



EMPLOYMENT TRIBUNALS

Claimant: Mr A Moon

Respondent: Roofoods Limited

Heard at: London Central

On: 27 February 2020

Before Employment Judge: Mrs A Isaacson

Representation

Claimant: In person

Respondent: Ms K Davis, Counsel

RESERVED JUDGMENT

The Judgment of the Tribunal is as follows:

- 1. The Tribunal does not have jurisdiction to hear the claimant's claim for unfair dismissal as he did not have two years' continuous service. Therefore, his claim for unfair dismissal is dismissed.**
- 2. The claimant's claim form was not presented within the three months' time limit for presenting a breach of contract claim. It was reasonably practicable for the claimant to have presented his claim in time. Therefore, since the was presented out of time the Tribunal does not have jurisdiction to hear his claim for breach of contract and it is dismissed.**
- 3. In any event, even if the claim was presented in time, the Tribunal would have struck out the claimant's breach of contract claim on the basis it had no reasonable prospects of success.**
- 4. Therefore, all the claimant's claims are dismissed.**

REASONS

Background and issues

1. The claimant presented a claim form on the 21 October 2019. The claimant claimed unfair dismissal and breach of contract. The claimant entered early conciliation with ACAS on 26 September 2019 and an ACAS certificate was issued on 8 October 2019.
2. A preliminary hearing was listed for the 27 February 2020 to decide:
 - 2.1 Whether the Tribunal had jurisdiction to hear the complaint of unfair dismissal given the respondent's contention that the claimant did not have two years' continuous service (if he was an employee).
 - 2.2 Whether the complaints were presented out of time and if so, whether it was not reasonably practicable for the claim to be presented in time.
 - 2.3 Whether the complaints should be struck out on the grounds that they had no reasonable prospects of success.

The law

3. Section 108 Employment Rights Act 1996 ("ERA") provides that the right to claim unfair dismissal does not apply unless an employee has been continuously employed for a period of not less than two years ending with the effective date of termination ("EDT").
4. The time limit for presenting a claim for unfair dismissal and breach of contract is three months from the EDT as set out in section 111(1) ERA. The Tribunal is able to consider complaints presented out of time only if it is satisfied (1) that it was not reasonably practicable for a complaint to be presented before the end of the relevant three months period, and (2) if so, that it was presented within such further period as it considers reasonable. The burden lies on the claimant at both stages of the test.
5. It is a question of fact in each case whether it was reasonably practicable to present a claim in time. There may be various relevant factors including the claimant's knowledge of the facts giving rise to their claim and their knowledge of their rights to claim and the enforcement of those rights.
6. Mere ignorance of the time limit for bringing a claim for unfair dismissal or breach of contract does not of itself amount to reasonable impracticability, especially where the employee is aware of their right to bring a claim. The question is, was the claimant's ignorance reasonable?
7. Where an employee has knowledge of their right to claim unfair dismissal there is an obligation on them to seek information or advice about enforcement of those rights.
8. If a solicitor is at fault the Tribunal will usually consider that it was reasonably practicable for the claim to have been presented in time.

9. A claimant's illness maybe relevant to the question of reasonable practicability and a Tribunal is prepared to exercise leniency in such situations but the Tribunal still needs to decide whether it was reasonably practicable for the claimant to have presented his claim in time.
10. The existence of an ongoing internal appeal is not by itself sufficient to justify a finding of fact that it was not reasonably practicable to present a complaint in time to the Tribunal.
11. Rule 37 in schedule 1 of the ETs (Constitution & Rules of Procedure) Regs 2013 (The ET Rules") provides that a Tribunal can at any stage of the proceedings strike out all or part of a claim on the grounds that it is scandalous or vexatious or has no reasonable prospects of success.
12. A Tribunal should not strike out any claim where there is a core of disputed facts and that discrimination issues "*should as a general rule, be decided only after hearing the evidence*" – **Anyanwu v South Bank Students Union and Anor (2001) ICR 391**. It is a high test and the Tribunal must carefully consider all material before it concludes that there is no reasonable prospect of success.

The facts

13. The claimant accepted that he started working for the respondent on 14 August 2017, as evidenced by the supplier agreement of the same date (p28).

14. The agreement provided at clause 5:

"Warranties As strict conditions of this Agreement you warrant upon commencement and continuously throughout the term of this Agreement that:.....(b) You have no unspent convictions for any criminal offence".

15. Clause 10.3 of the agreement provided:

"Deliveroo reserves the right to terminate this Agreement with immediate effect in the event of any serious or material breach of any obligation owed by you (including for the avoidance of doubt where such breach is the responsibility of any substitute engaged by you)."

16. A further similar agreement was signed by the claimant on 30 October 2018, containing the same clauses set out above.

