



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

Respondent

AND

Mr T Smith

Zenith Hygiene Systems Limited

RESERVED JUDGMENT OF THE EMPLOYMENT TRIBUNAL AT A PRELIMINARY HEARING

HELD AT Croydon ON 14th December 2020

EMPLOYMENT JUDGE A Richardson

Representation

For the Claimant: in person

For the Respondent: Mr S Wysall, Solicitor

JUDGMENT

The judgment of the Tribunal is that

- (1) the Claimant filed his claim late and that it is was reasonably practicable for him to have filed it in time.
- (2) The Tribunal therefore has no jurisdiction to hear his claim.
- (3) The claim is dismissed.

REASONS

Issues

1. The Claimant filed a complaint of constructive unfair dismissal on 19th August 2019 following a period of early conciliation between 10th – 19th August 2019. His employment started on 1st March 2015 and ended by reason of his resignation on 27th June 2018. Time therefore expired on 26th September 2018 (with adjustment for early conciliation). The claim is clearly out of time by more than ten months.

2. The issue before the Tribunal is whether it was not reasonably practicable for the Claimant to have filed his complaint in time, and if not, did he thereafter

file within a reasonable time.

Proceedings and evidence

3. The hearing was held in public by video link with the parties' consent as a face to face hearing was not possible in light of the restrictions imposed by the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 and it was in accordance with the overriding objective to do so.

4. At the commencement of the hearing the Claimant explained that the bullying and harassment he experienced whilst in the employment of the Respondent had caused him to suffer depression and anxiety. The Claimant was informed that a claim for personal injury (whether physical or mental) is not within the jurisdiction of the Employment Tribunals unless it is related to a claim for discrimination such as disability. The correct forum for a personal injury claim alone is the County Court. The Claimant confirmed that he intended only to pursue a claim for constructive unfair dismissal.

5. The Claimant had received the file of documents; he was provided with the CVP log in details and after an adjournment the substantive part of the hearing on the time / jurisdiction issue commenced at 11am with the Claimant participating by smart phone.

6. I was provided with a file of agreed documents and I heard evidence from the Claimant who was cross examined.

7. Due to the late start of the hearing, there was insufficient time for an oral decision to be prepared and delivered.. I therefore reserved judgment.

Relevant Findings of Fact

8. I make findings of fact for the purposes of this hearing only on the basis of the contemporaneous documentary evidence where it exists and the Claimant's oral testimony. Disputes of fact have been determined on the civil standard of proof, the balance of probabilities. I found overall that the claimant was an honest witness.

9. The Claimant was employed by the Respondent from 2015 as an HGV driver. He resigned on 27th June 2018 because of the respondent's alleged conduct, more particularly, bullying, poor management practices, and failure to support the Claimant in a health crisis.

10. The Claimant claimed that his mental health was affected from about 2016/2017 by the conduct of the Respondent. Prior to his resignation the Claimant's health had taken a turn for the worse resulting in him being admitted to hospital, undergoing several surgical procedures and suffering from anxiety to

the extent that he could not leave the house for some six months. Following his resignation on 27th June 2018, the Claimant lodged a grievance with the Respondent.

11. The Claimant was diagnosed with anxiety, stress and depression from about July 2018 and continued to have sick notes issued by his GP until March 2019 .

12. During August – October 2018 the Claimant engaged with the Respondent in the grievance process. His Grievance was not upheld and in November 2018 he filed an appeal. The grievance procedure then stalled with a gap in communications between the Claimant and the Respondent until April 2019 when the grievance procedure was concluded.

13. The Claimant had been engaged in child custody proceedings since about 2014 against his former partner. Throughout this time he was taking legal advice in that respect. Those proceedings are still on going.

14. The Claimant was working from March 2019 with a new employer who he found was supportive of his medical condition. The Claimant continues to take medication for depression and believes he is now coming out of this depressive episode altogether, although the pressure of these proceedings and a bereavement set him back.

15. With regard to the Claimant's knowledge of the time limits for filing a tribunal complaint, he had asked for informal advice from the legal team who were assisting him in the custody proceedings. He had merely sounded them out as to the extent of the poor treatment he had received from the Respondent; he had not asked for or received advice on time limits. Until the conclusion of the grievance procedure with the Respondent and the commencement of custody proceedings, the Claimant did not feel able to

16. The Claimant was unaware of any time limit until he contacted ACAS in August 2019 to commence early conciliation. At that point ACAS informed him that there may be 'restrictions' on filing his claim. When he completed the on-line application at home on his lap top form, only at that point did he become aware of the time limits for filing an unfair dismissal complaint in the Employment Tribunals. He said to himself he would give it a go anyway.

17. The Claimant submitted that even if he had known of the time limit earlier he was not in sufficient health to have looked at the screen for long enough to file proceedings because his health and circumstances had affected him so badly. He was too ill to have filed proceedings earlier.

