EMPLOYMENT TRIBUNALS

SITTING AT: **LONDON SOUTH**

BEFORE: **EMPLOYMENT JUDGE F SPENCER**

BETWEEN: **MR S DONLON** **CLAIMANT**

AND

GREENWICH LEISURE LIMITED **RESPONDENT**

ON: **31 JANUARY 2019**

Appearances

For the Claimant: **In person**
For the Respondent: **Ms J Akinkuole, HR Business partner**

JUDGMENT

The Judgment of the Tribunal is that the Tribunal has no jurisdiction to consider the Claimant's claim which was presented out of time.

REASONS

Although oral reasons were given in the Tribunal, these written reasons are given because the Claimant was unhappy with the decision reached and may wish to appeal.

1. This was an open preliminary hearing to consider whether the Tribunal had jurisdiction to consider the Claimant's complaints of unfair and wrongful dismissal, and for holiday pay. It is the Respondent's case that the claim is out of time.

2. I heard evidence form the Claimant who had brought a small bunch of papers, including emails to and from his union, and to and from his MP. He feels passionately about his case, but at times his evidence was a little unclear.

3. The Claimant was employed by the Respondent from 29 March 2010 until his dismissal with pay in lieu of notice on 18th September 2017. It is the Respondent's case tht he was fairly dismissed for misconduct.

4. The Claimant contacted ACAS on August 2018 and issued his ET1 on 25 August 2018, nearly a year after his dismissal.

5. Section 111(2) of the Employment Rights Act 1996 provides that an employment tribunal shall not consider a complaint of unfair dismissal 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.

2. In respect of claims for notice pay and holiday pay the test is the same. See Article 7 of the Employment Tribunals (Extension of Jurisdiction) Order 1994 and Regulation 30(2) of the Working Time Regulations 1998 (the WTR).

3. The time limits are extended to allow for early conciliation. (Section 207B of the ERA, Article 8B of the Extension of Jurisdiction Order and Article 30B of the WTR.) When determining whether a time limit has been complied with, the clock will stop when ACAS receives the early conciliation request and restart the day after the early conciliation certificate is given. It follows that if ACAS does not receive the early conciliation request in time the prospective claimant will not get the benefit of the extension of time.

4. In this case, the relevant three-month period expired on 17th December 2017. The Claimant contacted ACAS on 8th August 2018 nearly 8 months later. ACAS issued its early conciliation certificate on 20th August and the claim was presented on 25th August 2018. It follows that the claim is out of time unless the Claimant is able to show that it was not reasonably practicable for him to have presented his claim in time. Even if he satisfies that test, he will also need to show he presented his claim within a reasonable further period.

5. The Claimant had been represented by his union during the disciplinary process and at his appeal. The Claimant candidly told the Tribunal that, after his dismissal, his union representative had said that he did not have a case and that the union would not support him. However, the Claimant felt that he had been unjustly treated and the union did agree to assist with his appeal. They sent him a case form on 21st September (though it was not clear whether that had been completed at that time).

6. The Claimant's internal appeal (submitted on 6th October) was dismissed

on 14th December.

7. On 21st December the union sent the Claimant a case form for him to fill in. This was for the union to assess whether they believed his case was strong enough for the union to support him. He returned that form on 12th January. By then of course the primary time limit had already expired. Unison duly responded that they would not support the Claimant and that the form should have been returned by 17th December. I accept that the Claimant had not been given this deadline by the union. The Claimant also says that at no time did Unison tell him about the time limits for the presentation of claims to the Tribunal, nor did they advise him that he could go to the Tribunal without their assistance.

8. In the meantime, the Claimant had seen his MP in surgery on 15th December. She in turn took matters up on his behalf with Unison. She also advised the Claimant to see an employment lawyer. The branch secretary responded that the Claimant had been asked to complete a case form and return it to the office, so that an assessment could be made, though the branch secretary opined that in his view the case was not strong enough. This was passed back to the Claimant.

9. The Claimant went back to see his MP in February. He felt that the union had let him down. His MP wrote again to Unison on his behalf to complain on his behalf. She contacted Unison several more times on the Claimant's behalf and they insisted that the Claimant had been given the correct level of support.

10. The Claimant told me that he had not tried to contact ACAS directly. He said he did not know about ACAS. He had a new job and was working full time. He thought Unison would do it all for him. When they said they would not take his case he went to see his MP again. He believed that the way forward was only though the union. He said that it was only when he contacted ACAS that he became aware he could put in a claim himself and he did that straightaway, (Confusingly the Claimant also said that he had called ACAS in May who said that if he wanted to make a claim, they needed all the details, though that was at odds with the evidence that he had only contacted ACAS just before the formal notification was made.) It was not clear in evidence what had triggered the eventual notification to ACAS on 8th August.

11. The issue is whether it was reasonably practicable for the Claimant to have presented his claim (or contacted ACAS) within the three-month time frame. Reasonably practicable does not mean reasonable nor does it mean simply physically possible. Individuals who have acted "reasonably" may fall foul of the time limit provisions.

12. The Respondent may have been slow in dealing with the appeal, but that fact does not mean that it was not reasonably practicable for the Claimant to present his claim in time. The appeal process does not stop the clock when calculating time limits.

13. In this case the Claimant knew he was dismissed and that there was the possibility of a claim to an employment tribunal. He was advised by the union, who I accept (at least for the purpose of this Preliminary Hearing) did not advise him of the time limit. In most cases, where an employee has advisors who are at fault, then this does not of itself mean that it was not reasonably practicable to present his claim in time. A trade union representative is an advisor for these purposes.

14. In any event the Claimant knew by February 2018 that the union would not support him; and he took no action to begin early conciliation until August. Even if I could find (which I do not) that it was not reasonably practicable to have contacted ACAS by 17th December, the Claimant did not act within a further reasonable timeframe thereafter. Although he continued to contact his MP, he does not appear to have undertaken any research into how to make a claim to the Tribunal. Even if he could not afford an employment lawyer there was free advice available from the CAB and a wealth of information available on the internet. I should stress that this is not intended to be a criticism of the Claimant; it is simply to explain that for those reasons I cannot say that it was not "reasonably practicable" for the Claimant to have presented his claim in time. Time limits in the Employment Tribunal are very short.

15. In his claim the Claimant had also ticked the box for redundancy pay, although from his own account it would not appear that the was dismissed for redundancy. However, that claim is also out of time as the claim was not presented with six months of the effective date of termination and it would not be just and equitable in the circumstances to extend the limitation period. (see section 164 of the ERA)

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Employment Judge F Spencer
20th March 2019