EMPLOYMENT TRIBUNALS

Claimant: Mr H Kerkouki

Respondent: Guarding UK Limited

Heard at: London South Employment Tribunal (by CVP)
On: 24 March 2021

Before: Employment Judge Abbott (sitting alone)

Representation
Claimant: In person
Respondent: Katherine Anderson, counsel (instructed by Darwin Gray LLP)

JUDGMENT

The claim is dismissed on the basis that the Tribunal has no jurisdiction to hear it.

REASONS

Introduction

1. The Claimant, Mr Kerkouki, brings claims for unfair dismissal and in respect of unpaid notice pay against his former employer the Respondent, Guarding UK Limited. Pursuant to a direction of Employment Judge Bryant, the case came before me at a Preliminary Hearing on 24 March 2021 to determine whether the Tribunal has jurisdiction to hear the claims in view of them being presented out of time.

2. Having heard from Mr Kerkouki and from Ms Anderson, counsel for the Respondent, I concluded that the claim should be dismissed for lack of jurisdiction and gave oral reasons for my decision at the hearing. Immediately following the delivery of my oral judgment Mr Kerkouki requested written reasons. These are those reasons.

Relevant legislative provisions

3. The jurisdiction of the Employment Tribunal to hear complaints of unfair

dismissal is established by section 111 of the Employment Rights Act 1996 ("the Act"). Section 111(2) of the Act provides that:

> [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.

(None of the "following provisions" of section 111 of the Act are relevant to the present case.)

4. Section 207B of the Act provides for the extension of the time limit mentioned above to facilitate ACAS conciliation before the institution of proceedings. So far as relevant to this case, it provides:

> (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.

5. There are provisions to the same effect in articles 7 and 8B of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 in respect of breach of contract claims, under which Mr Kerkouki's claim in respect of unpaid notice pay falls. In the remainder of these reasons I shall refer only to section 111 of the Act for convenience, but the same points apply in relation to these provisions.

<u>Applicability of Section 111(2)(a) of the Act</u>

6. The following points were not in dispute.

a. The effective date of termination was 24 January 2020;

b. For the purposes of section 207B of the Act, Day A was 1 April 2020 and Day B was 23 April 2020;

c. Accordingly, the date by which the claim should have been presented was 23 May 2020;

d. In fact, the claim was presented on 5 August 2020, *i.e.* around 2.5 months late.

7. As a consequence, Mr Kerkouki has to rely upon section 111(2)(b) of the Act in order to establish the Tribunal's jurisdiction to hear his claim.

Applicability of Section 111(2)(b) of the Act

8. I have to consider a two-stage test under the wording of this provision: first, am I satisfied that it was not reasonably practicable for the claimant to file his claim in time; and second, if I am so satisfied, was the claim presented within a reasonable period after the deadline passed.

Relevant case law guidance

9. Court of Appeal case law has established three general rules which apply when considering the application of the "escape clause" provided in section 111(2)(b) of the Act.

10. First, the section should be given a "liberal construction in favour of the employee" — *Dedman v British Building and Engineering Appliances Ltd* [1974] ICR 53, CA.

11. Second, what is reasonably practicable is a question of fact and thus a matter for the tribunal to decide — see, e.g., *Wall's Meat Co Ltd v Khan* [1979] ICR 52, CA.

12. Third, the onus of proving that presentation in time was not reasonably practicable rests on the claimant. "That imposes a duty upon him to show precisely why it was that he did not present his complaint" — *Porter v Bandridge Ltd* [1978] ICR 943, CA.

The parties' positions

13. Mr Kerkouki stated that it was not reasonably practicable for him to present the claim in time for several reasons, being in summary:

a. He was busy seeking to find alternative work (Mr Kerkouki estimated he had applied for over 100 jobs) and, when that was not successful, claiming Universal Credit (which involved completing many forms);

b. He was suffering from anxiety and depression and was not in the right state of mind to focus on filing the claim;

c. He was unable to make contact with his Union rep for a period of several months, up until late June 2020;

d. He needed advice in order to fill out the ET1 claim form;

e. There were other distractions, notably the unfortunate passing of two family members due to COVID and his sister's diagnosis of cancer.

14. In response, Ms Anderson, counsel for the Respondent, submitted that:

a. Mr Kerkouki's actions in seeking work indicate that he was well capable of presenting his claim form in time;

b. While Mr Kerkouki was unable to contact his existing Union rep, this was no obstacle to seeking alternative advice from the Union more generally or from other free sources;

c. Mr Kerkouki has submitted no supporting medical evidence for this hearing;

d. Mr Kerkouki was able to engage with ACAS in April 2020 as part of the conciliation process.

