



EMPLOYMENT TRIBUNALS

Claimant: Mr A Shelton

Respondent: Inchcape Retail Limited

Heard at: London South

On: 22 January 2019

Before: Employment Judge Fowell

Representation:

Claimant Mr J S Jagpal

Respondent Mr B Ross instructed by Crossland Employment solicitors

JUDGMENT

The complaint of unfair dismissal was presented in time.

REASONS

Introduction

1. The claimant, Mr Shelton, was employed by the respondent, Inchcape Retail Ltd as a car salesman until his dismissal on grounds of conduct on 21 December 2017. This arose out of a car accident on 8 January 2017, the circumstances of which are disputed.
2. This preliminary hearing is to decide whether his complaint of unfair dismissal, submitted on 2 May 2018 was in time. The essential dates are as follows:
 - a. The disciplinary hearing took place on 21 December 2017

- b. On 22 December 2017 the respondent states that the outcome letter was posted.
 - c. On 19 February 2018 the outcome letter was emailed to Mr Shelton.
 - d. Early conciliation commenced on 25 April 2018.
 - e. It concluded two days later on 27 April 2018.
 - f. The claim form was submitted on 2 May 2018.
3. At this hearing it was accepted on the part of Mr Shelton that he was expressly told at his disciplinary hearing on 21 December 2017 that he was dismissed and so, as a matter of law, that was the date of dismissal. It follows that the claim form was submitted outside the primary time-limit and the remaining issues for me to decide, as set out in section 111 of the Employment Rights Act 1996 are:
- a. whether it was reasonably practicable for him to have submitted the claim form in time; and if not
 - b. was it submitted within such further period as was reasonable in all the circumstances?
4. I was assisted by a bundle of 150 pages, a witness statement from Mr Shelton, a skeleton argument and list of issues from Mr Ross.
5. Mr Shelton gave evidence briefly and I heard submissions from each side. Having done so, I make the following findings of fact.

Findings

6. The first issue is whether or not the company sent out the letter of dismissal, as they claim, on 22 December 2017. Mr Shelton's evidence was that he was waiting for the letter so that he could appeal. He did not really understand the basis for the dismissal and over the New Year period was in contact with various colleagues at work. He told some of them that he was still awaiting his dismissal letter but did not request it directly until 18 February 2018, by which time he was getting anxious. He had received his final payslip for December 2017 but it did not include holiday pay, and so his position seemed to him very unclear.
7. The respondent replied the following day by email. A PDF attachment with that email was said to be that dismissal letter. Mr Shelton's evidence was that the electronic, embedded properties of this document showed that it was created on 5 February 2018 and so had never been sent on the date claimed.
8. He was not challenged about that aspect, and so although I have not seen any original evidence on the point, I accept his account. So, although the company's position

throughout has been that he was sent this letter at the outset, that appears to be incorrect, as they must have known.

9. In any event, it would make little sense for Mr Shelton to allow nearly two months to pass whilst he was sitting on a letter setting out the reasons for dismissal and pretending not to have received it. He was anxious to challenge his dismissal and wanted to put in an appeal, for which he needed the letter. When he received it, he acted promptly, and on 21 February 2018 he submitted his appeal.
10. The appeal hearing took place on 7 March 2018. Mr Shelton is recorded in the minutes as saying that the evidence provided against him had been reviewed by an employment law solicitor. When questioned about it today he said that that was not true, he had never been to see an employment lawyer, and this was him, in his words, “puffing his chest out”.
11. Mr Shelton was represented at this hearing by his friend Mr Jagpal, who is not a solicitor. He is an auditor. He does not profess to have any knowledge of employment law but is acting on the basis that he would be better able to help his friend articulate his case. In that he has been very successful.
12. Given that Mr Jagpal has been the main representative on the Tribunal file from the outset, and appeared today, and given that I found Mr Shelton’s evidence otherwise consistent and reliable, I accept that this statement about consulting an employment lawyer was indeed a bluff. Mr Shelton added that he was employed as a car salesman and that is the sort of thing that is sometimes said, which may well be the case.
13. I accept therefore that at no time did he take any advice from a skilled adviser, nor was he aware of the normal time limits or procedure which applies to such cases. He did not take any step himself to find out until he contacted ACAS on 25 April 2018.
14. Matters dragged on after the appeal hearing. At page 54 of the bundle is an email to the claimant from Ms Meredith, the HR business partner who attended this hearing. She emailed to say that the company was conscious that some time had elapsed, that they were thoroughly investigating the issues raised and were waiting on some information from the police. She added that, “As soon as we receive that information we will formally come back to you with our findings.” The police report related to the circumstances of the accident.
15. I accept Mr Shelton’s evidence that he was acting throughout on the assumption that he needed to complete the appeal process before he was in position to bring a claim to a Tribunal. He therefore waited for this further information. On 9 April 2018 he wrote to Mr Sharman, who had conducted the appeal hearing, demanding that the appeal decision and follow-up actions be sent to him no later than five working days from receipt of his letter, adding that if he failed to give him a decision he would need to take further legal advice and potentially take legal action against the company. This too was a bluff,

