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EMPLOYMENT TRIBUNALS

Claimant		***Respondents***
Mr R Swales	**AND**	East Coast Main Line Company Limited

Heard at: London Central **On**: 4 March 2019

Before: Employment Judge Brown

Representation
For the Claimant: In person
For the Respondent: Mr S Ohringer, of Counsel

JUDGMENT

The Judgment of the Tribunal is that: -

1. **It was not reasonably practicable for the Claimant to present his claim for unfair dismissal in time and the Claimant presented his claim within a reasonable time thereafter. He therefore presented his claim in time and it can proceed.**

2. **The Tribunal does not strike out the Claimant's claim on the ground that it has no reasonable prospect of success.**

3. **The Tribunal orders the Claimant to pay a deposit the Claimant to pay £300 deposit as a condition of continuing to argue that the Respondent acted outside the band of reasonable responses in**

concluding that the Claimant had stolen items and thereby brought the company into disrepute, so that dismissal was not a reasonable sanction.

REASONS

1. These are the Respondent's applications for the Tribunal to strike out or make a deposit order in relation to the Claimant's claim for unfair dismissal. The Respondent contends that the Claimant brought his complaint out of time when he presented it on 19 June 2018 following early conciliation at ACAS starting on 4 May 2018. The Respondent also contends that the claim has no reasonable prospect of success and that I should make a deposit order.

2. I heard evidence from the Claimant on time limits. The Claimant was cross examined by Mr Ohringer, who appears for the Respondent. I find the following facts.

3. The Claimant was told, at a disciplinary hearing on 30 January 2018, that the Respondent had decided to terminate his employment with immediate effect and that the decision would be confirmed in writing. On the same day, the Claimant appealed against his dismissal by email. In the email he said, "Today 30 January I have been dismissed". The Claimant then received a letter of dismissal and a Notice of Decision sent together by the Respondent on 8 February 2018. The letter of dismissal said, "… I hereby confirm my decision and dismiss you from Virgin Trains East Coast. Thus, your contract of employment will be recorded as having been terminated with immediate effect from 30 January 2018. …..Your P45 income tax form will be forwarded to your home address as soon as possible," page 63.

4. However, the accompanying Notice of Decision contained the following words, "No steps will be taken to give effect to the decision until a period of seven days has lapsed when, in the absence of any appeal, it will be carried out and entered on your employment file", page 65.

5. As stated, the Claimant had appealed on 30 January 2018. The Claimant attended an appeal hearing a short time later, on 21 February 2018. At the end of the hearing, the appeal manager was told that the Claimant was unsure of the details of his dismissal. The Claimant was told that, from the date of dismissal, his benefits were not valid however, the manager went on to say, "You appealed against that decision. You are fully entitled to use them until the end of your appeal. Whilst you are not employed you are at liberty to use your passes".

6. Despite the wording of the dismissal letter, the Claimant's P45 was not forwarded to the Claimant promptly following the disciplinary hearing. Furthermore, the Claimant continued to receive pay slips in January, February and March 2018. It appears that the February and March 2018 pay slips both recorded that the Claimant was on "unpaid leave". The pay slips also made deductions from the Claimant's pension.

7. The Claimant's original appeal manager left the company and did not provide the Claimant with an appeal outcome. There was a delay until 16 April 2018 until a second appeal hearing was convened; it was adjourned until 19 April 2018. It was not until 27 April 2018 - two days before the expiry of the primary time limit - that the Respondent sent the outcome of the appeal to the Claimant. The Claimant told me that he received it on 2 May 2018, that is after the expiry of the primary time limit, if he had been dismissed on 30 January. He contacted ACAS on 4 May 2018.

8. The Claimant then presented his claim on 19 June 2018. The Claimant told me that he did not believe that his claim had been presented out of time; he did not believe that he had been dismissed until he received the outcome of the appeal hearing and the appeal outcome was what prompted him to contact ACAS. He said that he did not know that his claim was out of time until the Respondent's solicitors told him that he should have contacted ACAS by 29 April and that his claim was out of time.

