamental to the issue of whether an Employment Tribunal was and is "reasonably practicable".

The facts discovered after resignation changed the status of what was "reasonably practicable" with respect to success in an Employment Tribunal".

Respondent's Submissions

19. The respondent's solicitor responded by email on 7 April as follows:-

> *"I refer to the claimant's submissions. By way of my comment, I would refer only to paragraphs 22-24 of those submissions. Those submissions are consistent with the respondent's position. In other words, because the claimant only became aware of the fundamental breach of contract **after** he resigned, it was not something which caused the claimant to resign. In a constructive dismissal claim, the respondent must resign **in response** to the breach."*

Discussion and Decision

20. An employee who seeks compensation for unfair dismissal is bound to comply with a strict time limit. S.111(2) of the Employment Rights Act 1996 ("the 1996 Act") is in the following terms: -

> *"… 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 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."*

21. In respect that it was common ground in the present case that the effective date of termination of the claimant's employment was 30 June 2018, and the claim form was not submitted until 18 December 2019, it was out of time by over 17 months. The issue for me, therefore, was whether or not the claimant could avail himself of the so-called "escape clause" by establishing that it was not reasonably practicable for the claim to be presented timeously and if so, the next question for me was whether I could conclude that the claim had been presented: "*within such further period as the Tribunal considers reasonable"*.

22. It is clear that the statutory provisions require an examination of the particular facts and circumstances of each case. What is "reasonably practicable" is a question of fact, the onus being on the claimant to establish that it was not "reasonably practicable" for him to present the claim form in time.

23. The claimant did not maintain that he was ignorant of his right to bring an Employment Tribunal claim or of the 3-month time limit. In any event, that could have been ascertained by reasonable enquiry. Indeed, in his claim form he states that when he received the decision from the Pensions Ombudsman he did consider bringing an employment tribunal claim.

24. He did not advance any impediment to him submitting his claim in time, other than him becoming aware in December 2019 of the two Circulars, "4 and 11", which he claims provided evidence that the Pensions Ombudsman had been misled by the respondent.

25. However, when he resigned, he said this in his resignation letter dated 26 March 2018 (P14): -

> "*My decision comes in response to the final arbitration from the Pensions Ombudsman received 24 March, which declines to offer any solution to the loss of more than half of my years of pension contributions on return to NHS service as a result of the changes to the NHS pension scheme while I was working in New Zealand. These changes were not notified to me at the time of my appointment. I know you are aware of my predicament.*

This is a source of great sadness to me, having specifically returned from well resourced and remunerated employment in New Zealand to contribute again to the NHS. I do very much enjoy my work here at Raigmore. It is not the outcome I wished for.

My decision comes in response to the wider issues arising and is carefully considered. The NHS has no future if it treats its valued staff in this way. I feel it is incumbent on me not to accept employment on terms that are degraded in such a significant manner. Although my particular circumstances are unusual, there is a universal risk that accepting terms and conditions that are unfavourable will foster conditions that make our profession unattractive to the next generation. Each of us must make our own determination on this.

At present I am considering the alternative opportunities available."

26. The basis for his resignation, therefore, was an alleged failure by the respondent to notify him of changes to the NHS pension scheme when he was offered employment. That remains the basis for his claim that the was constructively and unfairly dismissed. He said in his resignation letter that he was "*considering the alternative opportunities available*". It was clear, therefore, he felt aggrieved at that time at the way he had been treated and one of his options at that time was to bring an employment tribunal claim. However, he made a conscious decision not to do so and thereafter there was a lack of proactive attention to the matter on his part for over 17 months. He took the view that the findings by the Pensions Ombudsman, *"**appeared** to be a finding in law with respect to the responsibilities of an NHS employer towards returning employees"* but he did not agree with these findings and the Ombudsman's decision did not prevent him making a tribunal claim.

27. The claimant maintains that discovery of the two Circulars in December 2019 was "evidence" to support his contention that this was ignorance of a fact which is "crucial" or "fundamental" to his claim and before he had this "evidence" it was impracticable to present his claim in time. I do not agree.

28. While this "evidence" was the catalyst for the claimant submitting his claim form, it was discovered long after the claimant resigned and it was not relevant, therefore,

to his constructive unfair dismissal claim. As the respondent's solicitor submitted, *"the employee requires to have identified a fundamental breach of contract **at the time of resigning** and must resign (at least in part) in response to that breach. Information related to a potential breach which is obtained **after resignation** is irrelevant since it cannot be part of the reason why the employee resigned and is certainly not "fundamental" (**Churchill**) to the bringing of the claim. The clamant in this case did not resign because he believed, at the time of resigning, that the respondent had misled the Pensions Ombudsman. That belief only formed later, once the relevant documents were obtained. With reference to **Crouchman**, the new facts (misleading of the Ombudsman) are not fundamental to the claim. They are irrelevant to it. They do not support the particular breach of contract in response to which the claimant resigned."*

29. I am of the view that the submissions by the respondent's solicitor are well founded.

30. Further, the claimant alleges a discussion which he had with his MSP, in December 2019, led him, for some reason, to undertake, *"further research which led to the discovery of Circulars* 4 *and 11".* This was not "new evidence". These Circulars were in existence when the claimant resigned on 26 March 2018 and could have been discovered by the claimant then by *"further research*".

31. I decided, therefore, in all the circumstances, that it ***had*** been reasonably practicable to present the claim form in time. I was also mindful, in arriving at that view, that the onus was on the claimant to establish that it had not been reasonably practicable.

32. In ***Palmer and Saunders v Southend-on-Sea Borough Council*** [1984] IRLR 119 the Court of Appeal suggested that the best approach is to read *"practicable"* as *"feasible"* and to ask: *"was it reasonably feasible to present the claim to the Industrial Tribunal within the relevant 3 months?"* In my view, in the particular circumstances of present case, it was.

33. The plain fact is that s.111(2) imposes a strict time limit. The test does not depend, as do other applications for an extension, in relation to discrimination complaints, for example, upon a finding of fairness, justice and equity. The harshness of the regime is stressed time and again in the authorities. As the EAT said in ***Horwood v Lincolnshire County Council*** UKEAT/0462/11/RN at para 68: "*the hurdle to surmount is a high one",* a hurdle which the claimant in the present case failed to clear.

34. The Tribunal does not have jurisdiction, therefore, to consider the unfair dismissal claim as it is time barred and the claim must be dismissed.

Employment Judge:	**Nicol Hosie**
Date of Judgment:	**12 June 2020**
Date sent to parties:	**15 June 2020**