EMPLOYMENT TRIBUNALS

COVID-19 Statement on behalf of Sir Keith Lindblom, Senior President of Tribunals

This has been a remote hearing which has not been objected to by the parties. The form of remote hearing was by video (CVP). A face to face hearing was not held because it was not practicable and no-one requested the same and all issues could be determined in a remote hearing.

Claimant		**Respondent**
Mr Witold Suchanski	V	Montague's Laundries Ltd

PRELIMINARY HEARING

Heard at: Watford (by video) **On:** 20 January 2021

Before: Employment Judge Bloch QC

Appearances:

For the Claimant: Mr Kozik, Legal Consultant
For the Respondents: Mr C Murray, Counsel

JUDGMENT

1. The claimant's complaints are each struck out as being brought out of time contrary to s.111(2) of the Employment Rights Act 1996 ("ERA"), s.23(4) ERA and Article 7 of the Employment Tribunals (Extension of Jurisdiction (England & Wales)) Order 1994, respectively and it is not appropriate to extend time under any of these provisions.

REASONS

1. The claimant was employed from 27 September 2018 by the respondent as a delivery driver. His employment came to an end on 7 February 2020 but it was not until 29 June, well after the expiry of the relevant limitation periods that he approached ACAS for a Conciliation Certificate, which was granted on 30 June 2020. His claim (ET1) was not presented to the tribunal until 27 July 2020.

2. The claimant complained of unfair dismissal in the form of constructive dismissal under s.104 ERA (Assertion of a Statutory Right), the claimant relying on the

respondent's alleged refused to pay him his statutory holiday pay. He also claimed (statutory) unlawful deduction of wages in respect of holiday pay and notice money (in contract).

3. The particulars of claim extend to two and a half pages and state that he tendered his resignation from employment when he was told there would be no holiday pay for 2020 against a background of his not having been paid earlier holiday pay too. I observe that the particulars of claim are relatively straightforward.

4. It was common ground that each of the claimant's complaints was well out of time and that it was for the claimant to establish that it was not reasonably practicable for him to have presented his claims within the period of three months beginning with the effective date of termination (as extended by statutory provisions relating to the ACAS conciliation period).

5. The onus of proof was on the claimant to prove not only that it was impracticable for him to present his claim within that (extended) period but also (if it was so impracticable) that he presented his complaint within such further period as the tribunal considered reasonable after it had become reasonably practicable for the complaint to be presented.

6. S.111 of the Employment Rights Act states that a complaint may be presented to an employment tribunal against an employer by any person that he was unfairly dismissed by the employer, and (by sub-section 2) that … "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". It was common ground that in respect of the claim for holiday pay and notice pay the statutory provisions were worded materially the same.

7. The claimant submitted a witness statement from which he said that since he had left his employment, the country was paralysed with lockdowns which obstructed any ability to find employment and his health began deteriorating every month as he was suffering from a condition called "pulmonary embolism".

8. He said that while he wished to get his money back, the amount he was seeking was too low to hire any legal assistance. Between March and April he rang a couple of Polish lawyers who practise in England and when he said how much he wished to recover, all they said was that they would charge him well in excess of that apparently very low amount if they were going to represent him. One solicitor never called him back. At that point he did not even have money for a consultation to find out how to claim the money himself. He said that he had never had anything to do with the English legal system nor had he had anything to do with the Polish legal system prior to coming to the UK. He was in the dark, unable to do anything. Further, his English was not good enough to run a court case or write anything formal. That said, he agreed in cross-examination that his English was good enough to carry out his job as delivery driver without any difficulty. He further told me that his English was reasonably good but he wanted an interpreter in a situation such as a tribunal hearing where every word was

important. The claimant obtained some money towards the end of June and decided to try seeking legal advice about the issue again. He contacted KL Law Ltd and booked a consultation via skype on 29 June 2020.

9. He added that during the conference which lasted a "decent amount of time" he received quite a bit of information. It was then that he learnt of the concept of constructive dismissal and the exceptions to the two years of continuous employment that would entitle one to make a claim. He had had no idea about this because that concept did not exist in Polish law.

10. When KL Law told him about his rights, he felt that it was appropriate to pursue the claim at the tribunal - only that it was late.

11. Mr Kozic of KL Law was working remotely and the claimant said that he needed to send over paperwork to Mr Kozik and give him instructions to prepare his claim. The case was immediately registered. The claimant added that on 10 July following a period in which he was really unwell he ended up in hospital. He said that during that time he was unable to see and reply to any emails that Mr Kozic sent him with questions and a draft version of his claim.

