

**THE INDUSTRIAL TRIBUNALS AND
FAIR EMPLOYMENT TRIBUNAL
PRELIMINARY HEARING
BY WEBEX**

CASE REF: 7169/21

CLAIMANT: **Leeanne McCracken**

RESPONDENT: **Oak Property Management (NI) Limited**

JUDGMENT ON A PRELIMINARY HEARING

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 that it was not reasonably practicable for the claimant to have presented her claim before 28 October 2020 but the claimant did present her claim within a further reasonable period of time thereafter. The tribunal therefore has jurisdiction to hear the claimant's unfair dismissal claim.

CONSTITUTION OF TRIBUNAL

Employment Judge (sitting alone): Employment Judge Sturgeon

APPEARANCES:

The claimant represented herself and attended by WebEx.

The respondent was represented by Ms M Kane and attended by WebEx.

Issues

1. The purpose of this Preliminary Hearing (PH) was to establish the following issues:-
 - (i) The effective date of the claimant's termination of employment.
 - (ii) Whether the claimant's complaint of unfair dismissal was presented to the tribunal before the end of the three months beginning with the effective date of termination?
 - (iii) If not, whether it was reasonably practicable for the claimant to have presented her claim before the end of that period of three months?
 - (iv) If not, whether the claimant presented her complaint within a reasonable period of time thereafter?

Background

2. This matter had been previously case managed on 26 May 2021. At that Case Management Preliminary Hearing (CMPH), I directed that a Preliminary Hearing (PH) be listed for today as it appeared that the claimant's claim was potentially out of time. At Section 7.4 of the claimant's claim, the claimant stated that her employment with the respondent ended on 28 July 2020. A claim for unfair dismissal should be lodged within the statutory time period of three months from the effective date of termination. Accordingly, the claimant's claim form should have been presented to the tribunal no later than 28 October 2020. As it was not presented until 10 January 2021, it was therefore, on the face of it, over 2 months outside of the time limit.
3. At the last CMPH, on 26 May 2021, I directed that the parties lodge all documentation, which they wished to rely on at this Preliminary Hearing, by 9 June 2021, and any written submissions by 16 June 2021.

Sources of Evidence

4. The tribunal considered the claim form and the response form. The tribunal also had regard to the two previous claim forms, submitted by the claimant, which were rejected by the tribunal. The first claim, dated 15 September 2020, was rejected for not containing the proper early conciliation certificate and the second claim form, dated 13 October 2020, was rejected for not containing a respondent's name identifying to that on the early conciliation certificate. The tribunal also had regard to a letter from the claimant, dated 8 June 2021, setting out the sequence of events leading up to her submitting her claim form.

Relevant Findings of Fact

5. The tribunal makes the following relevant findings of fact:
6. There is no dispute between the parties that the claimant was dismissed on 28 July 2020.
7. The claimant first lodged a claim, for unfair dismissal, on 15 September 2020.
8. However, she did not lodge an early conciliation number or certificate with her claim form, on 15 September 2020, and therefore the claim form was rejected.
9. The claimant resubmitted another claim form on 13 October 2020 and this time her claim form contained an early conciliation number. However, this claim form recorded a name for the respondent which differed from the name recorded for the prospective respondent on the early conciliation certificate to which the early conciliation number related.
10. The claimant was informed of this decision, on 7 January 2021, and was informed of her right to apply for a reconsideration of the rejection of the claim on the basis that the decision to reject was wrong or that the notified defect could be rectified. The claimant was also informed that an application for reconsideration should be made in writing to the Tribunal Office within 14 days of the date of the letter notifying her of same i.e. by 21 January 2021. Finally, the claimant was also

informed that the written application must explain why the decision was said to have been wrong or else rectify the defect.

11. On 10 January 2021, the claimant resubmitted her claim form again. On this occasion, she identified the respondent as Oak Property Management (NI) Ltd and this corresponded to the name of the respondent on the early conciliation certificate. Accordingly, this claim form was registered. However, the claimant did not request that this new claim be treated as a reconsideration.

The Relevant Statutory Provisions

Presenting the claim

12. Under rule 9(3)(b)(i) of the Industrial Tribunal and Fair Employment Tribunal Rules and Regulations (Constitution and Rules of Procedure) Regulations (Northern Ireland) 2020 (hereinafter “the 2020 rules”), all claim forms, when presented to the tribunal office, must be accompanied with an early conciliation number.

Rejection

13. The Secretary to the tribunal may refer a claim form to an employment judge if it records a name for the respondent which differs from the name recorded for the prospective respondent on the early conciliation certificate to which the early conciliation number relates (under Rule 11(1)(c)(iii)(bb) of the 2020 rules).

