EMPLOYMENT TRIBUNALS

Claimant: Mr. S. Alsirt

Respondent: Pizza Express Restaurants Limited

Date of Hearing: 26 September 2017

Employment Judge Sage

Representatives:

For the Claimant: Mr Decker Lay Representative

For the respondent: Mr. Powis Paralegal

JUDGMENT

1. The Claimant's claim for unfair dismissal was presented out of time and is dismissed.
2. The Claimant is to pay to the Respondent costs of £250 under Rule 76(1)(a) due to the unreasonable conduct of the case

REASONS

Requested by the Claimant.

1. This hearing was listed in order to consider whether the Claimant's claim for unfair dismissal should be dismissed on the grounds that it was presented outside of the statutory time limit. It was not disputed that the claim was presented out of time, the effective date of termination was the 14 December 2016 therefore should have been presented on the 13 March 2017. The ET1 was presented on the 15 May 2017. The claim was significantly out of time.

2. The Claimant and his representative gave evidence to the Tribunal.

3. The Claimant's evidence was that he was unable to present his claim in time because he was not sure about disclosing matters relating to his family and his mental illness. He stated that had he been in the right mind he would have filed it in time. The claimant explained that during the primary time period was going through a bitter divorce which was then compounded by the dismissal in December 2016. He also stated that he

was suffering depression at the time and he was therefore not able to submit his claim. The claimant was challenged in cross examination in relation to his evidence that he had to be woken up every morning; he conceded that he was able to attend work because he had to earn money to feed his two children. It is concluded as a fact that he was able to work and to deal with matters relating to his divorce which were being dealt with by solicitors.

4. The claimant disclosed to the tribunal a letter from his GP dated 21 August 2017 which confirmed that he had been suffering acute stress since October 2016. It stated his concentration was affected. The tribunal were also taken to a prescription dated 15 September 2017 for sleeping pills. The tribunal find as a fact that there was no evidence to suggest that at the relevant time, namely the period from 14 December to 13 March 2017 that the claimant was prevented by ill-health from presenting his claim to the tribunal. Although his concentration may have been affected there was no evidence to support the evidence given by Mr Decker that his memory was adversely affected or that his depression had a serious adverse impact on his ability to get out of bed.

5. The claimant told the tribunal that he handed all his papers over his representative Mr Decker, who spoke to ACAS on his behalf and reassured him that the ET1 had been presented in time. Both the claimant and Mr Decker conceded that this was incorrect. Mr Decker conceded that he thought time began to run after the outcome of the appeal against dismissal, which took place on 20 February 2017. He accepted he was mistaken in his view. Mr Decker was asked when he contacted ACAS and he could not be specific about the date that told the tribunal he spoke to them 'sometime in March'. There was some confusion as to who had completed the claim form as the claimant told the tribunal that he had written it but Mr Decker said the claimant was mistaken and in fact he had completed it. On the balance of probabilities it is concluded that it was Mr Decker who completed the claim form and submitted it on the claimant's behalf. Mr Decker stated on the form that he was the Claimant's representative.

6. Mr Decker conceded that he could have contacted ACAS earlier than he did and he should have researched the matter and should have looked at the Employment Tribunal Rules and Procedures but did not do so. Mr Decker said that the reason he failed to present the claim form until the 15 May was because he had exams at university (he is in his third year of studying for a law degree) and had family issues to deal with. He also had assumed that the claimant could deal with it himself, however this appeared to be contrary to the evidence he gave about his view of the Claimant's mental health at the time. It was noted that the evidence given appeared to be contradictory as the claimant believed that Mr Decker was dealing with it on his behalf but Mr Decker seemed to believe that the claimant could deal with it. There was some confusion between the parties on this point.

7. The claimant conceded in cross examination that it was practicable to submit his claim in time. The claimant was asked why he delayed presenting his claim until after receiving the appeal outcome and he replied that he knew he should have put it in at that time but he didn't

because he “wasn’t feeling right”.

The closing submissions of the respondent as follows:

8. There is clear case law, where the claimant receives incorrect advice and are referred to the case of Walls Meat v Khan (see below). It is incredibly unlikely that ACAS would not refer to the time limit and it is also unlikely that they would get the advice wrong. Both the claimant and Mr Decker accept that the effective date of termination is 14 December 2016 and therefore the submission date was 13 March 2017. I say it was reasonably practicable to submit claim in time, both were able to attend work and meetings and both said that they had to await the outcome of the appeal on 20 February. The claimant could have been submitted in time, however they waited until 1 April, the certificate was granted on 4 April and knowing the time limits they they waited until 15 May to present the claim; this was not as soon as practicable. The claimant said he could not function but he could attend the appeal his new place to work and attend divorce meetings.

9. There are inconsistencies about who completed the claim form and this goes to whether the claimant was able to function. I refer to the GP’s letter. I would not class Mr Decker as an unskilled adviser, he acted negligently by not seeking clarification. They both conceded they could have put the claim in time.