12. When he returned home on the evening of 13 July 2020 he was still unwell and unable to deal with the case that he was about to start.

13. He replied to Mr Kozic's correspondence on 22 July 2020 which was the first day that he was capable of doing so. Mr Kozic was on his annual leave by that point and the claim was eventually lodged on 27 July. He said that he had exchanged over 6 emails between himself and Mr Kozic between 22 July and 27 July.

14. The claimant produced a discharge summary from Northwick Park Hospital showing an admission date of 11 July 2020 and the reason for admission as being shortness of breath. The discharge date is shown as 13 July 2020. Under the "clinical narrative" it said that the claimant was admitted with a two week history of exertional shortness of breath. He reported some orthopnoea (breathlessness) but no chest pain.

15. The claimant gave evidence and was cross-examined by Mr Murray. He said that in the two weeks before his admission to hospital he had been experiencing symptoms which were getting stronger by the day. It was put to him that there was nothing to stop him progressing his claim before 10 July and he said that there was an obstruction to his doing so in the form of the state of his health.

16. The respondent submitted that it was reasonable practical for the claimant to have presented his claim within the statutory time limit and that even if it were not so then a reasonable period after 29 and 30 June after he was aware of his rights would have been 30 June but in any event that he should have submitted his claim at the very latest before 10 July.

17. Mr Murray submitted that given that the claimant had between March and April contacted a couple of Polish lawyers that he must have known that he had a claim potentially worth pursuing at that time. He had consulted his current lawyer formally on 29 June and that, while he had produced evidence showing an emergency admission to hospital on 10 July, he had not explained properly why the claim was not issued in the eight full working days between 29 June and 10

July. The claimant had said that he had recovered by 22 July but he and his lawyers exchanged six emails and spoke on the telephone about six times between 22 and 27 July. He submitted that having had a conference "which lasted a decent amount of time" information necessary to draft the formal claim would have been at Mr Kozic's fingertips. If the claim could not be presented on 29 June, it could have been presented on 30 June.

18. I was shown a bundle of authorities by Mr Murray which ran into some 90 pages which included the well known case of <u>Dedman v British Building and Engineering Appliances Ltd</u> [1974]1 All ER 520.

19. The case law on the subject indicates that ignorance of the law may render it impracticable for a claim to be brought but not ignorance because of a failure to make reasonable enquiries. It is inherently more difficult for a claimant to avail himself of "ignorance" where the claimant knows he may have a right but does not know the time limit. Once the claimant is aware of the existence of a right it is unlikely that he will not be aware that there will be a time limit relevant to the exercise of that right.

20. Mr Kozic realistically accepted that his position in relation to the holiday and notice pay claims might be more difficult than the claim for unfair dismissal. It is clear that the claimant understood that he had a right to bring these (lesser) claims but he did not know about the possibility of bringing a constructive unfair dismissal claim.

21. In my judgment that is a realistic approach and the more difficult question is that relating to the unfair dismissal claim.

22. Properly analysed in my judgment it seems that the real obstacle which prevented the claimant from a fuller review of his case was lack of money. As Lord Scarman commented in the Dedman case: "Where a claimant pleads ignorance as to his or her rights the tribunal must ask further questions: what were his opportunities for finding out that he had rights? Did he take them? If not why not? Was he misled or deceived?"

23. In my judgment while it was reasonably practicable for the claimant to bring his claims for holiday pay and notice pay within the (extended) imitation period, in relation to the unfair dismissal claim, by the narrowest of margins the claimant has persuaded me that it was impracticable for him to bring that claim within that time limit. I conclude that, even though the claimant knew that he had (potential) smaller, economically unviable claims, through ignorance (being unfamiliar with the English legal system generally and employment law in particular) – as well as his impecuniosity - did not (and could not reasonably) have known that he had a separate larger (economically more viable) claim. I therefore conclude that it was not reasonably practicable for him to bring the constructive unfair dismissal claim until after he had received Mr Kozik's advice.

24. Therefore, in relation to the constructive unfair dismissal complaint, I must go on to decide whether that complaint was presented "within such further period as the tribunal considers reasonable" pursuant to s.111(2)(b) ERA. In this regard I accept Mr Kozik's submission that the absence of the word "practicable" from the second part of the enquiry means that the tribunal must apply a less stringent test of asking whether the claim was presented within a reasonable time after the

time limit expired. However, I accept Mr Murray's submission that a tribunal is unlikely to accept a late claim where the claimant fails to act promptly once the obstacle that prevented the claim being made in time in the first place has been removed. The authorities (which I do not rehearse in detail but which are well known) are to the effect that the claimant must act quickly to minimise the delay as soon as he becomes aware of it. Regard must be had to the background of a strong public interest in claims being brought promptly - and the fact that delay may be caused by the advisors and not the claimant will not make a difference to that conclusion.

