



# EMPLOYMENT TRIBUNALS

**Claimant:** Ms N Azzouz

**Respondent:** Samworth Brothers Limited t/a Kettleby Foods

**Heard at:** Midlands East Tribunal via Cloud Video Platform

**On:** 6 January 2022

**Before:** Employment Judge Brewer

## Representation

**Claimant:** Ms F Hussein, lay representative

**Respondent:** Mr C Finlay, Solicitor

## JUDGMENT

The claimant's claim for unfair dismissal is dismissed. The claim was brought out of time and the tribunal does not have jurisdiction to hear the claim.

## REASONS

### Introduction

1. This claim was originally listed for a final hearing today but following the application by the respondent to strike the claim out, this hearing was converted to a 3 hour open preliminary hearing to consider that application.
2. The hearing was conducted via CVP. Initially the claimant was not represented but her friend, Ms Hussein, was present and asked that she be allowed to represent the claimant. There was no objection to that from Mr Finlay and so Ms Hussein went on record as representing the claimant.

3. The claimant required an interpreter and before proceedings began the interpreter was sworn in. I then proceeded to explain in some detail the procedure we would follow and the basis of the respondent's application. I also explained the issues I would be required to determine.
4. I heard evidence from the claimant who swore an oath, I was provided with a number of documents to consider, and I heard submissions from both representatives. Given that the hearing took the full allocated time I reserved my decision which I set out here. In reaching my decision I have taken account of the evidence and submissions of the parties.

### Issues

5. The issue before me was whether the claimant's claim of unfair dismissal was brought in time and if not whether time should be extended.

### Law

6. Section 111(2) of the Employment Rights Act 1996 (ERA) provides that an employment tribunal shall not consider a complaint of unfair dismissal 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..."*

7. I set out here a summary of the relevant case law.
8. S.111(2)(b) ERA should be given a 'liberal construction in favour of the employee' (**Dedman v British Building and Engineering Appliances Ltd** 1974 ICR 53, CA).
9. The onus of proving that presentation in time was not reasonably practicable rests on the claimant. '*That imposes a duty upon him to show precisely why it was that he did not present his complaint*' (**Porter v Bandridge Ltd** 1978 ICR 943, CA). Accordingly, if the claimant fails to argue that it was not reasonably practicable to present the claim in time, the tribunal will find that it was reasonably practicable (**Sterling v United Learning Trust** EAT 0439/14).

10. Even if a claimant satisfies a tribunal that presentation in time was not reasonably practicable, that does not automatically decide the issue in his or her favour. The tribunal must then go on to decide whether the claim was presented 'within such further period as the tribunal considers reasonable' (see below).
11. In **Palmer and anor v Southend-on-Sea Borough Council** 1984 ICR 372, CA, the Court of Appeal conducted a general review of the authorities and concluded that 'reasonably practicable' does not mean reasonable, which would be too favourable to employees, and does not mean physically possible, which would be too favourable to employers, but means something like 'reasonably feasible'. Lady Smith in **Asda Stores Ltd v Kauser** EAT 0165/07 explained it in the following words: *'the relevant test is not simply a matter of looking at what was possible but to ask whether, on the facts of the case as found, it was reasonable to expect that which was possible to have been done'*.
12. A claimant's complete ignorance of his or her right to claim unfair dismissal may make it not reasonably practicable to present a claim in time, but the claimant's ignorance must itself be reasonable. As Lord Scarman commented in **Dedman v British Building and Engineering Appliances Ltd** 1974 ICR 53, CA, where a claimant pleads ignorance as to his or her rights, the tribunal must ask further questions: *'What were his opportunities for finding out that he had rights? Did he take them? If not, why not? Was he misled or deceived?'*
13. In **Porter v Bandrige 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*.
14. 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. Indeed, in **Trevelyans (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.
15. Jurisdiction for an out-of-time complaint was accepted in **Drewery v Carphone Warehouse Ltd** ET Case No.3203057/06, where the claimant had been in contact with ACAS. Following his dismissal, D contacted his local Jobcentre and, when he expressed concern over his dismissal, was referred to ACAS. He phoned ACAS for advice and was informed that there was little point in pursuing a tribunal claim until after his internal appeal against dismissal was concluded.