and he had not taken any such advice, but his concern was simply to progress matters rather than having any specific time-limit in mind for Tribunal proceedings.

16. Mr Shelton received a response dated 12 April 2018, which I do not appear to have, but it appears from the surrounding correspondence that Mr Sharman told him that he was still waiting for the police report. Mr Shelton wrote back on 17 April 2018, complaining more strenuously about the delay. He also raised a grievance against Mr Sharman over his handling of the appeal and ended by stating that he had waited long enough - “way beyond what was reasonable” - and that “I will take legal advice on taking this matter to an employment tribunal” – a phrase which strengthens my view that he had not already done so. Mr Sharman responded promptly by letter dated Friday, 20 April 2018. This was a longer response taking issue with many of the points raised by Mr Shelton. In it he insisted that he had to wait for the police report. He reminded Mr Shelton that if his appeal was upheld he would be reinstated and receive the appropriate back pay.
17. That letter would have arrived in the ordinary course of post on Monday, 23 April 2018. On 25 April 2018 Mr Shelton contacted ACAS for advice. This was not intended to start the early conciliation process. I conclude that Mr Shelton did not know anything about that process, only that he could obtain some advice from ACAS. He then became aware for the first time of the three month deadline. The early conciliation process ended two days later, on Friday 27 April 2018, and he submitted the claim form on Wednesday 2 May 2018, three working days after that.

Applicable Law and Conclusions

18. As stated above, first issue is whether it was reasonably practicable to have submitted the claim form within the primary time-limit, which comprises three months plus the time allowed for early conciliation. I am grateful to Mr Ross for his clear and comprehensive skeleton argument.
19. Summarising the relevant guidance, three general rules apply:
 - a. This test should be given a ‘liberal construction in favour of the employee’ — [*Dedman v British Building and Engineering Appliances Ltd 1974 ICR 53, CA*](#);
 - b. What is reasonably practicable is a question of fact and thus a matter for the Tribunal to decide;
 - c. The onus of proving that presentation in time was not reasonably practicable rests on the claimant. As the Court of Appeal observed in *Dedman* - ‘That imposes a duty upon him to show precisely why it was that he did not present his complaint’.
20. The explanation here is simply that Mr Shelton was unaware of the time limit. [*In Porter v Bandridge Ltd 1978 ICR 943, CA*](#), the majority of the Court of Appeal, having referred to Lord Scarman’s comments in *Dedman*, ruled that the correct test is not whether the

claimant knew of his or her rights but whether he or she ought to have known of them.

21. Where the claimant is generally aware of his or her rights, ignorance of the time limit will rarely be acceptable as a reason for delay. This is because a claimant who is aware of his or her rights will generally be taken to have been put on inquiry as to the time limit. In Trevelyan (Birmingham) Ltd v Norton 1991 ICR 488, EAT, Mr Justice Wood said that, when a claimant knows of his or her right to complain of unfair dismissal, he or she is under an obligation to seek information and advice about how to enforce that right. Failure to do so will usually lead the tribunal to reject the claim.
22. An example of this approach is Sodexo Health Care Services Ltd v Harmer EATS 0079/08: Ms Harmer submitted an unfair dismissal claim 23 days late because she wrongly assumed that the time limit in respect of her claim would not start running until the end of the appeal process. Again, the crucial question was whether, in the circumstances, the employee was reasonably ignorant of the time limit. In that case she knew of the time limit but had failed to make proper inquiries about it, so her ignorance was not reasonable.
23. These cases impose a high standard on an employee in Mr Shelton's position, but care is still needed in considering his particular circumstances. Even though he was on notice to enquire about such time limits, it does not follow that this automatically translates to an assumption that he did know of such time limits immediately. Ultimately the question is whether his ignorance was reasonable in the circumstances.
24. Clearly Mr Shelton was focusing on his internal rights of appeal for much of this period. It is an understandable view. It used to be a requirement, before such a claim could be brought to an employment tribunal, that the employee had exercised his or her right of appeal. Then, for reasons which were essentially beyond to Shelton's control, the appeal process was still ongoing at the time the primary time limit expired and so he had not addressed his mind to the practicalities of bringing an employment tribunal claim, although he realised that that was the next step. The position is therefore not quite the same as someone who has been dismissed, given a letter of dismissal, exercise their right of appeal within a few days of that letter, had their appeal hearing within a further couple of weeks, and then has a reasonable further period within the normal time limit in which to turn their minds to the next stage of the process.
25. I note that simply waiting for the outcome of an appeal by itself is not in itself sufficient to justify the failure to bring a claim in time but it is relevant to consider the reasons for the delay in the appeal process. For the reasons set out above, this was entirely out of his control. I also note that it had not been concluded by the time he submitted his claim form so again, it is not quite the same as those cases in which an individual has waited for the outcome before going onto the next stage. He has pressed repeatedly for an outcome before seeking advice from ACAS at what appears to be a reasonable stage, and then acted appropriately.

