Case No: 2501592/2020

EMPLOYMENT TRIBUNALS

Claimant: Mr RU Ahmed

Respondent: Newcastle City Council

CERTIFICATE OF CORRECTION
Employment Tribunals Rules of Procedure 2013

Under the provisions of Rule 69, the Judgment sent to the parties on 19 March 2021, is corrected as underlined at the type of Hearing in the corrected Judgment served with this certificate.

Employment Judge Shore

1 April 2021

Important note to parties:
Any dates for the filing of appeals or reviews are not changed by this certificate of correction and corrected judgment. These time limits still run from the date of the original judgment, or original judgment with reasons, when appealing.

EMPLOYMENT TRIBUNALS

Claimant: Mr R U Ahmed

Respondent: Newcastle City Council

VIDEO FINAL HEARING

Heard: Remotely (by video link) **On:** 25 February 2021

Before: Employment Judge S Shore

Appearances
For the claimant: In Person
For the respondent: Mr A Webster, Counsel

JUDGMENT

1. The claimant did not present his claim of unfair dismissal before the end of the period of three months (including any pause in calculating time due to early conciliation) beginning with the effective date of termination, as required by section 111(2)(a) of the Employment Rights Act 1996 when it was reasonably practicable for him to have done so. The Tribunal therefore has no jurisdiction to hear his claim of unfair dismissal pursuant to sections 94 and 98 of the Employment Rights Act 1996. That claim is struck out.

REASONS

Introduction

1. The claimant was employed as Regional Transport Team NECA/NoT Specialist Transport Planner by the respondent from 1 June 1994 to 16 March 2020, which was the effective date of termination of his employment following his dismissal for the stated reason of gross misconduct. The claimant started early conciliation with ACAS on 8 June 2020 and obtained a conciliation certificate dated 26 June 2020. The claimant's ET1 was presented on 24 August 2020. The respondent is a large local authority.

2. The claimant presented a claim of:

    2.1. Unfair dismissal (contrary to section 94 of the Employment Rights Act 1996), and;

3. On 25 August 2020 the Tribunal issued a Notice of Claim and made a series of case management orders, including an order that listed the case for a one-day hearing by video on 15 December 2020.

4. That hearing was postponed by Employment Judge Aspden on 10 October 2020 and the case was relisted for a two-day hearing by video on 25 and 26 February 2021. In its ET3, the respondent had submitted that the claimant's claim had been presented to the Tribunal out of time. Employment Judge Johnson directed that the question of whether the claim had been brought in time would be dealt with at the final hearing.

5. I note that EJ Aspden's Notice of Postponement contained a chronology of the Tribunal's record of the claimant's attempts to file his claim which I have taken as the basis of this summary:

    5.1. 16 July 2020: Claimant emailed his ET1 to the Newcastle Employment Tribunal;

    5.2. 16 July 2020: ET rejected the claimant's ET1 and informed him by letter (delivered by email) of the three permitted ways in which he could present his claim – online, by hand to a designated Tribunal Office, or by post to the Tribunals Central Office in Leicester. It was acknowledged that the letter wrongly advised that the Newcastle Tribunal's former office at Kings Court, North Shields was a designated office);

    5.3. Unrecorded date: The claimant spoke to a clerk at the Newcastle ET and said he had delivered his ET3 to Kings Court on 16 or 17 July 2020. A Security Guard had given him an envelope for his ET1 and he had dropped the ET1 in the ET drop box;

    5.4. 22 July 2020: Tribunal at Newcastle received the claimant's ET1 from Kings Court;

    5.5. 22 July 2020: Claimant was sent another Returned Claim Form notice letter by email dated 22 July 2020 from the Tribunal. That letter again advised the claimant of the three permitted ways of lodging a claim and gave the correct address for the Newcastle designated office; and

    5.6. 19 August 2020: Tribunal emailed the claimant in response to a telephone call from him.

6. In preparation for this hearing, the parties prepared an agreed bundle of documents that ran to 657 pages. If I refer to any page in the bundle, I will indicate the page number of the document in square brackets.