Nothing was said to D during the conversation to suggest that ACAS was an independent body not empowered to give advice and D was not told of the three-month time limit for making a claim. The appeal hearing was delayed due to errors on the employer's part and D presented his claim 12 days out of time. The tribunal found that it was not reasonably practicable for D to have presented the claim in time and accepted jurisdiction. While his ignorance of the time limit would not have excused his late claim, D had contacted the Jobcentre and ACAS — the latter of which he considered to be an authoritative body — and relied on ACAS's advice to await the outcome of his appeal. If such misleading advice had been given by an independent adviser, the claim would in all probability have been rejected, but with an organisation such as ACAS it was to be expected that callers would be informed of the limits on its role, something which ACAS failed to do on this occasion. The tribunal also took into account the fact that the employer had significantly delayed the hearing of D's appeal. D's claim was accordingly allowed to proceed.

16. The EAT upheld a similar decision in **DHL Supply Chain Ltd v Fazackerley** EAT 0019/18. There, F was dismissed on 15 March 2017 but his appeal was not heard until 22 June. Shortly after being told that his appeal had not been successful, F took advice and brought proceedings on 19 July. F explained that he had contacted ACAS some days after his dismissal and was advised that before considering any form of action such as tribunal proceedings he should first exhaust the internal appeal process. He did not seek any further advice and the employment judge found that it was reasonable for him to approach the matter on the basis of ACAS' advice. The EAT observed that if F had simply awaited the outcome of an appeal, this would not have been enough. However, the ACAS advice, while limited in scope, was relied upon and 'tipped the balance'. The EAT declined to find that the judge's decision had been perverse.
17. A debilitating illness may prevent a claimant from submitting a claim in time. However, this will usually only constitute a valid reason for extending the time limit if it is supported by medical evidence, particularly if the claimant in question has taken legal advice and was aware of the time limit. Note that such medical evidence must not only support the claimant's illness; it must also demonstrate that the illness prevented the claimant from submitting the claim on time.
18. In **University Hospitals Bristol NHS Foundation Trust v Williams** EAT 0291/12 the EAT emphasised that this limb of S.111(2)(b) does not require the tribunal to be satisfied that the claimant presented the claim as soon as reasonably practicable after the expiry of the time limit in order to allow the claim to proceed. Rather, it requires the tribunal to apply the less stringent test of asking whether the claim was presented within a reasonable time after the time limit expired. That said, a tribunal is unlikely to accept a late claim where

the claimant fails to act promptly once the obstacle that prevented the claim being made in time in the first place has been removed.

19. What amounts to a 'further reasonable period' for the purposes of S.111(2)(b) is essentially a matter of fact for the employment tribunal to decide on the particular circumstances of the case. There is no hard and fast rule about what period of delay is reasonable and the extent of the delay is just one of the circumstances tribunals will need to consider.
20. In **Cullinane v Balfour Beatty Engineering Services Ltd and anor** EAT 0537/10 Mr Justice Underhill, then President of the EAT, commented that the question of whether the period between expiry of the time limit and the eventual presentation of a claim is reasonable requires an objective consideration of the factors causing the delay and of what period should reasonably be allowed in those circumstances for proceedings to be instituted. Crucially, this assessment must always be made against the general background of the primary time limit and the strong public interest in claims being brought promptly.
21. In **Nolan v Balfour Beatty Engineering Services** EAT 0109/11 the EAT reiterated this last point, stating that tribunals, when considering whether to extend time under S.111(2)(b), should always bear in mind the general principle that litigation should be progressed efficiently and without delay. The EAT went on to hold that, when deciding what would have been a reasonable time within which to present a late claim, tribunals should have regard to all the circumstances of a case, including what the claimant did; what he or she knew, or reasonably ought to have known, about time limits; and why it was that the further delay occurred.

