EMPLOYMENT TRIBUNALS

Claimant: Mr C Fox

Respondent: Key Integrated Services (North West) Ltd

Heard at: Manchester **On:** 9 October 2019

Before: Employment Judge Holmes

REPRESENTATION:

Claimant: In person
Respondent: Not in attendance

JUDGMENT

It is the judgment of the Tribunal that the claimant's claim of breach of contract was presented out of time and it was reasonably practicable for it to have been presented within the time limit so that the Tribunal cannot extend its time for presentation.

REASONS

1. The Tribunal this morning has convened to consider, by way of a preliminary hearing, the claims made by Mr Craig Fox for damages for breach of contract, notice pay, arising out of the summary termination of his employment on what he agrees now was 21 December 2018. He submitted his claim form to the Tribunal on 11 July 2019 , and in that claim form, in the “additional information” section, he recognised and made reference to the fact that the claim was outside the normal three months less one day time limit . He clearly appreciated this was applicable to it, but he invited the Tribunal to extend time for the presentation of his claim and has done so when appearing in person today.

2. The respondent responded to the claim , and, not entirely surprisingly, did take the point that the claim was out of time and invited the Tribunal to reject any application for extension of time, making reference in the response to the fact that the claimant had been provided with a copy of his contract of employment in March 2018, in fact shortly before his employment began. For those reasons the respondents invited the Tribunal not to accede to the application, but they have not attended today, nor were they actually required to do so as time limits are jurisdictional matters which the Tribunal has to consider , whether they are raised or pursued by a respondent or not. So , regardless of the respondent's non attendance, the Tribunal has had to determine this issue , as it goes to its jurisdiction which cannot simply be overlooked , and must be determined one way or the other.

3. Consequently , Mr Fox has attended in person, and given evidence on oath to the Tribunal, which the Tribunal accepts in terms of the factual matters that he put before the Tribunal. In summary they were these, and he supported this by presentation of a small bundle of documents to which he has appended various appendices , including a copy of the contract in question.

4. In essence, his evidence amounts to this: having been taken on by the respondent , having dealt with mainly one Gary Williamson, and having been provided with a contract which he subsequently signed , after being presented with it by an HR representative, he started work . That contract was in the drawer of the desk that he used. On 21 December 2018 , however, he was invited to a meeting , but not told the purpose of the meeting. It transpired that the meeting was indeed to dismiss him without notice , and that was carried out. He was told effectively to leave on the spot, and was not able to retrieve all his possessions and other items in his desk drawer. He was obviously concerned about that , and indeed sought immediate advice upon that, and his evidence was that he contacted ACAS in relation to his position.

5. At that time the claimant suspected that he was entitled to more notice, and when he discussed with ACAS the notice period, they advised him or he was already aware , of the statutory minimum of one week's notice, but ACAS advised him (as indeed of course was the case) that he may be entitled to longer notice if his contract provided for more, and his suspicion was that that was indeed the case. So , he did not at that point take the matter any further , and did not pursue the week's notice thinking it was not worth doing so, but he did not at that time have, he believed, access to his contract of employment, and in particular the signed version, which was still locked in his desk drawer.

6. By the end of January 2019 , however, having made several attempts unsuccessfully to do so, the claimant succeeded in gaining access to his desk and upon doing so was able to retrieve other personal items , but then found that the signed copy of his contract of employment which had been in that desk drawer was no longer there.

7. Having made that discovery the claimant did not then further contact the respondent , or intimate any claim in respect of the notice pay that he suspected he was entitled to, and matters were left on that basis until the end of June when, looking through his emails on his computer and things of that nature, he literally

came across the email of March 2018 , which is indeed referred to by the respondents in their response, from Gary Williamson, in which the draft (not the signed copy of course which was not at that time in existence) the contract of employment, had been attached to that email . Indeed Mr Fox has put before the Tribunal a copy of that email , dated 24 March 2018.

