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EMPLOYMENT TRIBUNALS

Claimant ***Respondents***

Mr Fabio Viera **AND** Genting Casinos UK Limited

Heard at: London Central **On**: 22 November 2018

Before: Employment Judge Burns (sitting alone)

Representation
For the Claimant: Ms A Held, from FRU
For the Respondent: Mr J Cook, of Counsel

OPEN PRELIMINARY HEARING

JUDGMENT

1. The claim is dismissed
2. The Claimant is to pay the Respondent £500 costs within fourteen days of the 22 November 2018.

REASONS

1. This is an Open Preliminary Hearing to decide whether the claim of unfair dismissal presented by the Claimant on 15 July 2018 following his dismissal on 14 June 2016 has been brought within the time limit imposed by s.111 of the Employment Rights Act 1996, which, subject to the addition of time provided by early conciliation, requires a claim of unfair dismissal to be brought within three months of dismissal or, if it is not reasonably practical to bring the claim within that period, within a reasonable period thereafter.

2. The burden of proof at all stages is on the Claimant.

3. Ignorance of the law or facts on the part of a late Claimant is not a reasonable excuse unless that ignorance is itself reasonable.

4. The “reasonably practicable’ test amounts to a ‘reasonable feasibility’ test, the question is whether complying with the time limit was something that was reasonably capable of being done and not whether it was reasonable to comply.

5. If, as here, the claim has not been brought with the primary limitation period, then, in determining whether the claim has been brought within a reasonable period thereafter, the tribunal must take all the relevant circumstances into account which can in particular cases include the Respondent’s situation.

6. Generally, tribunals should take a strict approach to time limits particularly in cases of unfair dismissal where for example reinstatement can be ordered in the event of a successful claim.

7. In the Unison case the Supreme Court held in July 2017 that the Employment Tribunal fee regime which then applied was ultra vires. There are findings in the speeches that the fees were not reasonably affordable to many potential Claimants. However, I do not find that the mere existence of an ultra vires fee regime up to July 2017 should be regarded as a sufficient basis for concluding in all cases that it was not reasonably practicable to present an unfair dismissal claim prior to July 2017. That question must be considered in particular cases in the light of all relevant circumstances.

8. I heard evidence from the Claimant who was cross-examined by Mr. Cook, and I was referred to a bundle which had been kindly provided by Ms. Held.

9. The Tribunal is extremely grateful to Ms Held for giving her time to try to assist the Claimant.

10. The Claimant was dismissed on 14 June 2016. He got in contact with a solicitor Mr. Frame who after a discussion decided he was unwilling to take the case on a contingency fee basis. In 2016 also there was some discussion with ACAS which asked the Claimant what figure he would settle for but there was no progress.

11. There is no evidence before me that an ACAS conciliation certificate was issued in 2016 and, with the agreement of both sides, I proceeded on the basis that the only ACAS certificate which was ever produced was that issued in 2018 shortly before the Claimant issued his instant ET claim on 15 July 2018.

12. The Claimant did not give evidence that he was unaware of the original time limit.

13. According to the Claimant during the period from his dismissal in June 2016 up until about July 2017 he was out of work and living with his girlfriend and in receipt of financial assistance from the state. He says he was engaged in an apprenticeship and did not have much money in his bank account. Hence he could not afford to pay the tribunal fee to start his claim. This is not accepted by the Respondent.

14. An Order was made by the Tribunal that all documentation to support the Claimant's current arguments should be properly presented some time before the tribunal hearing.

15. I was shown on Ms. Hold's laptop a recent email from Mr. Frame which does provide some slight and vague corroboration of the suggestion which is now placed before me that in 2016 the Claimant was short of money. However apart from that, no documents have been presented by the Claimant to show his actual financial situation in the period up to July 2017.

16. There is no documentation relating to a student loan or state assistance, there are no bank statements, nor any apprenticeship documents, nor any statement from the girlfriend he says he was then (and remains) living with, who apparently was herself in employment.

17. The Claimant said that he does not really know what money he had in his three bank accounts at that time and he just has to try and remember back now to 2016 without the benefit of any bank statements to try to guess what money he had or did not have. I regard this as wholly unsatisfactory.

18. There is no satisfactory explanation for the absence of documentation to make out the first limb of the Claimant's argument. The Claimant has not shown that he could not himself afford, or raise, borrow or get assistance from his girlfriend to pay the £250 fee to commence his claim or the £900 fee for a Final Hearing.

19. If he was in poor financial circumstances and effectively without an income or living on benefits, then he could and should have applied for remission of fees. I have been shown a paragraph in the Unison report which shows that by 2016, 29% of all claims were receiving full remission. The Claimant did not even attempt to apply for remission or find out whether remission was available, which omission is the more significant bearing in mind that he had contact and

discussions with a solicitor in 2016 on a free basis to discuss the very subject of how to fund his Employment Tribunal claim.