26. Mr Jagpal made the point that he was not in a position to start taking advice about the prospects of a successful claim for unfair dismissal until he received the dismissal letter. That is not an absolute bar to taking advice, but I find that the point has force. Nearly two months elapsed before Mr Shelton was in a practical position to take any advice. I conclude that in all probability, if he had received his dismissal letter promptly no issue would have arisen over timeliness.
27. Accordingly I conclude this is the case in which, at the time at which the primary time-limit expired, his ignorance of the time limit was reasonable, and hence it was not reasonably practicable for him to have submitted the claim form on time.
28. This question is whether or not he did submit it within such further period as was reasonable. On this aspect, Mr Ross relies in particular on the case of Royal Bank of Scotland plc v Theobald EAT 0444/06, an unreported case cited in the IDS handbook on Unfair Dismissal. In that case, a delay of 13 days was held to be unreasonable. The claimant there was summarily dismissed for gross misconduct on 11 November 2005. On 19 November he consulted the Citizens Advice Bureau (CAB) regarding a potential unfair dismissal claim and was erroneously advised that he had to use RBS plc's internal appeal procedure before presenting a tribunal complaint. He duly lodged an internal appeal, which was dismissed on 9 February 2006. Later that day, he downloaded a blank ET1 claim form from the Employment Tribunals Service's website but did not immediately complete it. The three-month time limit for his unfair dismissal claim expired at midnight on 10 February but he did not present his claim until 23 February. The EAT held that, even taking into account the CAB's incorrect advice, he could not show that it was not reasonably practicable to have presented his claim in time — he still had time to present the claim within the time limit once he was told that his appeal had been rejected. In any event, the EAT considered a delay of 13 days between expiry of the time limit and the submission of the claim to be unreasonable.
29. I note that that was a case in which it was held that the claimant could (applying the reasonably practicable test) have submitted the claim form in time, and so the conclusion that any further delay is unreasonable is understandable. I have to approach this case on the basis that it was not reasonably practicable.
30. Mr Ross here laid emphasis on the fact that there was a 16 day delay between Mr Shelton's letter of 9 April 2018, in which he first raised the threat of legal action, and the contact made with ACAS on 25 April 2018. That does not however seem to me a realistic approach. Firstly, that threat of legal action was essentially a bluff as Mr Shelton had no idea of what was entailed. His main purpose was to chase for a response to his appeal. That response appears to have simply been a holding reply. His subsequent letter of 17 April pressed the point further, and indeed raised a grievance about Mr Sharman's handling of matters. As already noted, there was then the reply on Friday 20 April 2018 from Mr Sharman, with the appeal process still unconcluded, a letter which would have arrived on Monday, 23 April 2018. At that point Mr Shelton's patience was at an end and he contacted ACAS on 25 April. That further

two-day delay does not seem to me unreasonable, nor the three working day delay following the early conciliation certificate. In fact I am satisfied that it was reasonable, bearing in mind that such legal actions are not matters to be undertaken lightly and for the layman requires some investigation.

31. For all of the above reasons therefore I accept that the claim was presented in time.

Listing arrangements

32. Having concluded that aspect, the claim was listed for hearing on **10 and 11 June** before an Employment Judge sitting alone. It will be held at the same venue - London South Employment Tribunals, Montague Court, 101 London Rd, West Croydon, Surrey CR0 2RF.
33. The case had previously been listed for hearing and appropriate directions given, following which it appears that the necessary steps of disclosure, the preparation of a bundle of documents and witness statements are already complete. On reflection therefore it is not necessary to provide a further directions.

Employment Judge Fowell

Date 26 January 2019