



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr. Claudius Baptiste

**Respondent:** Network Rail Infrastructure Limited

**Heard at:** London Central (by video)                      **On:** 23 February 2022

**Before:** Tribunal Judge A Jack, acting as an Employment Judge

## Representation

Claimant: Mr. I Wheaton, counsel

Respondent: Mr. N Singer, counsel

# RESERVED JUDGMENT

The judgment of the employment tribunal is that the tribunal has jurisdiction to consider the claim. The tribunal is satisfied that it was not reasonably practicable for the claim to be presented within the normal time limit, but the claimant has presented it within such further period as the tribunal considers reasonable.

# REASONS

## Hearing

1. The purpose of the preliminary hearing was to consider whether the claim for unfair dismissal was presented outside the three month time limit for bringing the claim and, if it was, whether time should be extended for it because it was not reasonably practicable for the claim to be brought in time and it was presented within a reasonable time thereafter.
2. There was a hearing bundle of 71 pages plus inserts, and the Claimant gave oral evidence.

## Findings of Fact

3. The Claimant was taken ill while on holiday in Saint Lucia. He had initially planned to return on 11 September 2020.

4. On the 1 September 2020 he was seen by a Consultant Surgeon (medical evidence, p. 64).
5. A disciplinary hearing was conducted in the Claimant's absence on 8 October 2020.
6. On 9 October 2020 the Claimant had an emergency operation in Saint Lucia.
7. The Respondent sent a dismissal letter to the Claimant's home address on 22 October 2020 (p. 56). This stated that "your dismissal takes effect immediately and your final day of employment is therefore 8 October 2020".
8. On 25 October 2020 the Claimant was told by his wife that the Respondent had sent a dismissal letter (WhatsApp Message of that date, p. 55). His oral evidence was that his wife sent him a photo of the letter. He sent an email on the same day, stating that he wanted to appeal against his dismissal (p. 58). I am satisfied that although he was still in Saint Lucia, he became aware of the dismissal and read the dismissal letter on 25 October 2020.
9. The Claimant had an operation under local anaesthesia on 26 November 2020. As a result of complications developed after surgery he sought further medical treatment, which delayed his return to the UK (medical evidence, p. 64).
10. The Claimant returned to the UK on 12 December 2020, and then quarantined at home. He had an econsultation and then went to Saint Mary's, where he was prescribed stronger antibiotics and told to rest for two weeks. He saw his GP on 16 December 2020 and 8 January 2021 (medical evidence, p. 68-69). His soft tissue was still abnormal, and there was reswelling with pain on 8 January 2021. He was still ill and in pain after his return to the UK, and I accept that this continued to be the case until and after 8 January 2021.
11. An appeal meeting was held on 20 January 2021, which the Claimant attended via Teams (p. 60a).
12. On Wednesday 27 January 2021 the Respondent emailed the Claimant with a letter which stated that the outcome of the appeal was to uphold the original decision to dismiss him.
13. On Monday 1 February 2021 the Claimant notified ACAS, who issued a certificate on the same day. He presented his ET1 claim form, also on the same day. The Claimant apologised for being late with his claim in paragraph 15 of his ET1, so I am satisfied that by the time that he presented his claim he was aware of the time limits.
14. In his ET1 he says that he pursued an internal appeal of the decision to dismiss him, but was not in the country due to his surgery and recovering, and flight restrictions due to Covid and lockdowns (p. 16). On 23 July 2021

the Claimant emailed London Central (p. 37), stating that he did not make his claim as he thought his job would be reinstated after the appeal.

15. The Claimant was notably vague about dates in his oral evidence, other than dates relating to his travel and health. My assessment is that this was due to the fact that he had at the time of the relevant events been more focused on his health and travel than his employment situation, and not because of evasion. He accepted that he was aware that there was a right to bring a claim for unfair dismissal to the Employment Tribunal. He was also clear that he had a union representative, and that he went to his current solicitors after Christmas. He said that he spoke to his union representative, who told him to get the claim in straight away, which he did. Asked why he did not present his claim earlier when he was back in the UK, he said that he was still not feeling well and that he thought he would be getting his job back as he had not done anything wrong. He also said that there were also still a lot of restrictions due to covid in December 2020.

### **The Law**

16. The normal time limit for presenting a claim for unfair dismissal to a tribunal is set out in 111(2)(a) & (b) of the Employment Rights Act 1996.
17. Section 111(2)(a) provides that a tribunal shall not consider a claim of unfair dismissal unless it is presented before the end of the period of three months beginning with the effective date of termination.
18. In a case where an employee is dismissed without notice or with a payment in lieu of notice, the effective date of termination is the date on which that termination takes effect (section 97(1)(b), ERA 1996).
19. For the purposes of establishing the effective date of termination under the s.97(1)(b) ERA, where a dismissal is communicated to an employee in a letter, the contract of employment does not terminate until the employee has actually read the letter or has had a reasonable opportunity to read it: *Gisda Cyf v Barratt*, 2010 WL 3975647.
20. Section 111(2)(b) provides an exception to the primary three month time limit. There are two limbs to this test. Accordingly, a tribunal may consider a claim presented outside the primary time limit, if it is satisfied that:
  - it was not reasonably practicable for the claim to be presented within the normal time limit; and
  - the claimant has presented it within such further period as the tribunal considers reasonable.
21. The normal time limit is extended by section 270B ERA to take account of the obligation to enter into early conciliation facilitated by ACAS.
22. In order to determine how the normal time limit will be extended by early conciliation, it is necessary to identify Day A and Day B and then apply the extensions in section 207B(3) and 207B(4). Day A and Day B are defined in section 270B(2). Day A is the day on which the prospective claimant

initiates the early conciliation process and Day B is the date of the EC certificate issued when the process is concluded.

