BARBADOS

IN THE EMPLOYMENT RIGHTS TRIBUNAL

Case No. ERT/2017/044

ANTHONY HERBERT **CLAIMANT**

AND

BERGER PAINTS BARBADOS LTD. **RESPONDENT**

DATES: 28th October, 2019; 11th March 2020

BEFORE:

Christopher Blackman Esq, GCM; Q.C	Chairman
Dr. Hartley Richards	Member
Frederick Forde, Esq.	Member

APPEARANCES: Ms. Lesley Trotman, Attorney at law, with Mr. Dwaine Paul of the Barbados Workers Union for the Claimant.

Sir Elliott Mottley Q.C. with Ms. Kimberley Moe and Ms. Ava-Marissa Lee for the Respondent**.**

RULING

1. This ruling is on a preliminary issue as to whether the Tribunal has jurisdiction to hear the claim for unfair dismissal advanced by Mr. Herbert (the Claimant) in the circumstance that he was terminated by Berger Paints Barbados Ltd. (the Respondent) on 10th October 2014. Section 32 (2) of the Employment Rights Act, 2012-9 (the Act) requires that a complaint be made within 3 months of dismissal, unless it was not practicable. That date would have been 9 January, 2015. It was not until 11th August 2015, the Barbados Workers Union (the BWU) made a complaint of unfair dismissal on behalf of the claimant, to the Chief Labour Officer.

BACKGROUND

2. The Tribunal has adopted the salient facts on the matter from the Affidavits filed in this matter on June 26, 2018 by Marietta Alleyne, the Human Resources Director and Shawn Prescod, the Sales Manager on behalf of the Respondent, and that filed by the Claimant on May 10, 2019 in so far as they relate to the issue for determination. The Tribunal has not been concerned with the merits as to the fairness or otherwise, of the dismissal.

3. Miss Alleyne deposed that she commenced her employment with the respondent on July 1, 2001 and that as part of her human resource duties and functions, she had access to the employee files of the Respondent, including that of the Claimant. As a consequence, she was privy to matters concerning the Claimant's commencement of employment with the Respondent, his conduct, the disciplinary hearing and eventual termination.

4. The Claimant's employment with the Respondent began on July 27, 1988 as a Quality Control Supervisor. On January 1, 2010 he was appointed Technical Sales Representative and he was terminated from that position on October 10, 2014. Mr. Herbert at paragraph 23 of his Affidavit filed May 10, 2019 agreed that he had been terminated with immediate effect on October 10, 2014.

5. On August 11, 2015 the Respondent received a copy of notification sent to the Chief Labour Officer by the BWU indicating the inability to resolve the matter at a domestic level and requesting the Chief Labour Officer to assist in the conciliation of the matter.

6. At a hearing before the Tribunal on October 28, 2019, the parties were directed to file and serve Written Submissions as to whether the matter was filed out of time and whether the Tribunal had jurisdiction to hear the matter. On March 11, 2020 the parties were further directed to file and serve Written Submissions on what was to be considered the effective date of termination.

7. Arising from the foregoing, the issues for the determination by the Tribunal are (1) the effective date of termination of the Claimant by the Respondent, and (2) whether it was not reasonably practicable for the complaint to be presented before the end of the 3 month period.

8. In light of the Claimant's acknowledgement at paragraph 22 of his affidavit filed May 10, 2019, that he had been terminated with immediate effect on October 10, 2014, the only matter now for determination is whether it was not **reasonably practicable** for the complaint to be presented before the end of the 3 month period.

THE STATUTORY PROVISIONS

9. Section 32 (2) of the Act provides that:

(2) The Tribunal shall not consider a complaint under subsection (1) unless the complaint is made to the Tribunal;

(a) Before the end of the period of 3 months beginning with the effective date of termination; or

(b) Within such 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 3 months.

10. Section 37 of the Interpretation Act, Cap. 1 states that:

"in an enactment passed or made after the 16th June, 1966, the expression "shall" shall be construed as imperative and the expression "may" as permissive and empowering,"

11. Section 8 (3) of the Act further states that:

"A complaint shall be taken to have been made to the Tribunal on the date that it is presented to the Chief Labour Officer pursuant to section 42."

12. Section 42 of the Act, states that:

(1) where the employee believes that there is a dispute concerning an infringement of any right conferred on him by the Act, he may present a complaint to the Chief Labour Officer.

(2) A complaint may be made under this section by an employee, or a trade union or another representative group on behalf of the employee."

The Claimant's Case

13. By letter dated 31 January 2020 (hereinafter called **The Letter**) the BWU made a submission as to why the Tribunal should exercise its discretion under section 32 (2) (b) of the Act where the complaint had not been presented within the period of 3 months beginning with the effective date of termination.

14. In the second paragraph on page 1 of the said Letter the following is stated:

"The Barbados Workers' Union as the accredited bargaining agent for employees of Berger Paints Limited was engaged on or around September 2014, by Mr. Anthony Herbert, Technical Sales Representative, to assist him in responding to allegations being levelled against him by the company."

15. Given the length of **The Letter** (5 pages) and its centrality to the claimant's case, and that it has been referred to in submissions filed by the respondent, the Tribunal attaches the letter as an Addendum to this Ruling.

