



EMPLOYMENT TRIBUNALS

Claimant: Liam McInally
Respondent: Clapton Park Management Organisation
Heard at: East London Hearing Centre
On: 24 February 2022
Before: Employment Judge Hallen
Representation
Claimant: Mr. M. Singh-Counsel
Respondent: Ms C. Jennings- Counsel

RESERVED JUDGMENT

The judgment of the Tribunal is that: -

1. The Claimant presented his claim of unfair dismissal after the time limit imposed by Section 111 of the Employment Rights Act 1996 had expired and the Tribunal has no jurisdiction to hear that complaint.
2. The Claimant's claim is accordingly struck out.

REASONS

Background and Issues

1. This matter came before Employment Judge Lewis on 1 November 2021 at a preliminary telephone hearing. Following the hearing, Judge Lewis listed the matter to be heard before me to consider whether the Claimants claim for unfair dismissal was out of time so that the Tribunal had no jurisdiction to hear it. The Claimant at that hearing had withdrawn his other claims for race, age and religious discrimination along with his claim for unpaid wages such as redundancy pay, notice pay and other payments. In addition, prior to the hearing, on 21 October 2021, the Claimant through his solicitors made an application to amend his claim to add a claim for disability discrimination.

2. It was common ground that this claim for unfair dismissal was prima facie out of time, the following being the salient dates: a. Effective Date of Termination ('EDT') – 24 October 2020 b. The Claimant entered Early Conciliation – 19 November 2020 c. Date of Early Conciliation certificate – 19 December 2020 d. Time limit extended to 22 February 2021 e. The ET1 was actually presented – 12 March 2021.

3. As noted by Employment Judge Lewis at the previous preliminary hearing and brought to my attention by the Respondents counsel who was at the previous hearing, in order for a claim to be amended, there has to be a claim to amend. If the claim for unfair dismissal was out of time, there was no claim to be amended. As such, the issue of jurisdiction regarding the unfair dismissal claim needed to be determined first. Only then, if the claim continued, could the application to amend to include a fresh claim of disability discrimination be considered.

4. Produced for me at the preliminary hearing, was an opening note from the Respondent, a skeleton argument on behalf of the Claimant, the Claim Form, the Response Form, the Claimants witness statement and an agreed preliminary hearing bundle of documents made up of 45 pages including the initial order of Judge Lewis. The Claimant gave evidence after adopting his witness statement and was cross examined. The parties also had an opportunity of making closing submissions and I reserved my judgement.

Facts

5. The Claimant was employed as a maintenance operative by the Respondent between 24 April 2018 to 24 October 2020 at which time he was dismissed for gross misconduct. The termination date was 24 October 2020.

6. The Claimant went off work on 2 January 2020 by reason of bladder problems. He was signed off work from 25 June 2020 until 24 October 2020.

7. By letter dated 11 March 2020, the Claimant was invited to a welfare meeting on 17 March 2020. This meeting was scheduled to get an update on the Claimant's absence, to understand how the Respondent could offer the Claimant support and potentially assist him in returning to work.

8. On 17 March 2021, the Claimant emailed stating that he could not attend the welfare meeting due to ill health. By letter dated 24 March 2020, the meeting was rescheduled for 26 March 2020 and would take place at this time by telephone.

9. The Claimant did not attend this welfare meeting, nor did he inform the Respondent that he would not be attending. The Claimant did not answer his telephone. The Respondent wrote to the Claimant on the same date asking him to call and reschedule the meeting. Thereafter, there were email exchanges between the Respondent and the Claimant regarding his health and treatments he was receiving.

10. The Claimant obtained a fit note dated 28 August 2020 stating that he was fit to return to work. On 4 September 2020, the Claimant had a return-to-work meeting, during which concerns were raised regarding his fitness to return to work and also over aggressive emails that he had been sending to HJ and TB employees/managers of the Respondent. As a result, he was placed on medical suspension until he could be reviewed by the Respondents Occupational Health adviser.

