



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4102249/2020 (V)

5 **Held via Cloud Video Platform (CVP) on 31 August 2020**

Employment Judge R King

10 **Mr Bradley Donaldson**

**Claimant
In Person**

15 **Bear Scotland Limited**

**Respondent
Represented by:
Mr F Vandal -
Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Employment Tribunal, having decided that the claim has been lodged out of time, and not being satisfied that it was not reasonably practicable to lodge it in
25 time, finds that it does not have jurisdiction to hear the claim, which is dismissed.

REASONS

1. The claimant has lodged a claim in the Employment Tribunal claiming unfair dismissal. The respondent resists the claim on its merits and also on the ground that it is time barred in circumstances where it was presented out of
30 time and it would have been reasonably practicable for the claimant to have presented the claim in time.

2. Employment Judge McLean therefore instructed that the case be listed for a preliminary hearing on the question of time bar to take place by way of a video conference.

35 3. The Tribunal heard evidence from the claimant only and found him to be a candid and credible witness.

Findings in fact

4. Having heard the claimant's evidence the Tribunal finds the following facts to be admitted or proved.
5. The claimant was employed by the respondent from 15 February 2016 until
5 20 January 2020 when he was dismissed for gross misconduct.
6. On the day of his dismissal the claimant visited Citizens Advice for advice about making a claim for unfair dismissal. He was advised of the three month time limit for lodging his claim but that he would be unable to commence his claim until after the conclusion of any internal appeal. He
10 was also advised about the ACAS early conciliation process that was an essential pre-requisite of lodging an unfair dismissal claim with the Employment Tribunal.
7. The claimant's distress at his dismissal was compounded by its timing as he had post Christmas bills to pay, so he had to find alternative work quickly.
15 While alive to the possibility of pursuing an internal appeal and, if necessary, raising proceedings his first priority was to get a new job.
8. In due course the claimant submitted an appeal against his dismissal and an appeal hearing took place in late February 2020. Following the appeal hearing, but before he received the appeal outcome, the claimant visited
20 Citizens Advice again and once again he was advised that he had to wait until the outcome of his appeal before presenting a claim. He accepted that advice.
9. The claimant was subsequently informed on 27 March 2020 that his appeal had been rejected. By this time he had recently started working on a self-
25 employed basis. This was therefore a stressful time for him irrespective of his dismissal and the prospect of raising proceedings against his former employer.
10. By now the country had also gone into a state of Government imposed national lockdown on 23 March in response to the threat of the Covid-19
30 pandemic.
11. In the circumstances the claimant assumed that the national lockdown prevented him from contacting ACAS in order to commence proceedings

for unfair dismissal. He believed that ACAS would be “*the last thing open*” in circumstances where he believed that “*nobody was working*”. As a result, he did not make contact with ACAS at that time.

- 5 12. The claimant did not take advice from Citizens Advice or anyone else about whether he could still contact ACAS to commence early conciliation or whether the lockdown would otherwise affect the time limit for commencing his claim. Nor did he carry out any personal research to confirm the position or attempt to contact ACAS online or by telephone. There was no impediment to his doing any of these things.
- 10 13. At all times until he contacted ACAS the claimant was under the impression that the early conciliation procedure was a complicated procedure. This also served to discourage him from making contact with them as early as he might have done had he been aware that the process was relatively straightforward.
- 15 14. The claimant eventually contacted ACAS on 23 April 2020 to commence early conciliation. Having done so he received an early conciliation certificate dated that same day and subsequently also presented his unfair dismissal claim to the Employment Tribunal on 23 April 2020.

Submissions

20 *Submissions for claimant*

- 25 15. The claimant submitted that it had not been reasonably practicable for him to commence proceedings by contacting ACAS by 19 April 2020. His dismissal had come at a time that was both busy and stressful for him in the aftermath of Christmas. He had bills to pay and while raising a claim was a priority for him, it was not as high as finding alternative work in order to meet those liabilities.
- 30 16. He would likely have raised his claim sooner if there had not been so much going on in his personal and working life by the time he received the outcome of his appeal. In any event, by then the country had gone into lockdown because of Covid-19 and he had assumed that this prevented him contacting ACAS to commence proceedings. He had also been

discouraged by his belief that the ACAS early conciliation procedure was going to be more complicated than it turned out to be.

