



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mr. A. Couchman

v

**Ascendancy Internet
Marketing Limited**

Heard at: Birmingham via CVP On: 30 July 2021

Before: Employment Judge Wedderspoon

Representation:

Claimant: In Person

Respondents: Mr. J. Wallace, Counsel

JUDGMENT

1. It was reasonably practicable for the claimant to bring his unfair dismissal claim within time.
2. The claim is dismissed.
3. The final hearing date listed for 8 and 9 December 2021 is vacated.

REASONS

Issues to be determined

1. Pursuant to Employment Judge Cookson's order dated 26 May 2021 the Tribunal is to determine :-
 - (a) Whether the claimant's claim of unfair dismissal was presented in time;
 - (b) If not, whether it was reasonably practicable for the claim to have been presented in time; and
 - (c) If so whether the claim was presented within a reasonable time thereafter.

The hearing

2. The Tribunal was provided with an agreed bundle of 122 pages. The claimant relied upon his own evidence. The respondent relied upon the evidence of Ms. Helen Mitchell, Director of the respondent. The claimant chose not to cross examine Ms. Mitchell at the hearing so that the Tribunal accepted her evidence. Both parties submitted skeleton arguments with legal authorities.

Facts

3. The claimant was employed by the respondent from 12 February 2018 to 24 September 2020 as a business development manager. The respondent asserts he was dismissed for the reason of redundancy or business re-organisation.

4. The claimant entered/ended early conciliation on 24 February 2021. He brought a claim of unfair dismissal on 26 February 2021. It is agreed by the parties that the claimant's unfair dismissal claim was brought out of time and the primary limitation period ended on 23 December 2020.
5. On 27 March 2020 the claimant was notified by the respondent he would be furloughed from 1 April 2020. On 13 June 2020 the claimant received notice that his role was at risk of redundancy. During the first consultation meeting on 18 June 2020 the claimant stated he was concerned about his mental health and wellbeing. Throughout his employment with the respondent the claimant did not inform Helen Mitchell he suffered from anxiety and depression.
6. During the second consultation meeting on 25 June 2020 the claimant stated he was taking legal advice from his legal team and that he would appeal the decision if he was to be made redundant. The claimant was given notice of dismissal in writing on 26 June 2020.
7. On 1 July 2020 the claimant appealed his dismissal (pages 59-61) and he stated he wanted to claim unfair dismissal. His appeal against dismissal was unsuccessful (pages 62-81). By email dated 28 July 2020 the claimant set out his intention to challenge the decision by way of the Employment Tribunal (page 82) stating "*Despite your findings I and my legal representatives still consider the nature of my redundancy to be questionable and I will therefore be giving further consideration as to whether or not I should take my case to an Industrial Tribunal*". The claimant clarified in his evidence before the Tribunal that this was bluster because he wanted the respondent to take his response seriously. He had not received legal advice but he did have friends who assisted him namely HR professionals and a friend from the Citizens Advice Bureau.
8. The Tribunal accepts that from the early part of 2020 the claimant was experiencing a number of difficult life events. In 2020 he and wife made the decision to separate but did not actually do so until June 2021. They chose to sell their house in June 2020 and put this on the market in 2021. His daughter experienced serious health issues from May/June 2020 and underwent significant medical intervention for 4 to 5 months. He experienced a health scare himself on 13 July 2020 but this was resolved at the end of that month. His brother was admitted to hospital in November 2020 and he sadly passed away on 29 June 2021. He also felt lockdown due to the pandemic, financial stresses as a result of long term debts and redundancy and the continuous rejection to job applications impacted his mental health. He felt his mental health had affected his ability to prioritise his application to the employment tribunal over futile job applications and his mental health may have resulted in muddled thinking.
9. The claimant attended his G.P. on approximately two occasions during September and October 2020 (p.45) concerning the wrong dosage of medication for a thyroid issue. This he said added to his feelings of anxiety and depression. His evidence was that he commenced CBT in September 2020 but accepted that his G.P. had not mentioned this in the letter dated 18 June 2021. He did not find the CBT helpful. He had a telephone appointment to assess his mental health with the Wellbeing Service on 16 October 2020. This initial assessment by telephone identified the claimant's issues as "anxiety disorder" (p.47). He was sent some self-help materials and a clinician, Ms. B. Thomas followed this up with the claimant on 13