Reconsideration of rejection

14. Under rule 12 (1) of the 2020 rules, a claimant may apply for a reconsideration of the rejection of the claim on the basis that the decision to reject was wrong or the notified defect can be rectified. That application should be in writing and should be submitted within 14 days of the date that the notice of rejection was sent.

Time Limit for Unfair Dismissal claim

15. 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.*

Application of the Law and Findings of Fact to the Issues

16. The first issue to be determined was the effective date of termination (EDT). As stated at paragraph 6 above, there is no dispute between the parties about this date and the EDT is 28 July 2020.
17. The claimant had until 28 October 2020 to present her claim for unfair dismissal to the tribunal. The claim form, which was ultimately accepted by the tribunal, was presented on 10 January 2021 and was therefore over two months outside of time.
18. It is for the claimant to persuade the tribunal that it was not reasonably practicable for her to present her claim form within the time limit. The claimant relies on the following points in that regard:
 - (i) The claimant explained that she was dismissed on 28 July 2020 and she initially lodged a claim, for unfair dismissal, on 15 September 2020.
 - (ii) However, she did not submit an early conciliation number with her claim form, on 15 September 2020, and therefore the claim form was rejected.
 - (iii) The claimant resubmitted another claim form on 13 October 2020 and this time her claim form contained an early conciliation number. However, this claim form recorded the respondent's name as "Geraldine Kane" while the early conciliation certificate recorded the respondent's name as "Oakland Property Management (NI) Limited. Again, her claim form was rejected.
 - (iv) The claimant was not informed of this decision until 7 January 2021.
 - (v) On 10 January 2021, the claimant resubmitted her claim form again. On this occasion, she identified the respondent as Oak Property Management (NI) Ltd and this corresponded to the name of the respondent on the EC Certificate. Accordingly, this claim form was registered.
 - (vi) The claimant submitted that she had therefore always lodged her first claim (dated 15 September 2020) on time, that she was unfamiliar with the rules regarding tribunal claim forms but that she had promptly corrected her mistakes and she felt she should be allowed to continue with her claim.
19. Having heard the claimant's explanation as to why she felt her claim should be accepted, the respondent submitted that it did not feel that filling out a claim form incorrectly, not identifying the correct respondent and/or not attaching the appropriate early conciliation number/certificate was a reasonable enough excuse for allowing the claimant's claim to be accepted and for permitting the claimant to continue with her unfair dismissal claim. The respondent submitted that there is enough information on the tribunal website to assist claimants in completing forms correctly.
20. What is or is not reasonably practicable is essentially one of fact for an employment tribunal to decide. The claimant has persuaded me that it was not reasonably practicable for her to lodge her claim form within the time limit. I have reached this decision for the following reasons:

- (i) It was clear to me that the claimant had initially lodged her first claim form on time (i.e. 15 September 2020) but it was rejected as the claimant did not also submit an early conciliation number to accompany it.
 - (ii) When notified by the tribunal that she had to lodge an early conciliation number, the claimant submitted her claim form again promptly, on 13 October, this time with an early conciliation number. This second claim would also have been within the three month deadline for lodging a tribunal claim.
 - (iii) Unfortunately, due to the backlog of work arising from the closure of the tribunal building as a result of the Covid-19 pandemic, the tribunal did not communicate to the claimant until 7 January 2021 that the respondent's name on the early conciliation certificate and the response form did not match. Upon being notified of this, the claimant immediately rectified the position and resubmitted a third claim three days later on 10 January 2021. This claim form correctly identified the respondent which matched the name of the respondent on the early conciliation certificate.
 - (iv) However, by 10 January 2021, the three month time limit for the claimant that to lodge her claim with the tribunal had expired. It expired on 28 October 2020.
 - (v) Given that the tribunal did not communicate to the claimant the error in her second form dated 13 October 2020 (i.e. that the respondent's name on the early conciliation certificate and the response form did not match), until 7 January 2021, over two months outside of the time limit for the claimant to present her claim, I am satisfied that it was not reasonably practicable for the claimant to present her claim form on time.
 - (vi) The tribunal is also satisfied that the rules of procedures, regulating the presentation of early conciliation numbers and certificates, are complicated even for the most experienced Employment Law Advisors and Solicitors but that the claimant acted promptly, at each stage, to rectify her mistakes.
21. Having established that it was not reasonably practicable to lodge her claim form within the time limit, the tribunal must then consider whether or not the claimant presented her complaint within a reasonable period of time thereafter.
22. As stated above, the tribunal did not communicate to the claimant, until 7 January 2021, that the respondent's name on the early conciliation certificate and the response form did not match. Upon being notified of this, the claimant immediately rectified the position and resubmitted a third claim three days later on 10 January 2021.
23. The question of what is or is not a reasonable time thereafter is "*very much a matter for the employment tribunal*" (***Lord Denning in Wall's Meat Co Ltd v Khan [1979] ICR 52***). In this instance, the claimant acted promptly (i.e. within three days of being notified of the error) and I am therefore satisfied that she acted within a reasonable period thereafter.