Submissions for respondent

- 5 17. On behalf of the respondent Mr Vandal submitted that it had been reasonably practicable for the claimant to have submitted his claim in time. He had taken advice immediately after his dismissal and while that advice had been incorrect in relation to the requirement to exhaust his internal appeal before he was allowed to commence proceedings there had still been almost a month following the appeal decision when steps could have
10 been taken to contact ACAS and commence proceedings in time.
18. Mr Vandal referred to the decisions of the EAT in ***Beasley v National Grid Electricity Transmissions UKEAT/0626/06*** and ***Miller v Community Links Trust Ltd UKEAT/0486/07***, which he submitted demonstrated the importance of time limits in unfair dismissal claims and made it plain that
15 time limits should be strictly applied.
19. While the claimant had referred to having been under stress as a result of his dismissal and its timing, the EAT's judgment in ***Asda v Kauser UKEAT/0165/07*** established the principle that stress was not comparable to a medical condition that would legitimately prevent someone raising a
20 claim in time and the claimant had not demonstrated any medical incapacity that had prevented him doing so.
20. With regard to the claimant having waited until the conclusion of his internal appeal before taking any action Mr Vandal relied on ***Bodha v Hampshire Area Health Authority 1982 ICR 200, EAT*** and ***Palmer and another v Southend-on-Sea Borough Council 1984 IRLR 119***. These cases were
25 authority for the proposition that an ongoing appeal procedure did not alter the effective date of termination or the time limit for commencing proceedings and that pursuing an internal appeal was not by itself enough to make it not reasonably practicable for an employee to present his claim
30 in time.
21. Mr Vandal also referred to the case of ***Pearce v Bank of America Merrill Lynch UKEAT/0067/19*** as authority for the proposition that commencing

early conciliation after the time limit had expired did not have the effect of extending the time limit.

22. Mr Vandal submitted that while the claimant had followed the advice to exhaust the internal appeal before commencing proceedings, even with
5 lockdown in place there was still adequate time after 27 March for the claimant to have commenced his claim within the statutory time limit.

23. The claimant had failed to make reasonable enquiries as to his rights after he had received the appeal rejection letter. It had been problematic for him to assume that because of the national lockdown the ACAS early
10 conciliation process would also be in lockdown. The claimant should have taken steps to ascertain the true position rather than relying on an assumption.

24. In all the circumstances it had been reasonably practicable for the claimant to commence his claim in time but he had failed to do so and his claim
15 should therefore be dismissed.

The relevant law

25. The law relating to time limits in respect of unfair dismissal claims is contained in the Employment Rights Act 1996. Section 111, so far as relevant for present purposes, provides as follows: -

20 *“111(1) A complaint may be presented to an employment Tribunal against an employer by any person that he was unfairly dismissed by the employer.*

*(2) Subject to the following provisions of this section an employment Tribunal shall not consider a complaint under this section unless it is
25 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
30 reasonably practicable for the complaint to be presented before the end of that period of three months.”*

26. Thus where a claim has been lodged outwith the three month time limit, the Tribunal must consider whether it was not reasonably practicable for the claimant to present his claim in time. The burden of proof lies with the claimant. If the claimant succeeds in showing that it was not reasonably practicable to present his claim in time, then the Tribunal must be satisfied that the time within which the claim was in fact presented was reasonable.
27. The Court of Appeal has recently considered the correct approach to the test of reasonable practicability. In ***Lowri Beck Services Ltd v Brophy*** **2019 EWCA Civ 2490**, Lord Justice Underhill summarised the essential points as follows:
1. The test should be given a “liberal interpretation in favour of the employee” (*Marks and Spencer plc v Williams-Ryan* [2005] EWCA Civ 470, [2005] ICR 1293, which reaffirms the older case law going back to *Dedman v British Building & Engineering Appliances Ltd* [1974] ICR 53).
 2. The statutory language is not to be taken as referring only to physical impracticability and for that reason might be paraphrased as whether it was “reasonably feasible” for the claimant to present his or her claim in time: see *Palmer and Saunders v Southend-on-Sea Borough Council* [1984] IRLR 119.
 3. If an employee misses the time limit because he or she is ignorant about the existence of a time limit, or mistaken about when it expires in their case, the question is whether that ignorance or mistake is reasonable. If it is, then it will not have been reasonably practicable for them to bring the claim in time (see *Wall’s Meat Co Ltd v Khan* [1979] ICR 52); but it is important to note that in assessing whether ignorance or mistake are reasonable it is necessary to take into account any enquiries which the claimant or their adviser should have made.
 4. If the employee retains a skilled adviser, any unreasonable ignorance or mistake on the part of the adviser is attributed to the employee (*Dedman*).

