EMPLOYMENT TRIBUNALS

Claimant: **Mr K Power**

Respondent: **Stepchange Debt Charity**

Heard at: **Leeds** **On:** **15 January 2018**

Before: **Employment Judge Davies**

Representation

Claimant: Did not attend
Respondent: Mrs Coyne (solicitor)

RESERVED JUDGMENT

1. The Claimant did not present his claim within the statutory time limit and it was reasonably practicable to do so.
2. The Tribunal therefore has no jurisdiction and the claim is dismissed.

REASONS

Introduction

1. A three hour preliminary hearing in public was listed today to decide whether this claim of unfair dismissal was presented within the statutory time limit; if not whether time should be extended; and in any event whether the claim should be struck out on the basis that it has no reasonable prospect of success, or whether the Claimant should be required to pay a deposit as a condition of continuing with it on the basis that it has little reasonable prospect of success.

2. At 9:48 am the Tribunal received an email from the Claimant in which he explained that he was unable to attend the hearing. Roadworks had delayed his bus into York so that he had missed his connecting train. He said that if the hearing could not be fixed for another day it would need to go ahead in his absence and asked that his most recent email be taken into account in those circumstances. Because of changes to my list, I was in a position to start the hearing late and continue it this afternoon if necessary. I therefore asked the Tribunal staff to telephone the Claimant and explain that to him. The staff called him at around 10am, by which time he was already at home. He was reluctant to set out again and suggested that it would take him about two hours to get from Escrick into York. He would then have to catch a train to Leeds. He was also concerned about the amount of time it would take him to get home afterwards because he had animals to care for. He said that although he would prefer to be at the hearing he did not object to it going ahead without him and explained that what he had said in his email last week was what he would say if he were present. He said that the Respondent had asked for

information to which he did not think the Respondent was entitled. In any event he would not have had time to assemble it for today's hearing.

3. I decided that it was consistent with the overriding objective to proceed in the Claimant's absence. He was given the opportunity to attend a hearing later in the day and declined. He indicated that he did not object to the hearing going ahead without him and said that he had provided all the information on which he would rely. There was no suggestion that he would bring medical or financial evidence with him. This is a claim in which there has already been substantial delay (see below). The Tribunal had made an order for the production of witness statements and the Claimant had not produced one. The Respondent was present at the hearing with two witnesses. Postponing the hearing would cause further unnecessary expense and delay and in all the circumstances it was appropriate to proceed.

4. I read carefully all of the Claimant's emails to the Tribunal and took them into account. In addition, Mrs Coyne took me through the chronology and through relevant parts of the Respondent's bundle of documents.

The issues

5. We agreed that I would begin by dealing with the question of time limits and the issues were therefore:

   5.1 Was the claim presented before the end of the period of three months beginning with the Claimant's effective date of termination?
   5.2 If not, was it reasonably practicable to do so?
   5.3 If not, was it presented within such further period as the Tribunal considers reasonable?

The Facts

6. The basic chronology is that the Claimant's effective date of termination was 2 August 2016. The deadline for contacting ACAS to start early conciliation (or for presenting a Tribunal claim if the early conciliation provisions did not apply) was therefore 1 November 2016. The Claimant did not present a claim or start early conciliation. The Claimant first contacted ACAS to start early conciliation on 31 July 2017, four days after the decision of the Supreme Court in *R (on the application of Unison) v Lord Chancellor* [2017] UKSC 51. An ACAS early conciliation certificate was issued on 14 August 2017. In fact ACAS had not contacted the Respondent and I infer that the Claimant had asked them not to. The claim was presented on 27 September 2017.

7. The Claimant's correspondence identifies three broad reasons for the delay in presenting his claim, namely (1) that he was unable to present the claim earlier because of mental ill health; (2) that he could not afford to bring a claim until after the Employment Tribunal fees were abolished; and (3) that his partner worked for the Respondent until he tendered his resignation on 22 September 2017. Based on the content of the claim form, the Claimant's correspondence and the documents I make the following findings of fact relevant to those three reasons.

Ill health

8. The Claimant was dismissed on 2 August 2016 on capability grounds, having been absent with depression and anxiety since January 2016. The Respondent had taken occupational health advice and held long term ill-health meetings with the Claimant. The most recent occupational health report before his dismissal,

dated 6 July 2016, recorded that he had stopped taking his antidepressant medication and felt an improvement although he was still suffering from anxiety. Notes of the ill-health meetings that took place before his dismissal also recorded the Claimant saying that he had stopped taking antidepressant medication. Although his doctor had raised the possibility of starting different medication, the documents indicate that the Claimant was saying (repeatedly) that he would only need to start a new medication if he returned to work. Indeed, the documents record him saying that he did not want to return to work for that very reason.

9. Employment Judge Cox made an order on 6 December 2017 that the parties exchange written statements of the evidence they intended to give at the preliminary hearing relating to the issue of whether the claim was presented in time and if not why not. Those statements were to be exchanged by 27 December 2017. The Claimant did not produce any such statement. By letter dated 6 December 2017 the parties were also told that if they wanted to refer to documents they should exchange them in advance of the preliminary hearing. The Claimant did not produce any medical evidence or other documentary evidence relating to his ill-health apart from his correspondence with the Tribunal.

10. In his claim form the Claimant referred to suffering from stress and depression. He said that since his dismissal "in 2017" he had decided to stop taking antidepressant medication. That took several months but now he was no longer working for the company he was in a much happier state. He expanded on that in his letter to the Tribunal dated 20 November 2017. In that letter he suggested that at the time of his dismissal he was taking strong antidepressants prescribed by his doctor. This had side effects and affected his ability to make considered decisions so that he simply accepted the position he was in with no thought about how he had been treated after his dismissal. He said that he continued with the medication until "well into 2017" when he decided to stop taking it. That account was plainly inconsistent with the occupational health report to which I have referred above and with what the Claimant is recorded as having said to the Respondent shortly before his dismissal. The Claimant was not present to give evidence and I therefore approach what he said in his email of 20 November 2017 with some caution. There is, of course, no question that the Claimant had been suffering from depression for some months prior to his dismissal. However, what is less certain is when he stopped taking medication, when his condition started to improve and to what extent.

11. In trying to reach a view about that I have also taken into account what the Claimant said in his email to the Tribunal on 11 January 2018. That was an email dealing with his financial position. In that, he explained that he started a small car business in November 2016. To start with that generated a small income but by April 2017 it was losing money and he decided to close the business. He started a self-employed gardening business in August 2017. Given the inconsistencies referred to above, and the lack of medical evidence, it seems to me that this information provides the most reliable indicator of when the Claimant was well enough to bring Tribunal proceedings. If he was well enough to start a small business in November 2016 I find that he must also have been well enough at that stage to bring Tribunal proceedings.

Financial position

12. The Claimant did not refer in his claim form to the Tribunal fees being a reason why he did not bring his claim earlier. He first mentioned this in his letter of 20

November 2017. In that letter he said that when he found out there had been a change to the Tribunal process and that there would be no financial implications for him he contacted ACAS. They agreed to support his case so he submitted a Tribunal claim. I pause to note that the Claimant may have misunderstood the position of ACAS. Their role is to conciliate, not to support one side or the other. In any event, this was the first time the Tribunal fees and the Claimant's financial position had been mentioned.

13. The Claimant has not produced any documentary evidence of his financial position, although the Respondent requested it last week. In his claim form he referred to "£35,000 of unsecured credit" without giving any specifics. He provided more information about his financial position in his email of 11 January 2018. He said that he had not been in employment since his dismissal in August 2016. His partner had become the sole earner and was able to cover the household priority bills. However, their unsecured credit could not be repaid. He and his partner were on reduced payment arrangements now. The Claimant said that he did not register for Jobseekers Allowance ("JSA") because he had no means of transport to attend their office for interviews or finances to use transport. He also felt that as his partner could cover the priority bills there was no need to claim JSA. In November 2016 he and his partner sold their family car (which was initially purchased with a personal loan) so that he could start up the car business. It generated a small income to begin with but was losing money and closed by April 2017. His 2017 tax return highlighted the business loss. He had received a £280 tax rebate due to tax overpayment from when he was employed. He had no savings, investments or property. He had started self-employment as a gardener in August 2017.

14. The Claimant has not given any clear account of what his income, assets and outgoings were in August to November 2016 (or after that). He had exhausted his entitlement to sick pay by the time of his dismissal, but was paid four weeks' in lieu of notice. He has not referred to any attempt to seek help with the Tribunal fees through the fee remission process. It appears to have been his choice not to claim JSA. It is difficult to see how the cost of travelling from Escrick to the Jobcentre in York would have exceeded the amount of his JSA.

15. Even accepting that he had substantial unsecured credit and no savings or property, I am unable to find on a balance of probabilities that he was not reasonably able to pay the Tribunal fee, when he chose not to apply for JSA and when I do not know whether he applied for fee remission or what the likely outcome would have been if he had done so.

The Claimant's partner

16. In his email of 20 November 2017 the Claimant refers to the fact that his partner was working for the Respondent as a manager at the time of his dismissal. He said that it was a big worry that should he take any formal action that would lead to his partner's job being affected in some way. Once his partner had taken the decision to leave the organisation he felt confident in proceeding with his case. The Respondent confirmed that the Claimant's partner gave notice on 22 September 2017 and left on 20 October 2017.

Legal principles

17. The time limit for presenting an unfair dismissal claim is set out in s 111 Employment Rights Act 1996. Subject to any early conciliation extension, the claim must be presented within three months of 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 in time.

18. If the claim was not brought in time, it is for the Claimant to satisfy the Tribunal that it was not reasonably practicable to present the complaint within the time limit. Reasonably practicable means something between "reasonable" and "physically possible": see *Palmer and Saunders v Southend-on-Sea Borough Council* [1984] ICR 372, CA. It is a question of fact for the Tribunal whether it was reasonably practicable for the complaint to be brought in time. The factors to be considered may include the manner of, and reason for, the dismissal; whether the employer's conciliation machinery has 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 or her rights; whether the employer misrepresented any relevant matter to the employee; whether the Claimant has 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: see *Palmer and Saunders*.

