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EMPLOYMENT TRIBUNALS

Claimant: Mr J Singh
Respondent: William Hill Organization Limited
Heard at: Birmingham **On:** 29 May 2019
Before: Employment Judge Britton
Representation
Claimant: No attendance
Respondent: Ms C Knowles

JUDGMENT

The respondent refused the claimant to exercise his right under regulation 12 of the Working Time Regulations 1998 in relation to “rest breaks” was not presented in time despite it being reasonably practicable to do so.

The claimant’s application to amend his claim to add a new complaint of unfair dismissal is refused.

REASONS

1 The claimant did not attend the Hearing and provided no explanation. Attempts to contact the claimant by telephone were unsuccessful. I therefore determine to proceed with this Hearing in the claimant’s absence pursuant to schedule 1, rule 47 of the Employment Tribunal’s (Constitution and Rules of Procedure) Regulations 2013.

2 I have had regard to an oral submission made by the respondent’s representative and also her written submission, in the form of a skeleton argument, dated 29 May 2019.

3 According to his Claim Form, the claimant submitted his resignation on 30 December 2017, indicating his intention to resign with effect from 29 December 2017. As a matter of law, the claimant’s resignation will take effect when it has come to the attention of the respondent. It is not clear when the claimant’s resignation did in fact come to the attention of the respondent but contemporaneous documentation suggests that the claimant’s resignation would have been communicated effectively to the respondent by no later than 10 January 2018. On factual enquiry, it may in fact be established that the claimant’s resignation was communicated much earlier than that date.

4 However, if the date of the claimant’s resignation and therefore the effective date of termination of his employment is treated as 10 January 2018, this has the effect of establishing that the time limit within which the claimant was required to present his claim in relation to the alleged failure to provide rest breaks has been by no later than 9 April 2018.

5 Under regulation 30, of the Working Time Regulations 1998, a complaint that an employer has failed to provide rest breaks in accordance with regulation 12, has to be ordinarily presented to a Tribunal before the end of the period of 3 months beginning with the date on which it is alleged that the exercise of the right should have been permitted 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”.

6 In this case the claimant complied with his obligation to commence early conciliation and therefore regulation 30B of the Working Time Regulations 1998 takes effect so as to extend the normal time limit. The claimant commenced early conciliation on 16 February 2018, and the early conciliation period ended on 13 March 2018 when ACAS issued a certificate. As the early conciliation period lasted 25 days. Adding 25 days to 9 April 2018, would give a revised limitation date of 4 May 2018.

7 Therefore, even on the most generous interpretation of the Claim Form, which does not clearly particularize the dates on which it is alleged that rest periods should have been permitted. The latest date of which it could be said that a rest period should have occurred is the date on which the claimant submitted his notice of resignation.

8 The Claim Form was not presented until 13 May 2018 and was therefore presented out of time. Although the claimant did advance a reason for the fact that his claim was presented out of time, namely, that he had been misled with regards to the time limits by ACAS, he has not provided any evidence to support that assertion. The evidence of proving that presenting his claim in time was not reasonably practicable and 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.

9 The order that was made on 14 August 2018, set out to the parties that any witness statements be served no later than 14 days prior to the Hearing. The claimant has not served a witness statement and nor has he attended today’s Hearing. It follows that the claimant has had sufficient opportunity to present evidence but has failed to do so. The claimant has therefore not established that it was not reasonably practicable for him to present his claim within the time limit and as it was a claim that was presented out of time that the Tribunal does not have jurisdiction to deal with it. The claimant’s claim under the Working Time Regulations 1998 is therefore dismissed.

10 The claimant’s email to the Tribunal dated 14 July 2018 was read to the respondent’s representative and she was given an opportunity to make representations with regards to its content. The submission from the respondent’s representative were that the application to amend should be refused having regard to the nature of the amendment, the timing of the application on the time limits. It was submitted that the proposed amendment was a substantial amendment, which introduced entirely new claim that was not already particularized within the Claim Form. It was also submitted that the application to amend, which was received by email on 24 July 2018 was made after a significant further delay taking into account that the Tribunal wrote to the claimant on 23 May 2018 asking him to indicate the claims that he intended to pursue by no later than 30 May 2018. It was also submitted by the respondent’s representative that the claim for unfair dismissal that the claimant seeks to add by way of an amendment is substantially out of time.

11 I accept the submissions from the respondent’s representative. In my view, the proposed amendment is substantial and does purport to introduce an entirely new claim that is not particularized within the Claim Form. The application is made after some considerable further delay and I think it was now as a result of a prompt from the Employment Tribunal. I also accept that the unfair dismissal claim that is sought to be introduced by the proposed amendment is out of time.

12 The effective date of termination, as outlined above, would, at the very latest, have been 10 January 2018. The reasons set out above, the normal time limit would have been extended by reason of ACAS early conciliation to 4 May 2018. The amendment application was not made until 24 July 2018 and its now being considered by me on 29 May 2019. It is self-evident from the above that the proposed amendment does seek to introduce a claim of unfair dismissal which, if accepted, would be substantially out of time.

13 Although the claimant had indicated within his application, dated 24 July 2018, that the reason for his delay is the fact that he was misled with regard to the time limits by ACAS. This assertion is not supported by any evidence. I previously indicated, that the onus of proving that presentation in time was not reasonably practicable _____? on the claimant. In my view, therefore, he has not discharged this burden.

14 Although in the case of Abercrombie v Arger HEA Rangemaster [2014] AER 110 the court of appeal decided that even where the original claim form was presented out of time, is possible to amend to give jurisdiction over the claim of the Tribunal, this discretion should only be exercised in unusual circumstances as per paragraph 50, Underhill L J says that the claimant should not usually be permitted to circumvent the statutory time limit by introducing a claim by way of amendment. This is not a case where the proposed new claim is closely connected with the claim as originally pleaded and therefore, having regard to the guidance as set out within Selkent Bus Company v Moore [1996] ICR 836. I have taken into account all of the circumstances and have balanced the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it and have concluded that having taken into consideration all of the circumstances, is not appropriate to exercise my discretion to allow the proposed amendment. The claimant’s application to amend his Claim Form is therefore refused.

Employment Judge Britton

Date: 17 June 2019