11. The Respondent's Occupational Health adviser reviewed the Claimant on 24 September 2020 and deemed him fit to attend work. The Claimant was then expected to return to work on 5 October 2020. He did not attend work and was marked absent without leave.

12. In September 2020, the Claimant sent the Respondent what it deemed to be a series of abusive, aggressive and rude emails to HJ and TB who managers of the Respondent. The Claimants were investigated by the Respondent as part of the disciplinary process.

13. By letter dated 1 October 2020, the Claimant was invited to a disciplinary hearing on 5 October 2020. The purpose of the hearing was to discuss emails which had been sent by the Claimant in September 2020, which were considered to amount to misconduct contrary to the employee handbook, specifically: "*Rudeness towards customers, members of the public or other employees, objectionable or insulting behaviour; harassment, bullying or bad language*".

14. The Claimant was reminded that he had a number of previous informal warnings and as such the misconduct could potentially result in a final written warning. The Claimant was informed of his right to be accompanied to the hearing.

15. The Claimant did not attend work on 5 October 2020, and he did not attend the scheduled meeting. He did not provide an explanation for his lack of attendance.

16. By letter dated 6 October 2020, the Respondent informed the Claimant that he was absent from work without leave or prior permission being obtained. He was informed that it was expected that he would return to work the following day unless his GP had signed him off work. The disciplinary hearing was rescheduled for 7 October 2020. The Claimant was offered the option of telephone or online video hearing if he could not attend this meeting. He was also warned that if he did not attend, the hearing would continue in his absence.

17. In addition, within this letter dated 6 October 2020, the Claimant was informed of the Respondent's grievance procedure and was invited to raise a grievance if he was unhappy with the progression of the disciplinary process. The grievance policy was also sent with the letter.

18. The Claimant did not attend the rescheduled hearing on 7 October 2020. The Claimant replied with various emails refusing to attend the hearing. The meeting went ahead in his absence and following review of the email correspondence and the record of the return-to-work meeting dated 4 September 2020, it was decided that the Claimant be issued with a final written warning. The Claimant was notified of this by letter dated 8 October 2020. He was informed of his right to appeal against this penalty.

19. In addition, in the letter dated 8 October 2020, the Claimant was told that he remained absent from work without leave and was expected to return to work the following day unless he had been signed off by his GP. He was warned that further disciplinary action may be taken if he continued to fail to follow the Respondents absence reporting procedures.

20. The Claimant did not attend work on 9 October 2020 and remained on unauthorised absence. By letter dated 9 October 2020, the Claimant was invited to make immediate contact with the Respondent to discuss his absence. The Claimant replied by email. It was noted that the Claimant had sent aggressive emails that week and again was invited to

follow the grievance policy if he had any concerns regarding his workplace. He was also invited to a disciplinary hearing on 13 October 2020 in order to address his current unauthorised absence and his failure to follow the company absence reporting process.

21. The Claimant replied on 13 October 2020, stating that he did not recognise or accept the disciplinary action taken against him by the Respondent. He made broad reference to "*health and safety and worker rights*" as being the reasons for his unauthorised absence from the workplace. As a result, the disciplinary hearing was rescheduled for 20 October and the Claimant was invited to attend to discuss his concerns and the reasons for his absence. The Claimant was warned that if he did not attend the hearing would proceed in his absence. He was warned that the allegations could amount to gross misconduct and dismissal without notice was a possibility.

22. The Claimant did not attend the disciplinary hearing dated 20 October 2020 and continued to remain absent from work without leave or prior authorisation. He failed to engage with the Respondent or attend any meeting to discuss his reasons for not attending work. The disciplinary hearing went ahead in the Claimant's absence. It was noted that the Claimant had been absent without leave since 5 October 2020, his sick note having expired on 28 August 2020. It was also noted that he had been invited to discuss his concerns regarding health and safety in a meeting but had failed to do so. He was also invited to consider the grievance policy and again he failed to do so.