10. The tribunal also took into account the respondent’s written submissions where the following case law was referred to:

    London Underground v Noel [1999] ICR 109
    Walls Meat Co Limited v Khan [1979] ICR 52
    Palmer v Southend on Sea Borough Council [1984] ICR 372.
    Asda Stores limited v Kauser UKEAT/0165/07

11. The Respondent stated that the claimant’s case appears to be that he was blaming his adviser and the advice given was incorrect. If the claimant received advice from an unskilled adviser respondent contends that the claimant could have research the limitation periods and he has produced no evidence as to why it was not reasonably practicable to contact ACAS himself. The claimant has failed to provide any reason why he did not submit his claim between the date of 20 February, which is the date of the outcome of his appeal and the 13 March the limitation deadline. The Claimant also failed to provide any evidence as to why he failed to submit his claim between 4 April and the 15 May, a further significant delay. The respondent states that it was reasonably practicable to bring claim within the limitation period

12. **The claimant submissions**: Was it reasonably practicable for the claimant to present the claim himself? There were issues on the divorce and the claimant’s mental health, he was in no state to do anything. The claimant received medical treatment since October 2016 and you have seen the prescription. Had I not intervened at all, the claim form would not have been submitted. The claimant can’t sleep and his memory is problematic, he doesn’t check his email and the effect of his difficulties in the family issues is that any legal matters terrify him.

13. You have to take into context with the medical illness when the claimant said that the claim form filled in by him, it was not a deliberate action, this is how his memory works. It would not be fair for the wrongs of one person to be visited on the claimant. I refer to the case of Virdi; the claimant should not be penalised. I acted in good faith and had I not intervened his claim would not have been issued. I have university commitments and I encouraged him to see a legal representative. He was so terrified. The claimant was able to get another job because the person knew him. I have explained the difficulties about putting in a claim form.

14. The respondent has said that the claimant is able to work so could have put in his claim form but I refer to the Norbert case (see below), that case referred to evidence about a medical condition and he wasn't able to put his claim in in time. Someone may be fit to do one thing, but other things like legal paperwork may be a mountain to climb. Since his dismissal he has not been in the right state of mind; had I not intervened, he would not have submitted it. Yes, there was a mistake by me and I was wrong. I have to study. The Claimant was not able to fill in the form because English was not his first language and in no fit medical state, which is why I put in the claim form for him within a reasonable time from April to May. When I came back the claimant had done nothing and had I not intervened, nothing would be done.

15. Even if the claimant gets no compensation and only clears his name that would be something. I know the issue of the misunderstanding with the claim form I respectfully asked the claim to proceed, taking into account all the circumstances including the medical assessment and psychiatric treatment.

16. The tribunal also took into account the claimant's written submissions and the case law he referred to of all Robinson v Bowskill and others (p/a fairhill Medical practice) UKEAT0313 2011 and Norbert Destessangle logistics Limited v Hutton [2013] UKEAT 0011.

17. **The Law**.

Employment Rights Act 1996

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.

The Decision

18. The first matter is whether or not it was reasonably practicable for the claimant to present his claim in time; he says it was not and relies on two factors, firstly his ill-health and his mental state during the primary time

period and the misapprehension of his legal adviser as to when time started to run.

19. Firstly dealing with the matter of the misapprehension of his adviser. It was accepted by Mr Decker that he mistakenly believed that time started to run at the end of the appeal process, not from the effective date of termination. Mr Decker accepted responsibility for this error. Mr Decker accepted that he failed to conduct any research into the law relating to unfair dismissal or to time limits. He only become aware of the time limits around the time of the presentation of the claim form on 15 May 2017. He also stated that he spoke to ACAS sometime in March.

20. The issue for the tribunal is whether Mr Decker was a skilled advisor and the tribunal heard that he was assisting the claimant not only with his employment tribunal claim, but also with his divorce and in the Claimant's appeal against dismissal. Mr Decker stated in his witness statement that he had limited knowledge "in this area". All the communications with ACAS were conducted by Mr Decker on the claimant's behalf and he was listed as the representative on the claim form; it was also consistent with the claimant's view that he was acting on his behalf on a pro bono basis. Mr Decker accepted that he gave the wrong advice. If he was acting as a skilled adviser, an ignorant or mistaken belief will not be reasonable if it arises from advisers in not giving the information that they should reasonably in all the circumstances have given. I conclude that Mr Decker was acting as a skilled adviser and failed to give the claimant the correct information that he reasonably should have given and failed to take all reasonable care in researching the matter. The Claimant is not able to rely on the negligent advice given by Mr Decker to excuse the late presentation of the claim. I therefore conclude that it was reasonably practicable for the claim to be presented in time.

21. In the alternative, even if Mr Decker was not acting as a skilled adviser, I conclude that this would make no difference to the outcome as on the facts it was accepted by the Claimant that it was reasonably practicable to present the claim in time and he failed to do so.

