EMPLOYMENT TRIBUNALS

Claimant: **Mr D Scott**

Respondent: **Premier Foods Group Limited**

Heard at: **Nottingham** **On:** **Wednesday 23 October 2019**

Before: **Employment Judge Britton (sitting alone)**

Representatives

Claimant: **Mrs K French, Representative**
Respondent: **Mr J Connolly, Solicitor**

JUDGMENT

The judgment of the Tribunal Employment Judge is that:-

1. The claim of the Claimant Dean Scott is permitted to proceed it having not been reasonably practicable to present it within time and it having been presented within a reasonable period (3 days) thereafter.

2. The claim of Alex Pressley is dismissed it being out of time and for want of prosecution/failure to comply with the Tribunal's order.

REASONS

Introduction

1. I am going to confine myself for the purposes of this part of my adjudication to the claim of Mr Scott. I say that because on the face of it there may be a second Claimant, a Mr Pressley, but for reasons which I shall come to I am dismissing his claim.

2. As to Mr Scott the issue for me to determine today, his claim having been presented out of time, is as to whether it was reasonably practicable for him to have presented his claim within the appropriate time limit and second as to whether he has presented it within a reasonable period thereafter.

The procedural history

3. Before adjudicating on that issue I will set out briefly the procedural history of this case. The claim (ET1) was presented to the Tribunal on 24 June 2019. The Claimant had been employed for a very long time by Premier Foods Group Limited: some 33 years of service. His employment had commenced on 1 August 1993 and from the bundle before me it is clear that the effective date of termination was 8 March 2019. It is a claim for unfair dismissal, the Claimant having been employed as a Maintenance Technician. As to the fairness or otherwise that is not a matter that concerns me at this stage. There was an ACAS early conciliation certificate. That is essential because pursuant to Section 207B of the Employment Rights Act 1996 and cross referenced to the Employment Tribunals Act 1996 a claim for unfair dismissal cannot be presented to the Tribunal until there has been ACAS early conciliation. The effect of that conciliation is that it extends time essentially for a maximum period of 6 weeks, which does not engage in this case, otherwise by the number of days during which ACAS early conciliation has taken place as demonstrated by said certificate. So in this case we start from that as the dismissal was on 8 March 2019 that means the last date for presentation, as there is a three month time limit absent the ACAS EC, would have been 7 June. As it is there was ACAS early conciliation between 26 April and 9 May and applying the relevant provision this in fact extends time by 14 days, thus meaning that the last date for filing this claim was 21 June. It follows that it was presented 3 days out of time.

4. So what I have to determine is whether or not it was reasonably practicable to have presented this claim within the appropriate time limit, that is to say by 21 June. Before I address the issue I wish to stress that I am most grateful for the submissions provided by Mr Connolly.

5. As to reasonable practicability the core test as is well known is that as set out in **Palmer and Another v Southend-on-Sea Borough Council** [1984] 372 CA:

> "Reasonably practicable does not reasonable which will be too favourable to employees and does not mean physically possible which will be too favourable to employers. It means something like "reasonably feasible" .

6. And as opined by Lady Smith in **Asda Stores Limited v Kauser** EAT 0165/07 "the relevant test is not simply a matter of looking at what was possible but to ask whether on the facts of the case as found it was reasonable to expect that which was possible to have been done."

The following are my findings of fact

7. When the Claimant was dismissed summarily without notice on 8 March, essentially on the basis that he had committed a serious health and safety breach, I have no doubt that he was traumatised. He became in turmoil. This was a man of 33 years unblemished service, looking forward to completing his service with Premier up to retirement.

8. Yes he was able to complete a coherent appeal document and attend at the appeal hearing having made preparatory notes and at which he was assisted by a trade union official as indeed he had been at the disciplinary hearing.. But I have no doubt that although he could focus on that he was otherwise, and I repeat this, in a state of mental shock so to speak. I am quite satisfied that that

was the case from his evidence before me and his demeanour as to which he on occasion became emotional and which I am satisfied was genuine. That he was going through this trauma is supported by the evidence that was provided by Mrs French about how having usually been sociable with her and her family he had gone to ground so to speak; and they found out what had happened when he came round and in effect emotionally broke down. This is a proud man with a work ethic as is obvious, skilled at his work and very proud of it, who suddenly loses his job.

