



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 1802650/2022

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Held via Cloud Video Platform (CVP) in Glasgow on 12 December 2022

Employment Judge I McFatridge

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Mr A Kerr

**Claimant
In Person**

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DFS Trading Ltd

**Respondent
Represented by:
Mr D Hay -
Advocate**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

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The Judgment of the Tribunal is that it does not have jurisdiction to hear the claim since the claim was submitted out of time.

REASONS

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1. The claimant submitted a claim to the Tribunal on 7 June 2022 in which he claimed that he had been unfairly dismissed by the respondent. The respondent submitted a response in which they denied the claim. They also made the preliminary point that in their view, the claim was time barred.

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2. The case had been lodged by the claimant in England and Wales since the claimant had referred to the respondent's principal address being in Doncaster and had not indicated that he worked at the respondent's Glasgow store. A preliminary hearing took place on 10 October 2022 following which the case was transferred to Scotland. At the preliminary hearing on 10 October 2022, the parties agreed that:

a. the claimant's employment terminated on 9 February 2022;

- b. ACAS early conciliation took place during 5 days from 3 to 7 March 2022;
 - c. the preliminary time limit for the claimant expired on 13 May 2022; and
 - d. the claimant submitted his claim on 7 June 2022.
- 5 3. During that hearing, it was also agreed that a further preliminary hearing would be required to determine the issue of:
- a. whether it was not reasonably practicable for the claimant to submit his claim outside the Tribunal's time limit; and
 - b. if so, whether the claimant submitted his claim within a reasonable
- 10 period after the time limit expired.
4. That hearing took place before me on 12 December 2022. At the hearing, the claimant gave evidence on his own behalf. The parties had lodged a joint bundle of productions which I have referred to by page number below. Please note that the page numbers used refer to the page numbers of the electronic
- 15 bundle and not the page numbers of the paper bundle which were different by approximately two digits. On the basis of the evidence and the productions, I found the following factual matters relevant to the issue I had to deal with to be proved or agreed.

20 **FINDINGS IN FACT**

5. The claimant was employed by the respondents from 9 March 2009, laterally as a store manager. The claimant's career with the respondents was successful and part of the claimant's remuneration was based on sales. By the time of his dismissal, the claimant was earning around £100,000 per
- 25 annum including bonus. The claimant had a lifestyle and commitments which went along with this level of salary. The claimant was advised on 9 February 2022 that he was being dismissed with immediate effect.
6. The claimant found the loss of his job devastating. He had just moved into a new property which had a high rent. He had other commitments. He found

the circumstances in which he had lost his job to be extremely upsetting. He was concerned about the impact of losing his job on his way of life and on his relationship and family.

- 5 7. In early 2020, the claimant had suffered a heart attack and shortly thereafter, his father had died. As a result of this, the claimant had begun to suffer from depression. He attended his GP and was put on antidepressants for a period of around nine months. By the time of his dismissal, the claimant was no longer on anti depressants however immediately after he was told he was dismissed, he again consulted his doctor and was placed on antidepressants
10 again.
8. The claimant consulted with a solicitor very shortly after he was dismissed. The consultation took place online. Various documents were sent by the claimant to the solicitor. The solicitor advised the claimant that he should follow the internal appeals process. He advised the claimant he had a good
15 prospect of a successful tribunal claim.
9. The claimant submitted his internal appeal and then had another meeting with his solicitors shortly before the appeal meeting on 2 March 2022. At that meeting, his solicitor suggested various questions he should ask at the appeal hearing. The appeal hearing took place on 2 March 2022. Following the
20 appeal hearing, the claimant was advised that his appeal was not successful. It was unclear from the evidence before me exactly when this information was conveyed to the claimant. In any event, the claimant commenced early conciliation on 3 March 2022 and on 7 March, ACAS issued a certificate. The claimant had a further consultation with his solicitor after the result of his
25 appeal was known. He discussed with the solicitor the possibility of the solicitor taking forward a claim to an employment tribunal. The solicitor mentioned the likely costs involved and the claimant decided that at that particular point he was not in a position to afford a solicitor albeit he still wished to go to a tribunal representing himself.

