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EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mr W Opwonya

AND

St Mungo's Community Housing
Association

PRELIMINARY HEARING

HELD AT: London Central **ON:** 25 June 2019

BEFORE: Employment Judge Brown (Sitting alone)

Representation:

For Claimant: In person
For Respondent: Mr G Graham, of Counsel

JUDGMENT

The Judgment of the Tribunal is that:

1. The Claimant failed to present his claim for unfair dismissal to the Employment Tribunal before the end of the time limit in s.111(2)(a) Employment Rights Acts 1996. It was reasonably practicable for the complaint to be presented in time and so the Tribunal does not grant any extension of time for its presentation under s.111(2)(b) Employment Rights Acts 1996.
2. Accordingly, the Tribunal has no jurisdiction to consider the Claimant's claim and it is dismissed.

REASONS

Findings of Fact

1. The Claimant brings a complaint of unfair dismissal against the Respondent, his former employer. It is not in dispute that the Claimant

presented his complaint eight days beyond the time limit for presenting it. I heard evidence from the Claimant who submitted a written witness statement. Both parties made submissions.

2. On the evidence I find as follows. The Claimant was dismissed by the Respondent on 28 August 2018, he was represented by a union representative at the disciplinary hearing. He wrote his letter of appeal on 5 September 2018 and attended an appeal hearing, which he addressed, on 2 October 2018. His appeal was dismissed by letter of 23 October 2018.

3. The Claimant contacted ACAS on 22 November 2018 and ACAS issued an early conciliation certificate on 19 December 2018. The time limit for presenting the Claimant's claim therefore expired on 19 January 2019. The Claimant presented his claim on 27 January 2019, 8 days out of time.

4. The matter which led to the disciplinary hearing occurred on 28 October 2017. The disciplinary hearing itself took place on 20 April 2018. There was a delay between that hearing and the outcome being notified to the Claimant.

5. The Claimant consulted his GP in April 2018 suffering from feelings of depression, including some suicidal ideation. His GP referred him to Croydon Talking Therapies Service, run by the South London and Maudsley NHS Foundation Trust.

6. The Claimant was sent an appointment for two different workshops, a managing anxiety workshop and a stress and worry workshop, both to be held on 25 August 2018. The Claimant did not feel well enough to attend those, but he did attend the same workshops on 6 October 2018. He also had telephone review appointments thereafter.

7. The Claimant told me that he was not well enough to submit a claim to the Tribunal due to his mental ill health. He did not produce any medical evidence, in the form of GP notes, or a Talking Therapies outcome report, or any other medical reports which supported his evidence about his mental ill health during the period October 2018 to January 2019. There was no independent medical evidence, therefore, to support his assertion that he was not well enough to submit a claim during that period.

8. On 3 May 2019, when the Claimant first wrote to the Tribunal giving the reasons that his claim had been presented late, he did not mention his mental ill health.

9. From his evidence, before he submitted the claim to the Tribunal, the Claimant was aware of the 3 months time limits for bringing Employment Tribunal claims and of the 1 month additional period allowed following an ACAS Early Conciliation in certain circumstances - although it appears that he may have miscalculated the dates. The Claimant was able to undertake research into Employment Tribunal claims and this is how he became to know of the time limits.

10. The Claimant criticised the Respondent for delaying in giving him the appeal outcome. He was advised by his union to seek Early Conciliation through ACAS and did so immediately on receiving that advice on 22 November 2018. He still had one month after receipt of the Early Conciliation certificate to submit his claim.

Relevant Law

11. The time limits for presenting complaints of unfair dismissal to an Employment Tribunal are set out in s111 *Employment Rights Act 1996*. 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.”

12. 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.

13. 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] 1 All ER 945, [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.

14. 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.

15. 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. In *John Lewis Partnership v Charman* UKEAT/79/11 the EAT held that it was not unreasonable for the Claimant to be ignorant of his right to bring a Tribunal claim where the Claimant was pursuing an appeal and deferred investigation of his rights until after the appeal had been concluded.

Discussion and Decision

16. On all the evidence, I did not accept that the Claimant was prevented by mental ill health from bringing a claim, or that he was significantly impeded from bringing a claim by his mental ill health. I accepted that he had treatment for his mental ill health in October 2018 and he had telephone follow up appointments thereafter, but there was no independent medical evidence that his ill health was sufficiently serious to significantly impede his ability to present a claim. I noticed that he was able to appeal and to address the appeal hearing. He was able to conduct research into Employment Tribunal time limits and was aware of them before he submitted the claim. Had the Claimant's ill health been so significant to prevent or impede a claim, I considered that the Claimant would have mentioned it in his letter to the Employment Tribunal in May 2019.

17. Taking into account other matters, the Claimant was aware of the time limits. He still had one month after the appeal outcome to present a claim, even within the primary time limits. The time limits were extended by the Early Conciliation process to the 19 January 2019. I concluded, therefore, that the Claimant had ample time after the outcome of the appeal to present the claim.

18. Taking into account everything, the fact that his ill health did not prevent or significantly impede the Claimant from bringing a claim, the fact that he did know about the time limits and was able to research them during the relevant period, around October - December 2018, and given that the employer's appeal outcome still left him sufficient time to bring a claim, I concluded that it was reasonably practicable the Claimant to bring his claim in time. Therefore, I did not extend time for presentation of it. The Claimant's claim is dismissed.

Employment Judge Brown

Dated: 03rd July 2019

Judgment and Reasons sent to the parties on:

10th July 2019

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For the Tribunal Office