

Case No. 12/11

THE EMPLOYMENT TRIBUNAL

DR DIRK HEINZ HOEHMANN (the Potential Claimant')

and

THE DEPARTMENT OF HEALTH (the Potential Respondent')

In the matter of the Application of Dr Dirk Heinz Hoehmann ('Dr Hoehmann') against the Department of Health ('the Department') to file a Claim to the Tribunal against the Department for:- "(1) Unfair Dismissal, (2) Injury to Feelings, (3) Unlawful Deduction of Wages,(4) Compensation in respect of notice period/accrued holidays/suspension without pay" ('the Claims').

Hearing held on: 25th January 2012

At: Douglas

Chairperson: Dr Sharon Roberts (sitting alone)

Appearances: Dr Hoehmann was represented by Ms Chiva Samani, Advocate
The Department was represented by Ms Leanne McKeown, Advocate

Decision

That it was reasonably practicable for Dr Hoehmann to have presented his the Claims within the period of three months from the 20th April 2011. He did not do so. The Claims are rejected as being out of time.

1. The following matters were agreed;
 - i) That Dr Hoehmann was an employee of the Department.
 - ii) That Dr Hoehmann was suspended from work on the 18th November 2010 ('the Suspension').
 - iii) That Dr Hoehmann was arrested in the Isle of Man on the 18th November 2010 and charged with an offence under the Theft Act 1981 – obtaining a pecuniary advantage by deception ('the Charge').
 - (iv) That the alleged pecuniary advantage bore direct relationship to Dr Hoehmann's employment by the Department.
 - (v) That Dr Hoehmann's suspension was because of the Charge.
 - (vi) That Dr Hoehmann resigned from his employment with the Department on the 20th April 2011.

- (vii) That Dr Hoehmann's effective date of termination of his employment was the 20th April 2011.
- (viii) That the date time started to run in relation to the unlawful deductions from wages potential claim to the Tribunal was the 20th April 2011.
- (ix) That Dr Hoehmann was found not guilty of the Charge by a jury on the 24th November 2011 ('the Criminal Case').
- (x) That Dr Hoehmann made the Claims, the subject of this pre-hearing review on the 22nd December 2011.
- (xi) That Section 133 of the Employment Act 2006 ('the Act') sets out the provisions applicable to the late filing of a claim to the Tribunal for unfair dismissal.
- (xii) That Section 25 of the Act sets out the provision applicable to the late filing of a claim to the Tribunal in relation to an unlawful deduction from wages.
- (xiii) That Dr Hoehmann seeks to file the Claims outside the statutory time limit of three months.

2. The arguments put forward by Ms Samani are, in summary, as follows:-

- (i) That the Criminal Case and the allegation of gross misconduct claimed by the Department when it suspended Dr Hoehmann are completely interlinked. Indeed the suspension was because of the Charge. Given that fact, to bring a claim within time to the Tribunal would have prejudiced his position vis a vis the Criminal Case. The Claims would have come to the attention of at least three key witnesses for the prosecution at the Criminal Trial namely Mr David Killip, Ms Barbara Scott and Mr Steven Upstell ('the Key Witnesses'). To use the terminology put forward by Ms Samani, they would have considered it "a cheek" on the part of Dr Hoehmann to claim wages and unfair dismissal when at the very same time he was awaiting trial for the Charge. Ms Samani suggests that Mr Killip for example may have "altered his mind". It would have "inflamed matters" and "tainted" Mr Killip's testimony at trial. Ms Samani was not suggesting that the Key Witnesses would have altered what they may have said in witness statements (she did not seek to impugn their integrity) but when giving testimony on oath may have "amplified matters" and been influenced.
- (ii) Ms Samani accepted that it was not impossible to have commenced the Claims within three months and ask for a stay of the tribunal proceedings until the conclusion of the Criminal Case but that would not have helped in that the Key Witnesses would have known about the commencement of the employment claim and would still have been potentially affected as detailed aforesaid.
- (iii) Ms Samani stated Dr Hoehmann had the right to have a fair trial. She quotes Article 6 and refers to the jury. Ms Samani states that Dr Hoehmann's Criminal Case attracted a great deal of publicity in the newspapers in the Isle of Man. It was a very high profile case. It was not inconceivable that Dr Hoehmann's

claims to the Employment Tribunal would come to the attention of the public including therefore the jurors and they might equally be coloured by that knowledge in like manner to the key witnesses. It would be highly prejudicial to a fair trial in such circumstances.