Findings of fact

15. I make the following findings of fact in respect of the period between Mr Kerkouki's effective date of termination and the presentation of his ET1:

a. Mr Kerkouki pursued (unsuccessfully) an internal appeal against his dismissal;

b. Mr Kerkouki contacted ACAS regarding potential conciliation of his dispute;

c. Mr Kerkouki made a significant number of job applications;

d. Mr Kerkouki applied for Universal Credit, requiring the completion of relevant claim forms;

e. Mr Kerkouki spoke to his GP regarding potential anxiety and/or depression, and his GP advised that he contact the organisation Bromley Well in that regard – Bromley Well is an organisation that provides non-medical health and wellbeing services, among other things;

f. Mr Kerkouki was unable to make contact with his original Union representative from the end of his appeal proceedings until late June 2020;

g. There were distractions in Mr Kerkouki's family life including the passing of family members due to COVID and his sister's cancer diagnosis.

Discussion

16. The core of Mr Kerkouki's arguments centre on his illness or state of mind. In this regard, I accept (and Ms Anderson did not dispute) that a debilitating

illness may make it not reasonably practicable for the claimant to present a claim in time. However, this will usually only constitute a valid reason for extending the time limit if it is supported by medical evidence. Such medical evidence must not only support the claimant's illness; it must also demonstrate that the illness prevented the claimant from submitting the claim on time, *i.e.* to prove the causal link between the illness and it not being reasonably practicable for the claimant to present the claim on time.

17. Here Mr Kerkouki has not presented any medical evidence. He described (and I accept) that he spoke with his GP regarding potential anxiety and/or depression and was advised to contact an organisation which offers non-medical health and wellbeing services. However, I have no evidence before me upon which I could properly find that, not only was Mr Kerkouki ill, but that his illness in fact prevented him from submitting his claim in time.

18. Moreover, such a finding would be inconsistent with my other findings based on what Mr Kerkouki explained in the course of the hearing. Notwithstanding any illness Mr Kerkouki was able to pursue an internal appeal process and ACAS conciliation, make a very large number of job applications, and fill in the forms that are required in order to claim Universal Credit. There is no credible explanation for how Mr Kerkouki was able to do these things, yet was prevented from presenting his claim form.

19. The same applies in relation to the unfortunate passing of Mr Kerkouki's family members and his sister's illness - I cannot be satisfied based on the evidence before me that these events made it not reasonably practicable for the claimant to submit his claim in time, in circumstances where they did not prevent him undertaking the other activities already mentioned. The causal link has not been made out.

20. That leaves the issue of Mr Kerkouki's access to his Union rep. I have accepted that Mr Kerkouki was unable to contact his existing Union representative for a long period. However, I accept Ms Anderson's submission that, even so, this was no obstacle to Mr Kerkouki seeking alternative advice from the Union more generally or from other free sources (such as a Citizens Advice Bureau or online resources). Those would have been reasonable steps for Mr Kerkouki to take. Moreover, Mr Kerkouki was sufficiently aware of his rights to pursue an internal appeal process and ACAS conciliation. I am not satisfied that Mr Kerkouki's inability to access his existing Union representative meant that it was not reasonably practicable for him to present his claim in time.

21. Taking account of all the circumstances, therefore, and notwithstanding the need to take a liberal approach to the interpretation of section 111(2)(b), Mr Kerkouki has not met the burden upon him to show that it was not reasonably practicable for him to present his claim in time. The claim therefore falls to be dismissed on the basis that the Tribunal has no jurisdiction to hear it.

22. It is important to add that Mr Kerkouki had ample opportunity in the run up to the hearing to present supporting evidence in order to seek to meet his burden. That this was a key issue for determination was made clear in the

Response to the Claim dated 14 October 2020. Paragraph 3.d. of the Grounds of Resistance states

> … The Claimant's ET1 was received by the Tribunal on 5 August 2020. The Claimant has not pleaded any reason why it was not reasonably practicable for him to submit his ET1 by 23 May 2020. The Respondent avers that the Claimant is therefore over two months out of time and that his claim should be struck out.

23. The Notice of Preliminary Hearing to determine this issue was issued on 21 December 2020, with the original hearing date being 23 February 2021 (though this was later postponed to 24 March 2021). Accordingly, Mr Kerkouki had 3 months' notice that the hearing was to address this issue. While Mr Kerkouki indicated at the hearing he could obtain and provide medical letters, it would not have been fair and just in the circumstances to delay the proceedings to allow the late instruction of such evidence. In any event, such letters would be unlikely to greatly assist on the question of the debilitating effect of any illness, as opposed to merely confirming what I have already accepted regarding Mr Kerkouki's discussions with his GP.

24. It is not strictly necessary for me to deal with the second limb of the section 111(2)(b) test having concluded that the first limb was not satisfied. However, I was not persuaded that there was any reasonable justification for the delay of around 5 weeks between Mr Kerkouki speaking to his Union representative and the claim being presented. Mr Kerkouki asserted that this was a consequence of his state of mind at that time, but there was insufficient evidence presented which would permit such a conclusion. Thus, the claim would fall to be dismissed even had I concluded that it was not reasonably practicable for it to be presented in time.

Employment Judge Abbott

Date: 9 May 2021