

THE INDUSTRIAL TRIBUNALS

CASE REF: 5764/19

CLAIMANT: **Andrius Poska**

RESPONDENT: **Delwyn Enterprises Limited trading as Yardmaster
International**

DECISION ON A PRE-HEARING REVIEW

The decision of the tribunal is that the claim of unfair dismissal has been lodged outside the statutory time limit of three months and that that time limit should not be extended in all the circumstances of this case. The claim of unfair dismissal is therefore dismissed for want of jurisdiction.

CONSTITUTION OF TRIBUNAL

Vice President (sitting alone): **Mr N Kelly**

APPEARANCES:

The claimant was represented by Ms Louise Maguire, Barrister-at-Law, instructed by O’Kane Boyle Solicitors. The claimant was assisted by an interpreter Ms Van Cen Clene.

The respondent was represented by Mr Peter Bloch of the Engineering Employer’s Federation.

BACKGROUND

1. The claimant had been employed by the respondent company for approximately 13 years. He worked as an engineer.
2. The respondent company manufactured steel products.
3. The claimant was dismissed.
4. The parties agreed that the effective date of termination was 5 December 2017.
5. The claimant lodged a claim of unfair dismissal in the tribunal on 21 February 2019.
6. That claim was therefore lodged some 14 months after the effective date of termination and some 11 months outside the statutory time limit of three months.

7. The only issue before the tribunal was therefore whether the time limit should be extended on reasonably practicable grounds.

RELEVANT LAW

8. The issue to be determined in the Pre-Hearing Review was attached to the Notice of Hearing. That issue was:

“Whether time should be extended in the claimant’s unfair dismissal claim on the grounds that it was not reasonably practicable for him to lodge the claim within the requisite time limit.”

9. Under Part XI of the Employment Rights (Northern Ireland) Order 1996, Article 145 provides that a complaint of unfair dismissal must be presented to the tribunal within three months beginning with the effective day 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.”

10. The burden of proving that it had not been reasonably practicable for the claimant to have presented his claim within three months or within a further reasonable period rests firmly upon the claimant. The Court of Appeal (Great Britain) in **Porter v Bandridge [1978] IRLR 221** stated:

“The onus of proving that it was not reasonably practicable to present the complaint within a period of three months was upon the applicant. That imposes a duty upon the applicant to show precisely why it was he did not present his complaint. He has to satisfy the tribunal that he did not know of his rights during the whole of the period (of 11 months) and that there was no reason why he should make enquiries or should know of his rights during that period.”

11. The Court of Appeal (Great Britain) stated in **Palmer and Saunders v Southend on Sea Borough Council [1984] IRLR 119** that the correct approach to the “reasonably practicable” test was to ask “was it reasonably feasible to present the complaint to the Employment Tribunal within the relevant three months?”

RELEVANT FINDINGS OF FACT

12. The claimant came to Northern Ireland from Lithuania in 2004. He worked thereafter for the respondent company until 5 December 2017 when he was dismissed.
13. The claimant had therefore been resident and working in Northern Ireland for approximately 13 years at the time of his dismissal.
14. On 8 December 2017, the claimant attended his GP. He had taken an overdose of prescription medicine. He denied suicidal intent but agreed to a weekly prescription thereafter, presumably to limit access to those prescription only medicines. He had also been experiencing difficulties sleeping at this time.