9. The Claimant was represented by a Union during his disciplinary and appeal hearings. He told me that he asked the Union for advice regarding

Employment Tribunal proceedings and the union officer told him that he had plenty of time to bring a claim to the Tribunal and that he should bring an appeal first.

10. It seemed to me that, at that time, on 30 January or thereabouts, that advice was perfectly reasonable. It seems that, normally, the Respondent concludes appeals within a short time of a dismissal. In normal circumstances, where the appeal would have been determined promptly, the Claimant would have had plenty of time to bring a complaint to the Employment Tribunal thereafter.

11. The Claimant explained to me the basis on which he did not believe that he had been dismissed. He said that he relied on the words of the Notice of Decision. He also noted that he did not receive the P45 and that he had received pay slips saying that he was on unpaid leave.

12. I accepted his evidence regarding this. I accepted that he was misled by the wording of the Notice of Decision. I accepted that he was misled by the wording of the pay slips saying that he was on “unpaid leave”. Being on unpaid leave would usually be consistent with continued employment.

13. Therefore, despite the Claimant having been told that he had been dismissed, I concluded that the Claimant reasonably believed that the decision had not been put in to effect; that is, that while the decision to dismiss had been made, it would not be implemented until after the outcome of the appeal was known.

14. The Claimant is a lay person and I concluded that, even a lawyer considering the wording of the Notice of Decision would be confused as to the effect of the decision and when it was going to be implemented. Furthermore, I believed that even a professional lawyer, or a Union official, would be confused by the description of the Claimant’s status as being on “unpaid leave” as stated on the pay slips. People do not tend to be on unpaid leave unless they continue to be employed.

Relevant Law – Time Limits

15. The time limits for presenting complaints of unfair dismissal to an Employment Tribunal are set out in *s111Employment Rights Act 1996.*

16. By *s111(2)ERA 1996*,
".. 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 the period of three months."

17. Where a Claimant fails to present his claim in time and seeks an extension of time, the employee must show that it was not reasonably practicable to present his claim in time. The burden of proving this rests on the Claimant, *Porter v Bandridge Ltd* [1978] IRLR 271, [1978] ICR 943, CA. If he succeeds in doing so, the Tribunal must be satisfied that the time within which the claim was, in fact, presented was reasonable.

18. The question of whether it was reasonably practicable for the complaint to be presented is one of fact for the Employment Tribunal, taking into account all the relevant factors *Palmer and Saunders v Southend-on-Sea Borough Council* [1984] IRLR 119, [1984] ICR 372, CA. Relevant factors can include the manner of, and reason for, the dismissal; whether the employer's conciliation 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.

19. The fact of a pending internal appeal does not, on its own, allow a claimant to establish that it was not reasonably practicable to present a claim in time.

20. The Claimant's lack of knowledge of his rights and of the time limit may, however, assist the Claimant in establishing that it was not reasonably practicable to present the claim where an internal process was also being followed. In *Marks & Spencer v Williams-Ryan [2005] ICR 1293*, the Claimant's belief, pursuant to advice given by her employer, that she had to complete an internal appeal before starting tribunal proceedings, combined with her reasonable ignorance of the time limit for bringing an unfair dismissal claim, meant that it was not reasonably practicable for her to make her claim in time.

Time Limits – Discussion and Decision

21. I considered, in this case, that the cause of the Claimant's failure to bring the complaint in time was the Respondent's fault in the misleading wording of the Respondent's Notice of Decision, the misleading wording of the Respondent's pay slips and the Respondent's failure to send the P45. This was further exacerbated by the Respondent's fault in its very long delay in determining an appeal against a very simple unfair dismissal decision. The outcome of the appeal was not given to the Claimant until after the time limit had expired for contacting ACAS.