20. Even if that solicitor did not see fit to suggest fee remission to the Claimant, the Claimant is an intelligent person previously employed in a responsible position by a gambling company, and he would have been quite capable of doing some research himself. If the tribunal fees were a real impediment at the time I would have expected him to take some steps to find out about obtaining remission.

21. I am not satisfied that it was not reasonably practicable for the Claimant to claim within the primary limitation period.

22. In case I am wrong about that, I consider the situation since July 2017 when there was considerable publicity about the outcome of the Unison case which overturned the fee regime. Some claims were stayed briefly in August 2017 but the stay was removed by mid-August 2017 so all claims could then proceed thereafter with no fees payable.

23. I do not accept the Claimant's estimation that he heard about this only in March or May 2018 from news reports. I accept the submission from Mr Cook that this is implausible. It is far more likely that the Unison outcome would have come to the Claimant's attention at the time that it happened in July and August 2017, when everyone was talking about it and when it was being discussed and reported in the news media.

24. I find that, if the fee regime was an obstacle, it was removed or, if he had acted reasonably, it would no longer have appeared as an obstacle in the Claimant's mind by about August 2017 at the latest.

25. Even if I had accepted the Claimant's evidence that he found out about the removal of the fee regime only in March to May 2018, that would mean that at least another two and a half months elapsed after his date of knowledge before he issued his claim half way through July 2018.

26. It was submitted by Ms. Held that there were personal circumstances that made it difficult for him to issue his claim during that period, but there is no real evidence of that apart from the fact that he says he was doing temporary work as part of his training to be an electrician for various employers and was not engaged in full-time employment. However, the Claimant did not say that this placed him under any particular difficulty or mental stress.

27. It was also suggested that in the months up to July 2018 he wanted additional time to reflect and think and "build up the courage" to bring a claim

against his employer. I do not regard that a good reason to wait. He had already had well over a year to think and build up his courage. He does not appear to be a vulnerable person and there would have been no particular difficulty for him in his simply presenting his claim at the earliest opportunity.

28. It was also suggested that the risk of having to pay the other side's costs weighed on his mind and he couldn't afford a solicitor to help him present his claim. These factors are largely irrelevant, firstly because the risk, such as it is under the Tribunal rules, of having to pay the other side's costs, has been a constant factor throughout both before and after July 2017; and secondly, now that he has ultimately issued his claim, he has done so without paying a solicitor to help him do so.

29. The claim has been brought considerably out of time and is outside the jurisdiction of the Tribunal and is dismissed.

30. The Respondent made an application for costs in the sum of £1,500. On further examination it appeared that Mr. Cook has received his instructions directly from the Respondent without the intervention of a solicitor in the normal sense of the word. The Respondent has been defending its self using its in-house Legal Counsel Sally Smith. I am not sure whether or not she is professional lawyer, and there is no breakdown of the hours she has spent. Mr Cook accepted that Ms. Smith is probably in receipt of a salary which would not have varied according to whether or not the Claimant had brought his claim. There is no application for a preparation time Order. The claim for £1000 for solicitor's costs is not made out and probably offends the indemnity principle.

31. Mr. Cook has explained that his brief fee for today is £500, and he is not registered for VAT. The only recoverable Respondent legal costs which I find are proven is this brief fee.

32. Costs can be awarded if the claim has been misconceived or if it has been conducted unreasonably.

33. I find that the claim was misconceived, because it was brought about 20 months out of time, and about one year after the claimed fee-impediment relied upon had been removed. There is no proper evidence or reason adduced to support the bringing of such late claim.

34. Furthermore, it has not been conducted reasonably. There was very late and unreasonable serving of a substantial witness statement on the evening of 21 November 2018 contrary to the express order of the Tribunal that evidence should be served on 13 November at the latest. I appreciate that Ms. Held has only become involved recently, about a week ago, but the order was addressed

to the Claimant, who could and should have complied with it himself. The whole Tribunal is set up so that it can be user-friendly to people who appear here on a daily basis without the benefit of any legal assistance at all.

35. I find that the jurisdictional basis for me to make a cost award is present.

36. I asked the Claimant about his means, and he says he is currently engaged in a contract which earns him sixteen pounds an hour about forty hours a week, that last week he earned about £500, and he still lives with a girlfriend, who also works, although he says that he does not know what she earns. He has some money in his bank account saved for Christmas.

37. The Respondent issued an offer to walk-away and a costs warning to Ms. Held at 3.03 pm on 21 November, but the Claimant decided not to accept that offer and to press ahead as a result of which the Respondent has been forced to incur a fee instructing Mr Cook to come here to have the case formally dismissed.

38. In all the circumstances, I think I should make a cost award of £500 which I hereby do.

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Employment Judge Burns

Dated:. 4 December 2018

Judgment and Reasons sent to the parties on:

5 December 2018

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For the Tribunal Office