25. Not without some doubt I conclude that the claimant has not persuaded me that the claim was, after 29 or 30 June (once he had been advised of the existence of potential unfair dismissal claim) presented within a reasonable period after that time.

26. I take into consideration the various points made on behalf of the claimant, namely the need to take instructions in Polish and then produce an English set of particulars of claim where communication between the claimant and his legal adviser was by remote means - and the effect of the claimant's illness .

27. I was not persuaded by the language point. Mr Kozic is, as he confirmed to me, entirely fluent in Polish and he is entirely fluent and confident in English too as he demonstrated to me through his conduct of the hearing today. As set out above, the particulars of claim are short and straightforward and I do not see that rendering these in English would have presented any particular problem to Mr Kozic.

28. Nor am I persuaded by problems of communication, by skype or internet. This is not a document-heavy case and I do not see that remote communication (which is so common these days) would have presented any strong delaying factor into the presentation of the particulars of claim following what seems to have been a fairly lengthy Skype conference on 29 June. For Mr Kozic to have been able to advise that there was a claim which could be brought under s.104 ERA, ie without the usual two years of qualifying service, means that Mr Kozic must have had a good understanding of the claim.

29. Mr Kozic urged upon me that it would have been professionally improper for him to issue the proceedings immediately on 30 June without further enquiry and without checking the correctness of the particulars of claim with his client.

30. I have some sympathy with that and I do not accept the submission that the claim should have been presented by 30 June. That said, the claim could have been submitted and insofar as any details were outstanding or unclear, have been 'perfected" or supplemented by subsequent amendment, as is common practice. More significantly, I regard the evidence as to why the claim was not presented before 10 July 2020 as not entirely persuasive. Mr Kozic disclosed a list (taken from his computer) of email correspondence between himself and the claimant between 7 July 2020 and 27 July 2020 without waiving privilege in respect of the content of those emails. From that it appears that no further instructions were sought from the claimant until an email was sent on 7 July 2020 and the next email sent by Mr Kozic was on 21 July 2020. In my judgment a red light was flashing on 29 June 2020 and the claimant and his legal advisor were required to act with all proper expedition after that time.

31. No proper explanation was given for the delay on the part of the claimant or his legal adviser up until 7 July 2020. Further, the claimant's evidence regarding his being unwell before 10 July was very vague. In particular his evidence in his witness statement that he was unable to see and reply to any emails from Mr Kozic was not entirely persuasive. In particular he did not explain why it was that on 7, 8 or 9 July he was so unwell as not to be able to read any emails and nor was there any evidence of Mr Kozic seeking to contact the claimant before 7 July 2020 nor indeed, (having sent an email on 7 July), any evidence of Mr Kozic chasing a response from the claimant, in circumstances where the clock was ticking loudly after 29 June.

32. In short, while I consider the issue of Mr Suchanski's illness over that period as a significant point, I am left with real doubt as to whether between the claimant and his legal adviser this claim was pursued with proper expedition after 29 or 30 June.

33. In my judgment, on the balance of probabilities, the relevant "reasonable period" after the claimant was aware of his rights on 29 June was the end of the week following, namely Friday 5 June 2020. Given the "red light" which began to flash on 29 June and the simplicity of the particulars of claim, Mr Kozic could, consistent with his professional duties and notwithstanding such health difficulties as may have existed in the week of 1-5 June (about which there was very little evidence in any event) have presented the claim by 5 June. If I am wrong in that, in my judgment a reasonable period would have expired at latest by 10 June, when the claimant fell so ill as to be admitted urgently to hospital.

34. Accordingly in my judgment the claimant has not satisfied me that the unfair dismissal claim was brought within a reasonable period after 29 or 30 June 2020.

35. Accordingly, I find that it was reasonably practicable for the claims for holiday pay and notice money to be brought within the relevant statutory limitation periods (as extended by the time for ACAS conciliation) and that the constructive dismissal claim was not brought within such further period as I consider reasonable.

36. I accordingly find that the tribunal has no jurisdiction in respect of any of the claimant's claims, on grounds that they were presented out of time.

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Employment Judge Bloch QC

11/03/2021

Sent to the parties on:

11/03/2021…………….

For the Tribunal:

T Henry-Yeo…………………………..