5. The test of reasonable practicability is one of fact and not of law (*Palmer*).

28. It is well established that the principle that an adviser's negligence or delay in presenting a claim is ascribed to the claimant applies equally where the
5 adviser is not a solicitor but a Citizens Advice adviser or other employment consultant.

Discussion and decision

29. It was common ground in the case that the claimant's last day of employment was 20 January 2020, which is the date from which the time
10 limit should run. In the circumstances the claimant should have contacted ACAS by 19 April 2020 in order to comply with the early conciliation requirement.

30. The claimant accepts that he did not contact ACAS until 23 April 2020 and that he did not therefore commence proceedings within the statutory three
15 month time limit. However he submits that it was not reasonably practicable for him to do so in the particular circumstances of his case.

31. There are two elements to the test that the Tribunal must apply; the first question is whether it was reasonably practicable for the claimant to have lodged the claim in time; the second question is whether, when it became
20 reasonably practicable to lodge the claim, the claim was lodged within a reasonable time thereafter.

32. It is clear that the reasonably practicable question relates not just to physical impracticability, but also to other forms of mental impracticability relating, for example, to the claimant's knowledge. The case law makes it clear that
25 this may include a claimant's ignorance or mistake about time limits and the focus is on whether that mistake or ignorance was reasonable. It is not enough for the claimant to show that he was ignorant of his rights, but he must also show that he took reasonable steps to acquire the necessary knowledge.

30 33. In this case the claimant was aware of his right to bring a claim for unfair dismissal and of the relevant time limit within which he was required to comply with early conciliation in order to commence proceedings.

34. However he had received incorrect advice that he had to wait until the outcome of his internal appeal before he would be able to commence proceedings. The Tribunal was satisfied that the claimant followed that advice, which had therefore likely contributed to the position he found himself in when, by the time he received the appeal outcome, the national lockdown had already begun.
35. However, in the light of *Dedman*, to the extent that this advice was the cause of his initial delay and subsequently his ultimate failure to commence proceedings in time, the adviser's mistake is attributable to the claimant and it cannot be said that this made it not reasonably practicable for him to commence proceedings in time.
36. In any event, by 27 March when he found out the appeal outcome the claimant still had a reasonable amount of time to contact ACAS by 19 April in order to comply with the statutory time limit. The main focus of the test to be applied by the Tribunal therefore is whether it was reasonably practicable for him to do that.
37. The claimant knew of the relevant time limit and of the need to contact ACAS in order to commence proceedings within the time. If he was concerned about the potential impact of the lockdown on the time limit or the early conciliation requirements for his claim it was open to him to take advice from Citizens Advice or simply to contact ACAS online or by telephone.
38. However he did not take advice and he did not contact ACAS. Instead he proceeded on his own assumption that lockdown would pause the operation of the three month time limit. While the Tribunal has some sympathy for the claimant having considered that to be a possibility, it finds that he failed unreasonably to confirm the position in circumstances where he had previously taken advice from Citizens Advice about his legal rights and could have done so again and where there was no impediment to his carrying out his own researches or simply contacting ACAS direct.
39. In that regard the Tribunal accepts the respondent's submission that it was 'problematic' for the claimant to assume that the ACAS early conciliation process was also in lockdown by 27 March 2020.

40. The case law makes it clear that it is not enough for a claimant to show that he was ignorant of his rights. He must also show that he took reasonable steps to acquire the necessary knowledge.
- 5 41. The Tribunal finds that while the claimant was mistaken about his right to proceed with his claim notwithstanding the national lockdown, he had not taken reasonable steps to ascertain the true position. The onus was on the claimant to obtain specific advice or clarification but he did not do so. If he had made a relevant reasonable enquiry for advice or had simply contacted ACAS direct then he would have ascertained the true position and been
10 able to present his claim in time.
42. That leads inevitably to the conclusion that the claimant was not reasonably mistaken about the requirement to contact ACAS by no later than 19 April and that it would have been reasonably practicable for him to present his claim in time.
- 15 43. For the avoidance of doubt, as the Tribunal is not able to conclude that it was not reasonably practicable for the claimant to have lodged his claim in time, it does not require to consider the second element of the test.
44. The claim, as the claimant accepts, was lodged out of time. For the reasons set out above the Tribunal is not satisfied that it was not reasonably
20 practicable for him to lodge the claim in time. The Tribunal therefore does not have jurisdiction to hear the claim, which is dismissed.

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30 **Employment Judge:**
Date of Judgment:
Date sent to parties:

Robert King
22 September 2020
22 September 2020