23. The extension under section 207B(3) operates to "stop the clock" during the period in which the parties participate in EC as it provides that in working out when a time limit expires, the period beginning with the day after Day A and ending with Day B is not to be counted.
24. The additional extension under section 207B(4) where the limitation date, as calculated by subsection 207B(3), falls in the period between Day A and one month after Day B.
25. The burden of proof for establishing that it was not reasonably practicable to present the claim in time is on the claimant.
26. Where an applicant has knowledge of his rights to claim unfair dismissal before an industrial tribunal, then there is an obligation upon him to seek information or advice about the enforcement of those rights: *Trevelyan (Birmingham) Ltd v Norton*, [1991] I.C.R. 488.
27. A period of illness should not be given the same weight in whatever part of the limitation period it falls. The approach should vary according to whether it falls in the earlier weeks, or the more important weeks leading up to the end of the limitation period: *Schultz v Esso Petroleum*, [1999] I.C.R. 1202.
28. The mere fact of a pending internal appeal is by itself insufficient to justify a finding of fact that it was not reasonably practicable to present a claim within the limitation period, although there may be cases where there are facts additional to the fact that there was an internal appeal pending, which justify that finding: *John Lewis Partnership v A P Charman*, UKEAT/0079/11/ZT.
29. If a claimant goes to a skilled adviser and the skilled adviser makes a mistake, in that case failing to advise a claimant of the time limit, the claimant will be caught by that mistake: *Dedman v British Building and Engineering Appliances Ltd* [1974] 1 WLR 171.
30. If the first limb of the test under section 111(2)(b) is satisfied, the tribunal must then proceed to consider whether it was presented within a reasonable time thereafter. This is a matter for the tribunal (*Wall's Meat Co Ltd v Khan* [1978] IRLR 499) bearing in mind the length of and circumstances of the delay.

## **Conclusions**

31. As I have said, I am satisfied that the Claimant became aware of the dismissal and read the dismissal letter on 25 October 2020. The dismissal was communicated to him in a letter and the contract of employment did not terminate until he read it on 25 October 2020. So, applying *Gisda Cyf v Barratt*, the effective date of termination for the purposes of s. 97(1)(b) is 25 October 2020.

32. The latest date for the presentation of his claim under the primary three month time limit was therefore Sunday 24 January 2021. (The Claimant only notified ACAS after the expiry of the primary limitation period.) The claim was not presented until Monday 1 February 2021 and was therefore not presented before the primary three month time limit expired. It was eight days late.
33. The Claimant was out of the UK having more than one operation, and his return to the UK was delayed by complications. He did not return to the UK until 12 December 2020, roughly half-way into the limitation period.
34. He quarantined on his return, and was still unwell and in pain. He needed to go to St Mary's and was told to rest for two weeks. The medical evidence records that as late as 8 January 2021 his soft tissue was still abnormal, and there was reswelling with pain, and I am satisfied that he continued to be unwell and in pain after that date.
35. His health condition improved during the limitation period, and was more serious earlier in the limitation period, becoming less serious in the more important last few weeks. However I am satisfied that for most of the limitation period it was not reasonably practicable for the claim to be presented solely due to his illness.
36. The claimant accepted that he was aware that there was a right to bring a claim for unfair dismissal. There was therefore an obligation on him to seek information or advice about the enforcement of his rights. The claimant did in fact seek advice from a solicitor after Christmas. It was not argued that had been misinformed or misadvised about the time limits, and he was clearly aware of them by the time that he submitted his claim. So I do not accept that the reason for the delay in presenting his claim was ignorance.
37. Focusing on the most important last few weeks of the limitation period, the substantial cause of his not presenting his claim was a combination of the fact that he remained unwell and his expectation that he would be reinstated on appeal. The substantial cause of his failing to present his claim was not only the pending appeal. For much of the limitation period it was not reasonably practicable for the claim to be presented solely due to his illness. In the last three weeks the substantial cause of his failing to present his claim was a combination of his still being unwell and his expectation that he would be reinstated as a result of the pending appeal. I am satisfied on the basis of the Claimant's oral evidence that he was not only waiting for the appeal but also remained unwell during this period, a period which followed what was clearly a period of very significant difficulties with his health.
38. Taking into account all of the circumstances as I have found them, I am satisfied that it was not reasonably practicable for the claim to be presented within the primary three month limitation period.
39. The claim was presented eight days after the expiry of the three month limitation period. I consider that that further period was reasonable in the circumstances.

40. My decision is therefore that the tribunal has jurisdiction to consider the claimant's claim.

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Tribunal Judge A Jack,  
acting as an Employment Judge

7 March 2022

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON  
08/03/2022.

FOR EMPLOYMENT TRIBUNALS