EMPLOYMENT TRIBUNALS
PUBLIC PRELIMINARY HEARING BY TELEPHONE

Claimant: Mr K Giusti

Respondent: Avant Homes Limited

Heard: Remotely (by telephone) **On:** 1 July 2021

Before: Employment Judge S Shore

Appearances

For the claimant: In Person
For the respondent: Mr J England, Solicitor

WRITTEN REASONS

1. On 1 July 2021, I heard a telephone public preliminary hearing to determine whether the Tribunal had jurisdiction to hear the claimant's claims of unfair dismissal and unauthorised deduction from wages.

2. I found that the claimant's claim of unfair dismissal should be struck out because the Tribunal had no jurisdiction to hear it. The claimant did not have two years' continuous service with the respondent.

3. I also found that the claimant's claim of unauthorised deduction of wages (failure to pay commission) should be struck out because the claimant had not presented his claim before the end of the period of three months (including any pause in calculating time due to early conciliation) beginning with the date of the last alleged deduction, as required by sections 23(2)(a) and (3)(a) of the Employment Rights Act 1996 when it was reasonably practicable for him to have done so.

4. I gave oral reasons for my judgment at the hearing, but the claimant has exercised his right to request written reasons.

Background

5. The claimant was employed by the respondent, a company that builds, specifies and constructs residential properties from 6 November 2019 to 30 September 2020. The claimant began early conciliation with ACAS on 26 December 2020 and obtained an early conciliation certificate on 11 January 2011. His ET1 was presented to the Tribunal on 26 February 2021.

6. On 11 March 2021, the Tribunal issued a Notice of Claim and a Notice of Hearing that listed the case for a final hearing by video on 1 July 2021.

7. In its ET3 dated 8 April 2021, the respondent submitted that the claimant's unfair dismissal claim was submitted out of time, so the Tribunal did not have jurisdiction to hear that claim, and that the claimant did not have two years' service, so could not bring a claim of unfair dismissal.

8. The respondent also submitted that the claimant's claim for unauthorised deduction of wages was also out of time and that the Tribunal did not have jurisdiction to hear it.

9. It is important to note at this point that if the Tribunal finds that claims of unfair dismissal and unauthorised deductions are presented out of time, it simply cannot deal with the claim, no matter how unfairly a claimant may have been treated in relation to those claims. The Tribunal has no discretion to allow such claims to proceed because it would be just and equitable to do so.

10. On 27 April 2021, the Tribunal wrote to the parties to convert the hearing on 1 July from a final hearing by video to a preliminary hearing by telephone. On the same date, the Tribunal wrote to the claimant to point out that he was claiming that he had been unfairly dismissed, but that he did not have two years' continuous employment. He was given until 11 May 2021 to make representations as to why his claim of unfair dismissal should not be struck out.

11. Also, on 27 April 2021, the respondent wrote to the Tribunal to ask for clarification as to whether the hearing on 1 July had been changed to a private preliminary hearing (which is a hearing to make case management orders) or a public preliminary hearing (which is a hearing that can decide to strike claims out). If it was to be the former, the respondent requested that it be converted to a public preliminary hearing to decide if the Tribunal had jurisdiction to hear the claimant's claims on time points and whether he had enough continuous service to bring an unfair dismissal claim.

12. The respondent repeated its application in an email dated 4 May 2021. The Tribunal wrote to the claimant to ask for his comments on the respondent's application on 5 May 2021 by return.

13. On 6 May 2021, the claimant wrote to the Tribunal, but did not copy in the respondent. He said he had "only just" found the respondent's email of 27 April 2021 and "was aware that I am out of time". He asked for assistance with his case, as he said he was unsure on what was being asked of him. The Tribunal replied to the claimant on 19 May 2021 to confirm that it cannot advise him on his claim.

14. On 19 May 2021, the Tribunal also wrote to the parties to confirm that the hearing on 1 July was to consider if the claimant's claim had been presented out of time and if he had qualifying service to bring the claim.

