BARBADOS

EMPLOYMENT RIGHTS TRIBUNAL

NO. ERT/2014/038

BETWEEN:

KEITH ALLEYNE **CLAIMANT**

AND

STANDARD DISTRIBUTION AND SALES INC. **RESPONDENT**

TRIBUNAL

Kathy-A. Hamblin **Deputy Chairman**
Beverley Beckles **Member**
Deighton Marshall **Member**

APPEARANCES

Mr. Ensley Grainger. Attorney-at-Law for the Claimant
Katrina Newton, Chief Executive Officer and Marlene Gervais, Group Industrial Relations Manager for the Respondent

Date: August 8, 10 and 31, 2023

DECISION

Introduction

1. For 13 years, Keith Alleyne ("the Claimant") was employed by Standard Distribution and Sales Inc. ("the Respondent") as an appliance service technician. On May 25, 2013, he borrowed a disused washing machine pump from a scrap pile on the Respondent's premises for use on a washer he was fixing off site. That act led to his suspension and ultimate dismissal on July 12, 2013.

2. The Claimant presented a complaint of unfair dismissal to the Chief Labour Officer on January 23, 2014, more than six months after the date of his termination and almost three and a half months after the expiration of the 3-month statutory limitation period, which is counted from the effective date of termination. The complaint ought to have been lodged on or before October 11, 2013.

3. The complaint was referred to the Tribunal on March 10, 2014, by the Chief Labour Officer and notice of the referral was sent by the Tribunal's secretariat to the Claimant by letter dated May 12, 2014. By a further letter dated June 19, 2014, the Claimant was invited to submit his Claim Form 1 and supporting documents including the letter of termination. Near identical correspondence dated June 28, 2014, was sent to the Respondent inviting the submission of its Form 2 response and supporting documents.

4. For the next eight years, the Claimant did nothing. His matter languished despite repeated requests dated December 2, 2015, June 9, 2017, January 18, 2019, and May 27, 2021, for the submission of his Claim Form and Witness Statement. It was not until the Tribunal caused a notice of abandoned claims to be published in the Nation Newspaper on June 28, 2021, that the Claimant was prompted to file a Claim Form and Witness Statement on July 28, 2021. Neither document adequately addressed the circumstances of the Claimant's employment and dismissal or the nature of the relief he sought. Not one supporting document was provided for the consideration of the Tribunal.

5. In the meantime, the Respondent, having been formally put on notice since May 2014 that there was a pending claim against it, also did nothing. None of the Tribunal's correspondence to the Respondent was acknowledged.

6. A case management conference was held on June 29, 2023. The parties were ordered to file on or before July 13, 2023, in the case of the Claimant, a supplemental witness statement setting out in clear terms the nature of his complaint, and in the case of the Respondent, Form 2 and any witness statements and other documents upon which the Respondent intended to rely. The parties were also ordered to file and exchange skeleton arguments on or before July 20, 2023. They were both directed to show why

the Tribunal should or should not hear this matter, given the length of time which has elapsed since the Claimant's dismissal.

7. On July 14, 2023, the Claimant filed a witness statement without pay slip, letter of termination, contract of employment, employee handbook or any other documents to support his claim. On July 25, 2023, he filed a witness statement of Eric Trotman along with his skeleton arguments. The Respondent disregarded the Order of the Tribunal. The company filed nothing.

8. In a letter to the Tribunal's secretary dated July 25, 2023, the Respondent objected to the hearing of the matter citing estoppel, abuse of process and unfairness to the Respondent. The Tribunal invited oral submissions from the Respondent.

9. The crux of the Respondent's argument was that the time for presenting a complaint to the Tribunal is three months as set out in section 32 (2) (a) of the Employment Rights Act ("the Act"). The Respondent further contended that given the length of time which has elapsed since the Claimant's dismissal, the Respondent could not properly respond because the company is "*challenged*" as it relates to "*making contact with key witnesses*" and "*retrieving evidence*". The Respondent complained that "*the delay of some ten (10) (and counting) years in the Tribunal hearing the matter inevitably operates to the Company's irremediable prejudice and, therefore, if pursued would constitute an abuse of the Tribunal's process as prescribed under the Act*". Accordingly, the Respondent urged the Tribunal to dismiss the complaint.