- November 2020. The claimant was placed onto an online programme of treatment on 20 November 2020 (page 50). By January/February 2021 the claimant stated he felt a lot better; the correct treatment for his thyroid issue allowed him to feel more energy to put in a tribunal claim.
10. The claimant relied upon a letter dated from his G.P., Dr. Hurst dated 18 June 2021 (p.54). Dr. Hurst referenced the claimant's consultation with her colleague in September 2020 regarding his over treatment with Levothyroxine. He was not very well, had lost a considerable amount of weight and he had issues with anxiety. Dr. Hurst confirmed a consultation with the claimant on 25 February 2021. He had been suffering with anxiety and depression for over a year which *"has got significantly worse since January of this year. He is now in the process of trying to get help for this."* The claimant did not agree with the G.P.'s assertion that the claimant's health was worse in 2021. He stated he had started anti-depressant medication following a consultation on 25 February 2021.
 11. The claimant states he was always aware of the three month time limit in bringing a claim and had always intended to do so. The claimant's evidence to the Tribunal is that the main reason for submitting his ET1 so late was because of his poor mental health. He did not rely upon the "new evidence" of seeing the respondent advertise jobs in the Spring of 2021 but seeing the adverts bolstered his belief that his dismissal was unfair. The claimant conceded that the contents of his appeal letter dated 1 July 2020 which was prepared with the assistance of friends with some legal knowledge (HR professionals and a Citizens Advice adviser) was in similar terms to the contents of his ET1. He stated that his mental health prevented him from considering simply cutting and pasting the detail of his appeal letter into a Tribunal claim form.
 12. During the claimant's employment with the respondent (37.5 hours per week) he had also worked for Tesco as a delivery driver for about 19 hours per week. Following the termination of his employment with the respondent the claimant increased his working hours for Tesco. For the period week ending 27 September 2020 to end of December 2020, the claimant worked usually more than 40 hours per week. The claimant's evidence is that although he had to concentrate on driving it was very different from having to mentally focus on completing documentation to submit a Tribunal claim.
 13. From 29 September 2020, the claimant made a number of job applications (pages 85 to 99). In order to do so, the claimant updated his curriculum vitae. The letter dated 29 September 2020 to Insynth Marketing Limited is a detailed and well drafted application. In October 2020 the claimant made an application to work for engage services. This job required the claimant to attend addresses to check whether debtors of energy bills were still residing at the properties. He found this job through a friend. He commenced work with them in mid-November 2020 and worked about 3 hours per week for them on top of his Tesco driving job.
 14. On 11 November 2020 (p.101) the claimant sent an email to Ms. Culshaw of the respondent requesting reinstatement with the respondent. In the email the claimant requests a return to the respondent's business and to be furloughed under the Coronavirus Job Retention scheme.
 15. The claimant disputed that his daughter could have assisted him in making a claim. The claimant's daughter is a criminal law specialist. She has not practiced for 5 years. He deliberately did not inform her that he made a

claim to the Tribunal due to her health issues until recently. His daughter provided him with “some pointers” to include in his application to extend time.

The Law

16. Pursuant to section 111 (2) of the Employment Rights Act 1996 a claim of unfair dismissal must be presented
 - (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.In the
17. In the case of **Palmer and Saunders v Southend on Sea Borough Council (1984) 1 All ER 945** it was held that the test under this limb is not “whether it was physically possible” but “*was it reasonably feasible to present to the employment tribunal within the relevant three months?*” The burden rests upon the claimant to establish this (see **Consignia plc v Sealy (2002) EWCA Civ 878**). The case of **Marks and Spencer plc v Williams-Ryan (2005) EWCA Civ 470** makes clear that what is reasonably practicable should be given a liberal interpretation in favour of the employee.
18. Illness may be an impediment to presenting a claim. The Tribunal should take account of (a) the nature of the illness (**Ebay UK Limited v Buzzzo EAT 5.9.2013**) (b) the effect of the illness or injury over the limitation period; **Schultz v Esso Petroleum Company Limited (1999) IRLR 488** and (c) the effect of the illness in the weeks running up to the limitation expiry.
19. In respect of the second limb of the test “**such as the tribunal considers reasonable**” the EAT in **Cullinane v Balfour Beatty Engineering Services 5 April 2011** held “*it requires an objective consideration of the factors causing delay and what period should reasonably be allowed in those circumstances for proceedings to be instituted having regard certainly to the strong public interest in claims in this field being brought promptly and against a background where the primary time limit is three months.*”.

Submissions

20. The respondent supplemented his skeleton argument with oral submissions and invited the Tribunal to consider the cases of **Palmer and Saunders v Southend-on-Sea Borough Council (1984) 1 All ER 945**, **Marks and Spencer plc v Williams- Ryan 92005) EWCA Civ 470**, **Wall’s Meat Co Limited v Khan (1978) IRLR 499**, **Ebay UK Limited v Buzzzo**, **Schultz v Esso Petroleum Company Limited (1999) IRLR 488**, **J v DLA Piper (2010) IRLR 936**, **Dunham v Ashford Windows (2005) IRLR 608** and **Cullinane v Balfour Beatty Engineering Services Limited** .The respondent submitted the claim ought to have been presented on 23 December 2020 but was instead presented on 26 February 2021 some 9 weeks and two days late. The respondent submitted that in the context of the claimant’s concession that the job advertisements by the respondent were not the real reason he submitted his claim late (new evidence) but the main factor was the claimant’s ill health, the Tribunal should discount the claimant’s new evidence point. The respondent further submitted the

claimant had failed to provide sufficient evidence as to the nature of his illness and its effects. There was evidence of medical appointments and notes of telephone discussions but these revealed little to the Tribunal to assist it in exercising its discretion. There was no contemporaneous documentary evidence of formal diagnosis, description of symptoms, prognosis or the prescription of medication. On the contrary the respondent submitted there was a wealth of evidence which pointed in the opposite direction as to the functioning ability of the claimant. The respondent invited the Tribunal to consider the claimant's ability to apply for job vacancies, ability to work for Tesco as a self-employed contractor; to update his c.v., enter into email correspondence with the respondent and the long period of delay. The respondent submitted that the claimant possessed the knowledge and ability to bring a claim which was more than feasible to present in time. He had given a carefully worded version of his case to the respondent at page 59. He knew where to obtain legal advice from and clearly did obtain such advice; he was aware of his rights and the period of limitation. He also relied upon the cases of **J v DLA Piper and Dunham v Ashford** and submitted the cases illustrated the difficulty for the Tribunal in seeking to assess the mental health of a claimant and should be cautious to do in the absence of clear evidence. The respondent submitted that the claimant was an opportunist and exaggerated his evidence; he was now saying he could not prioritise appropriate choices. This was not in his witness statement or supported by medical evidence. Further even if the Tribunal was satisfied that it was not reasonably feasible for the claimant to have issued his claim in time, there was no supportive evidence that the claimant had submitted the claim in a further reasonable period.

21. The claimant submitted that time should be extended. In his written skeleton argument he referred to the Tribunal to the cases of **Machine Tool Industry Research Association v Simpson (1988) ICR 558**, **Schultz v Esso Petroleum (1993) 3 All ER 338**, **Marks and Spencer plc v Williams-Ryans (2005) EWCA Civ 470**, **University Hospitals Bristol NHS Foundation Trust v Williams, Norbert Dentressangle Logistics v Hutton (2013) UKEAT/0011/13**, **Jv K & another (2019) EWCA Civ 5**. He accepted he was always aware of the three month limitation period to bring a claim and had always intended to make a Tribunal claim but he did not do so because of the state of his mental health. He had a number of adverse life events aggravated by being made redundant. He had to focus on getting another job because of finances. The incorrect medication for his thyroid affected his mental health. Between October to December 2020 he was not in a good place. He suffered an inability to prioritise the issuing of his Tribunal claim. His long working hours, attempts to secure alternative employment, along with the breakdown of his marriage, brother and daughter's health caused him to be muddled. He had no input into the G.P.'s letter and did not necessarily agree with it.

Conclusions

22. The burden rests upon the claimant to establish that it was not reasonably feasible for him to have submitted his claim within time. The claimant no longer relies upon the "new evidence" point but explains his claim was delayed due to his poor mental health.
23. The Tribunal accepts that the claimant has suffered a number of difficult life experiences from January 2020 as set out in its findings of fact and also

suffered an issue with the incorrect medication for his thyroid condition as set out in the medical evidence of Dr. Hurst. The Tribunal accepts that these matters had a detrimental effect on the claimant's mental health and he did seek mental health assessment and support from October 2020.

24. However, there are a significant number of discrepancies in the claimant's evidence. Despite the accepted impact on the claimant's mental health as a result of these issues, the claimant was able to draft a detailed response to the rejection of his appeal against dismissal on 1 July 2020. This document could be readily cut and pasted into a claim form. The Tribunal was not persuaded that the claimant just did not have the ability to do this prior to February 2021 in the context of other documentation he was drafting at the time.
25. Following his dismissal, the claimant was able to update a C.V. for job applications, from 27 September 2020 he was able to apply in writing for a number of jobs, he was able to draft a detailed job application on 27 September 2020, he was able to increase his working hours for Tesco and obtain and work for an additional employer Engage, write a detailed email applying to be reinstated to the respondent in November 2020. Although the claimant has stated he was working long hours for Tesco and although he had to focus on his driving it was different from completing documentation for the Tribunal, the claimant was able to engage in correspondence in the form of detailed job applications and a detailed plea for reinstatement to the respondent's employment.
26. Furthermore, there is no corroborative medical evidence to support the claimant's contentions. The claimant's evidence before the Tribunal is that his mental health improved in January/February 2021 to the point that he could draft and issue a claim form. This is in direct contradiction to the medical report of Dr. Hurst who suggests that in 2021 the claimant's mental health in fact deteriorated. The claimant informed the Tribunal he was prescribed anti-depressants in February 2021 (shortly before he issued the claim form). Following the claimant's termination from employment to the date of the primary limitation period, although it is accepted the claimant's mental health was affected it does not realistically appear to have been an impediment to submitting a claim to the Tribunal.
27. The claimant sought to explain to the Tribunal that his mental health affected his prioritisation of issuing a Tribunal claim. The Tribunal was not persuaded by this explanation because it did not feature in the claimant's witness statement or his skeleton argument; but it was an explanation he gave during cross examination when it was pointed out to him how he had been able to draft a detailed job application, apply for jobs in writing, work long hours and engage in email correspondence with the respondent to obtain his job back.
28. In conclusion the Tribunal found that the claimant had failed to establish that it was not reasonably feasible to have submitted his claim within time.
29. In the alternative, if the Tribunal is wrong about that, it considers whether the claimant submitted his claim within a further reasonable period. The claimant's evidence is that he started to feel better in January/February. If that is correct the Tribunal finds that the claimant could have issued his

proceedings in January and not waited until February. In the circumstances the claimant has failed to establish that he has submitted his claim within a reasonable further period.

30. In the circumstances the claimant's claim is dismissed. The final hearing listed for 8 and 9 December 2021 is accordingly vacated.

Employment Judge Wedderspoon

31/07/2021

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