Case No: 2601304/2018

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr G N Smith	**-v-**	Combined Shipping Company Limited

Heard at: Leicester **On:** 5 December 2018

Before: Employment Judge Evans (sitting alone)

Representation
For the Claimant: in person
For the Respondent: Mrs Treacy (Shareholder in Respondent)

JUDGMENT

The Claimant's claim of unfair dismissal is dismissed because it was presented out of time and so the Tribunal has no jurisdiction to hear it.

REASONS

Preamble

1. The Claimant was dismissed by the Respondent with effect from 21 April 2018. Following his dismissal he presented a claim of unfair dismissal to the Tribunal on 12 June 2018. The hearing of that claim took place in Leicester on 5 December 2018 ("the Hearing").

2. The Claimant represented himself at the Hearing but was assisted by a friend, Mr Kalia. The Respondent was represented by Mrs Treacy, one of its directors. Before the hearing the parties had struggled to agree a bundle of documents. The Respondent attended with a bundle running to 97 pages. There were other documents which the Claimant wished to be included. These were documents which the Respondent had previously seen and which would have been included if the Tribunal's case management orders had been followed properly. I therefore ordered that they should be included. They were added to the bundle which in its final form ran to 143 pages. All page references in this judgment are to the bundle page numbers unless otherwise stated.

3. The Claimant gave evidence in support of his claim. The following witnesses gave evidence on behalf of the Respondent: Mr Jason Hall, the Respondent's Distribution Director and Mrs Treacy. The Claimant had prepared a witness statement but it did not deal with the issue of why his claim had been presented when it was so I asked

him questions to enable him to give oral evidence in relation to that issue. The Respondent had not prepared witness statements for Mr Hall and Mrs Treacy. They gave their evidence in chief by answering questions which I asked them about the Claimant's dismissal.

4. These reasons deal with a preliminary time limit point, whether the dismissal was unfair, the reduction of any compensatory award under section 123(1) of the Employment Rights Act 1996 ("the 1996 Act") as a result of the application of the principle derived from the case of Polkey v AE Dayton Services Ltd 1988 ICR 142, and the issue of contribution/conduct prior to dismissal.

The discussion at the beginning of the Hearing and the issues

The Preliminary Issue

5. Neither party has been professionally represented in the course of these proceedings. On reviewing the Tribunal's file, the following matter came to my attention which I concluded suggested that the claim might well have been presented out of time.

6. The Claimant presented an ET1 form to the Tribunal on 28 June 2018. In answer to the question "Do you have an ACAS early conciliation certificate?" at box 2.3 he had ticked the answer "No". In answer to the question "If No, why don't you have this number" he had ticked "My claim consists only of a complaint of unfair dismissal which contains an application for interim relief. (See guidance)".

7. On 10 July 2018 the Tribunal sent the Claimant a letter headed "Rejection of Claim" observing that the ET1 form did not "disclose any basis on which you could apply for interim relief". It went on to state that "If there is no basis for you to claim interim relief you will not be exempt from the ACAS Early Conciliation Process and you will need to obtain an ACAS Early Conciliation Certificate before you can validly present your claim". On 16 July 2018 the Tribunal received a letter from the Claimant stating that he was not claiming interim relief. That letter did not give the details of any ACAS Early Conciliation Certificate. On 13 August 2018 the Tribunal therefore sent the Claimant a letter headed "Rejection of Claim" stating that his claim had been rejected because an early conciliation number had not been provided.

8. The Claimant subsequently sent a further letter dated 22 August 2018 stating that he had by that date followed the rules on Early Conciliation and providing details of the ACAS Early Conciliation Certificate. On 4 September 2018 the Tribunal wrote to the Claimant stating that his claim had been accepted. The Tribunal's file shows that the date of receipt by ACAS of the Early Conciliation Notification was 20 August 2018 and the date of issue by ACAS of the Early Conciliation Certificate was also 20 August 2018.