10. In response, Counsel for the Claimant argued that the objective of the Act is to protect employees against being unfairly dismissed and pursuant to section 27 (1) of the Act, the Claimant had a right not to be unfairly dismissed. He also argued that the Claimant has "*a realistic case to be heard*" and that "*despite the passage of time, the Tribunal is well-equipped to hear this matter notwithstanding what the Claimant may have omitted to do due to…ignorance of the law.*"

ISSUE

11. In a letter to the Tribunal dated August 14, 2023, Counsel for the Claimant requested that "*the Labour Officer who have done (sic) the Conciliation be summoned before the Tribunal...in order to establish that the Claimant had a hearing before the said officer.*" That request was denied. Whether or not the Claimant had a conciliation hearing is not in issue. Enquiries relating to the conciliation hearing will not assist the Claimant. The facts recited above give rise to a preliminary issue, namely, whether the Tribunal should exercise its jurisdiction pursuant to section 32 (2) (b) and extend the limitation period, the complaint having been filed more than six months after the effective date of dismissal and more than three months after the expiration of the limitation period.

THE LAW

12. Section 32 of the Act provides that:

32. (1) An employee may make a complaint to the Tribunal on the ground that he was unfairly dismissed by his employer.

(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 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 3 months."

Section 32 (2) (b) is an "escape clause", which extends a lifeline to the claimant whose claim is filed out of time.

That section ought to be read in conjunction with section 8 and in particular with subsection (3). Section 8 (3) provides that:

"8. (3) 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."

13. Counsel did not invoke the escape clause. The Tribunal afforded the Claimant an opportunity to provide a reason or reasons for his failure to file the complaint in time. The Tribunal has no jurisdiction to hear the claim unless it is satisfied that it was not reasonably practicable for the Claimant to have presented his complaint before the end of the limitation period. If it is so satisfied, the Tribunal may extend the limitation period for such further period as it considers reasonable. If the Tribunal is not so satisfied, the matter can go no further. There is no automatic entitlement to the benefit of the escape clause.

DISCUSSION

"Not reasonably practicable"

14. The reason for the late filing of the claim is a question of fact in every case. In *Bodha (Visnudut) v. Hampshire Area Health Authority* **[1982] CR 200,** ***Times Newspapers Ltd. v. O'Regan*** **[1977]** IRLR 101, EAT, the EAT held that *"the correct test was a strict test of practicability, namely whether the act of presenting the complaint in time was reasonably capable of being done".*

It is for the Claimant to demonstrate to the satisfaction of the Tribunal one or more reasons why it was not reasonably practicable for him to present his claim to the Chief Labour Officer within the limitation period.

> *"[T]he question of what is reasonably practicable should be given 'a liberal interpretation in favour of the employee.'"* (***Marks and Spencer plc v. Williams-Ryan*** **[2005] EWCA Civ. 470)**

In ***Wall's Meat Co. Ltd. v. Khan*** **[1978] IRLR 499**, Shaw LJ stated that:

> *"The test is empirical and involves no legal concept. Practical common sense is the keynote and legalistic footnotes may have no better result than to introduce a lawyer's complications into what should be a layman's pristine province."*

15. Counsel argued that the Claimant "*was relying solely on the [Barbados Workers] Union to*

fight his cause". After five months had elapsed without hearing anything from the Union ("BWU"), the Claimant "*took the decision to go to the Chief Labour Officer*".

16. In both oral and written testimony, the Claimant referred to "*four or five meetings*" between the BWU and local and Trinidadian representatives of the Respondent company. The Claimant could not recall the dates of those meetings. He testified that "*nothing changed*" after those meetings.

17. Despite intensive enquiries by the Tribunal and having been given ample opportunity to explain the reason for the delay, including the provision of documentary evidence from the BWU, the Claimant advanced no reason for the late presentation of his claim other than that he was relying wholly on the BWU to secure his reinstatement.

18. Whereas the case law illustrates a willingness by the Court to allow an unrepresented claimant to avail himself of the escape clause, the Court is less charitable to the claimant who is represented by skilled professionals whose default in filing resulted from their inadvertence or negligence.