15. Over the period between 8 December 2017 up to approximately May or June 2018, the claimant experienced mental health difficulties which were on occasion significant. During this period he was at one point in hospital for two days in or around January 2018. Otherwise, he was at home throughout this period.
16. During this period, the claimant had claimed two social security benefits and was able to do so through the jobcentre. He had to attend the jobcentre premises and he had to use their interpreter. He had been able to attend multiple medical appointments during this period. He had not been either housebound or incapacitated during this period.
17. The claimant did not try to take advice from any source during this period; either from the Citizen's Advice Bureau, any advice centre or from a solicitor.
18. The claimant obtained a new job in June 2018. He is still employed in that job. Despite being fit to attend work from June 2018, he failed to seek advice in respect of a potential claim of unfair dismissal or to lodge such a claim in the tribunal.
19. The claimant gave evidence that he had "*first discovered you could make a claim*", some two months later, in August 2018 when he had been discussing his work history with his new work colleagues.
20. That evidence, given during the Pre-Hearing Review, differs significantly from what the claimant had said on multiple occasions in his ET1. That distinction brings into question the claimant's credibility in this matter.

In his ET1 the claimant stated:-

"I was unaware of any time limit to bring a claim. I am from Lithuania and we have three years to bring a claim in our country."

"The claimant was unaware of the time limit in which to bring a claim".

"We say that the claimant was ignorant of the time limit in which to bring a claim."

21. There is a big difference between being unaware that you could make a claim of unfair dismissal and being unaware, only, of the time limit for making such a claim. According to the ET1 the claimant had only been unaware of the time limit to lodge a claim of unfair dismissal and he referred specifically to what he stated is a three year time limit for such a claim in Lithuania. It seems clear from the ET1 that the claimant accepted that had been aware of the right to make a claim. If he had been unaware of the right to make a claim, he would have said so in the ET1. He did not, but he maintained in the course of the Pre-Hearing Review that he had not been so aware.
22. In any event, the claimant had been approximately 45 years of age when he was dismissed from his employment. It is simply not credible that a worker of that age, who had worked for 13 years in Northern Ireland and had presumably worked elsewhere for different periods, could have been unaware, even in the broadest terms, of employment rights and of the right not to be unfairly dismissed. That is

even less credible when the clear terms of the ET1 are considered. In that ET1 the claim asserts that in Lithuania they had three years to bring such a claim and asserts only that he was unaware of the local time limit and does not assert that he had been unaware of the right to make a claim. Yet the claimant throughout the Pre-Hearing Review maintained he had not been aware of his right to make a claim until August 2018. If that was correct, that would have been the basis of his ET1, not an alleged ignorance of the local time limit.

The tribunal does not find that evidence at all credible. The tribunal concludes that he had been aware of his right to make a claim but had, for whatever reason, chosen not to make any enquiries in that respect in the period following his dismissal up to August 2018.

23. The claimant accepted in evidence before the Pre-Hearing Review that he had not sought advice from the Citizen's Advice Bureau, any advice centre, a solicitor or from any other source. He alleged that he had first learnt of his right to claim when he was discussing his work history in August 2018 with his new colleagues.
24. Despite the fact that the claimant accepted in evidence that he had been aware, at the latest, in August 2018 of his right to bring a claim, he did nothing to pursue such a claim or seek further advice for a further four months until December 2018. Even then, he did not lodge a tribunal claim. He spoke to his brother about a potential claim when he had been discussing his health.
25. The claimant states that he spoke on the telephone to his brother in Lithuania in December 2018 and that in that conversation his brother had advised him to see a solicitor. He did not see a solicitor until at least one month later on 23 January 2019.
26. It is clear that any doubts or uncertainty that the claimant might have had at that stage would have been cleared up during that meeting with a solicitor. Nevertheless he did not submit a claim until 21 February 2019 again almost one month later. The claimant stated in cross-examination that he needed to save some money to pay his solicitor. This is a tribunal jurisdiction where personal litigants are common. There is no fee for lodging a claim of unfair dismissal. He could have done so himself, if necessary with the assistance of friends. It did not require yet a further delay.

DECISION

27. The claimant is clearly outside the time limit for lodging a claim in this tribunal. His effective date of termination was 5 December 2017 and his claim was lodged in the tribunal on 21 February 2019.
28. His claim of unfair dismissal was therefore some 11 months out of time.
29. The onus is on the claimant to establish that it had not been reasonably practicable to present his claim of unfair dismissal within the period of three months from the effective date of termination. The onus is also on the claimant to satisfy the tribunal that he did not know of his right to claim unfair dismissal during the whole of the relevant period and that there had been no reason why he should have made appropriate enquiries to establish those rights.