18. The Claimant did not have sufficient funds to take expert employment advice as the custody proceedings had incurred significant cost and he had to

limit his expenditure. He was concerned that he could have ended up paying for more legal costs and discover he was not entitled to anything.

Submissions

19. I took a full note of the oral submissions made and have re-read them in the course of my deliberations.

The Law

20. Under S111(1) Employment Rights Act 1996 a complaint for unfair dismissal must be presented to an Employment Tribunal before the end of three months beginning with the effective date of termination, or 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.

21. It is a two stage test – first, the tribunal must decide if it was not reasonably practicable for the claim to have been presented in time – the onus is on the claimant and requires him /her to show why s/he did not present the complaint in time; and second, was it then presented within a reasonable time.

22. If the tribunal decides it was not reasonably practicable to file the complaint in time, it must then go on to decide what is a reasonable further period for presentation of it. A balance is required between the claimant and the respondent, taking into account any difficulties which the respondent might have in defending the claim at that time.

23. The tribunal must ask itself the question: *“what did the claimant know and what knowledge should the claimant have had if he had acted reasonably...”*

24. There is no difference in the approach to be taken to ignorance of the right to bring a claim of unfair dismissal and ignorance of the time limit for doing so save in the ease or difficulty of establishing the reasonableness of such ignorance: **Wall’s Meat Co Ltd v Khan** [1978] IRLR 499.

25. The question of whether it was reasonably practicable to present the claim in time is a question of fact for the tribunal taking into account the circumstances of the case. Reasonably practicable means feasible.

26. The tribunal must look at what was the temporary impediment or hindrance which affected the Claimant in this case to result in him filing his claim late. Was it illness? Was he aware of the time limit and of the right to complain about unfair dismissal? Was he being advised? If so by whom? What was the extent of the advisor’s knowledge? Whether there was a substantial failure by the claimant or his advisers which led to the failure to comply with the time limit?

27. However, ignorance or mistaken belief will not lead to a 'not reasonably practicable' conclusion if the Claimant is at fault for not making enquiries as was reasonable in the circumstances. Ignorance of the right to complain would not make it not reasonably practicable if the Claimant should reasonably have known of the right to complain as unfair dismissal rights have existed for some 50 years.

Conclusions

28. Applying the law to the facts, the Claimant should have commenced proceedings by initiating early conciliation through ACAS by midnight on 26th September 2018. He did not contact ACAS until 10th August 2019, more than 11 months later. There are three distinct periods of time to consider. The first is the period from resignation in June 2018 until November 2018; second, from November 2018 to March 2019 and third, from March to August 2019.

29. Taking the first period June 2018 – November 2018, the Claimant did not produce documentary evidence of the diagnosis of depression in July 2018. He did produce evidence during the course of the hearing, on his smart phone, of his prescriptions for medication for depression at a not insignificant dose (which evidence was accepted by the Respondent as being authentic for the period covered by the prescriptions). I find that the Claimant suffers from depression and that he suffered from depression and other conditions which required his hospitalisation for surgery in 2018 and in May 2019. The Claimant continues to take medication for depression although he is happy working as a driver for a different employer and believes that he is now coming out of depression apart from the occasional set back.

30. The Claimant was engaging with the Respondent during the period July - November 2018 during the course of the grievance and grievance appeal process despite his depression. He wrote well-reasoned letters in his own cause raising his grievances and putting his case forward. He made a data subject access request in a letter dated 12th July 2018. In his grievance letters the Claimant set out his research on The Regulation of Investigatory Powers Act 2000 in a letter dated 22nd August 2018 and makes references to being "*advised by my Barrister*" and "*my Barrister has confirmed that.....*".

31. On 6th September 2018 the Claimant in a letter to the Respondent's HR managers refers to having sought legal advice on the treatment he had allegedly received from his line manager.

32. On 12th September 2018 the Claimant wrote again to the Respondent's HR manager and stated that his "*solicitor had pointed out that [her] letter of 11th September 2018 reads similar to that of my invitation to attend the disciplinary hearing that was held in June 2018.....*"

33. The Respondent relied on this evidence as proof that the Claimant was functioning adequately despite his medical conditions and therefore there was no reason why he could not have filed his claim in time, having had legal advice.

34. The Claimant says that the legal advice he took, such as it was, was in the form of him putting informal questions to his legal team in the custody proceedings about whether he had a case against the Respondent for constructive unfair dismissal. He was advised that he had although the advice the Claimant received was never billed and paid for. It was informal advice. He had been unable to afford to instruct an employment expert as well as the legal team conducting the custody proceedings for him.

35. The Claimant's evidence is that during this period of time – July – November 2018 he was unaware of the time limits for bringing a claim and that those legal advisers he had quizzed for advice, were not employment specialists. They had never mentioned time limits.

