



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr P Gold

**Respondent:** Sainsbury's Supermarkets Ltd

**Before:** Employment Judge Adkin

## JUDGMENT

- (1) The claim of unfair dismissal pursuant to section 98 of the Employment Rights Act 1996 is struck out.

## REASONS

- (2) Following a hearing on 3 September 2020 which the Claimant claims he was unable to attend because of technical reasons, the parties have made written representations on the Respondent's application to strike out the claim as being out of time. The Claimant made written submissions in an email dated 17 September 2020. The Respondent replied in an email dated 21 September 2020. I also have the benefit of the Claimant's response dated 29 September 2020 to the Respondent's response.
- (3) I can only apologise to both parties for a substantial delay. The parties provided written submissions in September 2020. Unfortunately the Tribunal administration has been operating with a substantial backlog of correspondence without a full complement of administrative employees. For a number of months from December 2020 onward the building was closed altogether. The correspondence was not referred to me for seven months.

### Out of time

- (4) The Respondent is pursuing an application for strike out based on the time/jurisdiction point.

- (5) The Claimant was employed from 3 January 2017 until his dismissal on 16 October 2019 as a Convenience Store Manager. Although the letter of dismissal suggests that the dismissal was effective on 17 October 2019, the reality was that the Claimant was summarily dismissed with immediate effect at a meeting on 16 October 2019. I take this to be the effective date of termination i.e. the day on which summary dismissal was communicated to the Claimant. In order to bring a claim for dismissal, the Claimant needed to present to the Tribunal *within* three months, that is by 15 January 2020 (sometimes described as three months less a day).
- (6) The Claimant commenced the early conciliation certificate on 2 December 2019 (day A). The early conciliation period came to an end on 18 December 2019 (day B). This had the effect of extending the limitation period by 17 days to 1 February 2020.
- (7) The claim was submitted on 3 February 2020 and was accordingly 2 days late.

Legal test

- (8) I have to consider whether to extend time to allow the claim (pursuant to section 111(2)(b) of the Employment Rights Act 1996), whether:
  - (i) it was not reasonably practicable for the claim to be presented by 1 February 2020;
  - (ii) the claim was presented within such further period as is considered reasonable.
- (9) What is reasonably practicable is equivalent to “reasonably feasible”. The onus of proving that presentation in time was not reasonably practicable rests on the claimant, but there should be a liberal interpretation of the provision in favour of the employee (*Lowri Beck Services Ltd v Brophy* [2019] EWCA Civ 2490).
- (10) Where mistake or ignorance on the part of the litigant was not the result of any faulty professional advice the question for the tribunal is whether the litigant's mistake or ignorance was reasonable. This was articulated in the leading case of *Wall's Meat Co Ltd v Khan* [1978] IRLR 499, [1979] ICR 52, CA in which Brandon LJ stated (at [60]–[61]):

"the impediment [to a timeous claim] 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."
- (11) IDS Brief contains the following commentary on ignorance of time limits:

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 *Trevelyan's (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. Some examples:

*Reed in Partnership Ltd v Fraine* EAT 0520/10: F presented his unfair dismissal claim one day late, wrongly believing that the three-month time limit ran from the day after the EDT. The EAT overturned the employment judge's decision to accept F's late claim. F was not reasonably ignorant of the start date for the limitation period: he knew of his right to bring a claim, as well as the three-month time limit. Furthermore, he was not misled by the employer or any other agency or adviser, and he had made no enquiries through solicitors, the Citizens Advice Bureau or the Employment Tribunals website. F had simply proceeded on a false assumption for which he had no basis

*Koudriachova v University College London* EAT 0132/14: a tribunal found that K had presented her unfair dismissal and unlawful deductions claims one day late because of her mistaken belief that the time limit expired on 28 rather than 27 May 2011. While K claimed that her mistaken belief was based on advice given to her by members of the tribunal staff, the tribunal found it probable that K had indicated simply that her employment came to end at 'the end of February' and so was told that the deadline would expire 'at the end of May'. The onus was on her to obtain specific advice or clarification but she did not do so, either because she did not properly listen to what she was told or because she did not ask the question with sufficient particularity. The EAT upheld the tribunal's decision that K's mistaken belief was not reasonably held, and so it had been reasonably practicable for her to have presented her claims in time.