8. Having come across that document in that way at that time , Mr Fox then could see its terms , which , of course, were confirmed, as he suspected, that he was entitled, having completed more than six months of his probationary period, to one month's notice from his employer, which had been his suspicion. Having seen that document he then wrote to the respondent on 27 June 2019, making reference to the terms of his contract of employment and to having sought further legal advice, which he had done again by contacting ACAS and indeed a solicitor. In this letter he offered the respondent an opportunity to make an amicable settlement , but did intimate the claim for one month's pay in accordance with the terms of his contract of employment. He did not, however, mention in that letter that he was writing it because he had recently come across his contract of employment. He was silent as to why he was writing at that time, he merely effectively asserted his claims in that letter , which were not met within the relevant 14 day period, which was doubtless why on 11 July 2019 he then contacted ACAS and obtained his early conciliation certificate and the very same day issued these proceedings before the Employment Tribunal.

9. That was the claimant's evidence which the Tribunal accepts and which the Tribunal must now consider in the context of the test that it has to apply in relation to the extension of time for presentation of this claim.

The Law

10. The law is clear. The Extension of Jurisdiction Order which applies to breach of contract claims imposes, as the claimant is clearly aware and was told by ACAS, a three month time limit, which would mean that having been dismissed without notice on 21 December 2018 that would ordinarily have expired on 20 March 2019, save perhaps for the provisions of the early conciliation process which can sometimes extend a time limit by some degree , but usually by no more than a maximum of some six weeks. So on any view even if early conciliation had been engaged in, and the clock had been stopped , then it is unlikely that the date for the presentation of the claims would have been delayed by much more than six weeks, which would have taken to at the very latest the early part of May 2019. Consequently, when it was not presented until 11 July 2019 it was still considerably out of time, as the claimant has, of course, recognised.

11. When a time limit is expressed in this way relevant statutes provide for extension of time , and , unlike discrimination statutes which provide for extension that it would be just and equitable to extend time, the Extension of Jurisdiction Order which confers breach of contract jurisdiction is in the same terms as the unfair dismissal provisions i.e. that the test of extension of time is that a Tribunal may only grant an extension of time if it was "not reasonably practicable" to have presented the relevant claim within the relevant time limit. That is a phrase which has been

considered extensively by the Employment Appeal Tribunal in the Court of Appeal and much discussion has taken place as to what exactly it means.

12. In terms of that, the case law has now settled to a view on the meaning which has been summarised in one of the leading cases as follows: the leading case in question is ***Palmer and Saunders v Southend-on-Sea Borough Council [1984] IRLR 119***. In the judgment of the Court of Appeal in that case Lord Justice May was asked to consider the meaning of this phrase, which he said was in effect a test of reasonable feasibility. What he said that meant was this:

> *"I think that one can say that to construe the words 'reasonably practicable' as the equivalent of 'reasonable' is to take a view that is too favourable to the employee. On the other hand 'reasonably practicable' means more than merely what is reasonably capable physically of being done d*ifferent, for *example from the construction in the context of (other legislation which he then cites),*
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> but he goes on to say:
>
> *"We think the words mean something between the two extremes. Perhaps the best way is to read the word 'practicable' as the equivalent of 'feasible' and to ask colloquially and untrammelled by too much legal logic; was it reasonably feasible to present the complaint to the Employment Tribunal within the relevant three month period, and this is the best approach to the application of the section."*

13. In terms of how that has been construed subsequently, other courts and other Tribunals have said that one of the questions the Tribunal should ask is: what was it that stopped the claim being presented within time? Was there some sort of impediment, physical or otherwise, that prevented the claim being presented in time? The enquiry the Tribunal has to make is what stopped it being presented? In the context of this case, of course, what stopped it being presented, the claimant says, is the absence of access to his contract of employment. That was access in a physical sense, because he could not access the signed copy locked in the drawer that he had not got access to, and which was subsequently removed when he did get access to it at the end of January 2019. So that, he says, in effect, which of course is conduct on the part of the respondent, was what was stopping him from bringing the claims within a relevant period of time.