36. Whilst it is just possible that the Claimant was unaware of time limits in the Employment Tribunals for bringing an unfair dismissal claim, given the Claimant's education, his articulate speech and articulate written communications despite his mental health issues at the time, and his access to lawyers, albeit not employment specialists, was it reasonable that he did not make inquiries about bringing an unfair dismissal complaint? It may not have been at the front of his mind but it is difficult to believe that solicitors and barristers informally advising him did not mention time limits even in passing. Even if they did not, it would have taken minutes only for the Claimant to 'google' unfair dismissal and reach the ACAS website with full information on bringing an unfair dismissal claim, including the information on time limits; he would have had access to the employment tribunals website with this important information. Googling 'unfair dismissal' would have provided him with dozens of solicitors' websites and other legal service providers' websites full of advice on unfair dismissal, many offering a free first consultation. He could have asked CAB's helpline, he could have phoned the ACAS helpline.

37. So whilst I could, just, accept the Claimant was not aware of any time limit prior to 26th September 2018, in that he did not have it at the front of his mind, I find it unreasonable that he did not address his mind to informing himself about how to make a claim and of the time limits for doing so. He had the intellectual ability and the computer/smart phone literacy to do so. He was engaging in correspondence with the Respondent, fighting his corner regarding what he perceived as unfair or harsh treatment by his line manager, pressing his case to them, lecturing them on the law and making references to taking or having taken advice. Despite being on medication and being ill with depression he did all of those things. I therefore can only find that it was also reasonably practicable for him to have commenced his claim by engaging in early conciliation with ACAS prior to 26th September 2019 and to have filed his claim in time allowing for the

ACAS early conciliation extension had he sought early conciliation in time. That would have taken less time and effort than his engagement in correspondence with the Respondent.

38. The conclusion is that it was reasonably practicable for the Claimant to have filed his claim in time. Because he did not, the Tribunal has no jurisdiction to hear his claim. However, I have gone on to consider that if I were wrong on that point, had the Claimant then filed the claim within a reasonable time?

39. The second period of time is November 2018 – March 2019. The Claimant had several months when he was ill. I accept that the Claimant suffered depression and other conditions from the date of his dismissal until about March 2019. From my own knowledge arising from hearing disability claims relying on depression, I am aware that symptoms of depression can include symptoms described by the Claimant such as not being able to go out, to socialise, to take care of one's own personal health and hygiene; unable to cook, make a cup of tea; unable to concentrate or think clearly; even get out of bed.

40. During this second phase I find that he was probably not well enough to engage in even simple research on unfair dismissal in the employment tribunals and to file a claim form. This is supported by the fact that there is a lull in the correspondence with the Respondent regarding his grievance appeal filed in November 2018.

41. The third phase is from March – August 2019. It is during this period that it could be reasonably expected that the Claimant would commence proceedings fairly promptly given the months that had now passed. In March 2019 the Claimant had commenced his recovery from depression. His doctor believed he was fit to work. He had found a new job with supportive employers. He was engaging again with the Respondent in connection with his grievance appeal. In a letter of 7th April 2019 addressed to the Respondent's group head office the Claimant refers to wanting time to take advice from his solicitor, ACAS and CAB before responding to the outcome of the grievance appeal. The Claimant himself said that he felt unable to consider commencing proceedings against the Respondent until March/April 2019 at about the time that his contact with the Respondent ceased altogether at the conclusion of the appeal process, and when he became engaged again in custody proceedings. There is no explanation why he did not do so. It took only a phone call to ACAS or CAB.

42. I asked the Claimant a direct question, why hadn't he filed proceedings sooner - between March – August 2019? He did not give me an answer to that question but provided an account of difficulties in functioning in normal day to day life caused by depression which was no doubt true, but which I find related to the worst of the depressive period pre-March 2019 together with two examples of setbacks. Whilst I readily acknowledge the difficulties caused by depressive illness, and that the Claimant was not then fully recovered, there was no direct

reference to, no evidence of any reason why the Claimant could not have filed his claim form in the Employment Tribunals between March and August 2019. Essentially there was no evidence on which I could base the exercise of my discretion to decide that the Claimant had filed his claim within a reasonable period of time after the original deadline had expired and to extend time. I take into account that the Claimant was in recovery, and he was happily working in a responsible job for a supportive employer. His medication did not affect his ability to work. My comments in paragraph 36 above apply during this period March – August 2019 as much as they do to the period from the Claimant’s resignation in June to 26th September 2018. From March 2019 there was a delay of about 5 months until the Claimant contacted ACAS for early conciliation.

43. A reasonable period of time allowing for the Claimant to seek freely available advice on bringing an unfair dismissal claim and the associated time limits from ACAS or CAB, or on line from a host of legal advice websites, would have been a matter of weeks and certainly no later than end April 2019. Therefore *had* my decision been that it was not reasonably practicable for the Claimant to have filed his claim in time, his application for an extension of time would have fallen at stage 2 of the legal test in any event, in that he did not file his complaint in a reasonable period of time thereafter.

Signed by _____

Employment Judge Richardson
Signed on 22nd December 2020