



EMPLOYMENT TRIBUNALS

Claimant: Mr T B Barnden

Respondent: Brighton and Hove Albion Football Club

Heard at: Croydon (by video)

On: 3 September 2020

Before: Employment Judge O'Rourke

Representation

Claimant: In person

Respondent: Mr Williams – solicitor

PRELIMINARY HEARING JUDGMENT

The Claimant's claims of unfair dismissal and breach of contract are dismissed, subject to s.111(2) Employment Rights Act 1996 and regulation 7 Employment Tribunal's Extension of Jurisdiction (E&W) Order 1994, for want of jurisdiction.

REASONS

Background and Issues

1. The Claimant was dismissed by the Respondent, with effect 14 June 2019 and as a consequence, brought claims of unfair dismissal and breach of contract in relation to a bonus payment.
2. The Respondent alerted the Tribunal to the possibility that the claim had been brought out of time and following a case management preliminary hearing on 21 April 2020, this issue was listed for hearing today, by way of open preliminary hearing, conducted by video.
3. It was agreed between the parties that the limitation date, allowing for ACAS Early Conciliation, was 13 October 2019.

The Law

4. I referred myself to s.111 Employment Rights Act 1996 (ERA) and regulation 7 of the Employment Tribunal's Extension of Jurisdiction (E&W) Order 1994, which state:

s.111(2). Subject to subsection (3), 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.

and

7. An employment tribunal shall not entertain a complaint in respect of an employee's contract claim unless it is presented—

(a) within the period of three months beginning with the effective date of termination of the contract giving rise to the claim, or

(b) where there is no effective date of termination, within the period of three months beginning with the last day upon which the employee worked in the employment which has terminated, or

(c) where the tribunal is satisfied that it was not reasonably practicable for the complaint to be presented within whichever of those periods is applicable, within such further period as the tribunal considers reasonable.

5. I also referred myself to the case of **Dedman v British Building and Engineering Appliances Ltd [1974] ICR 53 EWCA**, in which Lord Denning MR stated that '*If a man engages skilled advisers to act for him – and they mistake the time limit and present the claim too late – he is out. His remedy is against them*'. This principle was further considered in **Wall's Meat Co Ltd v Khan [1979] ICR 52 EWCA**, in which Brandon LJ explained that principle as being that ignorance or a mistaken belief will not be reasonable if it arises either from the fault of the complainant or from the fault of his solicitors in not giving him such information as they should reasonably in all the circumstances have given him. Finally, if the claim is delivered out of time, due to some error on a claimant's part, the whole of the limitation period is open to scrutiny. In the example given by Burton J in **Initial Electronic Security Systems Ltd v Avdic [2005] IRLR 671 UKEAT** (at para 12), if a claimant who wants to email a claim sits down at his computer and finds that it has crashed, and is thus prevented from presenting it in time, this unexpected or unforeseen circumstance will not get him within what Burton J called '*the Consignia escape clause*'. In other words, he will not be able to point to the circumstance of the computer crashing and invite the tribunal to look at that in isolation to see whether it was reasonably practicable for him to have presented his claim in time. Instead he will have to explain why it was that he left it until the last moment to make his claim.