14. The test has often had to consider the effect of ignorance , and whether or not someone could rely upon ignorance as a want of reasonable practicability. The courts and Tribunals have had to consider from time to time whether ignorance of one's right to claim could amount to want of reasonably practicability. The case law on that (e.g. ***Walls Meat Co Ltd. v Khan [1978] IRLR 499***) has made it quite clear that ignorance would only be relevant as a want of reasonable practicability if that ignorance was itself reasonable. What is very often relied upon is ignorance of time limits, or ignorance of the right to claim , or ignorance of the existence of the procedure by which to claim. In this case it is clear that ignorance is not as such relied upon, particularly in relation to the time limits, because the claimant took advice from ACAS immediately upon his dismissal and was told of the relevant time

limit and indeed of the considerations as to the relevant notice period. So this is not a case where the claimant was ignorant of the time limit; it is not a case either where he was ignorant of his right to claim, because he suspected, as he put it in his evidence, that he had an entitlement to more than a week's notice. Without sight of the actual terms of his contract of employment he already suspected that being dismissed as he was without that notice was a breach of contract. What he did not have was access to the actual written terms , and to that extent he lacked access to perhaps what is better regarded as the evidence in support of the claim, but he suspected that he had such a claim, he knew of the right to bring to bring a claim and he knew of the time limit in which he had to do it.

15. What happened then was that, having attempted to obtain a copy of his contract of employment in the locked desk drawer and having found , when he got in, he found there was not one there, and he thereafter, as he accepted in his evidence, took it no further. The matter was then left. He did not contact the employer , and point out that he had been to his desk, and had found that his contract had been removed. He says he did not do that because he did not expect it would make any difference, and they would not react, but of course he suspected, and had done since the date of his dismissal, that he had a valid claim; he wanted a copy of his contract of employment. He then found that that had been removed . I did raise with him the question as to why, at that point, he did not at least intimate the claim to the respondents, who would then have been in the position, if they were going to resist it, of having to produce the very document that the claimant had been denied, but the claimant did not do that, and effectively left matters . It was only , therefore, by chance when looking for something else, or coming across the email on his computer at the end of June 2019, that he found a copy of this relevant contract of employment. He had, and it is difficult to avoid putting it this way, really given up in the meantime, between the end of January and the end of June, and it is only a matter of chance that led to the discovery of the contract.

16. This was, of course, a contract of which the claimant accepts , and the evidence is clear , he actually did have a copy all along; as the respondent pleaded and the evidence shows there was, albeit located in a different email address or from a different source , which is why it was not immediately apparent to the claimant, he had in fact had this contract, or a draft copy of it, at least in terms of the main terms, all along. Had he been able to find it earlier this position would not have arisen.

17. The case law makes it clear that in cases of ignorance of the right to claim, then a person can only rely upon that if that ignorance is reasonable. This case, of course, is not one of ignorance of the right to claim, it is ignorance , or rather, lack of access to , evidence in support of the claim in terms of proving the contractual claim. Such ignorance in terms of right to claim , or the mechanism of claiming, or even the time limits, is only capable of being relied upon if that ignorance itself was reasonable, and a person is expected these days to use reasonable diligence in their own affairs , and if they believe they have a potential claim , to make reasonable steps to investigate and pursue that claim.

Conclusion

18. I am afraid I have to conclude that Mr Fox in this case, from the end of January, no longer did that. He did, as I put it, rather give up at that point, and indeed this claim would not have been issued had it not been for the happenstance of him coming cross this contract , which he actually had all the time.

19. Consequently, with some sympathy for the claimant , but applying the rather harder test in this type of claim than applies in discrimination discretion cases, I have to conclude that there was no want of reasonable practicability in this case preventing him from bringing these claims, within the original three month time limit and I therefore cannot extend the time for their presentation.

Employment Judge Holmes

Date: 17 October 2019

JUDGMENT AND REASONS SENT TO THE PARTIES ON
1 November 2019

FOR THE TRIBUNAL OFFICE