EMPLOYMENT TRIBUNALS

Claimant: Mr S Khan

Respondent: Engie Services Ltd

HELD AT: Liverpool (by CVP) **ON:** 7 October 2020

BEFORE: Employment Judge Shotter (sitting alone)

REPRESENTATION:

Claimant: In person
Respondent: Ms L Kaye, counsel

JUDGMENT

The judgment of the Tribunal is that the claimant's claim of unfair dismissal received on 14 March 2020 was not presented before the end of the period of 3 months beginning with 7 November 2019, the effective date of termination of employment. The Tribunal is satisfied that it was reasonably practicable for a complaint to be presented before the end of that period of 3 months and the complaint was not presented within such further period as the Tribunal considers reasonable. The Tribunal does not have the jurisdiction to consider the complaint, which is dismissed.

REASONS

1. This is a preliminary hearing to consider whether the claimant has filed his complaint form claiming unfair dismissal within the statutory time limit. The claimant claims unfair dismissal and in his claim form maintained the effective date of termination was the 19 November 2019, at paragraph 15 he admitted the claim was filed late and this was due to his appeal (the appeal hearing was held on the 27 January 2020), was wrongly advised on time limits by the union that he had 3-months after the appeal to file his claim and was suffering from stress and depression.
2. In oral submissions the claimant explained that he had been suspended then unfairly dismissed by the respondent when the Trust he had worked for no longer wanted him and he was dismissed as a result, which he appealed when under a "lot of stress" believing the respondent was "trying to get rid of me for nothing" and he wanted proof of the basis for the decision taken by the Trust.

3. The Tribunal heard evidence from the claimant under oath. The claimant was supported by Mr Hussein, a friend, who did not give evidence. It found the claimant's evidence was at times confused, and it did not accept on the evidence before it that the claimant was so incapacitated that he was unable to take part in ACAS early conciliation and lodge the ET1 claim form within the statutory time limit for the reasons set out below.

4. The Tribunal found the following facts and conclusion based on the contemporaneous evidence before it, oral submissions received from both parties, reference to the case law and the claimant's oral evidence. The Tribunal also took into account Ms Kaye's Skeleton argument dated 25 September 2020 previously sent to the claimant, who confirmed at the hearing he had read it and understood what had been written.

Facts

5. The claimant was dismissed with a payment in lieu of notice at a hearing held on 7 November 2019 for some other substantial reason. The claimant was accompanied by his trade union official, KH, and the notes of the hearing reflect the claimant took an active part. At the hearing the notes confirm the claimant was told the Health Trust for whom the claimant had worked as a security officer in excess of 10 years had invoked a contractual clause giving it the express right to remove an employee of the respondent provided under the contract. A search was made for alternative employment, none was suitable to the claimant and he was dismissed forthwith and a payment in lieu of notice was made.

6. The dismissal was confirmed in a letter dated 14 November 2019 ("the outcome letter") which the claimant received and he appealed the decision. The outcome letter confirmed Ian Bowden, head of estates and an employee of the respondent who chaired the meeting wrote "it was my decision to terminate your contract with immediate effect for some other substantial reason. You are entitled to ten weeks' notice and we will make a payment in lieu of this." At no stage did the claimant dispute he had been dismissed with immediate effect.

7. The claimant's last day of service was 7 November 2019, the effective date of termination as agreed by the claimant at today's hearing when he was giving oral evidence in chief under oath. The claimant conceded the date set out in the claim form of 19 November 2019 was incorrect, and accepted he had lodged his claim late.

8. The claimant continued to be supported by his union, and appealed. The appeal hearing took place on the 27 January 2020. The claimant was accompanied by a trade union official and he gave oral evidence under oath that the union representative had advised him beforehand to wait until the appeal outcome before filing proceedings with the Tribunal for unfair dismissal. The reality was that the claimant believed he could be reinstated on appeal and had decided to wait until after it was heard before issuing proceedings against the respondent.

9. It is apparent from the notes of the appeal hearing the claimant took an active part, commenting on his employment and the position taken by the respondent in respect of the Health Trust. He believed the respondent should "have stuck up for him more given the situation." There was no reference by the claimant or his union representative to the claimant being unable to conduct his affairs and take part in the process due to stress and depression. The claimant confirmed that the GP letter dated 14 January 2020 was not referred to or produced. The

evidence before the Tribunal was that the claimant took an active part in the process, he was not constrained by any mental health issues at the time and it was reasonably practicable for him to have consulted with ACAS, taken part in early conciliation and issue proceedings in time.

10. The claimant relies upon a medical report dated 14 January 2020 provided by his GP from Shift Surgery. The report confirmed the claimant attended his GP in November 2019 "due to stress at work. This was due to the suffering caused by his employer at the time. His mood was very low and he felt suicidal due to this problem. Currently he still feels under stress after losing his job and he is looking for employment elsewhere." In oral evidence the claimant confirmed he had been looking for work since his dismissal and had attended a number of interviews, although he could not remember the dates.