9. The Tribunal had treated the Claimant's letter of 22 August 2018 as an application by the Claimant under Rule 13 of the Tribunal's rules of procedure for a reconsideration on the basis that the notified defect (the failure to provide an early conciliation number as required by Rule 10 (1) (c)) could be rectified. Rule 13 (4) provides that if the judge considering that application concludes (as in this case) that the original rejection was correct but that the defect has been rectified, then "the claim shall be treated as presented on the date that the defect was rectified". That was at the earliest 22 August 2018 (the Claimant's letter of that date was not date stamped by the Tribunal when it was received but clearly it could not have been received before 22 August 2018).

10. The Claimant was dismissed by a letter dated 19 April 2018 (page 19) which he received on Saturday 21 April 2018. As such, the last date for him to submit a claim

of unfair dismissal was 20 July 2018. Consequently his claim was presented more than one month out of time because it is to be treated as having been presented on 22 August 2018.

11. Perhaps unsurprisingly, given that neither party was represented, the fact that the Tribunal clerk dealing with the case had failed to identify this as an issue had not been picked up on prior to the Hearing by either party. However, as it went to the Tribunal's jurisdiction to hear the claim, it could not be ignored once I had noticed it. I explained this to the parties. I said that I would deal with the issue in my decision but that in any event I would also set out what my conclusions were on the substantive issues arising in the unfair dismissal claim.

12. Following this discussion, it was therefore agreed that the issues for me to determine were as follows:

    1) Whether the Tribunal had jurisdiction to consider the Claimant's claim of unfair dismissal or whether the claim had been presented out of time.

    2) Had the Respondent shown the reason for dismissal? In a misconduct dismissal this requires the Respondent to show that it believed the Claimant was guilty of misconduct.

    3) Was the reason for dismissal a potentially fair reason?

    4) Was the dismissal fair pursuant to section 98(4) of the 1996 Act including

        a. Was the dismissal procedurally fair?

        b. Was the dismissal within the range of reasonable responses?

    5) In a misconduct dismissal in deciding whether a dismissal is fair under section 98(4) the Tribunal will consider:

        a. Whether the employer had reasonable grounds for its belief in the employee's guilt;

        b. Whether at the stage at which that belief in the employee's guilt was formed on those grounds the employer had carried out as much investigation into the matter as was reasonable in the circumstances.

    6) If the dismissal was unfair, should compensation be reduced as a result of the Polkey principle, i.e to reflect the chance that the Claimant might have been fairly dismissed if a fair procedure had been followed or in any event.

    7) If the dismissal was unfair, whether the compensatory award should be reduced because the Claimant had caused or contributed to their dismissal and whether the basic award should be reduced in light of Claimant's conduct prior to dismissal.

The Law

The time limit issue

13. Section 111(2) of the 1996 Act contains the time limit for unfair dismissal claims:

> *Subject to the following provisions of this section an employment tribunal shall not consider a complaint under this section unless it is presented to the tribunal—*

(a) before the end of the period of three 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 three months.

14. The Tribunal must therefore consider two things if a claim is presented outside the three month time limit. First, whether it was not reasonably practicable for the claim to be presented within the three month time limit (the burden of proof is on the Claimant). Secondly, if it was not, the Tribunal must be satisfied that the further period within which the claim was presented was reasonable.

15. The leading case in relation to reasonable practicability remains Palmer and Saunders v. Southend-on-Sea Borough Council [1984] 1 All ER 945, [1984] IRLR 119. In this case, May LJ stated that the test was one of reasonable feasibility: "We think that one can say that to construe the words "reasonably practicable" as the equivalent of "reasonable" is to take a view that is too favourable to the employee. On the other hand, "reasonably practicable" means more than merely what is reasonably capable physically of being done - different, for instance, from its construction in the context of the legislation relating to factories: compare Marshall v Gotham Co Ltd [1954] AC 360, HL. In the context in which the words are used in the 1978 Consolidation Act, however ineptly as we think, they mean something between these two. Perhaps to read the word "practicable" as the equivalent of "feasible" as Sir John Brightman did in [Singh v Post Office[1973] ICR 437, NIRC] and to ask colloquially and untrammelled by too much legal logic - "was it reasonably feasible to present the complaint to the [employment] tribunal within the relevant three months?" - is the best approach to the correct application of the relevant subsection."

