



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr R Goualin

**Respondent:** Mitie Limited

**Heard at:** East London Hearing Centre (by telephone)

**On:** 28 May 2020

**Before:** Employment Judge Gardiner

**Representation**

Claimant: In person

Respondent: Ms C Harman, solicitor

## JUDGMENT

The judgment of the Tribunal is that:-

1. The Tribunal has jurisdiction to determine the Claimant's claim on its merits. It was not reasonably practicable for the Claimant to present his claim within three months after the date of his dismissal and he brought proceedings within a reasonable time thereafter.

## REASONS

1. Mr Goualin brings a claim for unfair dismissal and accrued but unpaid holiday pay against his former employers, Mitie Limited. He was dismissed on 8 July 2019 (on the Respondent's case) or on 13 July 2019 (on the Claimant's case). The reason given was gross misconduct. In its Response, the Respondent argues that the Tribunal has no jurisdiction to consider either claim being brought by the Claimant because the claims were issued out of time. This hearing was listed as a

Preliminary Hearing (Open) by Employment Judge McLaren at an earlier Preliminary Hearing on 16 April 2020 to determine this time issue.

2. There are two issues to be decided:
  - a. Whether the primary limitation period had expired by the time that the claim was presented;
  - b. If so, whether time should be extended.
3. The Claimant gave oral evidence on oath in support of his position on each of these issues. He had sent a two page witness statement to the Tribunal on 30 April 2020. He also relied on the contents of an unpaginated bundle of exhibits which was sent to the Tribunal on 26 May 2020 at 12:48, together with further emails and attachments sent at 13:15 and 13:34 on the same date. He was cross examined on his evidence by Ms Harman. There was no evidence from the Respondent, although the Respondent put in written submissions by email dated 13 May 2020 and in similar terms again on 22 May 2020.
4. If the Claimant was dismissed on 13 July 2019, it is agreed that proceedings were presented within time on 3 December 2019. If the Claimant was dismissed on 8 July 2019, it is agreed that the primary limitation period expired on 1 December 2019, given the date of dismissal and the dates of early conciliation. When these proceedings were issued on 3 December 2019, they were issued two days out of time.
5. The Employment Rights Act 1996 and the Working Time Regulations 1998 both require that proceedings be issued within three months of the date of dismissal. The statutory wording is the same under both statutory provisions. The relevant section of the Employment Rights Act 1996 is Section 111(2) which states :

“An employment tribunal shall not consider a complaint of unfair dismissal unless it is presented to the Tribunal before the end of the period of three months beginning with the effective date of termination; or 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.”

**Whether the primary limitation period has expired**

6. The Claimant contends he was dismissed on 13 July 2019 because this was the date on which he received the letter telling him that he was dismissed, and advising him of his right to appeal against the dismissal.
7. The Respondent contends that the Claimant was told of his dismissal during a telephone conversation on 8 July 2019. In support of this, the Respondent refers to one of the pages in his bundle of documents, namely an email sent to the Claimant on 12 July 2019. This email was from Morne du Preez, Senior Contract Manager and was worded as follows :

“Good morning Robert

HR posted the letter to you via Royal Mail

I have attached a copy of the letter for you on this email

I verbally informed you of the outcome of the disciplinary meeting on Monday 8<sup>th</sup> July when I spoke to you over the phone.”

8. There is no email from the Claimant in response disputing this version of events. Under cross-examination, the Claimant accepted that he did have a conversation with Mr Morne du Preez on 8 July 2019. His evidence was unclear as to exactly what was said, but he accepted that it appeared to him that he was no longer wanted. He had received an email on 8 July 2019 referring to an “offboarding meeting” with Mr du Preez at 11am in order to return company property. His position was essentially that dismissal was not formally confirmed until he had been advised of his right of appeal against the dismissal, which only occurred on receipt of the dismissal letter.
9. On the balance of probabilities, I find that the Claimant was told of the outcome of the disciplinary process, namely that he was being dismissed, during the telephone conversation on 8 July 2019, as recorded in the email of 12 July 2019. Although he may not have been told of his right to appeal against the dismissal decision, what he was told was sufficiently clear that the effect was to end his employment contract at that point.
10. As a result, the three-month time limit for bringing employment tribunal proceedings (as extended by the operation of the Early Conciliation provisions) started on 8 July 2019. The last date for presenting proceedings was 1 December 2019 and when proceedings were presented two days later, on 3 December 2019, they were out of time.

### **Whether time should be extended**

11. The Tribunal only has the jurisdiction to consider a claim presented outside the primary limitation period if it was not reasonably practicable to issue proceedings in time. Even then, if the Tribunal is satisfied it was not reasonably practicable to issue the proceedings within three months, then the Tribunal may only consider the claim if it was presented within a reasonable time thereafter.
12. Reasonably practicable has been interpreted as meaning reasonably feasible. The focus is not merely on what it was reasonable for the Claimant to have done, but the higher hurdle of what was reasonably capable of being done (*Palmer v Southend-on-Sea Borough Council* [1984] ICR 372 at 384F-385F). It is a matter for the tribunal applying principles of “practicable common sense”, having regard to the background of the surrounding circumstances and whether the claimant

was hoping to avoid litigation by pursuing alternative remedies. In assessing whether something could or should have been done within the limitation period, whilst looking at the period as a whole, attention will in the ordinary way focus upon the closing rather than the early stages. Where illness is relied upon as the reason for not presenting the proceedings in time, the approach should vary according to whether it falls in the earlier weeks or the far more critical later weeks leading up to the expiry of the period of limitation (*Schultz v Esso Petroleum Co Ltd* [1999] ICR 1202 at 1207 and 1209-1210).