#### Claimant's case

- (12) The Claimant has not advanced any factual matters suggesting that it was not practicable to present his claimant in time. Rather he relies on a belief that the claim was presented in time. He takes the effective date of dismissal as 17 October 2019, and has added an additional 18 days during conciliation, to give a deadline of 4 February 2020. I infer that he has taken the expiry of limitation as 17 January 2020. On his case the claim was presented a day before the deadline as he understood it.
- (13) I find that the Claimant was mistaken about the deadline date for three reasons. First, he took at face value the content of the letter of dismissal that the effective date of dismissal was 17 October. Second, (I infer) he calculated the expiry date as 17 December, whereas the limitation period is *within* three months, often described as three months less a day. Third, he added 18 days for limitation by virtue of the ACAS Early Conciliation period, when it should have 17 days.

#### Conclusions

- (14) Following the *Wall's Meat* case I have to consider whether this mistaken belief was reasonable.

- (15) Regarding the first error, I find it was reasonable to take at face value in the circumstances of this case that a letter referring to a termination being effective on 17 October mean that the termination was effective on that date. It seems to be that it was reasonable that an employee of a large supermarket chain with substantial HR resources would expect the latter to get this sort of thing right.
- (16) Regarding the second error, calculation of the expiry date, I have considered the authorities set out above. It is clear that claims must be presented within three months and the Claimant ought to have established this. I do not find that this mistake (if indeed this was the Claimant's mistake) was reasonable.
- (17) Considering the third error, I cannot see how it is reasonable to find that the period 2-18 December amounts to 18 days. It is a question of basic mathematics. This was unreasonable.
- (18) It follows that although I find that it was reasonable to acting in reliance on the termination date in the Respondent's letter for the Claimant to be one day late in presenting his claim, I cannot find that the further delay was reasonable. The Claimant has not identified any practical constraints preventing him from presenting his claim in time.
- (19) Even if it was not reasonably practicable for the Claimant to present his claim by 2 February, any further delay, under the second limb of the test in section 111(2)(b) was not reasonable for the reasons given above. Accordingly the claim is out of time.

### Costs

- (20) The Respondent is also pursuing two application for costs.
- (21) The first costs application, made by the Respondent's solicitor in an email dated 11 August 2020, contends that the Claimant unreasonably failed to respond to a Tribunal request for the parties to notify the tribunal within four days of correspondence sent on 16 July 2020 whether there was any difficulty in an open preliminary hearing taking place on 11 August 2020. By making an application to postpone that hearing late and by deliberately using an incorrect email address to copy the Respondent, it is contended that he caused the Respondent additional cost. It is also alleged that the Claimant failed to respond to communication from the Respondent, which is characterised as a repeated pattern of failing to engage with the Respondent.
- (22) The second costs application is made on the basis that legal costs have been wasted as a result of the Claimant's conduct in failing to join the CVP (video) hearing before me on 3 September 2020. It is argued that his account of his failure to join is implausible, that it was unreasonable of him not to answer telephone calls when he was trying to join the hearing.
- (23) The Claimant asserts in his letter of 29 September 2020 that he has not deliberately failed to attend any hearing. He said he didn't answer the telephone because he was trying to join the hearing.
- (24) It seems that both parties were provided with a link to join the wrong hearing room initially on 3 September 2020, so I can see that it was not necessarily completely straightforward for the Claimant on that occasion.

- (25) Ultimately, the Respondent is inviting me to come to a conclusion that the Claimant has unreasonably and deliberately failed to engage in communication with it and also with the hearing on 3 September 2020. I feel that before making such a determination, I would have to hear live evidence from the Claimant, or at least give him the opportunity to answer himself in person in an in person hearing (i.e. at which the parties physically attend rather than a video hearing).
- (26) It is a matter for the Respondent, whether they wish to request a costs hearing, so that this can be determined. It may be that the Respondent takes a pragmatic view that the claim is struck out and they may wish to leave matters as they lie.

## **ORDER**

### **Made pursuant to the Employment Tribunal Rules of Procedure**

- (1) Unless the Respondent requests a costs hearing by **30 September 2021** both of the Respondent's costs applications will stand dismissed without further order.

**Employment Judge Adkin**

Date: 21 July 2021

Sent to the parties on:

21/07/2021

For the Tribunal: