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EMPLOYMENT TRIBUNALS

Claimant ***Respondent***

Mr S Corbett **AND** Formula One Management Limited

HELD AT: **London Central** **ON:** 24 January 2019

BEFORE: Employment Judge Wade (Sitting alone)

Representation:

For Claimant: In person
For Respondent: Mr A Smith, Counsel

RESERVED JUDGMENT

The Judgment of the Tribunal is that:

1. The claim is struck out because it was filed out of time.
2. The Claimant is ordered to make a payment of costs to the Respondent of £13,200.

REASONS

1. The claimant filed his unfair dismissal claim out of time. Mr Corbett brings a claim of unfair dismissal only and the relevant law is contained in Section 111 of the Employment Rights Act 1996 which says that a claim cannot be accepted if it is out of time unless it was not reasonably practicable to bring it in time and it is then filed within such further period as the Tribunal considered reasonable. Case law has explained that reasonably practicable has the same meaning as “reasonably feasible”.

2. The facts relevant to this Judgment are set out below.

3. Mr Corbett worked for the Respondent for a number of years and is a lawyer although his specialism is as a trade mark attorney not an employment lawyer. When working for the Respondent he earned £110,000 per annum. Thus he had both the training and the resources to enable him to comply with section 111.

4. He resigned on 26 January 2018. The language of his email was distinctly legal and consistent with the legal test for constructive dismissal which shows that he had in fact had access to the legal resources which would enable him to comply with the time limit; he said:

> "the company has been responsible for a number of repudiatory breaches of my employment contract and as a result of the bullying, victimisation, harassment …. I have no option but to consider myself constructively dismissed".

5. He also said, "I would like to confirm that I intend to follow up with an official complaint via the appropriate channels and claim for constructive dismissal and this will name the individuals responsible for the mistreatment and also those complicit with the victimisation utilising the wealth of materials (thus far kept back) that I made sure I retained even prior to the company surreptitiously blocking my email access". This is inconsistent with a statement to the tribunal that he could not issue his claim until he had the necessary documents.

6. The primary time limit expired on 25 April 2018.

7. However, the Claimant had expeditiously engaged in the ACAS early conciliation process which began on 26 February 2018 and ended on 21 March 2018 and activated an extension of time to lodge the claim to 18 May 2018. This demonstrated that he was aware of what he needed to do in order to bring a claim and it is not possible to initiate this process without being

alerted to the fact that there is a strict time limit for bringing claims. Early conciliation.

8. The Claimant did not issue until 7 August 2018 which was 81 days out of time. When questioned by the Tribunal the Claimant agreed that he thought it might be out of time although he was not entirely sure but he also said that he knew that there was a three-month time limit. His belief (contrary to what it was feasible to know) was that the Tribunal had discretion to extend time although that is of course not the legal test. As someone who had had access to ACAS, was a trained lawyer and could afford legal advice it is surprising to say the least that he was not more accurate and I conclude that he was aware of the time limit at the time and decided not to issue on time, indeed he said this himself.

9. In its ET3 of 19 October 2018 the Respondent applied for the claim to be struck out, so if he had not been aware before then, the Claimant knew from that date that the Respondent considered that there was no jurisdiction. The Respondent pointed out to the Claimant that the test was a strict one under s.111 in that he had to show that it had not been reasonably practicable to put the claim in on time. This should have triggered serious consideration and research on the part of the claimant.

10. The Tribunal then wrote on 6 November 2018 with the notice of Preliminary Hearing to consider strike out. The letter recommended that the Claimant research the citizen advice website on time limits and then said "time limits are strict and can be hard to calculate. Employment Judge Wade's view is that the Respondent's calculation is correct but the decision [as to whether the claim should be struck out because there is no jurisdiction] will be made by the Judge at the Preliminary Hearing." This should have triggered even more serious consideration but there was no sign at this hearing that the claimant had made an effort to research the point as he maintained that the tribunal had "a discretion".

11. The Claimant was again warned of the challenges on jurisdiction in the Respondent's skeleton argument for the Preliminary Hearing on 4 December.

He did not attend the Preliminary Hearing and has never provided medical evidence of his inability to do so. He says that he had a sickness bug. I do not disbelieve him, but it is notable that he did not provide evidence of his sickness and only emailed the Tribunal about 40 minutes before the Hearing began to explain his absence; this showed disregard for due process.

12. A Deposit Order was made at the Preliminary Hearing for £1,000 which the Claimant paid. This was a strong warning from the Employment Tribunal that it agreed with the Respondent's analysis and that there was little reasonable prospect of success.

13. The effect of the Deposit Order was, as the Claimant was told in the documentation, that "if the Tribunal finds against the Claimant on the relevant claim for substantially the reasons [set out in the Deposit Order] then unless the contrary is shown the Claimant shall be treated as having acted unreasonably in pursuing that claim for the purposes of Rule 76 (so a cost or preparation time order could be made against the Claimant). And in addition, the Deposit may be paid to the Respondent". The claimant had been warned that the stakes were now very high and that there was a presumption that he would pay costs if the claim was found to be out of time at the next hearing. Nonetheless he paid the deposit of £1,000.

14. Mr Smith revised his skeleton argument and served it on the Claimant before today's Hearing. This means that the Claimant received at least five warnings, with explanation, as to why the Tribunal might not have jurisdiction to hear his claim and that the law was strict and against him. He also had the opportunity to research the matter himself and to take legal advice. Further, on 4 December the Tribunal had ordered the Claimant to say if he was pursuing a discrimination claim so he had the opportunity to look at the different time limit test for discrimination cases, but he confirmed that he was only pursuing unfair dismissal so the stricter test only applied.

15. Also on 4 December, the Claimant was ordered to provide a witness statement setting out all his submissions about his delay in issuing his claim. He did not do so; instead he sent two emails on 4 and 23 January setting out

his reasons. These were mainly that following the GDPR regulations in May 2018 he had discovered that he could dig for evidence to support his claim by making a subject access request. Whilst he had originally thought that he did not have the evidence and had decided not to pursue one (which is odd given paragraph 5 above), after he received the GDPR disclosure he changed his mind. The application under the subject access request procedure was made on 25 May. The Respondent responded with documents on 22 June. The Claimant issued his claim six and a half weeks later on 7 August.

Conclusions

16. In this case it was reasonably practicable, or reasonably feasible, to bring the claim in time and my reasons are set out below:

1. The Claimant knew that there was a strict three-month time limit and that he had failed to comply with it. This information was available from multiple sources, including ACAS. He had taken legal advice on an informal basis from somebody he knew as the resignation letter showed (in a communication to the Respondent on 8 January 2018 he talked about referral to his “legal representative”).

2. The Claimant chose not to take more legal advice although he could have afforded to do so. He clearly knew what constructive dismissal was because he used the language of constructive dismissal in his resignation email. This means that at the time he believed that the components were there and that there had been a fundamental breach of contract. Indeed, his grievance sets out a number of complaints that demonstrated why he believed that there had been such a fundamental breach. It is therefore not possible for him to say that it was not reasonably practicable to issue on the material that he had at that time. In other words, he made a choice not to issue within the time limit it was not because it was not feasible.

3. The Claimant is a lawyer, and this means that he has no reason to say that it was not feasible for him to understand and comply with the time limit rules. He says that he decided he could not issue the claim until he had more evidence, but he must know that in litigation the process is that a claim is issued and then disclosure happens after that. There are strict disclosure duties which means that the evidence that the Claimant was seeking would have been provided. In any even this resignation letter said he had the evidence.

4. In terms of the GDPR regulations which came in on 1 May, the Claimant is again surprisingly ignorant. There has always been a procedure whereby an individual can obtain personal information from their employer although before May a fee was payable; May was not the great watershed. Also, of course, the Claimant could at least have tried to get the information he wanted before the time limit expired but he did not even apply until 25 May which was a few days after the expiry of the time limit.

5. Further, the Claimant delayed between receiving his subject access request material on 22 June and issuing on 7 August. For a lawyer who was unemployed a gap of a month and a half is very significant and longer than could be said to be a reasonable period after the disclosure.

6. Overall, I am sorry to say that the Claimant has taken a cavalier approach to this litigation. He seems to have believed that the rules could be fashioned by his beliefs and not to have taken responsibility to run his litigation in a conscientious way respecting the process, which it was feasible for him to do. This led to the problem with the time limits and has now led to the problem with costs.

Costs

7. The Respondent's costs are £24,400 plus VAT but the Respondent is limiting its application to £20,000.

8. The Claimant was unreasonable in persisting with his arguments in the light of so much that went against him. Of course, following the Deposit Order there is a presumption that his behaviour was unreasonable. He compounded it by failing to comply with the orders of 4 December. He further compounded it by failing to come to this Hearing with evidence of his means although he had been explicitly invited to do so by the Respondent in its letter of 15 January.

9. He seemed confused when I asked why he had not provided this information and did not offer to do so orally at the Hearing. He is working again on a self-employed basis and it seems as if there is an ability to pay. Of course, I do not have to take ability to pay into account, it is a discretion but I record that I would have looked at any evidence provided.

10. I have decided to make a Cost Order which reflects the cost of the Respondent preparing for and attending this hearing today and also the cost of attending the hearing on 4 December. VAT has been added.

11. This hearing was entirely avoidable had the Claimant applied his mind and faced the inevitable which was that his unfair dismissal claim simply could not proceed because it was so considerably out of time. Without question it was reasonably feasible to lodge the complaint in time had the Claimant chosen to follow the Tribunal rules which were accessible to him. Instead he closed his eyes to the risks and paid the deposit, an indication of his ability to pay as he must have realised that that there was a high risk that he would lose his money.

12. The cost of the preparation for today and today's Hearing, including counsel's fee were £5,700 plus VAT. This is a reasonable figure.

13. I also award the costs of the Hearing on 4 December and a figure of £5,487.50 plus VAT is reasonable. Again, the Claimant having been warned three times, and he knew, or should have known that he had no basis for asserting that his claim was in time. Further, the Hearing could have been postponed and costs saved had the Claimant provided more and earlier information about his ill health. The claimant told me at this hearing that he could ask his partner to confirm that he had been ill, but he had not done so to date. Also, the illness ight have arisen at the last minute but a reasonable person would have taken effective steps to contact the tribunal and the respondent earlier tha 40 minutes before the hearing. The claimant lives in West Sussex and so must have known from about 7am that he was not going to make it to the hearing.

14. This Order gives the Claimant credit for the fact that it does take time for the realisation that the Tribunal claim is out of time to sink in and that is why I have not made a larger order.

15. The sum held on deposit is to be paid to the respondent as part payment towards the costs order.

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Employment Judge Wade

Dated:. 30 January 2019

Judgment and Reasons sent to the parties on:

5 February 2019

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For the Tribunal Office