



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

MR DARYL PURDUE

AND

Respondent

SAINT - GOBAIN BUILDING
DISTRIBUTION

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT: BRISTOL ON: 20TH AUGUST 2021

EMPLOYMENT JUDGE MR P CADNEY
(SITTING ALONE)

APPEARANCES:-

FOR THE CLAIMANT:- MS D PURDUE

FOR THE RESPONDENT:- MS D MAGUIRE

JUDGMENT

The Judgment of the Tribunal is that:-

- i) The Claimant's claims for unfair dismissal and unpaid holiday pay are dismissed as having been presented out of time.

Reasons

1. By this claim the Claimant brings claims of unfair dismissal, and unpaid holiday pay.

2. The Claimant was employed by the respondent from 23rd June 2014 until 4th June 2020. In consequence the primary limitation period for lodging both claims expired on 3rd September 2020. The ACAS EC early conciliation period began on 20th August 2020 (date A) and ended on 11th September 2020 (date B), by which the claimant obtained the benefit of the extension of time provisions and any claim submitted by 11th October 2020 would have been in time. However the claim form was not submitted until 2nd November 2020 and it was therefore on the face of it out of time.
3. The case has been listed today to determine:-
 - i) Whether the claims have been submitted in time; and if not
 - ii) Whether I will exercise my discretion to extend time.
4. The Claimant has set out in his witness statement the events following his dismissal of which for my purposes the most relevant are:
 - i) On 8th July 2020 he submitted a subject access request;
 - ii) On 20th August 2020 his wife contacted ACAS;
 - iii) On 24th August a further Subject Access request was made;
 - iv) On 26th August 2020 his wife complained to the Information Commissioner's Office;
 - v) On 15th September 2020 his wife requested legal advice through their home insurance policy;
 - vi) On 7th October they received counsel's advice (Although I do not know what advice was received Ms Purdue accepts that following the receipt of the advice they knew of the imminent expiry of the time limit and that they were not anticipating that a claim would be lodged on their behalf by or through their legal expense insurers).
 - vii) They had a pre-booked holiday commencing on 10^h October 2020.
 - viii) They returned home on 18th October 202 and on the 19th began to study in detail the reasoning and case law referred to, and over the following two weeks concluded that the claimant's case was in fact sufficiently strong to bring a claim.
 - ix) As a result the claim was lodged on 2nd November 2020.

Time Limit

The primary time period in respect of claims of unfair dismissal is set out in s111 Employment Rights Act 1996. That provides that a claim must be brought within 3 months of the effective date of termination or 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.

5. It follows, and is not dispute, that the answer to the first question is that the claims were lodged out of time.

Extension of Time

6. The first test in respect of the extension of time both claims is whether it was “reasonably practicable” to have lodged the claims in time. The test has been considered by the appellate courts on many occasions but in essence requires that there must be some impediment to lodging the claim in time, and that it was reasonable for the claimant not to have presented the claim in time in the light of that impediment. The types of impediment considered have included the fact that an internal appeal or grievance process was ongoing ; the illness of the claimant; the ignorance of the claimant as to the existence of the right to bring a claim or the time limits for doing so; and the failure of an advisor to notify the claimant of the fact of the time limit or the time limit itself. The essence of the test was captured by Lady Smith in *Asda Stores Ltd v Kauser EAT 0165/07* : ‘*the relevant test is not simply a matter of looking at what was possible but to ask whether, on the facts of the case as found, it was reasonable to expect that which was possible to have been done*’. An alternative formulation to similar effect was set out , in *Palmer and anor v Southend-on-Sea Borough Council 1984 ICR 372, CA*, in which the Court of Appeal conducted a general review of the authorities and 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*’.
7. It is difficult not to be sympathetic to the claimant. The history described above shows a potential claimant diligently and promptly seeking information and exploring all the relevant avenues; and correctly invoking the ACAS early conciliation period from his own or his wife’s researches which gave him the benefit of the extension of time. He sought professional advice and when that advice was received gave himself time to consider and research until he satisfied himself that he had a strong enough case to lodge a claim. However the difficulty is that by that point, as he knew, the time limit had expired. By 7th October he knew that a claim was not going to be pursued on his behalf via his legal expense insurers, and he knew of the time limit for bringing a claim. Whilst there may not have been much time, there was clearly sufficient time between 7th and 10th October to have lodged a claim if he had chosen to do so. It was therefore clearly

“possible” for the claim to have been presented in time, as there was no impediment to doing so.

8. Was it therefore “reasonable to expect that which was possible to have been done” or was presenting the claim in time “reasonably feasible”? In essence the claimant submits that it was reasonable to take time to properly assess the merits of the case, that there was insufficient time before his holiday to do so, and that the time taken thereafter was reasonable. Whilst I am not aware of any directly comparable authority, the difficulty for the claimant is that there are a number of authorities normally in the context of ongoing internal processes in which the claimant has made a choice not to pursue a claim within time to await the outcome of those proceedings, and in which it has been held that was not sufficient to mean that it was not reasonably practicable to have brought the claim in time (See for example: *Palmer and anor v Southend-on-Sea Borough Council 1984 ICR 372, CA.*).
9. In my Judgment, sympathetic to the claimant as I am, I am unable to identify any impediment to the claim being lodged in time, and certainly not one which prevented it from being reasonably practicable, certainly in the sense it being reasonably feasible, for them to be presented within time. Essentially the Claimant chose not to lodge a claim in time for reasons which may have appeared to him reasonable at the time but which do not in my view mean that it was not reasonably practicable to have presented the claim in time. Although with some reluctance, I am bound to conclude that the claims were lodged out of time, that there is no basis for extending time; and that the claims must be dismissed on the basis the tribunal has no jurisdiction to hear them.

EMPLOYMENT JUDGE CADNEY
Dated: 24th August 2021