



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant
Miss J Atkin

AND

Respondent
Cornwall Council

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD REMOTELY AT Plymouth **ON**
By Telephone Conference

17 February 2021

EMPLOYMENT JUDGE N J Roper

Representation

For the Claimant: Mrs K Mills, Lay Representative

For the Respondent: Mr A Gloag of Counsel

JUDGMENT

The judgment of the tribunal is that the claimant's claim for unfair dismissal was presented out of time and is hereby dismissed.

RESERVED REASONS

1. This is the judgment following a Preliminary Hearing to determine whether or not the claimant's claim was presented in time.
2. This has been a remote hearing on the papers which has been consented to by the parties. The form of remote hearing was a public hearing by Telephone Conference. A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. The documents that I was referred to are in a paginated bundle of documents running to 91 pages, the contents of which I have recorded. The order made is described at the end of these reasons.
3. I have heard from the claimant. The claimant also adduced witness statements from Mrs Mills, Ms Hosking, and Ms Prescott, which were not challenged by the respondent. In addition, the respondent adduced a witness statement from Ms Lofthouse, which was not challenged by the claimant. I find the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after listening to any factual and legal submissions made by and on behalf of the respective parties.

4. The respondent Cornwall Council is the unitary authority for the county of Cornwall which provides a wide range of services to Cornish residents. One of the services it provides is the provision of the Lifeline service for elderly and vulnerable persons. Users wear a pendant alarm which can be activated if the user has a fall or needs to summon emergency support. The claimant Miss Jayne Atkin commenced her period of continuous employment with the respondent on 1 September 2014, and she was dismissed by reason of gross misconduct on 1 November 2019. At that time, she was employed in the Lifeline Control Centre as an operator. The allegations of gross misconduct relate to the claimant's breach of the Lifeline call handling procedure following allegations that she had failed to respond to an emergency call from a pendant alarm.
5. The chronology of this matter is not in dispute. The claimant was told that she was suspended pending an investigation on 22 August 2019. These allegations resulted in a disciplinary hearing which took place on 25 October 2019. The claimant was represented by her friend and work colleague Mrs Mills at this disciplinary hearing, the same Mrs Mills who also assisted the claimant at this preliminary hearing. The decision was taken to dismiss the claimant on 31 October 2019, and a letter of that day confirmed that the claimant was dismissed summarily for gross misconduct with effect from 1 November 2019.
6. By letter dated 5 November 2019 the claimant appealed against her dismissal. An appeal hearing was then arranged to take place on 13 January 2020. This was postponed because Ms Bonnington, the claimant's team leader who had investigated the matter, had suffered a family bereavement and had to attend a funeral. The appeal hearing was then rearranged to take place on 18 February 2020. One of the appeal panel was unable to attend at short notice, but the claimant preferred to proceed in any event. The appeal hearing therefore took place on 18 February 2019. The respondent decided to reject the claimant's appeal, and the outcome letter to the claimant confirming that appeal was unsuccessful was dated 2 March 2020.
7. The claimant then commenced the Early Conciliation process with ACAS on 30 March 2020, and the Early Conciliation Certificate was issued on 1 April 2020. The claimant presented these proceedings on 3 April 2020, and these proceedings are limited to the one claim of unfair dismissal.
8. Immediately after her dismissal in November 2019, the claimant was able to apply for and obtain alternative employment. Within three weeks of her dismissal she had obtained alternative part-time employment with Tesco. Prior to her dismissal the claimant had been absent on certified sick leave following a serious heart condition, but had recovered sufficiently to return to work. She was clearly distressed at her dismissal, but the claimant has adduced no medical or other evidence that she was too unwell or otherwise prevented from issuing these proceedings by reason of any medical condition. The claimant was asked whether she had recovered from her heart condition during the appeal hearing, and she confirmed: "physically I'm fine, emotionally I struggle but think that's because of this. I'm doing a part-time job in Tesco's to try make some money, life is a worry."
9. The claimant does not assert that she was misled by any negligent advice, nor that the respondent made any misrepresentation to her which may have prevented her from presenting these proceedings. The claimant was keen for her appeal to be resolved, and was hopeful that she would be reinstated. Mrs Mills confirmed on behalf of the claimant in her closing submissions that the claimant was reluctant to present a claim to the Employment Tribunal during the appeal process because she felt that this would have adversely affected the chances of being reinstated on appeal. The claimant does complain about the respondent's delay in completing the appeal process which the claimant argues could and should have been completed earlier.
10. Having established the above facts, I now apply the law.
11. The relevant statute is the Employment Rights Act 1996 ("the Act"). Section 111(2) of the Act provides that an employment tribunal shall not consider a complaint of unfair dismissal unless it is presented before the end of the period of three months beginning with the effective date of termination, or within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.