Summary

24. In summary, therefore, I find as follows:
- (i) the claimant's EDT was 28 July 2020;
 - (ii) the claimant's accepted claim form was lodged on 10 January 2021 and was therefore not presented before the end of the three months beginning with the EDT (i.e. 28 October 2020);
 - (iii) the claimant's accepted claim form was lodged over 2 months outside of the statutory time limit;
 - (iv) it was not reasonably practicable for the claimant to lodge her claim within the statutory time period; but
 - (v) the claimant did lodge her claim form within a reasonable period of time thereafter.
25. I conclude that that the tribunal has jurisdiction to deal with this claim and the claimant should be able to proceed with her unfair dismissal claim. I communicated this decision orally to the parties at the Preliminary Hearing and thereafter proceeded to manage the case for hearing as follows:

Orders

26. In accordance with Part 6 of the Industrial Tribunals and Fair Employment Tribunal Rules of Procedure 2020, the following orders were made, by consent:

1. The response

The respondent was ordered to serve the claimant with a more detailed response to the claimant's claim form no later than **4.00 pm on Tuesday 27 July**. The respondent must lodge a copy of its response to the tribunal and also the claimant.

2. Issues

Through discussion with the claimant about her claim form and the respondent about its response form, the following issues are to be determined by the tribunal at the forthcoming hearing:

- (1) Was the claimant's dismissal for a fair reason as set out in Article 130 of the Employment Rights (Northern Ireland) Order 1996?
- (2) Was the claimant dismissed by the respondent due to a redundancy situation?
- (3) Did the dismissal of the claimant, by the respondent, follow the statutory dismissal procedure?

3. Additional Information, Disclosure, Exchange and Inspection of Documents

The parties are ordered to serve any Notices for Discovery and/or Additional Information **by Friday 13 August 2021** and to respond **by Friday 3 September 2021**.

I explained to both parties that any tribunal hearing this claim will find it useful to look at and consider any documentation which either party has, in its possession, to support either the claim or the response to the claim. Accordingly, when the parties are serving replies to any notice for discovery, they should serve all documentation which they intend to rely on at the hearing to include emails, handwritten notes, text messages, WhatsApp messages and any other documentation and video or audio records, etc.

4. Witnesses

Ms McCracken informed the tribunal that she will give evidence on her behalf and Ms Kane informed the tribunal that Geraldine Kane will give evidence on behalf of the respondent.

5. Witness Statements

- (a) I ordered the claimant and any witness she wishes to call to provide a signed and dated witness statement to the respondent's representative no later than **4.00 pm on 24 September 2021**.
- (b) Likewise, the respondent and any witness it wishes to call must provide a signed and dated witness statement to the claimant's representative **no later than 4.00 pm on 24 September 2021**.
- (c) A witness statement must be a complete statement of the evidence relating to the issues, in respect of both liability and remedy, in the case, that the witness wishes to give to the tribunal. Witness statements must not contain the parties' submissions or arguments. The parties will be given the opportunity to make submissions at the conclusion of the evidence. A witness will not be permitted to add to his/her statement without the consent of the tribunal. Consent will only be given where there is good reason for doing so.
- (d) Witness statements should commence with an introductory paragraph which identifies the witness and explains the relevance of the witness to the claim, e.g. claimant, line manager, member of interview panel, etc.
- (e) The statement should then use the factual issues agreed above and set out the witnesses' evidence, if any, in relation to each factual issue chronologically. The claimant's witness statement should also include her evidence to support any claim for injury to feelings and/or financial loss. It should also include her evidence of all steps taken to obtain alternative employment. The witness statement should finish with a short summary paragraph.

Witness statements may not exceed 5,000 words unless otherwise directed by the tribunal.

- (f) Any documents referred to in the witness statements must be identified by the relevant page number in the bundle.
- (g) Witness statements will not be read aloud to the tribunal, subject to the discretion of the tribunal hearing the case.
- (h) Witness statements will be read by the tribunal prior to the commencement of the hearing which will then proceed by way of cross-examination.

6. Schedule of Loss

The claimant in her witness statement shall refer to and annex a separate updated schedule of all financial loss claimed by the claimant, setting out the nature and amount of any such loss claimed and how that sum is made up. If the claimant's financial circumstances should change prior to the Hearing, an updated Schedule of Loss should also be attached to the claimant's witness statement in the witness statement folders that accompany the bundles.

7. Oaths and Affirmations

Witnesses may elect to take the oath or make the affirmation in respect of their evidence.

In either case, the clerk will read and the witness will repeat the words of the oath or affirmation, as the case may be.

