Case Number: 3325709/2017

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr M Moallim	v	Spurway Foods Limited

Heard at: Watford **On**: 2 and 13 November 2017

Before: Employment Judge Hyams, sitting alone

Appearances:

For the Claimant: Mr James Khalid, of Counsel

For the Respondent: Ms Anish Esmail, Solicitor

JUDGMENT

The tribunal does not have jurisdiction to hear the claimant's claims.

REASONS

Introduction; the claims, the issue determined by me and the reason for the hearing being held on two separate dates

1 In these proceedings, the claimant claims (1) unfair dismissal, (2) "My Retirement Pension Scheme where I have substantial amount", and (3) Compensation for my Injury in Work". The only viable claim in this tribunal is that of unfair dismissal, i.e. unfair dismissal within the meaning of Part X of the Employment Rights Act 1996 ("ERA 1996").

2 The claim was recorded by Her Majesty's Courts and Tribunals Service as having been received on 23 June 2017. The respondent alleged that the claimant was dismissed summarily on 26 August 2016. The claim was apparently made long out of time, therefore. The question whether it was made out of time was listed to be determined as a preliminary issue on 2 November 2017.

3 The claimant gave oral evidence on 2 November 2017. He had not written a witness statement in advance of the hearing, and his evidence in chief was adduced by Mr Khalid and otherwise given in answer to questions asked by me. Mr Khalid said that the claimant might need an interpreter, but having heard from the claimant, I was initially satisfied that he did understand what was asked of him each time, and that he was able to express himself sufficiently well for me and the respondent to understand precisely what he was saying.

4 Having heard evidence and submissions on 2 November 2017, I asked the parties to withdraw and considered the matter. Having written in draft form a set of findings of fact, I found that a letter of apparently critical importance had not been the subject of cross-examination. I therefore asked the parties to return, and asked the claimant a number of further questions. It then became apparent to me that the claimant might well not be understanding my questions sufficiently to be able to give me accurate answers to them. Before I said anything about that view, Mr Khalid said that it looked as if the claimant was not understanding my questions properly. I then decided, with Ms Esmail's agreement, that I had to adjourn the hearing and resume the hearing with an interpreter. The hearing was then resumed on 13 November 2017 with an interpreter present.

The evidence

5 Two bundles of documents were put before me: one compiled on behalf of the respondent and one compiled on behalf of the claimant. At pages 88-89 of the respondent's bundle, there was a letter dated 26 August 2016 from the respondent to the claimant. The letter referred expressly and clearly to the fact that the claimant's employment was being terminated by that letter. The letter was written after a disciplinary hearing which took place on 16 August 2016, and included this sentence:

> "Your leave date will therefore be with effect from Friday 26th August 26, 2016." (Sic)

6 The claimant said on 2 November 2017 that he was aware at the time of his dismissal that there was a three-month time limit for making a claim to an employment tribunal in respect of the dismissal. He said that very clearly. However, on 13 November 2017, he said that he was not aware of that time limit until he had approached ACAS (i.e. the Advisory, Conciliation and Arbitration Service) in June 2017.

7 On both 2 and 13 November 2017, the claimant said that his reason for not making a claim within the period of three months from his dismissal was that he was in pain as a result of an injury to his knee which he had suffered three years previously when at work, working for the respondent, and that he was

worried about the fact that he was due to have an operation on the knee.

8 The claimant said also that he was stressed by the fact that he had been dismissed from his employment with the respondent, and that his dismissal had led to financial and family problems, which had (1) added to the stresses on him and (2) depressed him. He said also that after he had had the operation on his knee, he was unable to leave his home. He said on 2 November 2017 that he was able to use a computer and he did surf the internet, but on 13 November 2017 he said that he surfed the internet only at an internet café, and that while he had a Samsung smartphone, he did not use it for surfing the internet "much". He said (via the interpreter): "Sometimes when I am home I might use it."

9 On 13 November 2017, the claimant said that he was not aware of the "Google translate" tool.

10 The operation on the claimant's knee took place on 22 November 2016. The discharge summary was at pages 27-28 of the claimant's bundle. It was dated 22 November 2016, and on page 28, it had in the right hand column opposite the words "Post discharge plan":

> "Pain relief Improve function of the knee
>
> Return to daily activity within stated restrictions. Healthy diet, fluids and light mobility for the first week building up as sees fit."

11 The claimant said at both hearings that during the period when he was feeling stressed, he contacted his GP (i.e. his general medical practitioner) on three occasions, with a view to arranging an appointment to discuss the fact that he was depressed, but on each occasion it was going to be so long before he was able to see a doctor that he did not make an appointment to do so. Certainly, there was no medical evidence before me about the claimant's mental state during the period from 27 August 2016 to 22 June 2017.

12 The claimant underwent physiotherapy until 5 April 2017. He told me on 2 November 2017 that he experienced some pain in his knee in the mornings after then, but that when the weather was warm he did not experience much pain in the afternoons.