7. The respondent produced three witnesses, who had prepared witness statements:

    7.1. Luke Burton, who was the investigating officer. His witness statement ran to 19 paragraphs;

7.2. Pamela Perry, who was the dismissing officer. Her witness statement ran to 23 paragraphs; and

7.3. Anthony Kirkham, who was the appeal officer. His witness statement ran to 15 pages.

8. The claimant did not produce a witness statement as such. He had replied to an email from the respondent's solicitor asking about his statement by saying that he did not intend to produce one. Today, he indicated that he wished to adopt an undated statement of his case prepared by his union representative [586-625].

9. All witness statements were taken as read. All the witnesses were cross-examined and I asked some of them some questions.

10. I advised the claimant that the Tribunal operates on a set of Rules and went through the overriding objective with him.

11. At the end of the evidence, both sides made closing submissions. I then retired and considered my decision. I gave a judgment and oral reasons. Mr Ahmed asked for the reasons to be put in writing.

12. I spent some time discussing the claimant's claim with him at the start of the hearing. He was clear that the only aspect of the unfair dismissal claim that he took exception to was the disciplinary sanction imposed. He accepted that he had done the acts of misconduct alleged against him, but his case was that he should have been given a sanction short of dismissal because of his long service, unblemished record, work history, ill health at the material time and other matters.

13. I decided to hear the time point and substantive unfair dismissal case together, rather than hearing the time point as a preliminary matter. Whilst he said he would have preferred to have the time point dealt with as a preliminary issue, Mr Webster raised no objection to my suggestion.

Issues

14. No list of issues (questions that I had to find answers to) had been prepared. I discussed the issues with the parties and sent an agreed list to them. The agreed issues were as follows:

15. **Time Limits**

15.1. Was the unfair dismissal made within the time limit in section 111 of the Employment Rights Act 1996? The Tribunal will decide:

15.1.1. Was the claim made to the Tribunal within three months (plus early conciliation extension) of the effective date of termination?

15.1.2. If not, was it reasonably practicable for the claim to be made to the Tribunal within the time limit?

15.1.3. If it was not reasonably practicable for the claim to be made to the Tribunal within the time limit, was it made within a reasonable period?

16. **Unfair dismissal**

16.1. Was the claimant dismissed? The respondent accepts that he was.

16.2. What was the reason or principal reason for dismissal? The respondent says the reason was conduct. The Tribunal will need to decide whether the respondent genuinely believed the claimant had committed misconduct.

16.3. If the reason was misconduct, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant? The Tribunal will usually decide, in particular, whether:

16.3.1. there were reasonable grounds for that belief;

16.3.2. at the time the belief was formed the respondent had carried out a reasonable investigation;

16.3.3. the respondent otherwise acted in a procedurally fair manner; and

16.3.4. dismissal was within the range of reasonable responses.

16.4. If the claimant was unfairly dismissed, did he cause or contribute to dismissal by blameworthy conduct?

16.5. If so, would it be just and equitable to reduce the claimant's compensatory/basic award? By what proportion?

17. **Remedy for unfair dismissal**

17.1. Does the claimant wish to be reinstated to their previous employment?

17.2. Does the claimant wish to be re-engaged to comparable employment or other suitable employment?

17.3. Should the Tribunal order reinstatement? The Tribunal will consider in particular whether reinstatement is practicable and, if the claimant caused or contributed to dismissal, whether it would be just.

17.4. Should the Tribunal order re-engagement? The Tribunal will consider in particular whether re-engagement is practicable and, if the claimant caused or contributed to dismissal, whether it would be just.

17.5. What should the terms of the re-engagement order be?

17.6. If there is a compensatory award, how much should it be? The Tribunal will decide:

17.6.1. What financial losses has the dismissal caused the claimant?

17.6.2. Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?

17.6.3. If not, for what period of loss should the claimant be compensated?

17.6.4. Does the statutory cap of fifty-two weeks' pay apply?

18. As I found that the claimant's claim had been presented out of time when it had been reasonably practicable to present it before the expiry of the time limit, I did not make formal findings on points 13.1.3 to 15.6.4 above.

Law

19. Section 94 of the Employment Rights Act 1996 (ERA) provides that an employee has the right not to be unfairly dismissed.