23. By letter dated 23 October 2020, the Claimant was dismissed for gross misconduct. He was informed of his right to appeal.

24. The Claimant appealed against both disciplinary actions against him by email dated 5 November 2020. An appeal hearing went ahead on 27 November 2020. The Claimant did attend this hearing. The Claimant challenged any informal previous warning and thereby the existence of a final written warning. The Claimant was provided with evidence of previous warnings during the appeal hearing.

25. By letter dated 17 December 2020, the Claimant's appeal points were addressed in turn and his appeal was dismissed. At the hearing before me, the Claimant argued that he believed that the letter dismissing his appeal of 17 December 2020 was the date of dismissal and that the three-month time limit for lodging a claim in the Tribunal ran from this date. I did not accept this evidence. It was clear from the Claim Form completed by the Claimant himself that he believed that he was dismissed on 20 October 2020 as he entered this date in the Claim Form. This date was actually the date of the disciplinary meeting that led to his dismissal and his actual date of dismissal was 24 October 2020 when he received the dismissal letter. Nevertheless, it did show that the Claimant knew that he had been dismissed on or around 24 October 2020 and that he knew that this was the date of dismissal and not 17 December which he sought to argue was the actual date of dismissal. In addition, in an email sent to the Respondent on 24 December 2020 chasing the appeal outcome, the Claimant said, 'Give me my job back please'. This was at a time prior to him having received the letter of 17 December 2020 dismissing his appeal. This indicated that the Claimant knew that he had been dismissed on 24 October 2020 and not as he said at the hearing on 17 December 2020.

26. In evidence at the hearing, the Claimant confirmed in cross examination that he had sought advice from ACAS as to his rights to make a claim in the Employment Tribunal on or around 19 November 2020. In addition, he sought advice from his current solicitor Bethan

Rosson of Cartwright King about his rights as well as doing his own research on Google and downloading and printing the Employment Rights Act 1996 himself at about this time as well. Indeed, the name and address of Ms Rosson is on the Claim Form as the Claimants representative. Although his witness statement sought to indicate that at this time he was behaving erratically and suffered from issues with his mental health leading to memory loss and confusion, he did confirm in his evidence that he was engaged with the Employment Tribunal process in terms of his rights and the procedure to follow at least with regard to the early conciliation process. In addition, in cross examination he confirmed that he did know about the time limit for lodging the Claim Form from his discussions with ACAS and with Ms Rosson but believed that this ran from the conclusion of the appeal on 17 December 2020 and not from the date of dismissal on 24 October 2020.

27. In cross examination, the Claimant gave evidence that at the time he lodged his Claim Form he did not tick the box that confirmed that he was making a claim for disability discrimination because he did not believe that he was disabled or that he was treated less favourably due to disability. At the time, he said his main concern was that he was unfairly dismissed and discriminated against due to receiving less pay than two other maintenance operatives that he worked with. He also agreed that the Claim Form did not contain anything relating to disability discrimination because he was not concerned about this claim at the time he lodged the Claim Form for the reasons stated above. It was only towards the end of May 2021 did he take advice from his solicitors that he may have a claim for disability discrimination and this date he accepted was after the Claim Form had been received by the Tribunal on 12 March 2021. He also accepted that the application to amend his claim was not made by his solicitors until 21 October 2021, a week or so before the previous hearing before Judge Lewis and over five months since his Claim Form was received by the Tribunal.

Law

The Statute

28. The material parts of the Section 111 of the Employment Rights Act 1996 are as follows:

111 Complaints to employment tribunal.

(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.

A two-stage test

29. Where a claim is presented outside the period of 3 months it is necessary to ask firstly whether it was not reasonably practicable to present the claim in time and, only if it was not, go on to consider whether it was presented in a reasonable time thereafter. The two questions should not be conflated. There is no general discretion to extend time and the burden of proof rests squarely on the Claimant to establish that both limbs of the test are satisfied.