17. On the 29 January 2019 a third party, on behalf of the respondent, carried out a Disclosure and Barring Service check ("DBS") which included a criminal record check on the claimant which confirmed the claimant had failed the check due to unspent convictions.

18. The respondent emailed the claimant on 11 February 2019 notifying him that his supplier agreement with the respondent was terminated with immediate effect and that he was not entitled to a notice period because

the reason for termination was a serious or material breach of the supplier agreement.

19. It is not disputed by the claimant that his effective date of termination was the 11 February 2019, and correspondence between the claimant and the respondent in the following days show that he had received the email dated 11 February 2019.
20. The claimant asked for the DBS check to be done again and the results of the second DBS, dated 11 March 2019, showed that the claimant still had unspent convictions. The respondent confirmed that *“As such, the termination of your supplier agreement still stands.”*
21. The claimant was muddled about the steps he took after his dismissal to seek legal advice and what he knew about his rights to bring a Tribunal claim and the time limits. The claimant was clearly suffering from anxiety during the preliminary hearing. He told the Tribunal he has ADHD and did find it hard at times to keep his trail of thoughts and express them.
22. The Tribunal accepts that at the time of his dismissal he was extremely upset, especially as shortly after his dismissal he got access to his children and needed the security of the work to pay for things for the children to be able to stay with him. The Tribunal finds he was and still is suffering from anxiety.
23. The claimant told the Tribunal that he was led “around the mulberry bush” by the CAB and other advisors until he finally got some advice from the CAB and contacted ACAS on 26 September 2019.
24. The claimant presented his claim form on 21 October 2019. The ACAS conciliation period did not extend time as it was commenced after the three months time period had expired. The claimant’s claim form was presented out of time and should have been presented by 10 May 2019, or entered into early conciliation with ACAS by then.

Applying the law to the facts

25. It is clear to the Tribunal, and is undisputed by the claimant, that he does not have two years continuous service and therefore cannot bring a claim for unfair dismissal before the Tribunal. The claimant started his agreement on 14 August 2017 and his agreement was terminated on 11 February 2019. Therefore, the claimant’s unfair dismissal claim is dismissed.
26. The claimant wasn’t clear about why there was a delay between his dismissal and him contacting ACAS other than feeling he had been led around the mulberry bush.
27. What isn’t clear is why in September the claimant was able to speak to ACAS and present a claim in October but he wasn’t able to do these steps within the three months’ time limit. The Tribunal notes that the claimant had confirmation of the second DBS check results by 11 March 2019.

28. There is no clear evidence that the claimant was in anyway misled about the law and the time limits for bringing a claim. It can be difficult to obtain an appointment with the CAB but the claimant did have access to the internet and all the available helpful websites from CAB and ACAS and from GOV UK.
29. Case law confirms that mere ignorance of the time limits for bringing a claim of breach of contract does not of itself amount to reasonable impracticability, especially where an employee is aware of their right to bring a claim. The claimant had been involved with courts before, and had contact with ACAS. Where a claimant has knowledge of their right to claim there is an obligation on them to seek information or advice on how to enforce that right.
30. Although the claimant was suffering from anxiety at the time it is not clear why he was able to present his claim form in October but not before as he still continues to suffer from anxiety. There just wasn't a sufficient explanation from the claimant to explain why there had been a delay of several months apart from a general confusion and anxiety. The three months' time limits need to be strictly applied.
31. Therefore, the Tribunal concludes that it was reasonably practicable for the claimant to have been able to present his claim in time. Since his claim was presented out of time the Tribunal does not have jurisdiction to hear his breach of contract claim. Therefore, his breach of contract claim is dismissed.
32. It is not necessary to consider the respondent's application to strike out the claimant's breach of contract claim on the grounds of having no reasonable prospects of success because it has been dismissed for being out of time. However, even if the Tribunal had found that it had not been reasonably practicable for the claimant to present his breach of contract claim in time, the Tribunal would have gone on to strike it out on the basis it had no reasonable prospects of success.
33. The respondent's supplier agreement's clause 5.1(b) warranty makes it clear that it is a strict condition of the agreement that the claimant warrants upon commencement and throughout his term that he has no unspent convictions. The claimant had unspent convictions at the start and throughout his period of work. Clause 10.3 of the agreement gave the respondent the right to terminate with immediate effect in the event of any serious or material breach of any obligation owed. Therefore, the respondent had the right to terminate the claimant's agreement without notice.
34. In conclusion, it is clear from looking at the agreements and the undisputed results of the DBS checks that the claimant's claim for breach of contract has no reasonable prospects of success. The agreement provided the respondent with the right to terminate without notice in these circumstances.

35. Therefore, all the claimant's claims are dismissed.

Employment Judge A Isaacson

Date 27th Feb 2020

JUDGMENT & REASONS SENT TO THE PARTIES ON

28/02/2020

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FOR THE TRIBUNAL OFFICE