## **Findings of fact**

22. I make the following findings of fact.
23. The claimant was employed by the respondent as a production operative from 10 June 2005 until her summary dismissal on 31 March 2021 following a disciplinary hearing on 30 March 2021.
24. The claimant appealed against her dismissal and her appeal was heard on 19 May 2021 with the outcome given to her in writing on 21 May 2021.
25. The claimant contacted ACAS for early conciliation on 29 July 2021 and she received her early conciliation certificate on 20 August 2021.
26. The claimant presented her ET1 to the tribunal on 24 August 2021.

27. Given the effective date of termination was 31 March 2021 the claim form should have been presented by 30 June 2021 plus any extension for early conciliation. In this case although that the claimant did not contact ACAS until after the principal time limit had expired, I am still required to consider whether it was reasonably practicable for the claim to have been brought in time and if not whether the extra time taken was reasonable.

### **Discussion and conclusion**

28. In relation to the claimant's evidence, for the reasons set out below I found her to be a less than credible witness.

29. Before she gave evidence the claimant said that she could not remember anything and that she had relied on her friend Ms Hussein to deal with her claim. Ms Hussein is not legally qualified. However, during her evidence, it became apparent that the claimant did recollect a number of matters in sufficient detail but it is fair to say that she remained a reluctant witness of fact. There was some suggestion that Ms Hussein be allowed to give evidence for the claimant which is to say that she in fact be allowed to give the claimant's evidence which of course I did not allow.

30. Initially the claimant denied that she had been dismissed on 31 March 2021. She was taken to the letter of dismissal which was clear that she had been told in person on 31 March 2021 that she was being summarily dismissed. The discussion around this took some time and eventually the claimant said that the information which had been provided in the claim form was correct and despite her initially saying that she was not dismissed on 31 March 2021 she later conceded that she had been. Given that she appealed against her dismissal and the appeal was heard on 19 May 2021 it is difficult to understand why the claimant initially denied that she had been dismissed as set out in the letter of dismissal.

31. As I have said above, I find as a fact that the claimant was dismissed on 31 March 2021, her appeal was determined on 19 May 2021 with the decision being sent in writing on 21 May 2021.

32. The claimant had worked for around 15 years for the respondent with no issues having arisen until the matters arose in respect of which she was dismissed, about which I make no comment.

33. In relation to the claimant's ability to speak English I find as a fact that her standard of English was reasonable. She accepted that she had worked for 15 years being supervised by people who spoke English or what she referred to as broken English, all of which she clearly understood sufficiently to perform well in her role and I find that it is highly unlikely that someone who purports to be

unable to understand English sufficiently to bring a claim of unfair dismissal could have managed to survive in the workplace without apparent difficulty for such a lengthy period without access to constant interpretation services. In my judgement the claimant was overstating the extent to which her ability to understand English was impaired by it not being her first language. I was particularly struck by the fact that she attended and fully participated in an appeal hearing without any interpreter being present to assist her and I did not accept her evidence that the notes of the appeal hearing were fabricated.

34. The claimant accepted that she contacted ACAS on 29 July 2021 and when pressed on the point about whether she had tried to contact them earlier she said she had, and the date she gave for that was 24 August 2021. It was pointed out that this post-dated what ACAS referred to as the initial contact date and then the claimant agreed that she had first contacted ACAS on 29 July 2021, not earlier as she had initially asserted.
35. When pressed further on why this was the first time she had contact ACAS, the claimant said that she did not know how to use a computer. The claimant also asserted that she did not know how to use a telephone although again when pressed further on this she agreed that she did know how to make phone calls on a telephone.
36. The claimant asserted that during the COVID-19 lockdown period, ACAS offices were closed and this explained why she could not make contact with them. This was clearly untrue. First, ACAS offices were not closed. Second, given that the claimant had clarified that her first contact was on 29 July 2021 and that was clearly successful contact, given that that is the date set out in the letter from ACAS as the date of first contact, the failure to contact ACAS sooner was not because they were not contactable but was because the claimant had not tried to contact them sooner.
37. The claimant asserted in general that she was not aware of her right to claim unfair dismissal at the point she was dismissed. She said she became aware of the right later on. The claimant said that after she was dismissed, she took the letter of dismissal and the appeal letter dated 21 May 2021 to her friend, Ms Hussein, and from that date she knew that she had the right to complain of unfair dismissal. The claimant also accepted that from that date she knew of the time limit for claiming unfair dismissal.
38. During her employment the claimant was a member of an independent trade union who represented her at both her dismissal hearing and her appeal hearing. The claimant accepted that she could have asked the union about her employment rights, but she failed to do so.