The meaning of “reasonably practicable”

30. The expression “reasonably practicable” does not mean that the employee can simply say that his/her actions were reasonable and escape the time limit. On the other hand, an employee does not have to do everything possible to bring the claim. In **Palmer and Saunders v Southend-On-Sea Borough Council [1984] IRLR 119** it was said that reasonably practicable should be treated as meaning “reasonably feasible”.

31. **Schultz v Esso Petroleum Ltd [1999] IRLR 488** is authority for the proposition that whenever a question arises as to whether a particular step or action was reasonably practicable or feasible, the injection of the qualification of reasonableness requires the answer to be given against the background of the surrounding circumstances and the aim to be achieved.

“Reasonable ignorance”.

32. The question of whether it is open to an employee ignorant of her rights to rely upon that ignorance as a reason why it was not reasonably practicable to present a claim in time has been the subject of a number of decisions of the higher courts. In **Dedman v British Building and Engineering Appliances Ltd [1973] IRLR 379** Scarman LJ said the following: *“Does the fact that a complainant knows he has rights under the Act inevitably mean that it is practicable for him in the circumstances to present his complaint within the time limit? Clearly no: he may be prevented by illness or absence, or by some physical obstacle, or by some untoward and unexpected turn of events. Contrariwise, does total ignorance of his rights inevitably mean that it is impracticable for him to present his complaint in time? In my opinion, no. It would be necessary to pay regard to his circumstances and the course of events. What were his opportunities for finding out that he had rights? Did he take them? If not, why not? Was he misled or deceived? Should there prove to be an acceptable explanation of his continuing ignorance of the existence of his rights, it would not be appropriate to disregard it, relying on the maxim “ignorance of the law is no excuse.” The word “practicable” is there to moderate the severity of the maxim and to require an examination of the circumstances of his ignorance. But what, if, as here, a complainant knows he has rights, but does not know that there is a time limit? Ordinarily, I would not expect him to be able to rely on such ignorance as making it impracticable to present his complaint in time. Unless he can show a specific and acceptable explanation for not acting within four weeks, he will be out of time.”*

33. In **Wall's Meat Co Ltd v Khan [1978] IRLR 499** Brandon LJ dealt with the issue of ignorance of rights as follows: *“The impediment may be physical, for instance the illness of the complainant or a postal strike; or the impediment may be mental, namely, the state of mind of the complainant in the form of ignorance of, or mistaken belief with regard to, essential matters. Such states of mind can, however, only be regarded as impediments making it not reasonably practicable to present a complaint within the period of three*

months, if the ignorance on the one hand, or the mistaken belief on the other, is itself reasonable.”

34. In those and in subsequent cases it has been held that the question of whether bringing proceedings in time was not reasonably practicable turns, not on what was known to the employee, but upon what the employee ought to have known **Porter v Bandidge Ltd [1978] ICR 943, Avon County Council v Haywood-Hicks [1978] IRLR 118**. A further proposition can also be gleaned from those authorities. Where an employee is aware that a right to bring a claim exists it will be considerably harder to show that they ought not have taken steps to ascertain the time limit within which such claims should be presented.

Causation and “reasonable practicable”.

35. In **Palmer v Southend-On-Sea Borough Council [1984] IRLR 119** following a review of the earlier authorities including *Dedman and Wall’s Meat* May LJ concluded that the question of whether a step was or was not reasonably practicable would include the advice given, or available, but that was a material consideration which would have to be taken into account along with all of the other circumstances.

36. In **Northamptonshire County Council v Entwhistle [2010] IRLR 740** after an extensive review of the authorities the then President of the EAT said that the question posed under Section 111(2) of the Employment Rights Act 1996 “is not one of causation as such”. In that case an earlier error by the employer has led to a negligent assumption by the Solicitor retained by the Claimant. The EAT overturned the decision of the Employment Judge that it was not reasonably practicable to bring the claim in time.