Law

15. The time limits for submitting a complaint of unfair dismissal are set by s.111 Employment Right Act 1996 ("ERA"), which provides as follows:

> "(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 practicable 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."

16. The time limit has to be calculated by taking into effect any period of early conciliation as provided for by section 207B of the ERA.

17. The relevant law on time limits for an unauthorised deduction of wages claim is contained in section 23(2) of the Employment Rights Act 1996, the three-month period beginning with the date of payment of wages from which the deduction was made (rather than the effective date of termination of employment). Again, the time limit has to be calculated by taking into effect any period of early conciliation as provided for by section 207B of the ERA.

18. Section 108 of the ERA provides that an unfair dismissal claim cannot be brought unless the employee has been continuously employed for a period of not less than two years beginning with the effective date of termination of employment. There are some exceptions to this rule that depend on the reason for the dismissal.

Housekeeping

19. The respondent had prepared a bundle of documents for the preliminary hearing that ran to 93 pages. The claimant produced a copy of the respondent's Grounds of Resistance that he had annotated with his comments that ran to 28 pages.

20. Neither side produced any witness statements.

Hearing

21. I went through the history of the claim with claimant and was satisfied that he understood the nature of this hearing. I took him to the respondent's application for strike out dated 27 April 2021 [38], which he accepted that he had never responded to. He also accepted that he had never responded to the strike out

warning issued by the Tribunal on 11 May 2021 about the length of his continuous service.

22. He said he had spoken to ACAS, who had told him his unfair dismissal claim wouldn't stand in court, but he was entitled to claim unpaid wages.

23. I noted from the claimant's annotated copy of the respondent's Grounds of Resistance that his response to the respondent's submission that his unfair dismissal claim had been presented out of time was that he had posted his ET1 "during the last week of January" to the Employment Tribunal Office, PO Box 10218, Leicester, LE1 8EG.

24. He had then called the Tribunal Customer Service Line at 16:37pm on 23 February 2021. He had explained to the advisor that he was calling for an update on his claim form that he had posted in the last week of January. He was advised that the Tribunal had no record of receiving his claim form and that he should resubmit it.

25. The claimant says that he submitted another form by recorded delivery and received an email receipt for it on 26 February. He submitted that the original form was either lost in the post or at the Tribunal office.

26. The claimant made no comment whatsoever in his annotated copy of the respondent's Grounds of Resistance on the point that he did not have two years' continuous service with the respondent. He also did not suggest that his case came within any of the exceptions to the requirement that permit cases for unfair dismissal to be brought by employees with less than two years' service.

27. He had also failed to provide any substantive response to the strike out warning from the Tribunal or the emails from the respondent of 27 April 2021 and 4 May 2021, or the Tribunal's letter dated 5 May 2021 asking for a response to the respondent's email of 4 May.

28. In respect of his money claim, the claimant said that his claim was one of unauthorised deductions, rather than a breach of contract. In his ET1, the claimant made two types of claim: the first was that he should have been awarded a pay rise in April 2020 of £950 per year and claimed the difference between the rate he was paid and the rate he says he should have been paid for the period from April 2020 to the end of his employment.

29. The second element of his money claim was a claim for commission on sales of property. He had details of sales upon which he says he was entitled to commission and confirmed that the last of these was at the end of July 2020.

Analysis and Findings

30. A number of facts cannot be (and were not) disputed in this case:

    28.1. The claimant started work with the respondent on 3 October 2019 and his employment ended on 30 September 2020.

    28.2. He began ACAS early conciliation on 26 December 2020 and obtained a conciliation certificate on 11 January 2021.

28.3. The claim was presented on 26 February 2021.

28.4. He has never asserted or even suggested that his unfair dismissal claim is one that does not require two years' continuous service in order for the Tribunal to have jurisdiction to hear it.

28.5. The claimant has never asserted or even suggested that he was not aware of the requisite time limits for his Tribunal claims.