22. Taking into account the relevant factors, I concluded that the Claimant was not himself at fault - he reasonably relied on the Respondent's statement to him that the decision would not be implemented if he appealed or had appealed. The Claimant reasonably pursued his appeal.

23. His Union adviser was not at fault, because at the time he advised the Claimant that the Claimant had plenty of time to present a Tribunal claim following an appeal, this was proper and reasonable advice.

24. I considered that the Claimant acted promptly once he did receive the outcome from the appeal - he contacted ACAS on 4 May; that is, only two days after he received the appeal outcome.

25. I concluded that it was not reasonably practicable for the Claimant to bring his claim by 29 April 2018. He was misled by the Respondent into thinking that the decision to dismiss would not be effective until the outcome of the appeal. He contacted ACAS very promptly on 4 May and I decided therefore that the Claimant did bring his claim within a reasonable time after the expiry of the primary time limit. Accordingly, the Claimant's claim is not out of time and it can proceed.

Application to Strike Out

26. The Claimant was dismissed. It is not in dispute after he took items from a Boots store at a railway station where the Claimant was employed, while the Claimant was in uniform and without the Claimant paying for those items.

27. The Respondent contended that this is a case in which there can be no reasonable prospect of success; in that the Respondent clearly undertook an investigation, interviewing relevant witnesses and had evidence that the Claimant had removed items without paying for them and that witnesses had seen him doing so.

28. The Respondent contended that, in the circumstances there is a wide range of reasonable responses available to an employer, there was no reasonable prospect of success in the Claimant establishing, either, that the investigation was unfair or that the decision to dismiss was unfair, or that the Respondent acted unreasonably in concluding, on the evidence available, that the Claimant had stolen the goods rather than had taken the goods from the store.

29. The Claimant, on the other hand, contends that the hearing manager took into account another manager's report of CCTV evidence which the Claimant had never been given the opportunity to view and that that was unfair because the

Claimant could not comment on that evidence at all. He says that the Respondent's investigation was unreasonable in that regard. He also contends that, in the circumstances that the manager of the Boots store accepted the Claimant's explanation and at least one manager of the Respondent, who was present at the time, did not say the Claimant had stolen the goods then, it appeared that the Respondent was actively looking for evidence to implicate the Claimant to justify dismissal and did not conduct a reasonable investigation. A reasonable investigation would have involved looking for evidence which was exculpatory as well as evidence which would establish the guilt of the Claimant.

30. The Claimant also contends, with regard to the reasonableness of the evidence available to the dismissing manager, that the dismissing manager originally said during the hearing that he would have to view the CCTV evidence himself; that it would be essential to his decision to do so in light of the conflicting evidence which had been presented to him. Nevertheless, the hearing manager did not view the CCTV evidence because it was not available, but proceeded to dismiss the Claimant using the same conflicting evidence on which he had previously not been satisfied of the Claimant's guilt.

31. It seemed to me that all those arguments needed to be tested at a final hearing. A Tribunal would need consider them fully in relation to the evidence available to the Tribunal. I did not consider that it was possible to say that there was no reasonable prospect of success in this case, either with regard to the investigation, or with regard to the evidence, or with regard to the decision to dismiss, even applying a broad band of reasonable responses available to the Respondent.

32. I have taken in to account the relevant law in determining strike out applications. An Employment Judge has power to strike out a claim on the ground that it has no reasonable prospect of success under *Employment Tribunal Rules of Procedure 2013, Rule 37.* The power to strike out a claim on the ground that it has no reasonable prospect of success may be exercised only in rare circumstances, *Teeside Public Transport Company Limited (T/a Travel*

Dundee) v Riley [2012] CSIH 46, at 30 and *Balls v Downham Market High School & College* [2011] IRLR 217 EAT. In that case Lady Smith said:

"The Tribunal must first consider whether, on a careful consideration of all the available material, it can properly conclude that the claim has no reasonable prospects of success. I stress the word 'no' because it shows that the test is not whether the Claimant's claim is likely to fail nor is it a matter of asking whether it is possible that his claim will fail. Nor is it a test which can be satisfied by considering what is put forward by the Respondent either in the ET3 or in submissions and deciding whether their written or oral recessions regarding disputed matters are likely to be established as facts. It is, in short, a high test. There must be no reasonable prospect".