13 The reason why the claimant made the claim in June 2017 was, he said on 2 November 2017, that on 20 June 2017 he was told by someone that he needed to contact ACAS before making a claim, which he did on that day. On the following day, 21 June 2017, ACAS issued the certificate required before a claim could be made to an employment tribunal. On the day after that, the claimant said, he was assisted by someone to make his claim to the employment tribunals online. The claimant said that he did not know until then that he could make a claim online.

14 On 13 November 2017, the claimant said that when he made his claim, a friend (to whom I refer further below) came to the tribunal "to fill in the form for me". In fact, the ET1 claim form was accompanied by an ACAS certificate which was sent by email, and the form was completed digitally, and not by hand.

15 There were in the respondent's bundle copies of letters which showed that the claimant had appealed against the decision to dismiss him. He had done so in a letter dated 30th August 2016 (at page 90). That letter referred in terms to the dismissal as having been an "UNFAIR DISMISSAL", and the letter said that the dismissal would be dealt with by "the Trade Union". On 13 November 2017, the claimant said that he had joined the trade union only a few days before his dismissal, and that the union had declined to assist him since, it said, he should have been a member of the union for 6-8 months before then. I return to the letter at page 90 below.

16 The claimant was informed in a letter dated 15 September 2016 (at pages 91-92) that the hearing of the appeal would take place on 20 September 2016. In an undated letter to Mr Gary Juliff, the respondent's General Manager, at pages 93-95 of the respondent's bundle, the claimant, under the heading "REF: UNFAIR DISMISSAL", made a number of assertions, including that his dismissal was unfair, and ended the letter:

> "Since I have been mistreated, after long time services for the company, I reserve the right to chase my injury compensation, unfair dismissal and HMRC records.
>
> Thank you for your time."

17 On 13 November 2017, the claimant put before me some proofs of postage and receipt of the letters at pages 90 and 93-95 of the respondent's bundle. The letter at page 90 was delivered on 31 August 2016, and the letter at pages 93-95 was delivered on 20 September 2016. The latter letter was in fact stamped as having been received on 20 September 2016, but the former was stamped as having been received on that date also. I accepted the claimant's evidence that the letters were received by the respondent on 31 August and 20 September 2016 respectively.

18 At page 96 of the respondent's bundle there was a note of a telephone conversation with the claimant made on 20 September 2016. The note was made by Ms Mary Slattery, "HR Assistant". It was in these terms:

> "Received phone call from Mohamed Moallim at 12noon I asked if he had attended his appeal hearing meeting today and he replied that he's too busy not time for meetings.

> I asked if he had received letter posted (1st Class) to him on Thursday 15th September his reply was no but he will have to check.
>
> I then asked for his email address but he seemed not to know it, I asked if he could text it to me when he remembered."

19 The claimant did not attend the appeal hearing of 20 September 2016. The respondent then gave him an opportunity to attend an appeal hearing on 6 October 2016. The letter informing him of that opportunity (it was at page 97 of the respondent's bundle) was dated 3 October 2016 and was apparently sent in hard copy form only.

20 The claimant did not attend that reconvened hearing either, and on 14 October 2016, the respondent wrote (page 99 of the respondent's bundle):

> "Please contact us if you wish to [pursue] your appeal. If we do not hear from you by 21st October 2016 we will assume you do not wish to proceed with your appeal hearing. You may contact me on [and a mobile telephone number was given]."

21 The claimant's evidence on 13 November 2017 was that he was helped by one person, a Somali friend, throughout the period from his dismissal until he made his claim on 23 June 2017. That friend heard what he had said, told him that he had been wronged, and wrote the letters at pages 90 and 93-95. That friend then found out in June 2017 that ACAS could help with a claim, and after the claimant had contacted ACAS with his friend's help, the claim was made.

22 The claimant said that the friend did not read out the letters at pages 90 and 93-95 before the claimant signed them: rather, said the claimant, the friend just told him to sign the letters.

23 The claimant was asked in cross-examination to say why he did not seek advice or assistance from someone other than his friend between August 2016 and June 2017. He gave the pain and the stress that he was under as the reason for not doing that and he also said that he asked around to find the best advice but was unable to find someone who would advise him in the correct way. In addition, when pressed on this issue, he said this:

> "My knowledge of the ways of the legal system was very weak but I did have someone to try to advise me but when I got a little bit better, that is what I did."

24 The claimant's job was on a production line: he put sleeves onto ready-meal packages. He said that the English that the staff there used was "just street language and sometimes we expressed ourselves by gesture."

The applicable law

25 The test for me to apply was that stated in section 111(2) of the Employment Rights Act 1996 ("ERA 1996"), which, so far as material, is in these terms:

> "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."

26 The case law concerning the application of that section and its predecessors is now extensive. I referred myself to the passage in *Harvey on Industrial Relations and Employment Law* in paragraphs PI[187]-[213.04]. One particularly relevant passage was paragraph PI[208]:

> "If an employee is reasonably ignorant of the right to claim, it will inevitably follow that he will be unaware either of the correct mode of making a claim or the time within which it should be made. But if he knows in general about the availability of the remedy, he may still be ignorant of how and when to pursue it. In these circumstances, as Brandon LJ noted in the *Walls' Meat* case, it may be difficult for him to satisfy a tribunal that he behaved reasonably in not making suitable enquiries about these matters. Shaw LJ in the same case commented that 'mere ignorance' of the time limit will not of itself amount to reasonable impracticability, save perhaps where the employee does not discover the existence of his right until a short time before the expiry of the time limit. Waller LJ took a similar view in *Riley v Tesco Stores* [1980] ICR 323 at 335."

