



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4107977/2020 (V)

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Held in Glasgow (by CVP) on 04 May 2021

Employment Judge B Beyzade

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Mr. Michal Kazimierczak

**Claimant
In person**

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Tesco Stores Limited

**Respondent
Represented by:
Ms. Alice Stobart,
Counsel**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

1. The judgment of the Tribunal is that:

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1.1. the claimant's claim of unfair dismissal submitted by the claimant on 22 December 2020 was presented outwith the time limit of 3 months from the effective date of termination set down in s111(2) of the Employment Rights Act 1996. Further, that it was reasonably practicable for the claimant to have presented the claim within the relevant time limit. In these circumstances, the Tribunal does not have jurisdiction to hear the claimant's claim.

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1.2. the claimant's reconsideration application dated 21 December 2020 is dismissed and the decision to reject the claimant's initial claim dated 06 December 2020 is confirmed.

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REASONS

Introduction

2. The claimant presented a complaint of unfair dismissal which the respondent denied.
- 5 3. A preliminary hearing was held on 04 May 2021. This was a hearing held by CVP video hearing pursuant to Rule 46. I was satisfied that the parties were content to proceed with a CVP hearing, that it was just and equitable in all the circumstances, and that the participants in hearing were able to see and hear the proceedings.
- 10 4. The parties prepared and filed a Joint Inventory and Bundle of Productions in advance of the hearing consisting of 86 pages.
- 15 5. At the outset of the hearing the parties were advised that the Tribunal would investigate and record the following issues as falling to be determined, both parties being in agreement with these:
- (i) Whether the claimant’s claim for unfair dismissal was lodged in time?
 - (ii) If not, was it reasonably practicable to bring his claim within the time limit and was any additional time taken by the claimant to present his claim reasonable?
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6. The Claimant gave evidence at the hearing on his own behalf.
- 25 7. Both parties made closing submissions.

Findings in fact

- 30 8. On the documents and oral evidence presented the Tribunal makes the following essential findings of fact restricted to those necessary to determine the list of issues –

9. The claimant commenced employment with the respondent as a Team Leader in the respondent's store located at Princess Street, Edinburgh on 15 March 2015 and his employment came to an end on 08 September 2020.
- 5 10. Following an investigation on 15 August 2020 an investigation meeting was held by the respondent in relation to the claimant's conduct the claimant was suspended from his employment. A further investigation meeting took place on 22 August 2020. The claimant was invited to attend a Disciplinary Hearing on 08 September 2020. At the Disciplinary Hearing, the claimant was advised
10 that he was being dismissed by the respondent with immediate effect from 08 September 2020.
11. The respondent sent a letter to the claimant dated 09 September 2020 advising him that he was summarily dismissed due to gross misconduct. The
15 claimant appealed against his dismissal. An Appeal Hearing was held on 26 October 2020. The claimant received a letter from the respondent dated on the same day advising him that his appeal was not upheld. The claimant did not receive the appeal outcome and copy of the minutes of the appeal meeting he requested until 30 December 2020.
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12. In around October/November 2020, the claimant contacted ACAS and he explained that he was awaiting the outcome of the appeal against his dismissal. He was advised by ACAS that it could take time for employers to send the appeal outcome. ACAS advised him that he had 3 months less 1 day
25 to make his claim to the Tribunal and that he should move forward and make his claim regardless of whether he received the appeal outcome.
13. The claimant was also asked by ACAS if he wanted to commence Early Conciliation or if he wanted to proceed to make his Tribunal claim. ACAS
30 advised the claimant to visit their website and to make a Tribunal claim.
14. The claimant started his first Tribunal claim on 05 December 2020 and he submitted his claim on 06 December 2020. The claimant indicated on his claim form that he was exempt from early conciliation and he did not provide

an early conciliation number. The Tribunal advised the claimant by letter dated 11 December 2020 that his claim was rejected due to the failure to provide an Early Conciliation number. The claimant was advised that he had a right to apply for reconsideration within fourteen days from the date of the Tribunal's letter.

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15. The claimant stated he received the letter from the Tribunal dated 11 December 2020 on 19 December 2020. He sent a letter to the Tribunal dated 21 December 2020 advising he contacted ACAS as soon as possible after his dismissal with the intention to access its mediation services, that he had a poor understanding of the process or there was miscommunication, he presented his claim 3 months less one day after dismissal, and he believed a case manager would be appointed when he presented his claim who would work towards a resolution.

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16. The claimant contacted ACAS on 21 December 2020, and he obtained an ACAS Early Conciliation Certificate on the same day.