19. In Harvey on Industrial Relations and Employment Law (Lexis Nexis) paragraph 208, the learned author writes that *"where a claimant has, in advance of the expiry of the primary time limit, sought and received advice from a skilled adviser, and the reason for the failure to lodge the originating application within that time limit is reliance on erroneous advice or conduct by that adviser, the general rule is that the escape clause will not be available to them. This rule applies however careful the claimant's selection of a professional adviser and however reasonable the decision to rely on professional advice."* This is referred to as "the *Dedman* doctrine", so named for the decision in ***Dedman v. British Building and Engineering Appliances Ltd.*** **[1973] IRLR 91; [1974] 1 All ER 520.**

20. The ***Dedman*** doctrine was reaffirmed in ***Marks and Spencer plc.*** *supra*, where the Court

of Appeal held *"that it remains the case, as a proposition of law, that in any situation where the reason for a missed limitation period is the fault of a skilled adviser, that fault is to be visited on the claimant and it must be held that it was reasonably practicable to submit the claim within time."* (*ibid.*)

21. A similar issue arose in the March 2020 decision of the Tribunal in ***Anthony Herbert v. Berger Paints (Barbados) Ltd.*** In that case, the claimant was also represented by the BWU. The BWU focused its attention on the pursuit of an internal appeal and in the process allowed the time for presenting the claim to lapse. ***Herbert's*** complaint was not presented to the Labour Department until 10 months after his dismissal. The Tribunal declined to exercise its discretion in Herbert's favour on the ground that he had presented no facts to warrant the grant of an extension of time for bringing the complaint of unfair dismissal to the Tribunal.

22. The facts of the instant case are strikingly similar to those in ***Herbert's*** case. In this case, just as with ***Herbert***, the BWU was involved in the matter from as early as the disciplinary hearing. They were represented at the meeting at which the Claimant was dismissed, and they also were engaged in discussions with the Respondent with a view to overturning the dismissal. Still, the BWU, presumably well-versed in matters of this nature, allowed the limitation period to expire without taking any steps to preserve the Claimant's position.

23. The Claimant denied having prior knowledge of the Tribunal's existence, or of the deadline for filing a complaint. He also testified that the BWU did not discuss the filing deadline with him at any time and that it was not "*until the ending*" when he realised that he "*was not getting any mileage*" that the BWU informed him he could file a complaint with the Employment Rights Tribunal. He stated unequivocally that the BWU never suggested that the matter be referred to the Labour Department. It was he, said the Claimant, who made the suggestion, and ultimately presented his complaint to that department.

> *"It is a cornerstone of the Dedman doctrine that any faulty advice must have been material to the failure to meet the time limit; the fact that there has been negligent advice regarding time limits, is*

not the end of the matter, the tribunal must determine whether that advice was the operative reason for the failure to submit the claim in time." Ibid at paragraph [219].

24. The Tribunal is satisfied that the reason for the Claimant's failure to file his complaint in time was his reliance on the BWU. The BWU's sole objective, according to the Claimant, was to try to secure his reinstatement. The Claimant testified that the BWU representative told him that "*it didn't matter how long it take" (sic).* It appears from his testimony that the Claimant believed that he would have been reinstated and, as such, complaining to the Chief Labour Officer was not within his or the BWU's contemplation.

"If I had get (sic) the help from the Barbados Workers Union I wouldn't have to go further."

25. The onus was on the BWU as the Claimant's representative to ensure compliance with the limitation period of which they ought to have been aware. Trade union officials are captured by the ***Dedman*** doctrine and their erroneous or negligent advice will preclude a claimant from benefitting from the escape clause.

26. The Tribunal finds that the BWU's advice was material to the Claimant's failure to file his claim within the limitation period and was "*the operative reason for [the Claimant's] failure to submit his claim in time.*" We are satisfied that the complaint was reasonably capable of being filed in time. In the circumstances, the Tribunal will not exercise its discretion to extend the limitation period.

THE RESPONDENT'S CONDUCT

27. It would be remiss of the Tribunal not to address the conduct of the Respondent. The Claimant's evidence is that the Respondent refused to answer telephone calls from his representative at the BWU. He also testified that officials at the Labour Department informed him that they too were unable to contact the Respondent for the purpose of conciliation.