9. What he then did was to go into a shell; not speaking to anybody really, feeling very low, staying at home. He was also coping with the fact that his partner Irene Grayson who had been suspended for her part in the events during this period lost a substantial amount of weight; she is a diabetic and felt guilty that she had placed her partner, and for that matter the other Claimant Mr Pressley, in a situation where they were dismissed; and so the Claimant was not only coping with his own emotional trauma but that of his partner. On top of that his father had been diagnosed with acute dementia and he was having to attend his parents' home about three times a week to deal with the situation. It clearly was additionally traumatic for him. Indeed his father is now in a nursing home but an added difficulty was his mother could not cope with the scenario. And the final fundamental is that he was obsessed with getting back into employment. Not only was he worried financially but so much of the raison d'etra for his life had gone with losing his job. I am well aware how important work can be. After all it is such a significant part of many people's lives.

10. And so what he did was to focus on obtaining employment. He made some 50 applications; was able to attend for 4 interviews and in particular chose the job he now has because he was totally honest with that employer as to how he had come to be dismissed and they were sympathetic. But he then concentrated on proving his worth in that job as he was fearful of course of becoming unemployed again and so for instance he would take the manuals home from the job and study them.

11. So that brings me back to what was mentally happening in terms of bringing a claim to Tribunal. Irene having returned to work at Premier but finding herself in difficult circumstances, was advised by work colleagues that she ought to take the matter to ACAS. She then found out about ACAS and told Mr Scott that he should contact them and this he did, getting in contact with their helpline on 26 April. This was in fact the start of early conciliation period although I do not think he perhaps understood that. I conclude that his frame of mind was such that he really was not taking anything in given the circumstances that I have already referred to other than this parental issue, support for his partner and in particular getting himself back into work and sustaining it.

12. He received a notification from ACAS explaining that he was now in early conciliation. It did refer to time limits for bringing claims to Tribunal but did not specify what they were. I bear in mind that the ACAS time limit provisions at s207B are somewhat complex, particularly for somebody such as Mr Scott in his particular circumstances. What is not spelt out in the reference to ACAS early conciliation is what is the actual time limit for bringing a claim to unfair dismissal, so there is no reference to that for instance in bold or as to how to calculate the time limit as extended by ACAS EC and by reference to such as a hyperlink. The Claimant did not know what the time limit was and it did not take on board what was being said in that document in that respect. He was not at that stage contemplating going to a Tribunal. He was hoping that ACAS could get a

resolution for him.

13. When the ACAS early conciliation period ended, I gather from what he has told me that he might have had a conversation with the ACAS officer who said something to the effect that he could if he want go to a Tribunal which was "a small claims court for employees". What he was not told was that he now needed to put his claim in. To turn it round another way, if it was said it did not register; and I have no documents at all other than the ACAS EC certificate in terms of that period of time. In other words it was just issued. But a point Mr Connelly makes is that surely he knew sufficient to have been able to make reasonable enquiry once he had that certificate in which case he could have comfortably put a claim in to Tribunal within the remaining period of time ie up to 21 June? It is a good point. So why didn't he? As Mr Connelly puts it he was able to research various vacancies for work and the businesses concerned for the purposes of preparing for interviews and conduct himself well and indeed achieve a very good result for himself in the circumstances by getting himself back into work although there is a shortfall of income.

14. I conclude as follows. Throughout the period that we are talking about the Claimant clearly was in a low mood. I am not a medically qualified but I have undertaken a great many Equality Act base claims focussing on such as depression. The demeanour of the Claimant before me today; his references to how he still is mentally, particularly in terms of not being outgoing as he once was; his breaking down into tears, is all indicative of something that might be approaching depression. He is a proud man who has not been to a GP at any time since he was dismissed. Again in my judicial experience it is not unusual for someone with such as the traits of the Claimant, possibly in a depressive state, to think that he can cope unaided and with an unwillingness to see a GP and for instance because of a reluctance to agree to an antidepressant regime of medication. So it means that I do not have any documented medical evidence on this case. Usually of course one would expect to have it and in that respect the jurisprudence makes that point as to which see such as **Midland Bank Plc v Samuels** EAT 672/92 and the commentary particularly at page 324 of the current IDS Handbook Employment Tribunals Practice and Procedure; but the word "is usually". The Claimant still has not sought medical advice. I have suggested that he might consider doing so.