33. A case should not be struck out on the grounds of having no reasonable prospect of success where there are relevant issues of fact to be determined, *A v B [2011]* EWCA Civ 1378, *North Glamorgan NHS Trust v Ezsias*, [2007] ICR 1126 ; *Tayside Public Transport Co Ltd (t/a Travel Dundee) v Reilly* [2012] CSIH 46.

Application for Deposit Order

34. If, at a Preliminary Hearing, an Employment Judge considers that any allegation or argument put forward by a party has little reasonable prospect of success, the Tribunal may order the party to pay a deposit of an amount not exceeding a £1,000 as a condition of continuing to advance that allegation or argument, *rule 39 Employment Tribunal Rules and Procedure 2013*.

35. When deciding whether to make a deposit order under *rule 39*, a Tribunal is not restricted to a consideration of purely legal issues, but is entitled to have regard of the likelihood of the party being able to establish the facts essential to his case and, in doing so, to reach a provisional view as to the credibility of the assertions being put forward *(Van Rensburg v Royal Borough of Kingston-upon-Thames* UKEAT/0095/07, [2007] All ER (D) 187 (Nov). Although, as Elias J pointed out in that case, the less rigorous test for a deposit order allows a tribunal

greater leeway to take such a course than would be permissible under the test of "no reasonable prospect of success", the tribunal 'must have a proper basis for doubting the likelihood of the party being able to establish the facts essential to the claim or response' (para 27).

36. The Respondent contended that the Claimant's explanation for what happened with regard to the goods in the Boots store was inherently implausible, in that the Claimant had contended that he had scanned the item twice and then collected the second item from the shop on his way out. The Respondent pointed out that tills do not allow items to be scanned twice without being put into the till's bagging area. It contended that the Respondent was clearly entitled to find, where there was disputed evidence about the circumstances in which the Claimant left the store without paying, that the Respondent did not accept the Claimant's explanation and that the facts indicated that he had stolen the goods and brought the Respondent into disrepute.

37. I considered that the Respondent's argument is a powerful one. The Tribunal allows a Respondent a band of reasonable responses. It is not in dispute that the Claimant left the store with an item without paying for it. I concluded that there was little reasonable prospect of success, in those circumstances, of a Tribunal finding that it was outside the band of reasonable responses for the Respondent to conclude that those actions constituted theft, rather than a mistake, and so brought the Respondent into disrepute.

38. Accordingly, I ordered the Claimant to pay a deposit as a condition of continuing to advance that argument.

39. Having heard evidence from the Claimant I found that the Claimant has obtained alternative work. He is working at an airport earning £16,000 a year. He told me that, after paying his bills, his considerable travel expenses and his road tax, he has about £200/£300 a month spare. The Respondent encourages me to make a deposit order in the sum of £400, so that the Claimant does have pause for thought before continuing with the claim.

40. I considered that the appropriate amount of the deposit order was £300. The Claimant told me that he just about has that amount of money at the end of each month. I did not think it was appropriate to require him to pay more money than he actually has. Paying £300 would mean that he has nothing else to spare at the end of the month, so it would have the effect of making him think carefully about whether to continue with his claim.

41. I ordered the Claimant to pay £300 deposit as a condition of continuing to argue that the Respondent acted outside the band of reasonable responses in concluding that the Claimant had stolen items and thereby brought the company into disrepute, so that dismissal was not a reasonable sanction.

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Employment Judge Brown

Dated: 19 March 2019

Judgment and Reasons sent to the parties on:

22 March 2019

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For the Tribunal Office