Unfair dismissal

16. Section 94 of the 1996 Act gives an employee the right not to be unfairly dismissed.

17. Section 98(1) of the 1996 Act provides that when a Tribunal has to determine whether a dismissal is fair or unfair it is for the employer to show the reason for the dismissal and that such reason is a potentially fair reason because it falls within section 98(1)(b) or section 98(2) of the 1996 Act. The burden of proof to show the reason and that it was a potentially fair reason is on the employer.

18. A reason for dismissal is a set of facts known to, or beliefs held by, the employer which cause him to dismiss the employee.

19. If the Respondent persuades the Tribunal that the reason for dismissal was a potentially fair reason, the Tribunal must go on to consider whether the dismissal is fair or unfair within the meaning of section 98(4) of the 1996 Act. This requires the Tribunal to consider whether the decision to dismiss was within the band of reasonable responses.

20. Section 98(4) applies not only to the actual decision to dismiss but also to the procedure by which the decision is reached. The burden of proof is neutral under section 98(4).

21. In considering this question the Tribunal must not put itself in the position of the Respondent and consider what it would have done in the circumstances. That is to say it must not substitute its own judgment for that of the Respondent. Rather it must decide whether the decision to dismiss the Claimant fell within the band of reasonable responses which a reasonable employer might have adopted. A claim will not succeed just because the Tribunal takes the view that the decision to dismiss was harsh if it nonetheless fell within the range of reasonable responses.

22. When the reason for the dismissal is misconduct, the Tribunal should have regard to the three part test set out in British Home Stores Limited v Burchell [1980] ICR 303.

23. First, the employer must show that it believed the Claimant was guilty of misconduct. This is relevant to the employer establishing a potentially fair reason for the dismissal under section 98(1) and the burden of proof is on the employer. Secondly, the Tribunal must consider whether the employer had reasonable grounds upon which to sustain its belief in the employee's guilt. Thirdly, the Tribunal must consider whether at the stage at which that belief was formed on those grounds the employer had carried out as much investigation into the matter as was reasonable in the circumstances.

24. The second and third parts of the test are relevant to the question of reasonableness under section 98(4) and the burden of proof in relation to them is neutral.

25. If the Tribunal concludes that the dismissal is unfair, section 123 of the 1996 Act provides for a compensatory award to be made. Section 123(1) provides:

> *(1) "Subject to the provisions of this section and sections 124, 124A and 126, the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.*

26. It is therefore necessary for the Tribunal to consider whether the compensation awarded should be reduced to reflect the chance that the Claimant might have been dismissed fairly at a later date in any event or if a fair procedure had been used.

27. In addition, section 123(6) of the 1996 Act s.123(6) requires the Tribunal to reduce the amount of the compensatory award by such amount as it considers just and equitable if it concludes that the Claimant caused or contributed to their dismissal. In addition, section122(2) of the 1996 Act requires the Tribunal to reduce the basic award if it considers that it would be just and equitable to do so in light of the conduct of the Claimant prior to dismissal.

Submissions

28. Mr Kalia made very brief submissions for the Claimant which may reasonably be summarised as follows. The Claimant had been subjected to warnings prior to the events leading to his dismissal but no disciplinary procedure had been followed prior to any of those. Further, so far as the dismissal itself was concerned, the Claimant had not been invited to a disciplinary hearing and when he had appealed he had not been shown the evidence the Respondent subsequently relied on to reject his appeal and, also, was not invited to an appeal hearing.