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17. The claimant lodged a further Employment Tribunal claim on 22 December 2020, after he had obtained the Certificate from ACAS, albeit on the following day. His claim form contained an ACAS Early Conciliation number

18. The claimant received an Acknowledgment of Claim on 05 January 2021.

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Claimant's submissions

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19. The claimant lodged his claim with the Tribunal on 06 December 2020, which he stated was within the 3 months less 1 day time limit. His claim had been rejected on the basis that his initial claim did not contain an ACAS Early Conciliation number. He had poor understanding of the process and he believed that contacting ACAS would be sufficient and he was not aware that he had to obtain a reference number.

20. He also believed that once he lodged his claim, someone from ACAS would contact him to guide him through the process.

21. When he was told by the Tribunal that he needed to start ACAS Early Conciliation and to obtain a reference number, he contacted ACAS straight away by telephone on 21 December 2020. On the same day he applied for reconsideration and on the following day he submitted a new claim.

Respondent's submissions

22. The respondent submitted that the Tribunal should dismiss the claim as it was presented out of time and it was reasonably practicable for the claimant to bring his claim in time. The claimant was told by ACAS that he should not wait for any appeal decision to be taken. The ACAS website advised that the claimant could start Early Conciliation and that a Certificate was required, and the claimant should have been or could have informed himself of that. The claimant was able to inform himself of the deadline of 07 December 2020. He was aware of box 2.3 on his claim form which provided notice that he needed to obtain an ACAS Early Conciliation Certificate.

23. The respondent referred to the EAT's decision in *Trevelyan's (Birmingham) Ltd. v Norton [1991] ICR 488* and the general principles at page 491. Reference was made to the second principle namely where the claimant has knowledge of his rights to claim unfair dismissal in an Employment Tribunal then there is an obligation on him to seek information or advice about the enforcement of those rights.

24. Further the respondent stated that if it were wrong and it were not reasonably practicable for the claimant to present his claim by 07 December 2020, the additional time taken by the claimant to present his claim on 22 December 2020 were not reasonable.

25. The respondent also applied for the claimant's claim to be struck out both on the basis that the unfair dismissal claim was presented outside the statutory

time limit and that the claimant's claim had no reasonable prospects of success. Alternatively, the respondent applied for a deposit order.

26. The claimant resisted the respondent's application for strike out and he sought to challenge his dismissal both on procedural and substantive grounds.

Observations

27. On the documents and oral evidence presented the Tribunal makes the following essential observations on the evidence restricted to those necessary to determine the list of issues –

28. I found the claimant to be a credible and reliable witness who gave his evidence in a clear manner. He was clearly affected by the events leading up to his termination, he found it difficult to obtain advice and assistance and he relied on ACAS to advise him and provide him with assistance making his claim. However, despite contacting ACAS in October/November 2020 and making his claim on 06 December 2020 it was clear that the claimant did not commence Early Conciliation until 21 December 2020. It was not clear why the claimant had delayed commencing the Early Conciliation process given that he spoke to ACAS in October/November 2020, he had access to the ACAS website, and he had read the information in section 2.3 of the claim form in relation to the ACAS Early Conciliation requirements. Having presented his claim form on 06 December 2020, which was defective, the claimant did not take any further steps to progress his claim until 21 and 22 December 2020, respectively.

Relevant law

29. To those facts, the Tribunal applied the law –
30. Section 94 of the Employment Rights Act 1996 (ERA) provides that an employee has the right not to be unfairly dismissed by his employer.
31. Section 111 (1) of the ERA sets out that a claim may be made to a Tribunal against an employer by any individual that he was unfairly dismissed by his employer.

32. Section 111 (2) of the ERA provides that “*an employment tribunal shall not consider a complaint under the section unless it is presented to the tribunal –*

5 (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*
10 *months”.*

33. Section 97 (1) (b) identifies the “effective date of termination” in relation to an employee whose contract of employment is terminated without notice, as meaning the date on which the termination takes effect.

15 34. The burden rests on the claimant to persuade a tribunal that it was 'not reasonably practicable' to bring a claim in time (*Porter v Bandridge Ltd [1978] ICR 943, CA*) at 948).