27 Another helpful paragraph was paragraph PI[190], which is in these terms:

> The possible factors are many and various, and, as May LJ stated in *Palmer and Saunders*, cannot be exhaustively described, for they will depend on the circumstances of each case. The learned judge nevertheless listed a number of considerations, collated from the authorities, which might be investigated (see [1984] IRLR at 125, [1984] ICR at 385). These included the manner of, and reason for, the dismissal; whether the employer's conciliatory appeals machinery had been used; the substantial cause of the claimant's failure to comply with the time limit; whether there was any physical impediment preventing compliance, such as illness, or a postal strike; whether, and

> if so when, the claimant knew of his rights; whether the employer had misrepresented any relevant matter to the employee; whether the claimant had been advised by anyone, and the nature of any advice given; and whether there was any substantial fault on the part of the claimant or his adviser which led to the failure to present the complaint in time."

28 In fact, in *Wall's Meat v Khan*, Brandon LJ referred to "professional advisers" and not just "advisers".

29 Finally, I note that there is this further helpful paragraph in *Harvey*, PI[207]:

> "So, whilst a claimant's state of mind is to be taken into account, it is clear that his mere assertion of ignorance either as to the right to claim, or the time limit, or the procedure for making the claim, is not to be treated as conclusive. The objective nature of the enquiry is exemplified by *Porter v Bandridge Ltd* [1978] ICR 943, where the majority of the Court of Appeal approved an employment tribunal's finding that the claimant 'ought to have known' of his right to claim, even though he did not in fact know of it. A similar conclusion was reached in *Avon County Council v Haywood-Hicks* [1978] IRLR 118, [1978] ICR 646, where the EAT overruled a decision of a tribunal which had granted an employee the benefit of the escape clause despite his 'extraordinary' ignorance of his rights. As in *Porter*, the EAT held that 'this was a case where the employee ought to have known of his right even if he did not actually do so'. Moreover, as the courts have pointed out, with the widespread public knowledge of unfair dismissal rights, it is all the time becoming more difficult for an employee to plead such ignorance successfully (see, for example, *Riley v Tesco Stores Ltd* [1980] ICR 323 at 328, 329, 335, *Wall's Meat Co Ltd v Khan*, above). A more lenient attitude was, however, shown in *Marks & Spencer plc v Williams-Ryan* [2005] EWCA Civ 470, [2005] IRLR 562, where the claimant, although she knew of the right to claim for unfair dismissal, was ignorant of the time limit. That ignorance was excused by a tribunal on the grounds that the employer's post-termination advice to her as to her rights, whilst referring to the right to make a claim to an employment tribunal, did not mention the time limit, and was thus misleading, and that the claimant was under personal pressure to complete a teacher training course. The tribunal duly gave her the benefit of the escape clause. The Court of Appeal considered the findings 'generous' to her but was not prepared to say that they were perverse (see paras 37-41)."

My conclusions

30 I was not sure whether or not the claimant's evidence was that he was unaware of the content of the letters at pages 90 and 93-95 of the bundle. I

found it difficult to believe that he was not aware of them, or at least that they referred to his right to claim unfair dismissal. I noted that the claimant had gone to see his trade union at the time of his dismissal, and that he might have obtained some advice from them. In any event, I concluded on the balance of probabilities, that the claimant was aware in August 2016 of the right to make a claim of unfair dismissal.

31 After then, whether or not he knew of the need to make a claim of unfair dismissal within 3 months of the dismissal (extended, if at all, by any early conciliation period), in my judgment he did not make such inquiries as he ought to have done during that 3-month period or subsequently to find out about that time limit.

32 It took the claimant just under 7 months from the expiry of the 3-month time limit to make the claim. While the claimant was, as he said, stressed, during that period (and I readily accept that he was), he put no medical evidence before me about the effect of that stress on him, and his assertion that he was hindered from making a claim by immobility led only to the conclusion that after he had, on 5 April 2017, had his last physiotherapy session, he was at the latest by then physically able to walk without significant pain. The claim was made approximately 2 and a half months after that final period of physiotherapy.

33 In the circumstances, I concluded that it <u>was</u> reasonably feasible or practicable for the claimant to have made his claim within the period of three months from his dismissal (extended as appropriate by any period of early conciliation involving ACAS).

34 If I had not come to that conclusion, then I would have concluded that the claimant did not make the claim within a reasonable period of time after the ending of that period. Even if the claimant's knee injury and his personal stresses had meant that there was such an impediment to the making of inquiries and then the making of a claim that it was reasonable not to have made the claim until the end of the period of his physiotherapy, the claimant did not make the claim within a reasonable period of time after then.

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Employment Judge

Date: …….14 November 2017……..

Sent to the parties on: ……..

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For the Tribunal Office