30. The claimant had experienced significant mental health difficulties in the period after his effective date of termination on 5 December 2017 up to May or June 2018. That said, the claimant had been only been hospitalised for a period of two days and was otherwise staying at his home. It is clear from his ET1 that he had known in general terms of the right to assert his employment rights on dismissal and he had been aware that a similar claim existed in Lithuania albeit with, he states, a different time limit. It seems clear to the tribunal that he could and should have sought advice during this period. He was not incapacitated throughout this period. There might have been an impediment from time to time during this period. Nevertheless he had been capable of pursuing and maintaining his claims to two separate social security benefits and capable of attending multiple medical appointments during this period. The tribunal therefore concludes that it had been reasonably feasible for the claimant to have pursued or sought advice from various sources at various times during this period.
31. In any event, the claimant had been fit to obtain employment and to stay in employment from June 2018 onwards. His claim to the tribunal was not lodged for a further eight months. There is absolutely no reason why the claimant could not have sought further advice in a period from June to August 2018. There is furthermore absolutely no reason why the claimant had not moved quickly in the period from August 2018 onwards when he had, according to his own evidence, been first aware of his right to claim.
32. He had spoken to his brother in December 2018, but he waited a further month before even meeting his solicitor. He stated in evidence that this was because of Christmas and also because of his need to accumulate some money to pay the solicitor. It is not necessary to hire a solicitor to lodge a complaint of unfair dismissal. Many claimants do not do so. The statutory time limitation periods do not provide for any exemption to those who cannot afford to retain a solicitor and there is no legal aid in this jurisdiction. It is a tribunal jurisdiction which frequently deals with unrepresented claimants and respondents.
33. Even when the claimant spoke to his solicitor on 23 January 2019, a claim was still not lodged for almost one further month until 21 February 2019.
34. This is a case for the claimant had clearly been aware in broad terms or should have been in broad terms of his right to assert employment law rights in relation to a dismissal which he had regarded as unfair. He did not seek to obtain advice from any source whatsoever before 23 January 2019. That was some thirteen months after his dismissal and some eight months after he had started new employment. It is clear that throughout this period he had, or should have been aware of his right to claim. However, even when, on his own evidence, he accepts that he had been advised in August 2018 of his right to make a claim, he took no further action until he spoke to a solicitor on 23 January 2019 and even then did not lodge a claim until one further month had passed.
35. This is a case where the claimant could have lodged his claim within the statutory time limit and should have done so. It is also a case where the claimant has not discharged the onus placed upon him to establish that he had lodged a claim within a further reasonable period after the expiry of that statutory time limit. Apart from those brief periods when he had been either hospitalised or otherwise

incapacitated, between the date of his dismissal and May/June 2018, there had been no real impediment to the claimant seeking advice on his rights.

37. Even if the entire period from the effective date of termination to June 2018 were to be disregarded, the claimant had been capable of attending work from June 2018. He had been capable of seeking advice and of lodging a tribunal claim from June 2018, even if not before. He chose not to do so. Even when his work colleagues brought the possibility of an unfair dismissal claim to his attention in August 2018, he still failed to seek advice or to lodge a claim. Even when his brother told him, on an unspecified date in December 2018, to seek advice, he failed to do so for one further month. Even when he had spoken to a solicitor, he failed to lodge a claim for a further month.
38. The tribunal is not satisfied that the claimant had lodged his claim within a further reasonable period for the purposes of Article 145. Time is therefore not extended.
39. The claim is therefore dismissed for want of jurisdiction.

Vice President:

Date and place of hearing: 27 August 2019, Belfast.

Date decision recorded in register and issued to parties: