



EMPLOYMENT TRIBUNALS

Claimant
Mr G Wray

v

Respondent
Jewish Care

PRELIMINARY HEARING

Heard at: Watford

On: 17 January 2018

Before: Employment Judge McNeill QC

Appearances:

For the Claimant: Mr W Lewis, Counsel

For the Respondents: Mr M Curtis, Counsel

JUDGMENT

The claimant's claims for unfair dismissal and breach of contract are dismissed.

REASONS

1. The claimant in this case complains of unfair dismissal and breach of contract.
2. His claim is listed before me for a preliminary hearing. A letter was sent to the parties on 25 November 2017 informing them of this preliminary hearing. It was stated in that letter that the preliminary hearing was to determine the following: 'to consider if the claim may proceed if it is out of time and, if so, whether a deposit order should be made'.
3. The parties have both been represented by counsel before me today. They agree that the relevant primary time limits for bringing these claims expired on 6 July 2017. That period takes into account the early conciliation extension.
4. The ET1 was in fact presented to the tribunal on 6 September 2017.
5. The relevant statutory/regulatory provisions are s.111(2)(b) of the Employment Rights Act 1996 and regulation 7 of the Employment Tribunals (Extension of Jurisdiction) Order 1994. The provisions are materially identical.
6. In relation to both complaints (unfair dismissal and breach of contract) I must consider first whether it was not reasonably practicable for the complaint to be presented by 6 July 2017 (the first limb). The claimant bears the burden of proof

on that issue. If I am satisfied that it was not reasonably practicable for the complaint to be presented by that date, the second matter to consider is whether it was presented within such further time as the tribunal considers reasonable (the second limb)..

7. In terms of outcome the parties agreed that if I were satisfied in relation to the first limb and if the complaint was presented within a reasonable time after 6 July 2017, the claimant's case would proceed to a full hearing on the merits. If I were not satisfied in relation to the first limb, the parties agreed, I would not go on to consider the second limb and the claim would be dismissed. The respondent made it clear that it would not be seeking a deposit order if the claim was permitted to proceed.
8. Neither party called any oral evidence. The evidence before me consisted of a witness statement from the claimant, with exhibit, and documents adduced in evidence before me at the hearing. As the claimant did not attend to give evidence, the respondent's counsel had no opportunity to test his evidence by cross-examination.

The key facts to date of termination of employment

9. The key facts, in short summary, giving rise to the claimant's claim, are as follows:
 - 8.1 The claimant was, at the relevant time, a Chef who was employed by the respondent. There is some dispute as to the start date of his employment but it is common ground that his employment terminated on 6 March 2017.
 - 8.2 On 3 March 2017, the claimant gave eight plastic containers from his place of work, to a friend. A CCTV recording showed the eight containers being loaded in to his friend's car, at the claimant's place of work, on that date.
 - 8.3 The following day, 4 March 2017, the claimant was informed of the CCTV footage. He returned the containers to his workplace on 6 March.
 - 8.4 On that same date, he attended a meeting with Mr Richard Munns, the respondent's Deputy Director of Operations. Mr Munns wrote out a letter of resignation for the claimant which the claimant signed. So much seems to be common ground.

The parties' respective cases on the merits

10. The claimant's claim, in brief, is that he was pressurised into signing the letter. He said he found the plastic containers near a skip and thought that they were rubbish. He had offered them to a friend who had wanted some plastic containers.
11. The defendant says that the meeting on 6 March took place because the defendant wanted to investigate whether the claimant had a reasonable explanation for his actions. The claimant's place of work was a care home and the respondent wanted to clarify whether the claimant had invited his friend onto the premises without authorisation.

12. At this stage, plainly, it is not for me to assess the merits of the claimant's claim. Suffice it to say that on its face this is a reasonably arguable claim.

The facts: from 6 March 2017

13. The agreed date of termination of the claimant's employment, 6 March 2017, is the date when time starts to run for limitation purposes. The claimant, in his witness statement, says that he was unwell on 10 March and that on 3 April 2017 he wrote a letter to the respondent's Head of Human Resources to which he says, to date, he has received no response.

14. On a date, which was either 24 April or, possibly, 27 April 2017, the claimant contacted ACAS. He says in his witness statement that he was not told by ACAS about the three-month deadline to bring a claim to the Employment Tribunal. ACAS is a conciliation service and not an advice service as its website makes clear. Because the claimant did not attend to give evidence, there was no opportunity to investigate or challenge his evidence, which adversely affected the weight to which I could give that evidence.

15. Between about 24 or 27 April and 7 June, the conciliation period ran. During that period the claimant says, and I accepted, that the conciliator was absent for a period of two weeks. I have been shown some correspondence between the claimant and ACAS which shows that the claimant was contacted on 27 April by ACAS. He was sent a letter which included a link to the booklet on early conciliation which the parties agree makes reference to the time limits for bringing unfair dismissal claims.

16. On 6 or 7 June 2017, the conciliation period ended and on 6 July the limitation period expired.

17. On 13 July 2017, the claimant saw Mr Lewis, who represented him before the tribunal today. Mr Lewis was giving advice at the CAB. On that date, Mr Lewis gave the claimant advice then on the limitation period and, indeed, accepted instructions from the claimant to represent him.

18. On 18 July 2017 a letter was written by, or more probably on behalf of the claimant to Mr Lewis. That letter referred to having reported the incident to ACAS but nothing was said in the letter as to how the claimant knew about ACAS or what he knew about their function, or how it came about that he got in contact with them

19. On 26 July 2017, the Supreme Court gave judgment in what is referred to as 'the Unison case' (**R (on the application of Unison) v Lord Chancellor** [2017] UKSC 51 leading to the quashing of the fees regime in the Employment Tribunal.