A reasonable period thereafter

37. The question of whether an employee has presented their claim within a reasonable time of the original time limit is a question to be determined objectively by the employment tribunal taking into account all material matters see **Westward Circuits Ltd v Read [1973] ICR 301, NIRC**.

38. In **Cullinane v Balfour Beatty Engineering Services Ltd UKEAT/0537/10** the then president of the EAT said: *“Ms Hart pointed out that the question which arises under the second stage in s 139(1)(b) is couched simply in terms of what further period the tribunal would regard as “reasonable”, and not, like the question under the first stage, in terms of reasonable practicability. She submitted that it followed that the “Dedman principle” – namely that for the purpose of the test of reasonable practicability an employee is affixed with the conduct of his advisers (see, for the most recent review of the case law, Entwhistle v Northamptonshire County Council (2010) UKEAT/0540/09/ZT, [2010] IRLR 740) – does not fall to be applied. She pointed out that that principle is a consequence of the ultimate test being one of practicability (not even, be it noted, when the test was first formulated, reasonable practicability), and that the consideration of what further period was “reasonable” did not require so strict an approach. She made it clear that she was not saying that the fact that a Claimant had been let down by his advisers was decisive of the question of reasonableness at the second stage, but she submitted that it must be a relevant consideration. [16] I accept the validity of the formal distinction advanced by Ms Hart, but I do not believe that it makes any real difference in practice as regards the question of the relevance of the culpability of the Claimant’s legal advisers. The question at “stage 2” is what period – that is, between the expiry of the primary time limit and the eventual*

presentation of the claim – is reasonable. That is not the same as asking whether the Claimant acted reasonably; still less is it equivalent to the question whether it would be just and equitable to extend time. It requires an objective consideration of the factors causing the delay and what period should reasonably be allowed in those circumstances for proceedings to be instituted – having regard, certainly, to the strong public interest in claims in this field being brought promptly, and against a background where the primary time limit is. If a period is, on that basis, objectively unreasonable, I do not see how the fact that the delay was caused by the Claimant's advisers rather than by himself can make any difference to that conclusion.”

39. What I take from these authorities is that, in assessing whether proceedings have been brought within a reasonable period after the expiry of the original time limit, it is necessary to have regard to all relevant matters including, where appropriate, the factors that made it not reasonably practicable to present the claim in time. Whether they remained operative may be an important matter.

Conclusion and Findings

40. I noted from the history of this case that following the preliminary hearing before Judge Lewis on 1 November 2021, the Claimant's only live claim was for unfair dismissal. He had withdrawn all of his other claims for race, religion and age discrimination as well as his claims for unpaid sums such as redundancy pay, arrears of pay and other payments.

41. I also noted that it was common ground between the parties that this claim for unfair dismissal was prima facie out of time, the following being the salient dates: a. The EDT was 24 October 2020 b. The Claimant entered into the Early Conciliation process – 19 November 2020 c. The Early Conciliation certificate was issued – 19 December 2020 d. As a result the time limit for lodging the Claim Form was extended to 22 February 2021 e. The ET1 was actually presented – 12 March 2021.

42. This open preliminary hearing was set down by Employment Judge Lewis on 1 November 2021 to determine the issue of jurisdiction and to hear the Claimant's application (dated 22 October 2021) to amend the claim to include a claim of disability discrimination.

43. As noted by Employment Judge Lewis at the previous preliminary hearing, in order for a claim to be amended, there had to be a claim to amend. If the claim for unfair dismissal was out of time, there was no claim to be amended. As such, I find that the issue of jurisdiction regarding the unfair dismissal claim needed to be determined first. Only then, if the claim continued, could the application to amend made on 21 October 2021 to include a fresh claim of disability discrimination be heard.