22. Turning to the second issue as to whether it was not reasonably practicable to present his claim in time due to ill health; it was the claimant's evidence that he suffered ill health from the time of his suspension in October 2016 and throughout the primary time period. He produced a letter from his GP referring to acute stress and that it impacted on his ability to concentrate. The medical evidence did not corroborate Mr Decker's evidence that it caused memory problems or that the claimant was "terrified" and unable to function and this was not corroborated by his evidence in chief. All the facts suggested otherwise.

23. It was also noted that the GP letter was dated 21 August 2017 and gave no indication as to the severity of the claimant's mental impairment at the relevant time. There was no evidence before the tribunal that the claimant's ill health somehow prevented him from presenting his claim to the tribunal. There was simply no evidence that he was unable to complete the claim form or to speak to ACAS on the telephone.

24. Although the tribunal had considerable sympathy with the claimant it was

accepted that suspension and dismissal must be extremely distressing and the approach the claimant adopted when faced with these circumstances was entirely pragmatic and practical. His priority was to secure an alternative job straightaway with another employer and present an appeal against the decision to dismiss.

25. Although the claimant's evidence to the tribunal was that he could not pay attention to the Tribunal matter, there was no evidence he was prevented by reason of ill-health from doing so. He was able to attend work and keep on top of the divorce proceedings, there was no evidence to suggest that ill-health prevented claimant from pursuing his claim within the primary time period or that it made it not reasonably practicable to do so. The claimant conceded in cross examination that it was practicable for him to submit his claim in time, this is therefore consistent with the tribunal's view. I conclude therefore that on this evidence, find that it was reasonably practicable for the claimant to pursue his claim in time. It is therefore out of time and is dismissed.

26. Even though I do not necessarily need the proceed to the second part of the test I will do so for completeness. I therefore considered whether or not the claim form was put in in such further period as was reasonable. I consider that on the facts before me that the claim was not pursued within such further period as was reasonable. The early conciliation form was dated 4 April 2017; however, the claim form was not presented until 15 May some 41 days later. I conclude therefore that the claim which was out of time was also not presented within such further period as was reasonable.

Costs Application

27. After delivery of this decision the respondent then presented their application for costs. The respondent produced to the tribunal a costs warning letter sent directly to Mr Decker, with a copy to the claimant, dated 9 August 2017. The letter stated that at this was a clear case where the claimant failed to present his claim in time due to incorrect or negligent advice and referred to the Walls Meat case (see above). It warned that the claimant's case had no reasonable prospect of success and submitted that in their view, he was pursuing his case unreasonably and were he to be unsuccessful, they would seek an award for costs. The Claimant was invited to withdraw his claim by 22 September, however he did not do so.

28. The claim for costs covered all the charges that had been incurred by the respondents from presentation of the response form to the preparation for this hearing, the charges incurred thus far were £1308.10 this did not include the costs incurred in attending today's hearing.

29. The claimant's representative was given time to respond to the application and his oral representations were as follows: that he had consulted case law and he based the matter on what he thought section 111(2) meant. He stated that the claimant was not in the right mental state. The respondent was not aware of his medical state and we have put in medical evidence. This claim was not vexatious and the costs application is not reasonable. The amount of time being claimed was excessive.

The Law

Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013

76 When a costs order or a preparation time order may or shall be made

(1) A Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that--

(a) a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted; or
(b) any claim or response had no reasonable prospect of success; [or

77 Procedure

A party may apply for a costs order or a preparation time order at any stage up to 28 days after the date on which the judgment finally determining the proceedings in respect of that party was sent to the parties. No such order may be made unless the paying party has had a reasonable opportunity to make representations (in writing or at a hearing, as the Tribunal may order) in response to the application.

78 The amount of a costs order

(1) A costs order may--

(a) order the paying party to pay the receiving party a specified amount, not exceeding £20,000, in respect of the costs of the receiving party;

Decision

30. This is a case where costs should be awarded. There was little or no evidence to suggest the claimant was unfit due to ill-health and was unable to present his claim in time. In any event, he had placed the matter in the hands of his friend Mr Decker who negligently failed to present the claim in time due to his own college and personal commitments. This is a case which has been conducted unreasonably. The case pursued before tribunal was on the facts doomed to fail; the case law had been brought to the claimant's representatives attention in good time before the hearing and it had been explained why his case had little or no merit. He persisted in pursuing the claim on that ground and was unsuccessful. This is therefore unreasonable conduct of the case.

31. Although the Respondent was claiming all their costs incurred in this matter, I considered that to be excessive. I concluded that the costs from the date of the costs warning should be allowed which were in the region of £729.50.

32. I took into account the claimant's ability to pay and he informed the tribunal and that he was earning £1200 a month and his outgoings are £690 a month on a mortgage, his utility bills are £200 a month. He pays £20 a month for his mobile telephone and gives pocket money to his two children of £50 a month each.

33. Taking into account the claimant's disposable income of £190 a month. I

conclude that the claimant shall pay costs to the respondent at £250.

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Employment Judge **Sage**

Date 4 October 2017