28. The Respondent's treatment of the Tribunal and its secretariat is also nothing short of contemptuous. At no time in the decade-long history of this matter is there any record of the Respondent having afforded the Tribunal the courtesy of a response to any of its correspondence. The discourtesy continued through the hearing of this matter when the Respondent refused to comply with case management orders.

29. The Respondent was aware from 2013 that the Claimant took issue with the manner of his dismissal and that he was seeking redress. Katrina Newton, the current Chief Executive Officer stated that she joined the Respondent company in that role in November 2013, just four months after the Claimant's dismissal. According to the Claimant, there were discussions ongoing between the BWU and the Respondent's local and Trinidadian representatives when Ms. Newton joined the company. However, Ms. Newton professed to have no knowledge of the Claimant's case or of any facts that would assist the Tribunal. The Tribunal considers her claim of ignorance to be disingenuous.

30. The Tribunal also considers the claim by the Respondent that it is unable to locate key witnesses and has no record of the matter to be equally dubious. Yvette Watts telephoned the Claimant on May 25, 2013, and instructed him to return the pump. Ms. Watts was present at the Claimant's disciplinary hearing. The Claimant's assertion that Ms. Watts is still employed by the Respondent was not refuted.

Further, the Respondent knew the Claimant's complaint was pending and ought to have taken appropriate measures to marshal and preserve its evidence, rather than to destroy or conceal it.

If the Claimant had overcome the limitation hurdle, the Tribunal would have rejected the Respondent's claim of prejudice, which was of its own making, and proceeded to hear the complaint.

COMMENCEMENT OF COMPLAINTS BEFORE THE TRIBUNAL

31. Under section 44 (2), the Tribunal is mandated to "*proceed forthwith to consider the*

complaint" upon receipt of the Chief Labour Officer's report. The current procedure requires the parties to file their Forms 1 and 2 and witness statements only after the Tribunal has received that report. It allows an employee to sit on his case for as long as he desires after his complaint is filed with the Chief Labour Officer without any repercussions. It also promotes contempt such as that which was shown by this employer to the Tribunal.

32. The procedure for presentation of a complaint to the Tribunal must be revisited as a matter of urgency, to obviate the need for the secretariat to waste time and resources chasing documents from litigants, thereby impeding the Tribunal's ability to properly discharge its mandate.

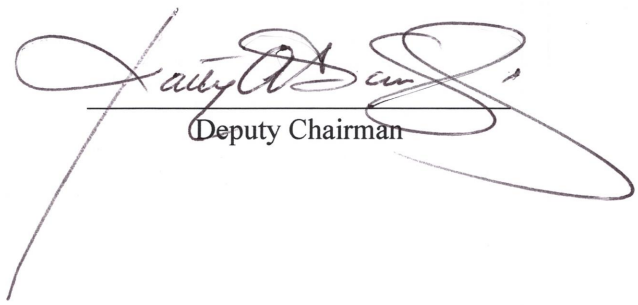
DISPOSAL

33. The Claimant's conduct of this matter demonstrates a complete lack of diligence and interest. The Claimant presented his complaint to the Chief Labour Officer more than 3 months out of time. Given an opportunity to satisfy the Tribunal that it was not reasonably practicable for him to file his complaint within the limitation period, the Claimant failed to do so. In *Herbert's* case the claimant was represented by the BWU at the hearing before the Tribunal. The BWU provided the Tribunal with a letter case detailing the reasons for their failure to lodge the complaint in time. In this case the BWU provided no such assistance to the Claimant.

34. The Claimant was represented in the initial stages by the skilled personnel of the BWU, who ought to have known that there is a 3-month limitation period for presenting a complaint to the Employment Rights Tribunal. The limitation period is not tolled by the exercise by the employee of his right of appeal. There is nothing in the Act which prevents the employee or his representative from presenting a complaint to the Chief Labour Officer even though he has not yet exhausted all internal appeals. Once filed, a complaint may be held in abeyance pending negotiations between the parties and withdrawn if the parties reach a mutually satisfactory compromise. The BWU ought, in the circumstances, to have

taken appropriate, timely, measures to preserve the Claimant's position. They failed to do so the detriment of the Claimant. The Claimant's remedies, if any, are against the Barbados Workers Union, not against the Respondent.

The complaint is accordingly dismissed.



Deputy Chairman

Member

Member