The Facts

6. I heard evidence from the Claimant.
7. I summarise that evidence as follows:
 - a. The Claimant has instructed solicitors throughout this matter, from prior to his dismissal, to the present date.
 - b. In respect of the act of submitting his claim, he had been provided by his solicitor, with the following link www.gov.uk/government/publications/make-a-claim-to-an-employment-tribunal-form-et1 . He was asked if his solicitors had wrongly advised him and whether they should have made clear to him what he needed to do and he said '*ideally, yes*'. He has not '*yet*' made a complaint to them on this matter. He used that link and it took him directly to a pdf ET1, which he completed. He stated there was no functionality on that form to submit it electronically to the Tribunal and nor did it provide guidance as to how it should be submitted.
 - c. He did not query this with his solicitors, or check on the Tribunal's website (which he accepts, now, does provide the correct information), but, instead, he stated, phoned this Tribunal, on 7 October 2019 (all dates hereafter 2019) and spoke to an unnamed member of staff, who, he asserted, told him to submit it by email, which he did, that day [2]. He also posted a hard copy, received on 8 October [4].
 - d. He then received an email from the Tribunal, on 14 October [5], stating that the Tribunal could not accept his claim, as it had not been submitted in one of the three prescribed ways (Rule 8 Employment Tribunal's Rules of Procedure 2013), namely, via the online submission service provided by HMCTS, by post to the ET's central office in Leicester, or by hand to a designated Tribunal office.
 - e. Following some further correspondence with the Tribunal [7], he arranged for his mother to hand deliver the form to this Tribunal office on 15 October (and therefore two days over the time limit).
 - f. He was asked why, when he had been dismissed four months earlier and had concluded Early Conciliation a month before he brought his claim, he had delayed in presenting his claim, until almost the last moment, thus affording him no lee-way, in the event of an error and he said that he '*had to gather a significant amount of evidence.*' He denied that the four months since his dismissal had been sufficient for him to do so. He also said that he hoped to reach some settlement with the Respondent (although Early Conciliation had concluded a month before).
8. 'Advice' from the Tribunal. I find, firstly that there was no reason for the Claimant to be seeking 'advice' from the Tribunal, when he had

recourse both to his own legal advisors and the clear guidance on the Tribunal website at <https://www.gov.uk/employment-tribunals/make-a-claim> which sets out the prescribed methods of submission. Secondly, even if he had called the Tribunal as he stated, there is no corroborative evidence as to what questions he asked, or what he was told and he is unable to name the person he spoke to. I don't consider, therefore that his account of what occurred can be relied upon to justify him failing to present his claim by the correct method.

9. Date of Submission. There can be no argument that the claim was not presented, by the prescribed method, until 15 October and is therefore out of time.
10. 'Reasonably Practicable'. Unlike the test in discrimination cases for extension of time (whether it is 'just and equitable' to do so), the test in unfair dismissal and breach of contract claims is more stringent, i.e. whether or not it was reasonably practicable (or 'reasonably feasible') for a claimant to have presented their claim within time. While the 'just and equitable' test allows for consideration of the reason for the delay, the length of it, the effect of such delay on the cogency of the evidence, the speed with which a claimant took corrective action and the balance of prejudice to both parties, no such factors apply to the test I must apply. I considered the following factors:
 - a. Ignorance of the Law – such ignorance must itself be reasonable. Applying Dedman, I must consider what were the opportunities for the Claimant to find out his rights/the law? Did he take them and if not, why not? Ought he to have known? In this case, it is clear that the Claimant had ample opportunity to find out the law in this area, by either asking his solicitors, or reading the clear advice on the Tribunal's website. However, he did neither and could provide no valid explanation as to why not. Further, as pointed out above, he compounded the situation, by leaving his claim until almost the last moment, thus greatly limiting any lee-way he might have had to correct any error (Avdic).
 - b. Advisers at fault – the Claimant reluctantly agreed that his solicitors should have provided him with accurate information as to how to present his claim, but did not. Applying Wall's Meat Co Ltd, this was information that appears to be such as they should reasonably in all the circumstances have given him. Any such fault on their part does not, however, excuse the Claimant, or render it not reasonably practicable to present the claim in time.
 - c. There are other potential factors in considering this issue, such as illness, postal delays, pending internal proceedings, but I have not considered them in any detail, as they do not appear to apply in this case and were not raised by the Claimant in evidence.

11. Conclusion. I conclude therefore that it was reasonably practicable for the Claimant to present his claim on time and that therefore he cannot rely on s.111, or regulation 7 and his claims are accordingly dismissed, for want of jurisdiction.

Employment Judge O'Rourke

Date: 3 September 2020