44. In relation to the test in section 111 ERA as cited above, the question for me to determine at stage one was where a claim was presented outside the period of 3 months, I had to ask whether it was not reasonably practicable to present the claim in time and, only if it was not, go on to consider whether it was presented in a reasonable time thereafter. The two questions should not be conflated. Although I have every sympathy for the Claimant and his various medical problems which plagued him during the latter part of his employment with the Respondent, it is my view that it was reasonably practicable for the Claimant to have lodged his Claim Form with the Tribunal within the primary three month time limit.

45. Whilst the Claimant said in his witness statement that during the latter part of his employment he had mental health issues that impacted on his memory and caused confusion, it was clear to me from his evidence to the Tribunal that at the time that he had commenced the ACAS early conciliation process in the middle of November 2020, he obtained advice from ACAS and also from his solicitor as to his rights in respect of unfair dismissal and also in respect of the time limits for commencing the claim in the Employment Tribunal namely 3 months. It was clear to me that the Claimant despite his difficulties was fully engaging in the process and indeed he took pro bono advice from Ms Rosson for 30 minutes prior to the commencement of the ACAS pre-claims conciliation process and was aware of the procedure to follow as well as the time limits that applied.

46. I did not accept his evidence that he believed that the three-month period ran from 17 December 2020 on the basis that not only was he aware of his rights from taking advice from Ms, Rosson and the ACAS officer in the middle of November 2020 but also in his Claim Form he also specified that the termination date was 20 October 2020. This was not consistent with the evidence that he gave to me that he was under the impression that the termination date only occurred when he became aware of the dismissal of his appeal on 17 December 2020. Furthermore, prior to receiving the outcome of his appeal, on 24 December, he wrote to the Respondent and asked for his job back. Again, this confirmed that the Claimant was aware that he had been dismissed otherwise he would not be asking for his job back. I find that the Claimant was well aware that his dismissal was on or around 20 October 2020 and not on 17 December 2020. Accordingly, he was aware or ought reasonably to be aware that the Claim Form had to be lodged at the Tribunal within three months of the date of dismissal based on the advice that he took from ACAS and his solicitor at the time he was involved in the ACAS early conciliation process.

47. Given my above findings, I must conclude that it was reasonably practicable for the Claimant to have filed his Claim Form within the primary time limit so there is no need for me to go on to consider Step 2 of the process as set out above in the Law section of this judgement. Furthermore, as the Tribunal had no jurisdiction to hear the Claimants claim for unfair dismissal and as there are no other outstanding claims in the Claim Form as they were all withdrawn by the Claimant, the application to amend the Claim Form dated 21 October 2021, five months after the Claim Form was lodged, cannot proceed. As judge Lewis rightly said at the previous hearing, in order for a claim to be amended, there has to be a claim to amend. As the claim for unfair dismissal was out of time, there was no claim to be amended.

48. For the sake of completeness, I should also add that although the Claimant's representative argued before me, that there was an extant claim for disability discrimination in the Claim Form lodged by the Claimant and received by the Tribunal on 12 March 2020, the Claimant gave evidence himself that no such claim was made by him. He confirmed that he did not tick the box claiming disability discrimination in the Claim Form nor did he set out any supporting facts in respect of disability discrimination because he did not believe that he was disabled. Furthermore, he did not believe that he had suffered any less favourable treatment due to disability. As a consequence, he confirmed that there were no facts set out in the Claim Form that supported such a claim. His evidence to me, which I accepted, was that the disability discrimination claim was only brought to his attention towards the end of May 2021 after he received advice from his solicitors who then, five months later, made an application on 21 October to amend the Claim Form to seek leave to add a claim for disability discrimination. Therefore, I find that there was no extant claim for disability discrimination in the Claim Form.

49. In conclusion, the Claimant's claim for unfair dismissal is dismissed as the tribunal has no jurisdiction to hear and accordingly it is struck out.

**Employment Judge Hallen
Dated: 2 March 2022**