



EMPLOYMENT TRIBUNALS

Claimant

Mr P McColgan

v

Respondent

DHL Services Limited

JUDGMENT OF THE EMPLOYMENT TRIBUNAL PRELIMINARY HEARING

In Judge's Chambers (on the papers)

On: 30 July 2020

Before: Employment Judge Lloyd

Appearances

For the Claimant: By written submissions

For the Respondent: By written submissions

JUDGMENT

The tribunal's judgment is:

1. The Claimant presented his claims of unfair dismissal and unauthorised deduction of holiday pay outside the statutory time limits provided.
2. It was reasonably practicable for him to have presented his claims within the primary time limits.
3. All the Claimant's claims are limitation barred and cannot proceed. The tribunal has no jurisdiction to hear the claims. I dismiss the Claimant's claims forthwith, in their entirety.

REASONS

Background

1. By my order of 21 May 2020, and with the consent of the parties, I directed that the preliminary issue of time limit in these proceedings would be heard by me in chambers on the basis of the case papers and the written submissions of each side. I set today's date, 30 July 2020, as the date for the chambers consideration.
2. This is a claim of unfair dismissal and accrued holiday pay by the Claimant. He was employed from 8 April 2002 to 21 May 2019, when he was summarily dismissed for gross misconduct. The Claimant was a warehouse operative based

at the Solihull site of Jaguar Land Rover. The Respondent is a commercial provider of logistics support. It operates a substance misuse policy.

The time issues

3. The Respondent contends that the tribunal does not have jurisdiction to hear any of the Claimant's claims on the grounds that his ET1 was presented out of time, that it was reasonably practicable for him to have presented his claims within the time limit; and that he is barred from proceeding.
4. The Respondent's case is that the normal limitation period was extended by early conciliation to 6 October 2019, for the unfair dismissal and 17 October, for the holiday pay claim. However, the Claimant submitted his ET1 claim form on 25 October 2019.
5. I must consider and determine whether or not it was reasonably practicable for the Claimant to present his claim on or before those dates; and if not, within what further reasonable period of time could the claim have been presented. If the claim is found to satisfy neither of those conditions, the tribunal has no jurisdiction to hear the unfair dismissal and holiday pay claims and the claims cannot proceed.
6. The Respondent submits that the Claimant's claims are out of time and should be struck out accordingly. Insofar as the time limits for the respective heads of claim which make up the Claims differ, the Respondent submits that the unfair dismissal Claim is out of time by nearly 3 weeks and the holiday pay Claim (but the Respondent contends that the Claimant has not particularised it) is out of time by 8 days. Both claims should be struck out, the Respondent argues.

The statute law

7. S.111 ERA 1996

(1) A complaint may be presented to an employment tribunal against an employer by any person, that he was unfairly dismissed by the employer.

(2) 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.

Section 207B - extension of time limits to facilitate conciliation before institution of proceedings - apply for the purposes of subsection (2)(a) above

8. The limitation period for bringing claims for underpaid holiday is three months and is also subject to extension to facilitate ACAS early conciliation.

9. Regulation 30(2) Working Time Regulations provides:

- (2) An employment tribunal shall not consider a complaint under this regulation unless it is presented—
 - a) before the end of the period of three months...beginning with the date on which the payment should have been made; *[and subject to the early conciliation period]*.
 - (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. I remind myself, further, of the provisions of ss.23(2) to (4) ERA 1996.

Case Law

10. The Respondent produced to the tribunal a bundle of case law on the issue of time limit and extension. The cases cited are all pertinent to the issues of this preliminary point in the present case. I make reference to them as legal sources and documentation before this tribunal at this time. I have considered their principles in my decision making. I do not give them detailed analysis in this written judgment.

Findings

- 11.** The Claimant was employed by the Respondent from 8 April 2002 until his dismissal on 21 May 2019. The Claimant was based at the Respondent's Jaguar Land Rover contract site in Solihull.
- 12.** The Respondent operates a substance misuse policy. On 29 March 2019, the Claimant tested positive for cocaine, in breach of the policy. Following an investigative and disciplinary hearing, and also a grievance by the Claimant alleging victimisation, it was decided that the Claimant would be summarily dismissed for gross misconduct.
- 13.** The Claimant was paid his accrued and outstanding holiday payment (6 days) on 25 June 2019 along with the Claimant's shift premium for May 2019. This was the final payment made to the Claimant by the Respondent.
- 14.** The Claimant submitted an appeal against his dismissal. An appeal hearing was held on 26 June 2019 The Claimant was informed in writing that his appeal had not been upheld.
- 15.** The Claimant presented his ET1 on 25 October 2019. However, no particulars of any holiday pay have been provided and no submissions have been made by the Claimant in this respect.
- 16.** I find that the unfair dismissal claim is out of time I must proceed to consider whether to grant an extension of time for submission of this claim. The Claimant must satisfy the Tribunal that "it was not reasonably practicable" for the complaint to be submitted by 6 October 2019.

