



EMPLOYMENT TRIBUNALS

Claimant: Mr P Sharma
Respondent: The Co-Operative Group
Heard at: East London Hearing Centre by video conference
On: 26 June 2020
Before: Employment Judge Russell

Representation
Claimant: In person, assisted by his friend, Mr B Dendera
Respondent: Mr D Stephenson, Counsel

JUDGMENT

The judgment of the Tribunal is as follows:-

1. The claim was presented outside of the primary time limit.
2. It was reasonably practicable to have presented it within time.
3. The claim is dismissed as the Tribunal lacks jurisdiction to hear it.

REASONS

1 The Claimant was employed by the Respondent as a warehouse operative from 6 October 2011. This work required lifting heavy items and, regrettably, the Claimant has experienced serious back problems which rendered him unable to work for a lengthy period in 2018. By a letter dated 16 January 2019, the Claimant was told that his employment was being terminated on capability grounds, namely his health and absences from work. The letter of termination states clearly in the first paragraph that the termination is with effect from 16 January 2019.

2 The Respondent operates a policy which provides for two levels of appeal against a sanction, including dismissal. The Claimant was familiar with the policy having used it successfully on a previous occasion and so decided to appeal against his dismissal. He

presented his appeal in a timely manner by a letter dated 24 January 2019. In his letter of appeal, the Claimant said that he felt discriminated against, that the termination of his contract of employment amounted to unfair dismissal, that he had been unfairly treated, the Respondent had failed to offer him an alternative job and that the dismissal procedure was not correctly followed.

3 The Claimant was a member of the USDAW Trade Union and benefitted from trade union representation at each of the hearings that he attended. He also had support from Mr Dendera, who is not a qualified lawyer but whose support has been valuable to the Claimant throughout. The Claimant decided to proceed through the appeal process.

4 The appeal was not heard until 4 March 2019. It was not successful. I accept that the Respondent is responsible for a significant period of the delay to 4 March 2019, although at that point the Claimant would still have been able to present his Tribunal claim in time. The Claimant did not do so and, instead, submitted a second appeal which was heard on 14 May 2019. One of the agreed outcomes of second appeal was that further Occupational Health advice should be obtained as to whether the Claimant could return to work. The Occupational Health advice was provided on 4 July 2019. It was not until 9 September 2019, that the Claimant was informed by the Respondent that his dismissal was confirmed.

5 The Claimant continued to be represented by his trade union during the appeal process following the termination of his employment on 16 January 2019. During this time, the Claimant suffered from health problems. No medical evidence was provided but I accept the Claimant's evidence that the loss of his job and the pressure of family life took a toll upon his mental and physical health. However, it is clear from the Occupational Health report, and it was the Claimant's position during the appeal that by 4 July 2019 he was fit to return to some form of work, albeit on lighter duties initially. The Claimant has also undertaken some agency work for a building supplier from June 2019. It is not permanent work but it demonstrates that the Claimant was able both physically and mentally to engage with day to day activities such as work. He was also able to engage with the internal appeal process throughout and to turn his mind to what he perceived to be the unfairness of his dismissal.

6 Having received the final decision to reject his appeal on 9 September 2019, the Claimant contacted ACAS on 11 November 2019. The ACAS Early Conciliation certificate was issued on 13 November 2019. The Claimant presented his claim to the Tribunal on 26 November 2019.

Law

7 Section 111 of the Employment Rights Act 1996 provides that a Tribunal shall not consider a claim of unfair dismissal unless it is presented to the tribunal within three months of the effective date of termination or such further period as the tribunal shall consider reasonable where it is satisfied that it was not reasonably practicable to submit the claim within time. This period is extended by operation of the ACAS early conciliation scheme if entered within the primary time limit.

8 In deciding whether it was not reasonably practicable for the claim to be presented, the tribunal must consider whether there is just cause for not presenting the

claim. The words “reasonably practicable” do not require the Tribunal to be satisfied that presentation was not physically possible, in the sense of a physical or mental bar, but should be read as being more a question of whether presentation within time was reasonably feasible, see **Palmer and Saunders v Southend on Sea Borough Council** [1984] IRLR 119, CA.

9 Generally, if a claimant is receiving advice from skilled advisers, such as a trade union representative or solicitor, it will be practicable to present the claim in time, see **Dedman v British Building & Engineering Appliances Limited** [1973] IRLR 379 Court of Appeal. However, the involvement of a solicitor (and by extension, a trade union) does not mean that an extension of time will automatically be refused, the Tribunal must look at all of the circumstances of the case, **North East London NHS Foundation Trust v Zhou** UKEAT/0066/18.