20. For a dismissal to be fair:

20.1. it must be for one of the potentially fair reasons contained in Section 98(1) or (2) ERA; and

20.2. the employer must have acted reasonably in treating the potentially fair reason as a sufficient reason for dismissing the employee in accordance with equity and substantial merits of the case in terms of section 98(4) ERA.

Reason

21. It is for the respondent to show the reason (or principal reason if more than one) for the dismissal (section 98(1)(a) ERA)

22. A reason relating to the conduct of the employee is one of the permissible reasons for a fair dismissal (section 98(2)(b)).

23. 'Some other substantial reason' is also a permissible reason for a fair dismissal (section 98(1)(b) of the ERA).

Did the employer act reasonably?

24. If the Tribunal is satisfied there was a potentially fair reason for dismissal, it should proceed to determine whether the dismissal was fair or unfair, applying the test within s.98(4). The determination of that question (having regard to the reason shown by the employer):-

24.1. (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

24.2. (b) shall be determined in accordance with equity and the substantial merits of the case.

Conduct – Reasonableness

25. The approach to the determination of this issue has been developed through case law. Where an employee has been dismissed for misconduct, **British Home Stores v Burchell [1978] IRLR 379**, sets out the questions to be addressed by the Tribunal as follows:

    25.1. Whether the respondent believed the individual to be guilty of misconduct;

    25.2. whether they had reasonable grounds for believing the individual was guilty of that misconduct; and

    25.3. whether, when it formed that belief on those grounds, it had carried out as much investigation as was reasonable in the circumstances.

26. However, compliance with **Burchell** is not in itself sufficient. For a dismissal to be regarded as fair, the Tribunal also requires to find that the respondent had carried out a fair procedure in accordance with principles of natural justice, taking into account the terms of the ACAS Code of Practice. Whilst a failure by an employer to follow the code is relevant to the question of reasonableness and thus liability, it does not *per se* render the dismissal automatically unfair: Tribunals should take all factors into account. In assessing whether an employer has adopted a reasonable procedure, consideration should be given to whether the disciplinary process as a whole was fair, which may be the case notwithstanding the presence of some particular procedural flaw. It is possible that procedural defects in an initial disciplinary hearing may be remedied on appeal, provided that the appeal is sufficiently comprehensive - see **Taylor v OCS Group Limited [2006] IRLR 613**.

27. The approach in Taylor was endorsed by the EAT (Simler P) in **D'Silva v Manchester Metropolitan University and others UKEAT/0328/16**. Dismissing the appeal, the EAT reiterated that what mattered was whether the disciplinary process as a whole was fair. Where an early stage of a process had been defective or unfair, subsequent stages would require particularly careful examination in order to determine whether, overall, the process had been fair (§44).

28. Lastly the Tribunal is required to consider whether the decision to dismiss was a reasonable sanction (whether it was within a band of reasonable responses), given the misconduct found to have taken place.

29. In determining these various issues, the Tribunal is not to approach the matter by effectively substituting its own view for what it would have done if it had been the employer, but to apply the object of standards of a reasonable employer. In doing so, the Tribunal should bear in mind that there is a range of responses to any given situation available to a reasonable employer and it is only if, applying that objective standard, the decision to dismiss is found to be outside that range of reasonable responses, that the dismissal should be found to be unfair (**Iceland Frozen Foods Limited v Jones [1982] IRLR 439**). If the Tribunal determines that a reasonable employer might reasonably have dismissed the employee, when faced with the same circumstances, then the dismissal would be fair, regardless of whether another reasonable employer might have taken a different or more lenient view.

Time

30. Section 111 of the ERA provides (I have only produced the relevant parts of the section):

> **111 Complaints to employment tribunal**
>
> *(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 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 reasonably practicable for the complaint to be presented before the end of that period of three months.*
>
> *(2A) Section 207B (extension of time limits to facilitate conciliation before institution of proceedings) applies for the purposes of subsection (2)(a).*
>
> *(3) Where a dismissal is with notice, an [employment tribunal] shall consider a complaint under this section if it is presented after the notice is given but before the effective date of termination.*
>
> *(4) In relation to a complaint which is presented as mentioned in subsection (3), the provisions of this Act, so far as they relate to unfair dismissal, have effect as if—*
>
> > *(a) references to a complaint by a person that he was unfairly dismissed by his employer included references to a complaint by a person that his employer has given him notice in such circumstances that he will be unfairly dismissed when the notice expires,*
> >
> > *(b) references to reinstatement included references to the withdrawal of the notice by the employer,*
> >
> > *(c) references to the effective date of termination included references to the date which would be the effective date of termination on the expiry of the notice, and*
> >
> > *(d) references to an employee ceasing to be employed included references to an employee having been given notice of dismissal.*