If any witness requires to hold a Holy Book when taking the oath in order to be bound by the oath, they should either:

- (a) bring their own Holy Book with them to the hearing for their own use; or
- (b) if this is not possible, they must inform the **office at least 5 working days** in advance of the hearing so that the Holy Book which the witness wishes to use can be quarantined for an appropriate period.

Following use of the Holy Book, it will be quarantined again before further use.

8. Bundles

The parties are ordered to liaise and prepare an agreed and paginated bundle of documents, **four copies** of which must be lodged in the Office of the Tribunals **on Friday 3 December 2021** along with **four copies** of a further folder containing witness statements. **Those will be for the use of the tribunal panel.** Ms Kane kindly confirmed to the tribunal that she would take responsibility for the lodging of the bundle on behalf of both parties.

The parties are also ordered to liaise with each other in order to agree and provide bundles or part bundles of documents and witness statements directly to each separate witness who will be giving evidence to the tribunal

at least five working days before the commencement of the Hearing for health and safety reasons. These should be identically ordered and paginated to the bundles provided to the tribunal office.

Each witness must bring these documents and witness statements to the hearing with them, to refer to when they are giving their evidence.

Documentation contained in the bundle must not be annotated by any witness.

Parties and witnesses cannot seek to introduce additional documents at hearing for public health reasons without leave of the tribunal. In such circumstances, the hearing may have to be adjourned for special measures to be undertaken to limit risk and this may involve an award of costs against a party.

- (a) The bundle must contain **only** those documents which are necessary for the tribunal to hear and determine the claim. The bundle is not meant to contain all documentation which has been disclosed between the parties, documents should appear only once in the bundle.
- (b) The bundle must contain all documents relating to financial loss including all documents relating to the steps taken by the claimant to obtain alternative employment.
- (c) The bundle must contain a detailed index and each page in the bundle **must** be clearly and consecutively numbered.
- (d) Document must appear in chronological sequence.
- (e) The bundle may not, without the consent of the tribunal, contain more than 300 pages.

9. Date of Hearing

The hearing will be ***on Tuesday 14 December 2021*** in Adelaide House.

The tribunal will read the witness statements between ***10.00 am*** and ***11.00 am*** *on the first day of hearing* and the substantive hearing will commence ***immediately*** thereafter. Parties and witnesses must be in attendance at that point in accordance with the timetable for witness attendance.

The hearing will take place in person (where all participants are in the Tribunal's building) having regard to the wishes of the parties and the overriding objective.

The parties should ensure that they attend the building in accordance with the instructions given in the Notice of Hearing, Safety Guidance and any direction by the tribunal.

These hearing dates are provisional and are subject to any changes arising from lockdown arrangements or other COVID-19 restrictions.

10. Reasonable Adjustments/Special Arrangements

None were identified.

11. Further Matters

Parties and their representatives should note that if any matters arise which require a further order by the tribunal, they should **immediately** notify the Office of the Tribunals of that matter so that a further preliminary hearing can be arranged promptly.



Employment Judge:

Date and place of hearing: 29 June 2021, Belfast.

Notice

- 1. If any party fails and/or is unable to comply with any of the above Orders, any application arising out of such failure or inability to comply must be made promptly to the tribunal and in accordance with the Industrial Tribunals and Fair Employment Tribunal Rules of Procedure 2020.**
- 2. Failure to comply with any of these Orders may result in a Costs Order or a Preparation Time Order or a Wasted Costs Order or an Order that the whole or part of the claim, or as the case may be, the response may be struck out and, where appropriate, the respondent may be debarred from responding to the claim altogether.**
- 3. Under Article 9(4) of the Industrial Tribunals (Northern Ireland) Order 1996, any person who, without reasonable excuse, fails to comply with a requirement to grant discovery and inspection of documents under Rule 27 of the Industrial Tribunals and Fair Employment Tribunal Rules of Procedure 2020 shall be liable on summary conviction to a fine not exceeding Level 3 on the standard scale - £1,000 at 27 January 2020, but subject to alteration from time to time.**
- 4. Under Article 84(9) and (10) of the Fair Employment and Treatment (Northern Ireland) Order 1998 (as amended) any person who, without reasonable excuse, fails to comply with a requirement to grant Discovery and Inspection of documents under Rule 27 of the Industrial Tribunals and Fair Employment Tribunal Rules of Procedure 2020 shall be liable on summary conviction to a fine not exceeding Level 5 on the standard scale -**

£5,000 at 27 January 2020, but subject to alteration from time to time; and if without reasonable excuse the failure continues after conviction shall be liable on a second or subsequent summary conviction to a fine not exceeding one tenth of level 5 of the standard scale for each day on which the failure continues.

- 5. A party may apply to the tribunal to vary or revoke any of the above Orders in accordance with the Industrial Tribunals and Fair Employment Tribunal Rules of Procedure 2020.**