10. On 10 March 2022, the claimant's mother, with whom he was very close, became extremely ill. She went into a diabetic coma which she remained in for ten days. She was in hospital from 10 March until approximately 10 July.
11. During this period, the claimant's depression got worse. The claimant described himself as being in a very dark place. The claimant would visit his mother two or three times a day. Whilst she was in a coma, he would be sitting with her at the hospital for substantial periods of time. Even after she came out of the coma, he would continue to visit her on a very regular basis.
12. The claimant continued to suffer from depression and take antidepressants. On one occasion, the claimant was on the telephone to his doctor's receptionist. He needed a further prescription of antidepressants. He was told that the GP had tried to phone him but the claimant advised he had no missed calls on his phone. He told the receptionist that he was thinking of crashing the car into a wall. The claimant's GP then telephoned him in a few minutes. He understood his GP was concerned he might harm himself. The claimant's dosage of antidepressants was increased.
13. The claimant started new employment on or about 4 April 2022 as a car salesman. This pays considerably less than the salary and benefits he enjoyed whilst employed by the respondents. The claimant obtained the job through recommendation and did not have to go through an interview process. The claimant has been working at the job since 4 April 2022. The claimant has also continued to apply for other jobs at a higher salary than he has in his current car salesman role.
14. Although the claimant considered that his dismissal had been extremely unfair and indeed in his words "underhand", the claimant did not submit his claim within the initial three month period. The position was that he simply did not address his mind to the issue because of the way he was feeling and everything else that was going on in his life. On or about 7 June 2022, he was in conversation with a friend who asked him what was happening about his claim. The friend was someone called Patrick Menzies who had no connection whatsoever with the respondent. This prompt caused the claimant

to think about the matter and look into what had to be done next. The claimant submitted his claim the same day. He did not require any assistance in completing the ET1 claim form.

5 15. On 5 September 2022 whilst the case was being managed in England and Wales, the Tribunal wrote to the claimant ordering him that by 19 September 2022 he would provide to the respondent and the Tribunal a written statement explaining the reason for any delay in bringing the claim (at page 76). On 13 September 2022, the claimant sent an email to the respondent's solicitor and the Tribunal stating: "with regards to the delay in making my claim, as I have
10 said previously, I am suffering from severe depression due to the nature of my dismissal and I am still on medication for depression due to this. There was a question around my mother's ill health which is not something I wish to discuss."

15 16. By 11 October 2022, the claimant's GP, Dr Kennedy, produced a letter addressed to the claimant stating:

"To Whom It May Concern,

The above named patient has suffered from depression and low mood, which can cause poor/reduced concentration. He has been treated for this with fluoxetine from early February 2022/ (page 81). No other medical evidence
20 was lodged with the tribunal.

Matters arising from the evidence

25 17. I had no doubt that the claimant was giving truthful evidence as he saw matters. There was absolutely no doubt that this has been an extremely traumatic and distressing time for the claimant and I had considerable sympathy for the position in which he found himself. The claimant answered all the questions he was asked frankly and straightforwardly. There was one passage of evidence relating to whether the claimant had ever discussed whether his solicitors would deal with the claim on a no win no fee basis and I have not found it necessary to make any findings in fact regarding this. I
30 accepted the claimant's evidence on this point that he had not actually

discussed his claim with anyone in the respondent organisation and any discussion amongst the respondent's managers that the claimant might be using no win no fee solicitors was probably speculative. As noted above, I was unable to make any factual finding as to when the claimant was advised of the outcome of his unsuccessful appeal. The claimant's evidence was that he thought this was around two weeks after the appeal however he could not recall exactly and could not recall whether he had submitted his early conciliation application to ACAS before he knew the outcome of the appeal.

10 Discussion and decision

18. The respondent's representative made a full submission setting out the legal background to the matter and how they considered it applied to the facts. The claimant's submission was shorter. Rather than seek to repeat these here, I will refer to them where appropriate in the discussion below.

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19. The sole issue which I was required to determine was whether or not the claim was time barred. If it was time barred then the claim would fall to be dismissed on the basis that the Tribunal has no jurisdiction to hear it.