Findings of Fact

31. All findings of fact were made on the balance of probabilities. If a matter was in dispute, I will set out the reasons why I decided to prefer one party's case over the other. If there was no dispute over a matter, I will either record that with the finding or make no comment as to the reason that a particular finding

was made. I have not dealt with every single matter that was raised in evidence or the documents. I have only dealt with matters that I found relevant to the issues I have had to determine.

32. I make the following findings. The chronology set out at paragraphs 5.1 to 5.6 above is correct, as neither side suggested that it wasn't and it was consistent with the evidence and documents.

33. I find that the effective date of termination of the claimant's employment was on 16 March 2020. The claimant began early conciliation on 8 June 2020 and obtained a conciliation certificate on 26 June 2020. These dates were agreed. I find that time for the presentation of the claim form expired at midnight on 26 July 2020.

34. I find that the claimant must have prepared his ET1 on or before 16 July, because he attempted to present it on that date. I find that he was aware of the time limit because he said he was and had been advised of the three-month limit in the letter from the respondent dated 13 March 2020 [521-529] confirming his dismissal.

35. I find that the Tribunal may not accept an ET1 that has been submitted by email. I find that the claimant submitted an ET1 to the Newcastle Employment Tribunal email address on 16 July 2020. This was rejected and notification of rejection was sent to the claimant by email on 16 July 2020 [45]. The email advised the claimant of the three permissible methods by which he could file his claim – online submission, hand delivery to a designated office and postal application addressed to the ET's Central Office at Leicester.

36. It is regrettable that the claimant was given details of the previous delegated office of the Newcastle ET in North Shields as the place to deliver his claim by hand, but he was still notified of the refusal of his claim well before the expiry date. I find that he handed in an ET1 to a Security Guard at Kings Court, North Shields on 16 or 17 July 2020. On balance, I find it more likely that the date was 17 July because of the contents of an email from the Tribunal to the clamant timed at 09:06 on 17 July [40].

37. I find that the second claim was received by the Tribunal's office in Newcastle on 22 July and was rejected lawfully on 22 July 2020 because it had not been handed in to the designated office. A further Returned Claim Form Notice dated 22 July 2020 was sent to the claimant by email on that date. I find that the claimant read it on that date because he said he had done so.

38. I find that the letter of 22 July 2020 contained all the correct information to enable the claimant to lodge his claim by the three prescribed methods. I find he had the opportunity to lodge the claim before the expiry of the time limit, but gave no cogent excuse as to why he did not do so. He could not say when he posted another paper copy of his ET1 to the Employment Tribunals Central Office, but I find that it was most likely to be between 19 August 2020 and 23 August 2020 because of the email from the Tribunal to the claimant dated 19 August 2020 [40] that refers to a telephone conversation with the claimant that day about the submission of his ET1 and because I find that the form was received at Leicester on 24 August 2020 because of the date stamp on the copy ET1 in the bundle.

Assessment and Conclusions

39. On my findings of fact, I conclude that it was reasonably practicable (and/or feasible) for the claimant to have presented the claim to the Tribunal by midnight on 26 July 2020. He did not do so, and so his claim was out of time and the Tribunal has no jurisdiction to hear it.

40. I add for the sake of completeness only, that in the alternative, had I found that it was not reasonably practicable for the claimant to have presented his claim by 26 July 2020, I would not have found it reasonable to extend the time for presentation of the ET1 to 24 August 2020.

Note: This has been a remote hearing. The parties did not object to the case being heard remotely. The form of remote hearing was V - video. It was not practicable to hold a face to face hearing because of the Covid19 pandemic.

Employment Judge Shore
1 March 2021

Sent to the parties on:

19 March 2021
For the Tribunal Office:

Miss K Featherstone