39. During her submissions Ms Hussein asserted that she had been told by an ACAS officer that she had 12 weeks to bring a claim for unfair dismissal. She also said that following receipt of the ACAS early conciliation certificate she contacted ACAS who said that she had a month to bring a claim. Ms Hussein said that she counted the 12 weeks from the 20 August 2021 date. What Ms Hussein did not say was that she was told by an ACAS officer that she had 12 weeks from **that date** to bring the claim or even that she had a further month from **that date**.
40. Having listened to all of the evidence and submissions and even taking into account what Ms Hussein said in her submissions, which in fact amounted to evidence not given on oath and after the cases had closed, the claimant's case is rooted in ignorance both of the right to claim and more importantly of time limits. But there is a central contradiction in the evidence of the claimant and the submissions made on her behalf. The claimant asserted that she was aware of her right to claim unfair dismissal and of the time limit following her discussion with Ms Hussein on or around 21 May 2020, and if that is correct then Ms Hussein's submissions about what she was told by ACAS are irrelevant. In any event Ms Hussein's submissions about what she thought she was told by ACAS do not fall within the kind of incorrect information the claimants were faced with in the two cases I have referred to above dealing with incorrect information from ACAS. The reference to being told about 12 weeks to bring a claim for unfair dismissal is broadly correct information although strictly the period is 3 months. As I have said there is no suggestion that that Ms Hussein was told that the 12 weeks or three months ran from the date of any discussion with ACAS or from the date of the EC certificate. As for the reference to the one month or one further month, this would reflect the fact that the conciliation period was in effect one month, but there is no evidence that whoever told Ms Hussein she had a further month to bring a claim was aware that the primary time limit had expired before the claimant had even made contact with ACAS.
41. In order for a claimant to rely on ignorance, she must show that such ignorance was reasonable. The claimant relies upon her inability to speak English, her inability to use a computer and her reliance upon her friend. In turn her friend, Ms Hussain, relies upon incorrect information from ACAS.
42. Given that the claimant's own evidence was that she was aware of her rights on or around 21 May 2021, I reject the contention that it was not reasonably practicable for her to bring her claim in time. If she was aware of the time limit when she says she was then at that point she still had four or five weeks to contact ACAS and even longer therefore to bring her claim which would have in time. Given that the details in her claim form amount to three lines of text I can see no reason why it was not reasonably practicable for that detail to have been



provided by the claimant to Ms Hussein, over the telephone of necessary, and then to ACAS and lastly to the tribunal within the primary time limit particularly given that would have been extended at least for the period of early conciliation or for an extra month. To put it another way I can see no good reason why ACAS were not contacted as soon as the claimant was aware she had the right to complain of unfair dismissal and of the relevant time limit.

43. Even though the claimant put herself in the hands of a lay representative, it is apparent from the claimant's evidence that that lay representative i.e. Ms Hussein was the very person who advised the claimant that she had the right to complain and of the time limit. Furthermore, given that the claimant had access to a trade union who provided representation at both dismissal and appeal hearings, it is inconceivable that they would not have either provided or been able to provide details of what the claimant needed to do in order to bring a claim. It was the claimant's choice not to seek their advice. In effect the claimant buried her head in the sand for a period of time and cannot rely on her own failure to inform herself of her rights as justification for missing a time limit set by statute for bringing a claim without any or any good reason. In short, I do not find that the claimant and/or Ms Hussein were ignorant, but if they were, that ignorance was not reasonable
44. For those reasons I find that it was reasonably practicable for the claimant to bring her claim for unfair dismissal within the primary time limit, but I do not need to go on to consider whether the extra time taken was reasonable. The claim is dismissed because the tribunal does not have jurisdiction to hear it.

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Employment Judge Brewer

Date: 6 January 2022

JUDGMENT SENT TO THE PARTIES ON

7 January 2022

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FOR THE TRIBUNAL OFFICE

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