- (iv) Ms Samani sought to distinguish the present matter from the Walls Meat Case (defined in the section on the Law in this decision). That case involved an employee who faced criminal charges but who decided to await the outcome of the criminal proceedings before deciding whether to make a claim to the employment tribunal. Dr Hoehmann's matter was entirely different. He did not commence the Claims until the termination of the Criminal Case because he did not want to prejudice the Criminal Case as detailed aforesaid.
- (v) If the Tribunal takes the view that it was not reasonably practicable to bring the Claims to the Tribunal within three months then Ms Samani argued that the Claims had been brought within a reasonable time. The Criminal Case concluded on the 24th November 2011 and the application to submit the Claims on the 22nd December 2011. The reason for what might appear to be a delay is the fact that Dr Hoehmann was immediately taken to a UK prison for extradition to a German prison in relation to certain matters. Communication between Dr Hoehmann and his advocates was therefore very limited indeed. In fact for some of that time Ms Samani did not know exactly where Dr Hoehmann was and Dr Hoehmann's ability to communicate and provide information necessary to bring the Claims severely limited. In these circumstances the period of just short of one calendar month was not unreasonable.

3. Ms McKeown's points, in summary, were as follows:-

- (i) Dr Hoehmann had legal representation throughout the relevant period. She referred specifically to a letter from Ms Samani's office of the 21st April 2011 to the Department ('the Letter') in which it is set out that Dr Hoehmann is resigning with immediate effect. The Letter states;

"We enclose herewith our client's letter of resignation with immediate effect. Please note that our client reserves all his rights in respect of accrued breaches."

It also states;

"By your actions our client has no choice but to hand in his resignation. It is unfortunate that our client has been forced into resigning as a result of your entrenched position in respect of his employment."

The Letter is couched in what is the usual wording re claiming constructive dismissal. It is readily evident therefore that Dr Hoehmann had the benefit of legal advice on employment issues throughout.

- (ii) She disputes that Dr Hoehmann would have suffered prejudice at the Criminal Case by making the Claims to the Employment Tribunal. He pleaded not guilty. Making an Employment Tribunal claim for constructive unfair dismissal would effectively bolster the assertion of not guilty in these circumstances and

there would not be any adverse thoughts in the minds of the jury which would prejudice a fair trial.

- (iii) No persuasive argument has been advanced as to Article 6 rights being affected.
- (iv) It is entirely probable that had Dr Hoehmann filed the Claims in the Tribunal in time he would have obtained a stay pending the outcome of the Criminal Case.
- (v) It is not fair or proper to suggest that the Key Witnesses at the Criminal Case could be tainted, influenced or inflamed by the filing of the Claims in the Employment Tribunal so as to affect their testimony on oath at the Criminal Case.
- (vi) No new facts have come to light since the conclusion of the Criminal Case. All the relevant information to commence an employment law case in time was known within time. Dr Hoehmann's acquittal did not make him more aware of a potential claim to the Employment Tribunal save for that acquittal. The Walls Meat Case makes it clear that mere acquittal does not alter the reasonable practicability of presenting a claim to the tribunal in time.
- (vii) If the Tribunal takes the view it was not reasonably practicable to present the Claims in time, the time taken after Dr Hoehmann's acquittal was not reasonable. It is evident Dr Hoehmann had legal representation throughout and all the information to commence the Claims could and should have been to hand immediately.

The Law

4. Section 133(2) of the Act sets out that a complaint of unfair dismissal should be presented to the Tribunal before the end of the period of three months beginning with the effective date of termination or "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 the period stated" [i.e. three months as aforesaid] (Section 133(2)(c)).
5. Section 25(2) indicates that a claim in respect of unlawful deduction from wages shall not be entertained by the Tribunal unless it is presented within the period of three months beginning with, in the case of a claim of deduction by the employer, the date of payment of the wages from which the deduction was made or 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 within the relevant period of three months, where a claim is brought in respect of a series of deductions the three months shall be read as referring to the last deduction or payment in the series.
6. The case of Walls Meat Co Ltd v Khan [1979] ICR 52 states that the test of reasonable practicability is an empirical one and involves no legal concept. Practical common sense is the keynote. ('the Walls Meat Case')
7. The case of Porter v Bandridge Ltd [1978] ICR 943 CA states that the onus of providing that presentation in time was not reasonably practicable rests on the

Claimant. He needs to show precisely why it was that he did not present his complaint.

If the Claimant satisfies a tribunal that presentation on time was not reasonably practicable the tribunal must then consider whether the claim was presented "within such further period as the tribunal considers reasonable".

8. The case of Palmer and anor v Southend on Sea Borough Council [1984] IRLR 119 stated that "reasonably practicable does not mean reasonable which would be too favourable to employees and does not mean physically possible which would be too favourable to employers but means something like "reasonably feasible".
9. In the Walls Meat Case it is stated that a Claimant should not wait to see what happens in criminal proceedings before deciding whether to lodge a claim. Lord Denning stated that it is not an acceptable reason for saying that it was not "reasonably practicable" to present his claim within three months. The fact that criminal proceedings are pending make it likely that tribunal proceedings will be stayed. He also stated as follows:-