12. With effect from 6 May 2014 a prospective claimant must obtain an early conciliation certificate from ACAS, or have a valid exemption, before issuing employment tribunal proceedings.
13. Section 207B of the Act provides: (1) This section applies where this Act provides for it to apply for the purposes of a provision of this Act (a "relevant provision"). But it does not apply to a dispute that is (or so much of a dispute as is) a relevant dispute for the purposes of section 207A. (2) In this section - (a) Day A is the day on which the complainant or applicant concerned complies with the requirement in subsection (1) of section 18A of the Employment Tribunals Act 1996 (requirement to contact ACAS before instituting proceedings) in relation to the matter in respect of which the proceedings are brought, and (b) Day B is the day on which the complainant or applicant concerned receives or, if earlier, is treated as receiving (by virtue of regulations made under subsection (11) of that section) the certificate issued under subsection (4) of that section. (3) In working out when a time limit set by a relevant provision expires the period beginning with the day after Day A and ending with Day B is not to be counted. (4) If a time limit set by a relevant provision would (if not extended by this subsection) expire during the period beginning with Day A and ending one month after Day B, the time limit expires instead at the end of that period. (5) Where an employment tribunal has power under this Act to extend a time limit set by a relevant provision, the power is exercisable in relation to the time limit as extended by this section.
14. I have considered the following cases, namely: Palmer and Saunders v Southend-on-Sea BC [1984] ICR 372; Porter v Bandridge Ltd [1978] IRLR 271 CA; Wall's Meat Co v Khan [1978] IRLR 499; London Underground Ltd v Noel [1999] IRLR 621; Dedman v British Building and Engineering Appliances [1974] 1 All ER 520; Cullinane v Balfour Beattie Engineering Services Ltd UKEAT/0537/10; and Wolverhampton University v Elbeltagi [2007] All E R (D) 303 EAT.
15. In this case the claimant's effective date of termination of employment was 1 November 2019. The three month time limit therefore expired at midnight on 30 January 2020. The claimant then commenced the Early Conciliation process with ACAS on 30 March 2020 (Day A), and the Early Conciliation Certificate was issued on 1 April 2020 (Day B). The claimant presented these proceedings on 3 April 2020. The Early Conciliation Certificate was issued on 1 April 2020 some two months after the time limit had already expired, and accordingly the claimant does not obtain any extension of time under the Early Conciliation provisions.
16. The claimant has not suggested that there were any compelling grounds to persuade the Tribunal that it was not reasonably practicable to have issued proceedings within the relevant time limit. The claimant was not prevented from issuing proceedings by any impediment such as ill-health, ignorance of the process, bad advice, or any misrepresentation on the part of the respondent. Effectively the claimant preferred to await the outcome of the appeal process (albeit one which was delayed) before choosing to issue proceedings.
17. The question of whether or not it was reasonably practicable for the claimant to have presented her claim in time is to be considered having regard to the following authorities. In Wall's Meat Co v Khan Lord Denning, (quoting himself in Dedman v British Building and Engineering Appliances) stated "it is simply to ask this question: has the man just cause or excuse for not presenting his complaint within the prescribed time?" The burden of proof is on the claimant, see Porter v Bandridge Ltd. In addition, the Tribunal must have regard to the entire period of the time limit (Elbeltagi).
18. In Palmer and Saunders v Southend-on-Sea BC the headnote suggests: "As the authorities also make clear, the answer to that question is pre-eminently an issue of fact for the Industrial Tribunal taking all the circumstances of the given case into account, and it is seldom that an appeal from its decision will lie. Dependent upon the circumstances of the particular case, in determining whether or not it was reasonably practicable to present the complaint in time, an Industrial Tribunal may wish to consider the substantial cause of the employee's failure to comply with the statutory time limit; whether he had been physically prevented from complying with the limitation period, for instance by illness or a postal strike,