29. Mr Kalia also submitted that if the Respondent had taken into account the allegation of assault made by a cyclist against him it should not have done so because as at the date of his dismissal the criminal proceedings in relation to that matter had not concluded. So far as the language that the Claimant had directed at Mr McEwan and Mr Hall was concerned, calling them "cunts" ("the offensive language") in the circumstances of the case did not amount to gross misconduct. Further, there was evidence in the bundle which showed that the Claimant had previously questioned his hours and it was an issue relating to his hours that had caused the Claimant to speak to Mr McEwan and Mr Hall as he had.

30. Mrs Treacy made very brief submissions for the Respondent. She said that it was clear that the use of the offensive language was an act of gross misconduct. It was

true that there were procedural failings but there was no doubt that the Claimant would have been dismissed if a fair procedure had been followed.

31. By the time Mr Kalia and Mrs Treacy had made their submissions it was 3.35pm so I reserved my decision.

Findings of Fact

32. I am bound to be selective in my references to the evidence when explaining the reasons for my decision. However, I wish to emphasise that I considered all the evidence in the round when reaching my conclusions.

Findings relevant to the time limit issue

33. I accept as true the Claimant's evidence in relation to when he presented his claim. The Claimant had not taken any skilled advice before 16 August 2018. After that date he sought advice from the CAB and from an organization called Helping Hands. They did not provide any real advice but pointed him to online resources as a result of which he realized that he needed to obtain an ACAS Early Conciliation Certificate to pursue a claim.

34. Prior to presenting his claim he had, however, spoken to a friend who had told him that he had grounds to claim unfair dismissal because the Respondent had failed to follow a proper procedure prior to dismissing him. The friend did not tell the Claimant that he needed to contact ACAS and obtain an Early Conciliation Certificate.

35. The Claimant said he had by mistake ticked the wrong box on the ET1 form when he had indicated that he was claiming interim relief. Further, he did not properly read the letter of 10 July 2018 from the Tribunal (which I find he received on or around 11 July 2018) stating that he needed to obtain an ACAS Early Conciliation Certificate before beginning his claim if he was not applying for interim relief, and so had concluded that all he had to do was to write back to the Tribunal stating that he was not pursuing interim relief. It was only when he received the Tribunal's letter of 13 August 2018 rejecting his claim that he realized that there was a problem.

36. I find, therefore, that the reason for the claim being presented out of time was that the Claimant did not know that he needed to obtain an ACAS Early Conciliation Certificate until after receiving the letter of 13 August 2018. However, I find that this lack of knowledge was not reasonable given that: (1) the letter from the Tribunal of 10 July 2018 clearly explained a claim could not be presented unless an ACAS Early Conciliation Certificate had been obtained if there were no basis for him to claim interim relief; and (2) the standard ET1 form which he completed should have strongly suggested to him that he would need an ACAS Early Conciliation Certificate and at the very least put him on notice that he should establish the position when it stated at box 2.6: "Nearly everyone should have this number before they fill in a claim form. You can find it on your Acas certificate. For help and advice, call Acas on 0300 123 1100 or visit www.acas.org.uk".

General findings

37. The business of the Respondent is importing and delivering hot tubs and pool tables. The Claimant was employed by the Respondent as a delivery driver from 8 October 2013 until he was dismissed in April 2018. His job involved him delivering and collecting hot tubs and pool tables all over the United Kingdom. As at the date of his dismissal he worked four days during the working week (Monday to Friday). He had weekends and one day (not fixed) during the working week off each week.

38. The incident which gave rise to his dismissal took place on 17 April 2018. The Claimant had been told by Mr Hall that he would be delivering in Scotland on the following day, Wednesday. The Claimant asked if he would then be allowed to have Thursday as his day off, because of the length of the hours he would work on the Wednesday. Mr Hall said that this would not be possible because on Thursday he was booked to go to Harwich to collect imported goods.