20. The relevant law is set out in section 111 of the Employment Rights Act 1996 as varied by section 207B of that act which introduced the provisions regarding early conciliation. It was a matter of agreement between the parties that the effective date of dismissal in this case was 9 February 2022. The normal limit is three months however this period falls to be extended to cover the period of early conciliation. I agreed with the respondent's that in this case, the stop the clock provisions in section 207B (3) were applicable. Day A was 3 March 2022 and Day B was 7 March 2022. I also agreed with the respondent's agent's calculation that the number of days to be added is the number of days from the day after Day A up to and including Day B. This amounts to four days rather than the five days set out in the English Tribunal's note. In any event, I do not consider the difference to be particularly material. By my calculation, the three month initial period would have expired on 8 May

2022. This means that after extending this by four days to take into account early conciliation, the claimant ought to have submitted his claim by 12 May 2022. He did not. The claim was submitted on 7 June 2022, nearly four weeks late.

5 21. It was the claimant's position that time ought to be extended in terms of section 111 (2) (b) which states that a claim may be presented "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."

10 22. It is clear that the Tribunal must approach the test set out in section 111 (2) (b) by adopting a sequential approach to the two questions posed by that section. The first question is whether the Tribunal is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months and the second question is whether, if the Tribunal
15 is satisfied as to the first point, the Tribunal considers that the claim was presented within a further period of time which the Tribunal considered reasonable.

23. In submission, the respondent's representative referred to the case of **Porter v Bandridge Limited [1978] IRLR 271** which makes it clear that the burden
20 of proof is on the claimant to show that it was not reasonably practicable. I was also referred to the well known cases of **Palmer and Saunders v Southend-on-Sea Borough Council [1984] IRLR 119** and **Wall's Meat Company v Khan [1979] ICR 52**. I would agree with the respondent's characterisation of those and the other numerous authorities on the subject
25 as showing that the Tribunal must be satisfied that there was some impediment to the claimant submitting his claim in time which made it not reasonably practicable for the claim to be presented within the initial period which in this case amounted to three months and four days.

24. As noted above, I entirely accepted the claimant's evidence regarding his poor
30 mental health at the time which was caused by him losing his job and also his mother's unfortunate illness. It was the respondent's position that whilst these

circumstances were obviously such as to arouse sympathy and compassion, they did not unfortunately come close to meeting the legal test.

25. It was clear that during this time, the claimant was able to submit an appeal and take part in the appeal hearing. He was able to consult with his solicitors on three occasions. The evidence was that the reason why he had to dispense with the solicitor's services was that he could no longer afford a solicitor. The claimant had also obtained another job albeit I accepted his evidence that this did not involve an extensive recruitment process. The claimant's own evidence was that he had been applying for other, better paying, jobs since. Finally, it was clear that when the claimant did address his mind to the issue, when prompted by his friend on 7 June 2022, he was able to immediately lodge the ET3 himself without assistance. The claimant has also been working at his new job since 4 April 2022. I also accepted the point made by the respondent that the claimant's response to the Order made by the Tribunal in September contained in his email of 13 September 2022 was fairly vague and unspecific albeit he had been much more specific at the hearing. The medical evidence was also extremely brief.

26. At the end of the day, I required to make a finding as described in the case of ***Wall's Meat Company v Khan [1979] ICR 52*** that the claimant had demonstrated that he had just cause or excuse for not presenting his claim in time. The claimant undoubtedly had difficulties but I could not on the evidence before me make a finding that it had not been feasible or practicable for him to submit his claim. Many people are extremely upset to lose their job. Many people suffer from depression or mental health difficulties or suffer adverse life circumstances. In this case, the medical evidence was fairly light and merely spoke of the claimant suffering from depression and low mood which can cause poor/reduced concentration. It was unspecific as to the timings. I felt the evidence as a whole was simply insufficient for me to make a finding that it was not reasonably practicable for the claimant to submit his claim on time.

27. Given that the claimant has not met the first strand of the test, there is no particular reason for me to go on and consider the second part of the test,

whether the claim was submitted within a reasonable time thereafter. That having been said however, my finding would have been that even if I had been persuaded that it was not reasonably practicable for the claimant to have submitted his claim prior to 12 May 2022, I would not consider that the period
5 from 12 May to 7 June 2022 amounted to a further reasonable period of time. I made this decision for essentially the same reasons I made the finding that the claimant had not established it was not reasonably practicable to submit his claim within the initial time period.

28. Given that the claim is out of time, the claim falls to be dismissed.

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Employment Judge: I McFatridge
Date of Judgment: 12 December 2022
15 **Entered in register: 13 December 2022**
and copied to parties

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