11. The Tribunal has had sight of the notes taken by the respondent at the appeal hearing and the appeal outcome letter dated 4 February 2020. Ms Kaye has instructions that the outcome letter was dated earlier than this; she did not have a copy and the Tribunal was satisfied, accepting the claimant's evidence, the outcome was communicated to him in a letter dated 4 February 2020 when his appeal was rejected.

12. Despite union advice and the claimant knowing (a) there were time limits for lodging an unfair dismissal claim, and (b) the union had advised the claim should be made after the appeal outcome, the claimant took no steps until he telephoned ACAS on the 2 March 2020. The explanation given for this was that the claimant was under a misapprehension from advice received via his union representative that he had 3-months from the date of the appeal to bring a claim, and the claimant had attempted to chase his union representative and the union for legal support. Having heard the claimant's oral evidence the Tribunal is satisfied that he was fully aware that time limits existed, he was responsible for contacting ACAS (not the union) and filing the claim form on time. The claimant did not seek legal advice other than chase the union for representation, and nor did he carry out an internet search. Had he done so, the position is very clear on the issue of time limits for bringing Employment Tribunal proceedings claiming unfair dismissal.

13. The claimant made a subject access request on the 13 December 2019 which the respondent complied with on 13 January 2020.

14. ACAS early conciliation took place between 2 March and 11 March 2020, and on this date ACAS issued the certificate with the ACAS EC reference number.

15. The claim form was lodged with the Tribunal 14 March 2020, the original limitation period being 7 November 2019 to 6 February 2020.

Law and applying law to the facts

16. Employees who have the right to claim unfair dismissal will generally lose that right if they fail to present their claim to a tribunal before the end of three months beginning with the effective date of termination — S.111(2)(a) ERA. Tribunals have a discretion to extend the time limit if the claimant can show that it was not reasonably practicable to put the claim in on time *and* that the claim has been submitted within a reasonable time of its becoming practicable to present the complaint — S.111(2)(b). The time limit may also be extended to allow for early

conciliation. As there was no early conciliation before the primary time limit expired on the 6 February 2020 there cannot be an extension of the statutory time limit.

17. A claimant will not normally be allowed to bring a claim in an employment tribunal unless he has informed ACAS of the complaint giving ACAS the opportunity to try to resolve the case by 'early conciliation' prior to the expiry of the primary limitation period.

18. The EC scheme is set out in Ss.18A and 18B of the Employment Tribunals Act 1996 (ETA), and in the Early Conciliation Rules of Procedure ('the EC Rules') contained in the Schedule to the Employment Tribunals (Early Conciliation: Exemptions and Rules of Procedure) Regulations 2014 SI 2014/254 ('the EC Regulations'). Proceedings in respect of which early conciliation applies includes unfair dismissal. The ACAS conciliator issues an EC certificate as evidence that S.18A(1) ETA has been complied with — S.18A(4) ETA/rule 7 EC Rules. This certificate is vital where the claimant wishes to proceed with his claim as he cannot start proceedings without it in any case to which the EC requirement applies — S.18A(8). The certificate also bears a unique reference number — rule 8(d). This number must be marked on the claimant's claim form when completed to avoid the claim being rejected under rule 10 of the Tribunal Rules.

19. Ms Kaye referred the Tribunal to Wall's Meat Co Ltd v Khan [1978] IRLR 499 and it is accepted the claimant firmly bears the burden of satisfying the Tribunal it was not reasonably practicable to bring his claim in time: Porter v Bandridge Ltd [1978]. He relies on three reasons for his failure to comply with time limits*:* "Due to have undertaken a long appeal process", "I was wrongly advised by my Union I will have 3 months after the appeal to put my case in" and "the fact I have suffered with stress and depression in dealing with this whole matter." The claimant has failed to discharge the burden placed on him, and has not satisfied the Tribunal that the three reasons put forward resulted in it not being reasonably practicable for him to have put his claim in time.

20. Ms Kaye submitted that the mere fact of invoking an internal appeal was insufficient to justify a finding of reasonable practicability, and there are no "special facts" in existence which may persuade the Tribunal otherwise: Palmer v Southend-On-Sea Borough Council [1984] IRLR 119*.* The Tribunal agreed, the claimant having failed to satisfy it that his mental health condition did not prevent him from taking part in ACAS early conciliation and lodging his claim in time against a backdrop of seeking alternative employment, attending interviews, liaising with the union, attending an appeal hearing and drafting various documents. It is notable the appeal outcome according to the claimant's evidence was received by him on 4 February 2020 and yet it took the claimant until 2 March 2020, a period of almost one month, before ACAS early conciliation commenced, with the result that even had the claimant established it was not reasonably practicable to have lodged his claim until after the appeal outcome was known (which he had not) the complaint was not presented within such further period as the Tribunal considers reasonable.