19. If the Tribunal finds that it was not reasonably practicable for the claim to be presented in time, it must then consider whether it was brought within a reasonable period thereafter. This requires an objective consideration of the factors causing the delay and what period should reasonably be allowed in those circumstances for the proceedings to be instituted, having regard to the strong public interest in claims being brought promptly, and against a background where the primary time limit is three months: see *Cullinane v Balfour Beatty Engineering Services Ltd* UKEAT/0537/10 (5 April 2011, unreported).

20. At the time of his dismissal, the Claimant was required by the Employment Tribunal and the Employment Appeals Tribunal Fees Order 2013 to pay a fee in order to bring an unfair dismissal claim. However, in the *Unison* case referred to above the Supreme Court held that the Fees Order was unlawful. The Supreme Court held that the fees put people off making claims, even claims that were likely to succeed. Lord Reed held at paragraph 93 that the question whether fees effectively prevent access to justice must be decided according to their likely impact on behaviour in the real world. They must be affordable not in a theoretical sense but in the sense that they can reasonably be afforded. Where households on low to middle incomes can only afford fees by sacrificing the ordinary and reasonable expenditure required to maintain what would generally be regarded as an acceptable standard of living, the fees should not be regarded as affordable.

21. My attention has not yet been drawn to any decision of the EAT establishing the principles to be applied in a case where a Claimant has argued that the unlawful fees made it not reasonably practicable to present the claim in time. It is therefore necessary to approach the question based on the wording of the legislation and the well-established general principles.

Determination of the issues

22. The claim was plainly not presented in time. The Claimant did not contact ACAS until almost a year after his dismissal, so he cannot rely on any early conciliation extension.

23. In the light of the material before me and my findings above, it seems to me that the principal reason relied on by the Claimant for the delay in presenting the claim was his ill-health. That was the only reason referred to in the claim form itself. However, the requirement to pay a fee seems to me to have been a further factor, particularly given that the Claimant contacted ACAS so soon after the Supreme Court's decision. Finally, I accept that his partner's position also played a part. Again, the fact that the claim form was presented less than a week after his partner gave notice of his resignation points to that conclusion. There was therefore one main and two less significant causes of the delay.

24. I turn therefore to the question whether it was reasonably practicable to present the claim in time, which in practice would have meant contacting ACAS by 1 November 2016. I find that it was reasonably practicable to do so. Most of the factors identified in the *Palmer* case are not applicable here. To a significant extent, this case turns on the reasons advanced by the Claimant and whether they are made out on the facts. For the reasons set out above I have found that the Claimant was well enough to start a business by November 2016 and I conclude that he was also well enough to contact ACAS to commence early conciliation. He has not provided any persuasive evidence that he was unfit to present a claim at that time and I find that his health was not something that made it "not reasonably practicable" to present a claim in time. As for his financial position, and the impact of the unlawful fees regime, in this case I have explained on the facts why I am unable to find on a balance of probabilities that the Claimant was not reasonably able to pay the Tribunal fee. He has not given a clear account of his income, assets and outgoings; he chose not to apply for JSA; and I have no information about whether he applied for fee remission or what the outcome was or might have been. Turning lastly to his partner's position, the mere fact that his partner worked for the same organisation is not in my view something that made it "not reasonably practicable" for the Claimant to present a claim in time. The Claimant may have been concerned, but that did not make it "not reasonably practicable."

25. For completeness, I have assumed for argument's sake that the requirement to pay and unlawful fee *did* make it "not reasonably practicable" to present this claim in time. Even if that were so, I would have found that the claim was not presented within a reasonable period thereafter. The Claimant evidently found out about the Supreme Court's decision very shortly after it was given, because he contacted ACAS within four days. There is no suggestion that his health was an impediment to bringing a claim at this time. Yet it was almost another two months before the claim was presented. The ACAS early conciliation period lasted 14 days, but the Respondent was not contacted so this is not a case in which meaningful negotiations were taking place during that time. The claim form as submitted is not lengthy or detailed and could have been prepared in an hour or two. The cases remind Tribunals that there is a strong public interest in claims being brought promptly and that the reasonableness of the time taken is to be assessed in the context that the primary limitation period is only three months. In all those circumstances, I would have found that the claim presented on 27 September 2017, more than eight weeks after the Claimant first contacted ACAS, was not presented within a reasonable period after it became reasonably practicable to do so. The position of the Claimant's partner would not have altered my view. I would not have found it objectively reasonable to delay a further eight weeks because the Claimant's partner worked in the same organisation.

26. For all these reasons, the Claimant was not presented in time and the conditions for extending the time limit are not met. Therefore, the Tribunal does not have jurisdiction to hear the claim. In those circumstances, I did not hear submissions from the Respondent on its application to strike out the claim for having no reasonable prospect of success.

Employment Judge Davies

Date: 15 January 2018