39. The Claimant accepts that before leaving the office area he had used the offensive language but said that it was directed only to Mr Mc Ewan and Hr Hall. The Claimant then went downstairs from the office and was followed downstairs by Mr McEwan. The Claimant and Mr McEwan exchanged words during the course of which Mr McEwan dismissed the Claimant.

40. The Respondent wrote to the Claimant stating "we formally write to confirm that your employment is hereby terminated with immediate effect" due to Gross Misconduct" by a letter dated 19 April 2018 (page 19). The reasons given for the dismissal were:

    Verbally abusive to office staff, company directors and customers
    Bad time keeping, resulting in customer dissatisfaction
    Physically assaulting a member of the public whilst driving a company vehicle

41. The reality was that this letter simply confirmed the summary dismissal carried out by Mr McEwan on 17 April 2018. No procedure was followed by the Respondent prior to Mr McEwan dismissing the Claimant.

42. The Claimant appealed the dismissal by a letter dated 22 April 2018. He gave the following explanation for his appeal:

    The reason being decision too harsh and irrelevant.

43. There was no appeal meeting and on 4 May 2018 Mr Hall wrote to the Claimant stating that his appeal had been unsuccessful (page 65). However, prior to this letter being sent Mrs Treacy did carry out some investigation of what occurred. She spoke to various employees about what had occurred and prepared short statements for two of them (Anne Arnold (page 38) and Rebecca Williams (page 40)). She also considered the Claimant's work schedule for the week in question and considered it to be "reasonable and fair". She spoke to Mr McEwan and Mr Hall about what had happened and they were "very upset" about it.

44. Mrs Treacy did not send the fruits of her investigation to the Claimant for his comments. Rather there was a meeting of the four directors (herself, Mr Treacy, Mr Hall and Mr McEwan) and they agreed that the Claimant should be dismissed. That resulted in Mr Hall writing to the Claimant dismissing the appeal.

45. Having heard evidence from Mrs Treacy and Mr Hall, I find that the reason that Mr McEwan dismissed the Claimant and that the directors confirmed that dismissal in their meeting was that they believed that the Claimant had: (1) used the offensive language in a way which meant it was directed at Mr Hall, Mr McEwan and the office staff present; and (2) acted aggressively to Mr McEwan in the conversation downstairs immediately following the incident in the office when he had used the offensive language. I find that the other matters raised in the dismissal letter were not taken into account when the decision to dismiss was made.

Findings relevant to contributory conduct and Polkey

46. I find that the Claimant did use the offensive language in a way which meant that all those in the office felt that it was directed towards them. In so finding I prefer the

evidence of Mr Hall to that of the Claimant. This is because his evidence was corroborated by what Anne Arnold and Rebecca Williams told Mrs Treacy.

47. I also find that when the Claimant spoke downstairs after the incident in the office with Mr McEwan both he and Mr McEwan raised their voices, there was a heated argument, and during the course of that argument the Claimant put his face close to that of Mr McEwan. I preferred the evidence of Mr Hall to that of the Claimant in relation to the exchange downstairs. This is because his account (that both Mr McEwan and the Claimant had been angry and spoken with raised voices) seemed far more plausible than that of the Claimant (that he was not angry, just disappointed), in light of the fact that the Claimant accepted he had used the offensive language immediately before the exchange downstairs. That is to say the fact that the Claimant used the offensive language strongly suggests that he was already angry.

48. I find that if the Respondent had followed a fair investigation of the incident it would have reasonably concluded that the Claimant had committed an act of misconduct (using the offensive language and acting aggressively to Mr McEwan). I find that the Respondent would also have reasonably concluded that the use of the offensive language and threatening behaviour amounted to gross misconduct. I find that it would not have considered that the concern the Claimant said he had about the hours would have been found to be a significant mitigating factor. That is because taking account of the evidence given by the Claimant and Mrs Treacy I find that the Claimant would only have worked around 48 hours in the week he was dismissed. I therefore find that if a fair disciplinary procedure had been followed there would have been an 80% chance that the Claimant would have been fairly dismissed a month after he was.