20 35. The Tribunal will often focus on the 'practical' hurdles faced by the claimant, rather than any subjective difficulties such as a lack of knowledge of the law or an ongoing relationship with the employer. In the case of *Dedman v British Building and Engineering Appliances [1973] IRLR 379*, per Scarman LJ who held that practicability does not always mean "knowledge". Where a claimant states a lack of knowledge as to the time limits, Scarman LJ found that the
25 Tribunal should ask (*[1974] ICR at 64*): "*What were his opportunities for finding out that he had rights? Did he take them? If not, why not? Was he misled or deceived? Should there prove to be an acceptable explanation of his continuing ignorance of the existence of his rights, it would be*
30 *inappropriate to disregard it, relying on the maxim "ignorance of the law is no excuse". The word "practicable" is there to moderate the severity of the maxim and to require an examination of the circumstances of his ignorance'.*"

Discussion and decision

36. On the basis of the findings made the Tribunal disposes of the issues identified at the outset of the hearing as follows –

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37. The Tribunal finds that the claim for unfair dismissal was not presented within the relevant time limit under s 111(2) of the Employment Rights Act 1996. The claimant's employment was terminated on 08 September 2020. The primary time limit for lodging his claim expired on 07 December 2020. The claimant contacted ACAS to commence Early Conciliation outwith the primary time limit; the case was in Conciliation for 1 day on 21 December 2020 and so the primary time limit was not extended. The Tribunal claim was lodged on 22 December 2020, which was 15 days after the expiry of the primary time limit (an application for reconsideration in relation to the initial claim form was also made on 21 December 2020).

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38. The Tribunal considered whether it would exercise its discretion under s111(2)(b) ERA to hear the claim out of time. For the reasons set out below, the Tribunal considered that it would not do so.

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39. The Tribunal considered that it was reasonably practicable for the claim to have been presented in time. Whilst the Tribunal has the utmost sympathy with the position in which the claimant found himself with having little knowledge of his legal rights and obtaining advice and assistance from a third party (ACAS), it was clear that the claimant was able to contact ACAS to seek advice and he later engaged with the Early Conciliation process so he could equally have engaged with the process for lodging his Claim Form within the primary time limit and providing the prescribed information including the ACAS Early Conciliation number.

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40. Further the claimant was aware that there was a short time limit for lodging the claim in the Tribunal (he became aware of this in October/November 2020) so there is no question of ignorance of the time limits during the totality

of the primary time limit (which, in any event, does not normally provide a valid excuse for lodging a claim late).

5 41. The claimant took no steps to progress his claim between 08 September 2020 and 05 December 2020. This is a rather lengthy period during which no steps appear to have been taken. Additionally, no steps were taken by the claimant to progress his claim between 07 December 2020 and 21 December 2020. There was no evidence that the claimant sought alternative advice and assistance other than from ACAS in October/November 2020 and from a friend when his claim form had been rejected. It is for the claimant to seek 10 advice or information about his right to claim unfair dismissal before the Tribunal. Furthermore, the claimant had access to ACAS's telephone advice service and website, and section 2.3 of the claim form was completed by him on 06 December 2020 (which states that nearly everyone should have an 15 ACAS Early Conciliation reference number before they fill in a claim form and it provides ACAS's contact number and website details if help or advice is required). Notwithstanding this the claimant's claim was submitted on 06 December 2020 without an ACAS Early Conciliation number and no contact with ACAS or reconsideration application were made until 21 December 2020, 20 and the claim were not resubmitted until 22 December 2020.

42. For these reasons, the Tribunal considered that it was reasonably practicable for the Claimant to have lodged his claim in time.

25 43. Even if the Tribunal found that it was not reasonably practicable for the claimant to have lodged his claim within the primary time limit, the Tribunal would have decided that the further 15 days that the claimant delayed in terms of lodging his claim was not reasonable in all the circumstances.

30 44. In these circumstances, the claim for unfair dismissal being lodged out of time and the Tribunal not being willing to exercise its discretion to hear the claimant's claim out of time, the Tribunal does not have the jurisdiction to hear the claimant's claim dated 22 December 2020. For the same reasons, the

claimant's reconsideration application dated 21 December 2020 is dismissed and the decision to reject the claimant's initial claim dated 06 December 2020 is confirmed.

5 45. If the Tribunal found the claimant's claim had been presented within the
statutory time limit (which for the avoidance of doubt the Tribunal found was
not presented within the statutory time limit), the Tribunal would have
dismissed the respondent's application for strike out or a deposit order on
grounds that the claimant's claim had no or little reasonable prospects of
10 success. It is clear to the Tribunal having considered the claim form, response
form and the parties' submissions that there are procedural and substantive
issues that are disputed in relation to the claimant's dismissal. There were
central disputes of fact, which it is likely would have required resolution at a
final hearing had the claimant's claim been presented within the statutory time
15 limit.

*I confirm that this is my judgment in the case of Mr. Michal Kazimierczak -v-
Tesco Stores Limited 4107977/2020 and that I have signed the order by
electronic signature.*

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Employment Judge: Beyzade Beyzade
Date of Judgment: 01 June 2021
25 Entered in register: 02 June 2021
and copied to parties