"The cases which have given rise to some difficulty have been those where a man is dismissed for stealing or some other criminal offence. He is charged with it before the magistrates: and does not make a claim for unfair dismissal for some time. Perhaps not until after he has been acquitted. In these circumstances, I would myself be in favour of the view taken by the Employment Appeal Tribunal in *Norgett v Luton Industrial Co-operative Society Ltd* [1976] IRLR 306; by Mr Justice Phillips in the present case; and by the majority of the Court of Appeal in *Porter v Bandridge Limited* [1978] IRLR 271, and against the view taken by the Employment Appeal Tribunal in *Union Cartage Co Limited v Blunden* [1977] IRLR 139. It seems to me that the reaction of the ordinary man who is so charged with theft would be: 'It's no good my claiming for unfair dismissal whilst this charge is still outstanding against me. I will wait and see what happens to it before making a claim'. If that be his state of mind, then he is time-barred as soon as the three months have elapsed without his presenting a claim. It was reasonably practicable for him to present his complaint (of unfair dismissal) within three months. His only reason for not doing so was because of the outstanding charge. That is not an acceptable reason for saying that it was not 'reasonably practicable' to present his claim within the three months."
10. The case of Trevelyns (Birmingham) Ltd v Norton EAT 175/90 reiterated the general principle that simply deciding to await the outcome of criminal proceedings before issuing a tribunal application is not an acceptable excuse for exceeding the time limit.
11. In the case of Rumney v Kent County Council EAT 322/75 it is stated that Rumney was ill when the time expired and the EAT was prepared to accept that it might not have been reasonably practicable for him to present his application in time. However it is pointed out that the reasonableness of further delay was quite a separate issue – it held in that case that an additional delay of three months was quite unreasonable.
12. In the case of Moore v Messrs Thrings and Long EAT422/93 the EAT emphasised that the question was essentially one of fact and there was no error of law or perversity in the Tribunal's decision that a further delay of four weeks was unreasonable.
13. The case of Marley UK Ltd and anor v Anderson [1994] IRLR 152 stated that in each case the tribunal should look at the particular circumstances and not focus on the extent of the delay to the exclusion of other facts.

14. In relation to the effective date of termination where a contract of employment terminated without notice the effective date of termination is the date on which the termination takes effect. This is the case also where there is a constructive dismissal claim. (BMK Ltd and anor v Logue [1993] ICR 601.
15. The operative date for presenting a claim for unlawful deduction from wages is the date of payment of the wages from which the deduction was made. Where the complaint is about a series of deductions the three month time limit starts to run from the date of the last deduction in the series.
16. The case of Taylorplan Services Ltd v Jackson and or [1996] IRLR 184 EAT states the correct approach was for a tribunal to ask itself, is the complaint relating to one deduction or a series of deductions by the employer and if it is a series of deductions what is the date of the last deduction? Was the relevant deduction within the period of three months prior to the presentation of the complaint? If the answer is no, was the complaint nevertheless presented within a reasonable time?

The Decision

17. I have read the Walls Meat Case and the other cases quoted above and I have considered carefully the arguments put forward by both Advocates and the requirements of the Act.
18. It is not denied that the wish to file the Claims is outside the three months time limit.
19. Ms Samani focuses on the termination of the Criminal Case as the first date when it became reasonably practicable for Dr Hoehmann to lodge his claim to the Tribunal for the reasons I have reiterated already in this decision.
20. I am afraid I do not accept the arguments put forward by Ms Samani. I do accept the arguments put forward by Ms McKeown. I need not repeat them here.
21. I find that it was reasonably practicable for Dr Hoehmann to file the Claims with the Tribunal within three months of the effective date of termination. I reject the argument that it would taint or somehow affect the Key Witnesses at the Criminal Case. The Key Witnesses made written statements. Ms Samani does not suggest they would tell lies on oath and therefore I find it difficult to see how Dr Hoehmann would not have a fair trial as a result of the knowledge by the Key Witnesses that he had lodged a claim in the Employment Tribunal. Even if, as Ms Samani says, they thought it 'a cheek' that was not going to stop them telling the truth.
22. I do not agree with Ms Samai that by the public (including jury members) knowing that Dr Hoehmann had lodged a claim in the Employment Tribunal would adversely colour their thinking and decision making. I agree with Ms McKeown, this would support Dr Hoehmann's assertion of innocence.
23. I agree with Ms McKeown that the Letter was couched in terms making it clear that constructive dismissal was in consideration and that Dr Hoehmann was in receipt of legal advice as to the reasonable practicability of commencing a claim within time.
24. I find the Walls Meat Case has relevance in this case. I do not agree with Ms Samani that it can be distinguished.

25. I find it was reasonably practicable for Dr Hoehmann to have presented the Claims to the Employment Tribunal within the period of three months commencing on the 20th April 2011.
26. I therefore do not allow an extension of time.
27. I find that the Claims are out of time and shall not be accepted out of time



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Dr S. Roberts
Chairperson

Signed 1st February 2012

Sent to parties 1st February 2012

Entered in the Register 1st February 2012

Clerk to the Tribunal