20. From the time of his instruction, Mr Lewis, in conjunction with other professional commitments, worked on the case and the claim was presented in due course to the tribunal on 6 September 2017.

Evidence that it was ‘not reasonably practicable’ to bring the claim within the statutory time limit and that it was brought within a reasonable period thereafter

21. As previously stated, the evidence which has been before me consisted of a witness statement from Mr Wray, signed on 16 January 2018, with a seven-page exhibit to that witness statement containing correspondence, mainly between ACAS and the claimant, but also in relation to an application by the respondent to extend time for the ET3. I was also shown a handwritten letter which I referred to a moment ago, to Mr Lewis, dated 18 July 2007.

22. As the claimant did not attend the tribunal to give evidence, there was no opportunity for the respondent’s counsel to challenge the claimant on key issues in the case, such as what the claimant knew about the time limits for bringing an unfair dismissal claim at the relevant times; what steps he took to find out about the time limits; how he found out about ACAS and why he called them in late April 2017; what assistance he was getting and from whom, at around that time; and what, if any, steps he took when he received the letter from ACAS which included in a prominent position, a link to the document which referred to time limits, including the three month time limit for bringing a claim for unfair dismissal.

23. It was also the case that, while the claimant appeared to an extent to rely on his own impecuniosity as a reason for not bringing his claims in a timely fashion, there was no specific evidence of his means before the tribunal. He simply stated (and this appeared to be during the period of ACAS conciliation), that he sought legal advice and was saving up to fund the case and to pay the tribunal fees of £250 plus his lawyer’s fees. The claimant knew about the Unison judgment from early August 2017. Mr Lewis told him about this judgment and its implications.

24. Taking into account all the evidence, I accepted the claimant’s evidence that he did not know about the three-month time limit until he attended the CAB on 13 July 2017. I also accepted that Mr Lewis gave him advice on that date about the time limits, albeit that was after the expiry of the limitation period. I also accepted that the claimant is a person who was significantly dependent on others for advice in looking at this potential claim, although Mr Lewis steered away from the suggestion that the claimant was illiterate, which was a suggestion arising out of the respondent’s response. Mr Lewis, at one stage, suggested the claimant was vulnerable, or referred to his vulnerability but I could not see any evidence that could support such a finding. Like many claimants he looked for, and obtained, some assistance in looking at how to progress his claim.

Conclusions

25. Starting with the first limb, the parties’ representatives agree that I should look not only at what the claimant in fact knew about time limits but what he ought to have known taking into account the sources of information that were available to him. In

this case I give particular weight to the fact that the claimant did know about ACAS; that he was able to contact ACAS on 24 or 27 April 2017; and indeed, that ACAS responded to an email address, apparently in the claimant's name. How and exactly what he knew about ACAS remains unclear because he has not attended the tribunal to give evidence, explain and to have his evidence tested.

26. ACAS' email to the claimant of 27 April contained a link to the ACAS booklet on early conciliation. Again, without the claimant giving evidence, I cannot make any finding as to whether he, with or without assistance, did in fact access this link. Had he accessed the link the time limits would have been clear to him. I do find, however, that he could be reasonably expected, with some assistance, and I find he plainly had some assistance, to access the link so as to be made aware of the relevant time limits. Many claimants depend on looking at sites such as the Employment Tribunal Website and the ACAS website to see what the relevant time limits are. In this case, there is sufficient evidence to show that the claimant, possibly with the benefit of advice, was able to gain access at the very least to the information available from ACAS.
27. The early conciliation process ended in early June 2017. There was then a period of one month until the limitation period expired. I accept that the claimant contacted the CAB on about 10 June 2017 and did not get an appointment until 13 July 2017. Given the time limits which he can reasonably be expected to have been aware of, I find, he could have put in a claim form at any time after the end of the early conciliation period, as indeed, very many claimants do without any sort of legal representation. I conclude that the claimant has not proved that it was not reasonably practicable to present his complaint within the relevant time limits. I make that finding subject to the issues of fees which I come to next.
28. The difficulty for the claimant with relying on a lack of money and the applicability of the fees regime during the period from the end of the conciliation period until the expiry of the limitation period, is that I do not have the evidence before me to satisfy me that the claimant did not have funds even to present a claim. Indeed, his evidence is that he had been saving up to fund the case and pay tribunal fees and lawyer's fees. On the basis that this is the only evidence before me I cannot say that it was not reasonably practicable for the claimant to present his complaint within the applicable time limits for this reason either.
29. In short, I find that the claimant has not made out that it was not reasonably practicable to bring his claim in time, both because there was information reasonably available to him, as explained, and, also, because I am not satisfied that he did not have the money to present a claim in time.
30. The claimant has sought to rely on an extension of time that was granted for the presentation of the ET3 as relevant to whether I should allow this claim to proceed. I accepted Mr Curtis' submission that that the extension of time granted for the ET3 was wholly irrelevant to the question I had to consider. The statutory and regulatory provisions which I was required to consider do not depend on some general principle of fairness but solely on the consideration of reasonable practicability.

31. In all the circumstances the claimant has not proved it was not reasonably practicable to present his complaint in time and, for that reason, his claim must be dismissed.

32. There is no need for me to look at the second limb and I do so only briefly, given the arguments advanced by the parties. I accepted that Mr Lewis wanted to present the claimant's claim fully and carefully and at its best and that he was instructed only after the primary limitation expired and not when it was about to expire. It does however, seem to me that where a primary time limit is three months as in this case, subject to the extension of early conciliation, that a further delay of two months in the presentation of the claim, was not a reasonable period under limb two. So, had it been necessary to consider limb two in this claim, I would have found that the claim was out of time for that reason also and I would have dismissed the claim.

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Employment Judge McNeill QC
Sent to the parties on: 21/2/2018

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For the Tribunal:
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