10 It is generally reasonably practicable for a claimant to present a claim to the Tribunal even when an internal appeal is pending, **Palmer**. However, regard should be had to what, if anything, the employee knew about the right to complain to the tribunal and of the time limit for making such a complaint. Ignorance of either, however, does not necessarily render it not reasonably practicable to bring the complaint in time and I should also have regard to what knowledge the employee should have had if he or she had acted reasonably, see **John Lewis plc v Charman** UKEAT/0079/11/ZT.

Conclusions

11 There is no dispute in this case that the effective date of termination was 16 January 2019. It is clearly and expressly stated in the letter of dismissal.

12 The Claimant's case, ably advanced by Mr Dendera, was that it was not reasonably practicable for him to present his claim within the primary time limit for four principle reasons. Firstly, his frame of mind due to the mental strain of the dismissal and effect upon his lifestyle. Secondly, his physical health problems with his back. Thirdly, his family circumstances and the financial pressures of providing for a wife and three children. Fourthly, and finally, that the Claimant was pursuing an internal appeal which was subject to significant periods of delay caused by the Respondent and which he believed, based upon previous experience, would lead to his reinstatement. Insofar as it may be said that the Claimant did not act reasonably swiftly after the final decision was sent on 9 September 2019 but instead waited a further two months to contact ACAS and a further two weeks to present his claim, Mr Dendera submits that the Claimant had no means of bringing the claim, had debts and again relied upon his stressed state of mind due to having only part time work for an agency.

13 On balance, I am satisfied that the Claimant was aware of the existence of the right to bring an Employment Tribunal claim from as early as his first appeal letter dated 24 January 2019. The contents of the letter strongly indicate a clear knowledge of unfair dismissal rights, consistent with the fact that the Claimant was being advised by his trade union at that point. With access to such advice, the Claimant should have known about the three-month limit for contacting ACAS to start the process of bringing a claim and that an internal appeal did not render it not reasonably practicable to present his claim in time.

14 I took into account the extent to which the Respondent caused the failure to

present the claim in time due to the delay in the internal appeal process. Even allowing that it bears some responsibility for the Claimant's failure to present the claim before 4 March 2019, from the failure of the first appeal, the Claimant ought to have realised the reduced prospects of reinstatement and turned his mind to the prospect of Tribunal litigation. Whilst I do not doubt the honesty of the Claimant's evidence that his health suffered as a result of dismissal and that he encountered financial problems, the real issue is whether they were of such a magnitude as to render it not reasonably practicable to present his claim (or enter into ACAS early conciliation) by 15 April 2019. The Claimant adduced no medical evidence as to the extent of his incapacity in this period and I consider it relevant that the Claimant was able to present and participate in a second appeal. It was reasonably practicable for the Claimant to have presented his complaint in time.

15 The claim was in fact only presented on 26 November 2019. Even if I had been satisfied that it was not reasonably practicable to present the claim in time (which I am not), I would have held that the Claimant had failed to present the claim within a reasonable time thereafter. The Claimant was able to undertake some remunerated work from June 2019, he maintained that he could return to some form of work and the Occupational Health report confirmed that by July 2019 he was fit to do so. From 9 September 2019, the Claimant could have been in no doubt that he would not be reinstated. It was incumbent upon him to act without further delay once the decision was reached. Instead it took two months for him to enter ACAS early conciliation and a further two weeks' after the certificate was issued to present his claim. Even if the Claimant did not have a computer, he had access to support from his trade union and Mr Dendera. The Claimant was still doing some work and could have accessed a computer at his local library or even submitted a claim by mobile telephone or post. This further period of inaction is not reasonable.

16 The test on an unfair dismissal extension of time is particularly strict. It is not a test of what is just and equitable as it would be for a discrimination claim. That test would allow me to take into account broader considerations than the more restricted reasonably practicable test. Whilst I understand that the Claimant feels it unjust that his claim be dismissed without being considered on the merits, I must apply the words of the statutory test and in so doing I have decided that the claim will not proceed. I was deeply grateful for the patience and forbearance shown by the Claimant, Mr Dendera and Mr Stephenson during the video hearing, not least following the interruption by a fire alarm. The Claimant should be reassured that Mr Dendera spoke eloquently on his behalf, with nothing that could be said left unsaid, and did him a great service.

Employment Judge Russell

5 August 2020