17. The burden of proof for establishing jurisdiction, and that it was not reasonably practicable to present the claim in time, is on the Claimant; Porter v Bandridge Ltd 1978 1 WLR 1145 (p.1150). Time limits should be adhered to strictly; Robertson v Bexley Community Centre 2003 EWCA CIV 576. In Palmer and Saunders v Southend on Sea Borough Council [1984] 1 IRLR 119, the Court of Appeal suggested that the test is one of “reasonable feasibility”. Factors that can be taken into account will vary from case-to-case. The following are considerations and conclusions that this tribunal can draw from the evidence.
- a) Whether and when the Claimant knew of their right to bring a claim; the Claimant confirmed in his emails to the Tribunal dated 12 November 2019 and 3 June 2020 that he had checked with ACAS and his union representative about bringing a claim.
 - b) The Claimant commenced Early Conciliation with ACAS on 14 August 2019.
 - c) The Claimant contacted ACAS and subsequently presented his claim to the Tribunal; the Claimant was aware of the procedure and the legal time limits.
 - d) The Claimant references in his emails to the Tribunal dated 12 November 2019 and 3 June 2020 that he had received advice from his union representative in respect of bringing a claim. Further his union representative’s details are given in the Claim Form as his representative.
 - e) The Claimant also had his union representative with him in both the disciplinary hearings on 17 May 2019 and 21 May 2019 and the appeal hearing on 26 June 2019.
 - f) It may properly be inferred that the Claimant has taken legal advice or had access to legal advice before he issued the claims.
 - g) The Claimant contends that he was unaware of the time limit in his emails dated 12 November 2019 and 3 June 2020.
 - h) Ignorance of the right to bring a claim, or of the time limit or procedure for making a claim, does not satisfy the reasonable practicability test. The Tribunal must be satisfied that the Claimant’s ignorance of the relevant time limit was reasonable. The tribunal is not so satisfied.
18. The Claimant is suggesting in his emails to the Tribunal dated 12 November 2019 and 3 June 2020 that he was unable to present the claims in time due to illness, drug dependency and had pressing issues at the forefront of his mind. The Claimant has failed to provide any evidence to suggest that there was any physical or mental impediment such as illness preventing the Claim Form being lodged. Further, the Claimant asserts that his drug dependency “stretched through till August” (albeit no evidence is provided to support this). However, the Claimant was still able to commence early conciliation in August - contacting ACAS on 14 August 2019 - and indeed there was ample time to file the unfair dismissal claim on or before 6 October 2019 and the holiday pay claim by 17 October 2019.
19. The Claimant has not produced any medical evidence to support his position. He also failed to make any mention of any health issues in his ET1 Claim Form to acknowledge the reasons for his late submission.
20. The Claimant also suggested in his emails to the Tribunal dated 12 November 2019 and 3 June 2020 that he was unable to file the claim in time due to his wife’s illness and wider family circumstances. The Claimant provided three appointment letters with his email dated 12 November 2019 relating to his wife. However, these

are all dated just before or after the extended limitation date of 6 October 2019 and the holiday pay claim date of 17 October 2019. The Claimant was dismissed on 21 May 2019 and has provided no supporting evidence of any circumstances that prevented him filing the claim during the months of May, June, July, or August 2019.

21. There is no evidence to suggest as the Claimant contends, that it was not reasonably practicable for the Claimant to present his claims in time or within a reasonable period thereafter.
22. It is clear that the Claimant had access to a “skilled adviser” at the time of his dismissal and appeal and thereafter in relation to any ability to raise a complaint against the Respondent. The Claimant has taken legal advice and had access to legal advice before he issued the claims.
23. The Claimant has also sought to lay blame with his trade union as regards the lodging of the claims and contact generally in relation to conciliation and his complaint against the Respondent.
24. It was reasonably practicable to lodge the claims in time. If the Claimant has recourse at all, it should be with his trade union; not the Respondent. The same applies in respect of whether the Claims were presented within a reasonable period after expiry of a time limit.
25. However, this tribunal concludes that it was reasonably practicable for the Claimant to present all his claims within the prescribed time limits.
26. The same findings apply in relation to the Claimant’s holiday pay claims. The normal limitation period was extended to 17 October 2019. The Respondent’s Claims were lodged on 25 October 2019, and the holiday pay Claim therefore is 8 days out of time. The Respondent has relied on its submissions provided in respect of the unfair dismissal.
27. This tribunal concludes that it was reasonably practicable for the Claimant to present his holiday pay claims before 17 October 2019.

Conclusion

28. The tribunal has no jurisdiction to hear the Claimants claims of unfair dismissal and unpaid holiday pay.
29. I dismiss the Claimant’s claims in their entirety.

Signed by Employment Judge Lloyd

Signed and Dated: 30 July 2020