13. The burden of proof in showing that it was not reasonably practicable rests with the Claimant : it is for the Claimant to provide sufficient evidence to satisfy the tribunal it was not reasonably practicable to present the proceedings in time.
14. If an employee is relying on ignorance of the three month time limit as the excuse for failure to issue proceedings in time, then the Tribunal should ask not just whether the Claimant does not know the time limit for issuing proceedings, but also whether he ought not to have known of the time limit (see *Porter v Bannbridge Ltd* [1978] ICR 943 at 957 per Stephenson LJ). However, in the present case, that is not the essential reason relied upon by the Claimant, although the Claimant does say he did not know there was a three month time limit.
15. The Claimant's case is that it was not reasonably practicable to issue proceedings within the required time limit because firstly he had been advised by ACAS to delay issuing proceedings until after the appeal was concluded and secondly – and primarily - because of his state of health.
16. In an email dated 31 January 2020 and in submissions dated 30 April 2020, he addressed each of these factors. In its submissions in response dated 13 May 2020, the Respondent dealt with each of these points in turn.
17. So far as the advice from ACAS is concerned, he stated that “the ACAS representatives he spoke to over the telephone advised that it was best if he first went through the appeal process with the respondent”. The appeal outcome was delivered to the Claimant on 27 August 2019. The Claimant then delayed contacting ACAS until 1 October 2019, and took no further action between 1 November 2019 when he received the EC certificate and 3 December 2019 when the proceedings were issued. The appeal process therefore took up just over 7 weeks of the period available. Although the Claimant did look at the process for starting employment tribunal claims over the internet, the Tribunal accepts the Claimant's explanation that he did not specifically realise that there was a three month time limit for doing so.
18. The Claimant argues that he was not able to present his ET1 claim before 3 December 2019 because of his state of health. He has attempted to obtain evidence from his GP surgery to show how his symptoms varied over time. He told me, and I accept, that he contacted them two weeks ago to ask for this evidence but they have not been able to supply this. Given the current focus on

using health care resources to target the Covid-19 pandemic, I am not surprised that his surgery was unable to provide him with this information within the last fortnight.

19. Therefore, the only medical evidence is the evidence which is contained in the Claimant's bundle of documents and the oral evidence from the Claimant himself. This shows that the Claimant first presented at his GP's surgery in November 2017 with depressive symptoms and was prescribed medication at that point. Over the period since then different medications had been tried, but he had needed to consult his GP's surgery on various occasions due to the side effects of the medication. As at 30 July 2019, he had been on sertraline 50 mg tablets for over two months and had not experienced any drowsiness or other side effects.
20. The Claimant had been sufficiently well to have appealed against the dismissal decision, participate in the appeal process and also to contact ACAS to initiate early conciliation. During this time, he was continuing to take his medication.
21. The Claimant's evidence is that he decided to stop taking his medication in September 2019, but this was unsuccessful. He tried again towards the end of November 2019. He thought that the date was around 26 or 27 November 2019. As a result, he suffered what he described as a 'serious relapse' and 'just could not think straight'. This is consistent with what he had stated to the Tribunal in an email dated 31 January 2020, namely that he had attempted to wean himself off his mental health medications for clinical depression, anxiety and PTSD but this had proved unsuccessful because it caused him to present with memory lapses, poor concentration, a lack of focus and motivation, anxiety and irritability.
22. Due to his state of mind he was 'in a state of flux' and there were many tasks he had left undone. At some point he restarted on his medication but from February 2020 onwards he gradually reduced his medication and is no longer on medication.
23. He lodged the ET1 when he did because his wife reminded him that he still needed to send a claim to the tribunal. He did not realise that there was a three month time limit for issuing proceedings as adjusted by the Early Conciliation provisions. He did not realise that the deadline for issuing the proceedings was 1 December 2019. He believed that he was required to issue proceedings as soon as possible after receiving his ACAS Early Conciliation Certificate, which he received on 1 November 2019.
24. I accept the Claimant's evidence. Focusing in particular on the end of the limitation period, but taking into account all the circumstances including the period of the appeal process, the duration of early conciliation and the medical consequences of the Claimant's decision to stop his medication on about 26 November 2019 my conclusion is that it was not reasonably practicable for the Claimant to have issued proceedings by 1 December 2019.

25. Whilst it is unclear when his health improved sufficiently so that he was reasonably capable of issuing proceedings, in delaying no more than two days from the date on which the primary limitation period expired, the Claimant acted within such further period of time as the Tribunal considers reasonable.
26. Therefore, the Tribunal has jurisdiction to consider both the unfair dismissal claim and the claim for accrued holiday on their merits.
27. Directions have already been issued to enable the parties to progress the case to a Final Hearing currently scheduled for 30 and 31 July 2020. Given the potential number of witnesses that each party is intending to call and the volume of documents, this two day hearing is to be expanded to a three day hearing. It will accordingly now start on Wednesday 29 July 2020 and last for three days.
28. The Respondent has prepared a draft list of issues. The Claimant has yet to comment on these issues. He is to do so by 11 June 2020 in writing, sending his comments to both the Respondent and to the Tribunal. The parties are to make every effort to finalise the list of issues before the first day of the Tribunal hearing.

**Employment Judge Gardiner**

**Date: 29 May 2020**