21. Ms Kaye reminded the Tribunal of the general rule as per Lord Denning MR in Dedman v British Building and Engineering Appliances ([1974] 1 ALL ER 520, a Court of Appeal case that sets out in the ratio: 'Ignorance of his rights – or ignorance of the time limit – is not just cause or excuse, unless it appears that he or his advisers could not reasonably have been expected to have been aware of

them. If he or his advisers could reasonably have been so expected, it was his or their fault, and they must take the consequences. It is difficult to find a set of words in which to express the liberal interpretation which the English Court has given to the escape clause. The principal thing is to emphasise as the statute does `the circumstances'. What is practicable `in the circumstances'? If in the circumstances the man knew or was put on enquiry as to his rights and as to the time limit, then it was `practicable' for him to have presented his complaint within the four weeks and he ought to have done so. But if he did not know and there was nothing to put him on enquiry then it was `not practicable' and he should be excused. the time limit is so strict that it goes to the jurisdiction of the tribunal to hear the complaint. By that I mean that, if the complaint is presented to the tribunal just one day late, the tribunal has no jurisdiction to consider it. Even if the employer is ready to waive it and says to the tribunal: 'I do not want to take advantage of this man…"

22. Ms Kaye submitted that the claimant's state of mind will not be held to be reasonable and will not allow an extension of time if it arises 'from the fault of his solicitors or other professional advisers in not giving him such information as they should reasonably in all the circumstances have given him' (see Brandon LJ in the Wall's Meat case). Where it is established that the adviser's fault is to be attributed to the claimant and that fault is the reason for the missed deadline, neither the extent to which claimant relied upon that advice nor the precise quality of the advice will be regarded as a relevant special reason justifying a finding of reasonable impracticability; Croydon Health Authority v Jaufurally [1986] ICR 4, EAT. The Tribunal accepted Ms Kaye's submission that to the extent erroneous advice of the Union is relied upon, the Tribunal ought to attribute such failings to the claimant and conclude it was reasonably practicable to present the claim in time. In the words of Lord Denning MR in Dedman cited above, 'If a man engages skilled advisers to act for him — and they mistake the time limit and present [the complaint] too late — he is out. His remedy is against them."

Conclusion: applying the facts to the law

23. The claimant has lost the right to claim unfair dismissal having failed to present his claim to a Tribunal before the end of three months beginning with the effective date of termination as required by S.111(2)(a) ERA. The primary time limit has not been extended by ACAS early conciliation as this did not take place until after the limitation period had expired. The primary time limit expired on 6 February 2020.

24. The claimant took the advice of a union representative throughout, who was present when the claimant was dismissed with a payment in lieu of notice on 7 November 2019, the effective date of termination. The claim form was drafted by the claimant, who had submitted a subject access request before the expiry of the primary limitation period. There was no satisfactory evidence that the claimant's health prevented him from lodging his claim in time, and the claimant's oral evidence points away from this as he was well enough to take part in the appeal process and actively seek alternative employment. The GP report does not assist the claimant in establishing that his health condition during the relevant

time resulted in it not being reasonably practicable for the claim to have been presented in time.

25. The Tribunal is required to consider whether any substantial fault on the part of the claimant's adviser that has led to the late submission of his claim may be a relevant factor when determining whether it was reasonably practicable under the test set out in S.111(2)(b) ERA for the claimant to present the claim within the prescribed time limit. It is notable following a number of cases, including Times Newspapers Ltd v O'Regan [1977] IRLR 101, EAT, Alliance and Leicester plc v Kidd EAT 0078/07 and London Borough of Islington v Brown EAT 0155/08 an adviser's incorrect advice about the time limits, or other fault leading to the late submission of a claim, will bind the claimant and a Tribunal will be unlikely to find that it was not reasonably practicable to have presented the claim in time. Trade union representatives are 'advisers' and, if they are helping a claimant with his or her case, they are generally assumed to know about ACAS Early conciliation, the need for a Early Conciliation Certificate, the relevant time limits and to appreciate the necessity of presenting claims in time following early conciliation. The Tribunal is bound by legal authority to find the claimant could not rely on the union official's mistake to excuse late submission of his claim.

26. In conclusion, the claimant's claim of unfair dismissal received on 14 March 2020 was not presented before the end of the period of 3 months beginning with 7 November 2019, the effective date of termination of employment. The Tribunal is satisfied that it was reasonably practicable for a complaint to be presented before the end of that period of 3 months and the complaint was not presented within such further period as the Tribunal considers reasonable. The Tribunal does not have the jurisdiction to consider the complaint, which is dismissed.

Employment Judge Shotter

Date 27 October 2020

JUDGMENT & REASONS SENT TO THE PARTIES ON

10 November 2020

FOR THE TRIBUNAL OFFICE