49. Further, since the Claimant was dismissed he has been convicted on 26 October 2018 of a criminal offence which he committed during an altercation with a cyclist whilst driving a vehicle of the Respondent in January 2018. During the incident the Claimant twice punched the cyclist. The cyclist's bicycle was also damaged. The Claimant was ordered to pay the cyclist £400 (£100 compensation and £300 for damage to his bike) and to pay £200 towards prosecution costs. I find that if the Respondent had not dismissed him when it did in April 2018 there would have been an 80% chance that he would have been dismissed no later than one month after the date of his conviction because he had committed a criminal offence during the course of his duties as an employee.

Conclusions

The time limit issue

50. The only reason the Claimant did not present his claim before the relevant time limit was that he did not know that he had to obtain an Early Conciliation certificate before doing so. However this lack of knowledge was not at all reasonable. If he had taken sensible steps to investigate the position in light of the standard text at box 2.6 of the standard ET1 form he would have established the true position. Equally, if he had carefully read the letter which the Tribunal had sent him on 10 July 2018, he would have understood the true position.

51. The Claimant gave his evidence in a generally articulate fashion and answered questions in a manner which showed that he was more than capable of understanding the issues in the claim he was pursuing. In these circumstances I find that it was therefore feasible for him to have obtained an ACAS Early Conciliation Certificate and to have presented a claim prior to the three month time limit expiring: he is sufficiently intelligent to have understood both the ET1 form and the Tribunal's letter of 10 July 2018. He has no excuse for his lack of attention to these documents.

52. I therefore conclude that it was reasonably practicable for the Claimant to present his claim within three months of his dismissal on 21 April 2018. Accordingly his claim was presented out of time, the Tribunal has no jurisdiction to hear it, and I now dismiss it.

Conclusions on unfair dismissal arguments

53. Because the time limit issue only arose at the Hearing, I indicated to the parties that, even if I dismissed the claim because it was out of time, I would still go on and set out what my conclusions would have been in relation to the substantive unfair dismissal claim if I had concluded that the claim was not out of time. Accordingly, I would have concluded as follows:

    53.1. **Issue 2:** the Respondent showed the reason for dismissal (misconduct).

    53.2. **Issue 3**: the reason was a potentially fair reason.

    53.3. **Issue 4:** the dismissal was not procedurally fair. There were many reasons for this, but in particular this was because of the Respondent's failure to invite the employee to a disciplinary meeting, to disclose the evidence it had gathered to him, and to invite him to an appeal meeting.

    53.4. **Issues 5:** (which is heavily related to issue 4). By the time the appeal was decided the Respondent had not carried out sufficient investigation (because the Claimant had not been interviewed) and so did not have reasonable grounds for its belief in the Claimant's guilt.

54. I would, therefore, have concluded that the dismissal was unfair. However this would not have resulted in any compensation once issues 6 and 7 had been dealt with:

    54.1. **Issue 6:** I would have concluded that if a fair procedure had been followed there would have been an 80% chance that the Claimant would have been dismissed by 18 May 2018. Further, if he had not been dismissed then, there would have been an 80% chance that he would have been dismissed in mid-November as a result of his assault on the cyclist.

    54.2. **Issue 7:** I would have concluded that the Claimant was guilty of culpable conduct prior to his dismissal (the use of the offensive language and acting aggressively) which had caused his dismissal. I would have concluded that it was just and equitable to reduce his basic and compensatory awards by 100% as a result of this.

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Employment Judge Evans

Date: 9 January 2019

JUDGMENT & REASONS SENT TO THE PARTIES ON

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FOR EMPLOYMENT TRIBUNALS