or something similar. It may be relevant for the Tribunal to investigate whether, at the time of dismissal, and if not when thereafter, the employee knew that he had the right to complain of unfair dismissal; in some cases the Tribunal may have to consider whether there was any misrepresentation about any relevant matter by the employer to the employee. It will frequently be necessary for the Tribunal to know whether the employee was being advised at any material time and, if so, by whom; the extent of the advisor's knowledge of the facts of the employee's case; and of the nature of any advice which they may have given him. It will probably be relevant in most cases for the Industrial Tribunal to ask itself whether there was any substantial failure on the part of the employee or his adviser which led to the failure to comply with the time limit. The Industrial Tribunal may also wish to consider the manner in which and the reason for which the employee was dismissed, including the extent to which, if at all, the employer's conciliatory appeals machinery had been used. Contrary to the argument advanced on behalf of the appellants in the present case and the obiter dictum of Kilner Brown J in Crown Agents for Overseas Governments and Administrations v Lawal [1978] IRLR542, however, the mere fact that an employee was pursuing an appeal through the internal machinery does not mean that it was not reasonably practicable for the unfair dismissal application to be made in time. The views expressed by the EAT in Bodha v Hampshire Area Health Authority on this point were preferred to those expressed in Lawal:-

19. To this end the Tribunal should consider: (1) the substantial cause of the claimant's failure to comply with the time limit; (2) whether there was any physical impediment preventing compliance, such as illness, or a postal strike; (3) whether, and if so when, the claimant knew of his rights; (4) whether the employer had misrepresented any relevant matter to the employee; and (5) whether the claimant had been advised by anyone, and the nature of any advice given; and whether there was any substantial fault on the part of the claimant or his adviser which led to the failure to present the complaint in time.
20. In addition, in Palmer and Saunders v Southend-on-Sea BC, and following its general review of the authorities, the Court of Appeal (per May LJ) concluded that "reasonably practicable" does not mean reasonable (which would be too favourable to employees), and does not mean physically possible (which would be too favourable to employers) but means something like "reasonably feasible".
21. Subsequently in London Underground Ltd v Noel, Judge LJ stated at paragraph 24 "The power to disapply the statutory period is therefore very restricted. In particular it is not available to be exercised, for example, "in all the circumstances", nor when it is "just and reasonable", nor even where the Tribunal "considers that there is a good reason" for doing so. As Browne Wilkinson J (as he then was) observed: "The statutory test remains one of practicability ... the statutory test is not satisfied just because it was reasonable not to do what could be done" (Bodha v Hampshire Area Health Authority [1982] ICR 200 at p 204).
22. Underhill P as he then was considered the period after the expiry of the primary time limit in Cullinane v Balfour Beattie Engineering Services Ltd (in the context of the time limit under section 139 of the Trade Union & Labour Relations (Consolidation) Act 1992, which is the same test as in section 111 of the Act) at paragraph 16: "The question at "stage 2" is what period - that is, between the expiry of the primary time limit and the eventual presentation of the claim - is reasonable. That is not the same as asking whether the claimant acted reasonably; still less is it equivalent to the question whether it would be just and equitable to extend time. It requires an objective consideration of the factors causing the delay and what period should reasonably be allowed in those circumstances for proceedings to be instituted - having regard, certainly, to the strong public interest in claims in this field being brought promptly, and against a background where the primary time limit is three months."
23. In conclusion therefore the claimant has not discharged the burden of proof upon her to show that it was not really practicable for her to have issued these proceedings within the relevant time limit. The cause of the claimant's failure to comply with the time limit was effectively that she decided to await the outcome of the delayed appeal process. There was no physical impediment which prevented her from complying with the time limit such as illness or a postal strike. The claimant has not suggested that she was unaware of her

- right to bring a claim or that she was misled by bad advice or any misrepresentation on the part of the respondent. Accordingly I find that it was reasonably practicable for the claimant to have presented these proceedings within the relevant time limit.
24. In any event, even if this had not been the case, the claimant has not been able to give a satisfactory explanation as to the continuing delay before issuing proceedings after the notification of the rejection of her appeal on 2 March 2020, and her commencing the Early Conciliation process on 30 March 2020 so as to be able to issue these proceedings on 3 April 2020. She did not therefore issue these proceedings within such further period as is reasonable.
 25. For these reasons I conclude that the claimant's unfair dismissal claim was presented out of time, and it is hereby dismissed.
 26. For the purposes of Rule 62(5) of the Employment Tribunals Rules of Procedure 2013, the issues which the tribunal determined are at paragraph 1; the findings of fact made in relation to those issues are at paragraphs 4 to 9; a concise identification of the relevant law is at paragraphs 11 to 22; how that law has been applied to those findings in order to decide the issues is at paragraphs 23 to 25.

Employment Judge N J Roper
Date: 17 February 2021

Judgment sent to Parties: 25 February 2021

FOR THE TRIBUNAL OFFICE