28.6. The claimant failed to engage with the issues in this hearing on a number of occasions.

28.7. Given the date that ACAS ended, the claimant should have presented his claim to the Tribunal by midnight on 11 February 2021.

28.8. Given the date that ACAS began, the claimant could not rely on any acts that occurred (or if there were a series of deductions, the last of them occurred) before 26 September 2020.

29. The law in this area is reasonably well-established. It is certain that the burden of showing that the presentation of a claim was not reasonably practicable is on the claimant.

30. The case of **Consignia plc v Sealy** [2002] ICR 1193 is a decision of the Court of Appeal on the question of postal delays leading to the late submission of an ET1. The case set out three general propositions on such cases that establish an 'escape clause':

30.1. The not reasonably practicable escape clause is available where a claimant posts their claim on a date which in the ordinary event would result in the complaint being made in time but which arrives late, or not at all, due to some unforeseen circumstance;

30.2. If this condition is satisfied the escape clause remains available even if a claimant has waited until the last moment to post their claim form (and the reason for leaving it to the last minute does not matter); and

30.3. The question whether the condition is satisfied is a question of fact, to be determined by the tribunal on the evidence before it.

31. However, where the claim form was posted within the time limit, but does not arrive and is therefore not acknowledged by the tribunal, it has been held that a stringent rule applies requiring the claimant or claimant's advisers to have promptly followed up the silence from the tribunal if they are to avail themselves of the escape clause.

32. The cases show that a litigant cannot simply post the ET1, hear no confirmation of its safe arrival, and then sit back and rely on a 'not reasonably practicable' extension some days, weeks or months later. Those were the facts in **Capital Foods Retail Ltd v Corrigan** [1993] IRLR 430, where an unfair dismissal complaint was posted by the claimant's solicitors five weeks before the expiry of the time limit. There was no acknowledgment of receipt by the Tribunal. The document was not returned by the Post Office.

33. Three months after the time limit had expired, the solicitor realised that something was amiss and sent a copy of the claim to the tribunal. The Tribunal accepted the solicitor's evidence as to the posting of the original claim and granted an extension of time on the ground that it was not reasonably practicable for it to have been presented in time. The EAT, however, reversed the decision, and dismissed the complaint. It held that it was not sufficient for the solicitor simply to rely on the presumption that what is posted will be delivered, for reliance on that presumption must itself be shown to be reasonable. The 'not reasonably practicable' test is only satisfied if the claimant or their advisers can show that they have taken all reasonable steps to see that the claim was received in time, and this includes checking the position if no reply has been received. In the circumstances, as the solicitor had not carried out any such check to ensure that 'the conduct of business was taking a normal course', it could not be said to have been reasonably impracticable for it to have presented the claim in time.

34. This requirement to take all reasonable steps to check whether the claim was delivered, and therefore that business is taking a normal course, has been held to be satisfied only if the enquiry is made contemporaneously, at or near the time that a reply from the tribunal might reasonably have been expected to be received (**Camden and Islington Community Services NHS Trust v Kennedy** [1996] IRLR 381). In this case, the claimant's solicitor posted a claim a week before the time limit expired, did not get a reply from the tribunal, and waited for three weeks after the date when an acknowledgement would reasonably have been expected before checking whether it had been received. The EAT, reversing the tribunal's decision, held that this was too long a delay, and had failed the 'stringent' test laid down in **Corrigan**.

35. The stringency of this test is further exemplified by **Clark v H20 Water Services Ltd** *(*20 August 2012, unreported*)*. As in **Kennedy**, the claimant's solicitor allegedly posted the claim form to the tribunal a week before the deadline on Friday 12 November, but it never arrived. On Saturday 13 November he noticed that no acknowledgement had been received from the tribunal, and on Monday 15 November he sent a copy of the form by fax. However, this was not sufficient to enable the claimant to benefit from the escape clause. In the EAT, Richardson J found that the checking system referred to in **Corrigan** requires the solicitor to check that the claim form has been received by the tribunal by the day of the deadline. If he is sending the form by post 'so close to the deadline that an acknowledgement may not have been received in the ordinary course, then he will need to make a more careful check with the tribunal—or send the claim form again, belt and braces, by fax or email' (§35]).