THE RESPONDENT'S CASE

16. The essence of the Respondent's case is that the Claimant acting through his representative the BWU, was concerned with the pursuit of internal appeals, rather than an adherence to the provisions of the Employment Rights Act. This position seems to be supported by the following in the middle paragraph on page 3 of **The Letter** which states: ***"The above summary represents the attempts made by the Barbados Workers Union to resolve this matter, utilising the agreed grievance protocols outlined in the Collective Labour Agreement."***

17. There is no dispute as to the chronology of events following the termination. These are detailed on pages 2 and 3 of **The Letter**, showing the exchange of correspondence starting on October 31, 2014, reference to meetings and finally culminating in the letter of August 11, 2015 referred to in paragraph 5 above.

18. However, the Respondent disputes the assertion that the extensive delays were not the fault of the claimant, but rather the fault of the representative of the Respondent and the unforeseen delays in scheduling meetings. In that regard, Counsel for the Respondent cited ***Bodha v. Hampshire Area Health Authority*** [1982] ICR 200 at page 205 where **Browne-Wilkinson J** noted that "*we do not think that the mere fact of a pending internal appeal, by itself, is sufficient to justify a finding of fact that it was not **"reasonably practicable**" to present a complaint to the industrial tribunal."*

19. Counsel for the Respondent in his submissions, has contended that whereas on the last paragraph of page 3 of **The Letter** the Claimant alleged that he engaged the services of the Labour Department on or around late October or early November, 2014, there is no evidence to corroborate the allegation. Counsel further contended that pursuant to Section 42 (2) of the Act, that not only could the Claimant have made the approach to the Labour Department while negotiations where on going, the BWU, as a body with the legal and working knowledge of the statutory limitation, could also have filed the complaint within the prescribed three (3) month period to preserve the Claimant's interest.

DISCUSSION

20. **Underhill J** in a decision given on May 25, 2010 in the case of ***Northamptonshire County Council v. Entwhistle [2010] IRLR 740***, at paragraph 5 observed that there is a great deal of authority about the effect of the "not reasonably practicable" test and, in particular, about its application in circumstances where a Claimant consulted skilled advisers (a term which has been interpreted to include a trade union official) who then failed to give the Claimant proper advice about the applicable time limits.

21. What has come to be referred to as the **Dedman** principle is that in a case where a Claimant has consulted skilled advisers, the question of reasonable practicability is to be judged by what he could have done, if he had been given the advice that reasonably in all the circumstances should have been given.

22. Lord Denning MR in the said ***Dedman v. British Building and Engineering Appliances Ltd*** [1974] 1 All ER 521 at page 526, letters b to e, said:

"But what is the position if he goes to skilled advisers and they make a mistake? The English court has taken in the view that the man must abide by their mistakes. There was a case where a man was dismissed and went to his trade association for advice. They acted on his behalf. They calculated the four weeks wrongly and posted the complaint two or three days late. It was held that it was practicable" for it to have been posted in time. He was not entitled to the benefit of the escape clause: ***see Hammond v Haigh Castle & Co Ltd [1973] ICR 148****. I think that was right. If a man engages skilled advisers to act for him, and they mistake the time limit and present it too late, he is out. His remedy is against them. Summing up, I would suggest that in every case the Tribunal should enquire into the circumstances and ask themselves whether the man or his advisers were at fault in allowing the four weeks to pass by without presenting the complaint. If he was not at fault, nor his advisers, so that he had just cause or excuse for not presenting his complaint with the four weeks then it was not practicable for him to present it within that time. A court has then a discretion to it to be presented out of time if it thinks it right to do so, but if he was at fault, or his advisers were at fault in allowing*

the four weeks to slip by, he must take the consequences. By exercising reasonable diligence the complaint could and should have been presented in time."

23. There are two (2) issues of significance that arise for consideration. The first is that the BWU was engaged in September, 2014 on behalf the claimant to assist him in responding to allegations by the Respondent, which led to his dismissal on October 10, 2014. In that circumstance, the Tribunal is of the view that the BWU, as a skilled body should have been aware of the requirements of Section 42 (2) of the Act from the outset of the dismissal, and therefore for the need to act in a timely manner.

The second issue of significance is that the BWU did not in its letter of August 11, 2015 advert to the alleged earlier notification in late October or early November, 2014 by the Claimant to the Chief Labour Officer. Was this an oversight? Or, as observed at paragraph 16 above, was the BWU more concerned with the pursuit of internal appeals, utilising the grievance protocols outlined in the Collective Labour Agreement rather than an adherence to the provisions of the Employment Rights Act?.

24. In the Tribunal's view, the burden is upon a claimant to satisfy the evidentiary requirement of submitting a complaint to the Chief Labour Officer within the prescribed three (3) month period where ever and whenever that prescription is specified. See **Porter v. Bandridge Ltd.** [1978] IRLR 271, where Walker LJ held at Paragraph 12:

"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 that he did not present his complaint:

In simple terms, the responsibility to ensure that there is compliance rests and remains with the dismissed employee or his designated representative. There is no purpose to be gained by blaming the Labour Department, and more so now, almost a decade after the Employment Rights Act has been passed.

25. The Tribunal respectfully adopts the dicta of **Browne-Wilkinson J** shown at paragraph 18 hereof, and further states that it has not been presented with any facts to warrant the exercise of the discretion to grant an extension of time for bringing the complaint of unfair dismissal to the Tribunal.

26. The Claimant's claim for unfair dismissal is therefore dismissed.

Dated this 15th day of June, 2020.

Christopher Blackman

Chairman

Hartley Richards

Member

Frederick Forde

Member