15. And so what I conclude is as follows. Irene was on at the Claimant that he should put a claim into Tribunal. The Claimant mentally did not think he could face it. He was concentrating on the job as I have already said. His mind was otherwise as he put it "in another place" and he was in "turmoil". As to why he put it in when he did, the evidence essentially is that is because that is the first time he felt up to doing so.

16. I conclude that what he has told me in his evidence is genuine. Sufficed to say that t I therefore conclude that there was an impediment operating on his state of mind that made it not reasonably feasible for him to present his claim to Tribunal until he did. It follows that I am going to allow his claim to proceed.

Mr Pressley

17. The situation here is different. His claim is also out of time. I will work on the basis that it was in fact intended via the central server of the Employment Tribunals on-line processing services for the purposes of bringing Tribunal claims to be seen as being an associated claim to that of Mr Scott. Having said that Mr

Scott makes no reference to any other Claimant in his own ET1 and there is no ACAS certificate for Mr Pressley; but if as the printout from the Employment Tribunal Services suggests they were in fact linked claims, then Mr Pressley would not have needed to produce a second ACAS certificate. However he was asked to confirm this. And although there was some clerical slippage by the Tribunal secretariat in terms of previous letters not necessarily been copied to him, I have no doubt whatsoever that the letter that he was sent on 10 October was issued and that he had a deadline for answering these queries by 17 October. He has not replied.

18. Second as his claim would in any event be out of time and by the same period as that of Mr Scott, it had been made plain to him that this Preliminary Hearing today would also include his own claim in terms of determining the out of time issue in relation to him. Mr Pressley has not attended. He has given no explanation for his non attendance. It follows that I dismiss his claim as being out of time. I will also dismiss it on the basis of want of prosecution and failure to comply with the Tribunal's orders.

DIRECTIONS

1. Mr Scott's case is hereby relisted for hearing before a Judge sitting alone at the Nottingham Employment Tribunal Hearing Centre, 50 Carrington Street, Nottingham NG1 7FG to be heard on Wednesday 12 and Thursday 13 February 2020, commencing at 10:00 am.

2. For the purposes of the hearing the following directions apply:-

2.1 Revised schedule of loss to be served by the Claimant upon the Respondents by Friday 22 November 2019 (this does not include the pension issue which the parties know they will need to further explore with the pension trustees in terms of loss of benefits).

2.2 By not later than Friday 22 November 2019, a single bundle of documents is to be agreed. The Respondent shall have the conduct for the preparation of the bundle for the hearing. The bundle is to be bound, indexed and paginated. The bundle should only include the following documents:

- the Claim Form, the Response Form, any amendments to the grounds of complaint or response and case management orders if relevant;
- documents which will be referred to by a witness;
- documents which will be referred to in cross-examination;
- other documents to which the tribunal's attention will be specifically drawn or which they will be asked to take into consideration.

In preparing the bundle the following rules must be observed:

- unless there is good reason to do so (e.g. there are different versions of one document in existence and the difference is material to the case or authenticity is disputed) only one copy of each document (including documents in email streams) is to be included in the bundle

- the documents in the bundle must follow a logical sequence which should normally either be simple chronological order or chronological order within a number of defined themes e.g. medical reports, grievances etc
- correspondence between the Tribunal and the parties, notices of hearing, location maps for the Tribunal and other documents which do not form part of either parties' case should never be included.

Unless an Employment Judge has ordered otherwise, bundles of documents should <u>not</u> be sent to the tribunal in advance of the hearing.

2.3 By not later than Friday 20 December 2019, the parties shall mutually exchange the witness statements of all witnesses on whom they intend to rely on. The witness statements are to be cross-referenced to the bundle and will be the witness's main evidence. The Tribunal will not normally listen to witnesses or evidence not included in the exchanged statements. Witness statements should not routinely include a précis of any document which the Tribunal is to be asked to read. Witnesses may of course refer in their witness statements to passages from the documents which are of particular importance, or to the inferences which they drew from those passages, or to the conclusions that they wish the Tribunal to draw from the document as a whole.

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Employment Judge Britton

Date: 28 October 2019

JUDGMENT SENT TO THE PARTIES ON

FOR THE TRIBUNAL OFFICE