36. I accept that the claimant is a litigant in person, but in **Initial Electronic Security Systems Ltd v Avdic** [2005] ICR 1598, the EAT had no hesitation in finding that where a litigant in person had e-mailed the claim form and, having received no acknowledgment, followed up four or five days later, the **Consignia** escape clause remained available.

37. I find that the claimant gave a vague account of how he posted the first application. He was not able to state when he had posted it, other than to say that it had been some time “during the last week in January”. He did not say if it had been posted

first or second class, or by some form of guaranteed or signed for mail. He did not say where it had been posted from.

38. I find it unlikely that if the claimant had posted an application in late January that he discovered had been lost in the post on 23 February, that he would have posted another version, rather than using the online portal.

39. I also find it unlikely that the claimant would not have mentioned in his second application that his first application had been submitted before the expiry of the deadline and that the submission of the second version had followed a telephone conversation with the Tribunal Customer Services Advisor.

40. I note that the Tribunal responded to the claimant's second ET1 on 26 February 2021, a period of 3 days, which included a Saturday and Sunday from the conversation with the Advisor.

41. I take note of the decision of the Court of Appeal in **Coors Brewers Ltd v Adcock and others** [2007] IRLR 440, which supports the proposition that in order to show that there has been an unlawful deduction from wages within the meaning of section 13 of the ERA, claimants have to be able to point at a legal obligation to be paid a quantified or quantifiable salary increase. In this case, the claimant would have to show that his performance was evaluated to entitle him to a pay grade entitling him to a pay rise of £950. On his own case, the evaluation did not give him such an entitlement.

42. In order for the claimant to succeed, the Tribunal would have to put itself in the position of the respondent and effectively recreate his evaluation. That is not within the jurisdiction of the Tribunal. The claimant would not, therefore, be able to show that he was entitled to wages in a quantified or quantifiable sum.

43. I find that the claimant could not identify or quantify any loss of commission after July 2020.

Applying the Findings to the Law

44. I find that the claimant has produced nothing to suggest that he had two years' continuous service with the respondent at the effective date of termination of his employment. I therefore find that his unfair dismissal claim should be stuck out as having no reasonable prospect of success. Given his complete failure to engage with the issue, I find his conduct to be unreasonable in bringing the proceedings and continuing them once he had received the respondent's ET3.

45. I find that the claimant has not shown on the balance of probabilities that he posted a first ET1 in the last week of January 2021.

46. In the alternative, if he did post a first ET1 in the last week of January 2021, he cannot avail himself of the **Consignia** escape clause because he was aware of the time limit of 11 February 2011 and did not seek to make enquiries as to what had happened to it until 23 February, some 12 days after the expiry of the time limit. If he had posted the ET1 on 31 January, he had 11 days in which he did nothing to satisfy himself that the ET1 had been received, so falls foul of the principle set out in the cases of **Corrigan, Kennedy**, and **Avdic** that I have referenced above.

47. I find that on the claimant's claim at its highest, the claim for salary increase as a qualified sales advisor has no reasonable prospect of success. It was misconceived.

48. I find that the last commission payments that the claimant can quantify would have been paid in his July 2020 salary. Assuming payment on the last day of July, the time for starting early conciliation would have been on 31 October 2020. The claimant did not start early conciliation until 26 December 2020. I therefore find that the potentially viable unauthorised deductions claim for commission were presented months out of time.

49. I have already dismissed the unfair dismissal claim, but for the sake of completeness, I find that it was also presented out of time.

50. I find that it was reasonably practicable for all claims to have been presented in time.

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

Employment Judge Shore
9 August 2021

Note
Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.