EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr K Mosakowski	**v**	Wagamama Limited

Heard at: Bury St Edmunds (by CVP) **On:** 01 October 2021

Before: Employment Judge M Warren

Appearances

For the Claimant: In person.

For the Respondent: Mr M Difelice (Solicitor).

JUDGMENT

1. The claimant's claim that he was unfairly dismissed is dismissed for want of jurisdiction, having been issued out of time. It was reasonably practicable for the claim to have been issued in time.

2. The claimant's applications for leave to amend his claim by adding claims in Breach of Contract and for breach of the Working Time Regulations are refused.

REASONS

Background

1. The history to this matter is that Mr Mosakowski's employment with the respondent began on 6 March 2016 and was terminated on 8 March 2020. That means that the primary limitation period for issuing proceedings expired on 7 June 2020. There was early conciliation between 12 June and 18 June . These two extant sets of proceedings were issued firstly on 24 June 2020 and secondly on 28 July 2020. Prior to the issue of these two sets of proceedings, Mr Mosakowski had issued an earlier claim on

4 June 2020. That was rejected because he had not consulted ACAS and had not provided an early conciliation certificate number.

2. In the first set of proceedings before me, Mr Mosakowski claimed unfair dismissal and "discrimination" without identifying what type of discrimination his claim was based on. In the second set of proceedings, he claimed unfair dismissal and discrimination on the grounds of age. The proceedings were consolidated on 10 January 2021 and matters came before Employment Judge Reed in Watford on 6 May 2021. EJ Reed listed the matter for a final hearing in Watford on 14-16 March 2022, but in the meantime listed today's Open Preliminary Hearing to consider the following:

   2.1 Whether the unfair dismissal proceedings should be dismissed as having been issued out of time;

   2.2 An application from Mr Mosakowski to amend his claim to include a Breach of Contract claim for Wrongful Dismissal and a claim under the Working Time Regulations; and

   2.3 Thirdly, to consider an anticipated application from the respondent for strike out or a deposit order in respect of the discrimination claims.

3. A strike out application was in due course made by the respondent on 2 June 2021.

Papers before me today

4. This hearing was conducted remotely and I did not have the tribunal file. I have relied today entirely upon a bundle of documents kindly put together for me by the respondent's solicitors. I checked with the parties before we started whether there was anything else that I would need or ought to have in front of me apart from those documents. Mr Mosakowski mentioned to me that there were some bank statements he had sent in to the tribunal. I indicated I did not think it likely that I was going to need to see his bank statements. In all other respects, both parties confirmed I had all the documents which I needed.

The Issues

5. The issues before me today were firstly, to consider the three points identified by EJ Reed. Further, the Tribunal had received a document from Mr Mosakowski in the meantime, which put forward a number of other applications or matters which he said should be dealt with. I ran through those with Mr Mosakowski at the outset of the hearing and in brief by way of summary they were:

   5.1 A slightly confusing application to amend the claim because of an error in the early conciliation certificate. I asked Mr Mosakowski to explain this, but it remained confusing. He had obviously heard

about recent changes to the rules which give greater discretion to the tribunal where errors are made on an ET1 in either the conciliation certificate numbers or the identity of the respondents. Those are not issues that arise in this case; his very first claim was rejected simply because he had not consulted ACAS and there was therefore no conciliation certificate at all. There is no question of the two later claims being rejected because of any problem with certificate number or the identity of the respondent.

5.2 He sought an extension of time because he says it was not reasonably practicable for him to have issued the claims in time. That of course is part and parcel of my considering whether the unfair dismissal claims were issued in time.

5.3 He made a reference to the Limitation Act. I explained that the Limitation Act of itself has no bearing in Employment Tribunal proceedings, although its provisions as to the exercise of discretion can have a guiding effect in the tribunal exercising its discretion in discrimination claims that are out of time, where there is a question whether it would be just and equitable to extend time.

5.4 He reiterated in his letter his applications to amend by adding the Breach of Contract and Working Time Regulations claims.

5.5 He sought leave to amend his Schedule of Loss. I explained there was no need for him to do so, it is a living document that he can change at any time as his situation changes.

5.6 Lastly, he had made an application for the unfair dismissal claim to succeed. I explained that can only happen after there has been a trial on the issues.

6. I should note on the subject of issues that at the end of hearing evidence from Mr Mosakowski, Mr Difelice indicated that the strike out/deposit order applications were not pursued today, and rightfully so. The discrimination claim therefore remains to be heard in March 2022.

Evidence

7. I heard oral evidence today from Mr Mosakowski. He confirmed under oath that the content of a statement included in the bundle beginning at page 84 was true. Although undated, both sides agreed the document was provided and filed with the tribunal sometime in March 2021. Mr Mosakowski relied upon the content of that very detailed and helpful statement and he answered questions under cross examination from Mr Difelice.

The Law

8. In relation to unfair dismissal, the relevant statutory provision is s.111(2) of the Employment Rights Act 1996. In respect of the Breach of Contract claim, the relevant provision is regulation 7 of the Employment Tribunals Extension of Jurisdiction (England & Wales) Order 1994. In respect of the Working Time Regulations 1998, it is regulation 30(2) that applies.

9. All of those statutory provisions for all of those heads of claim require that the claim be issued within 3 months of the relevant event in question, unless it was not reasonably practicable for the claim to have been issued within the 3 month timeframe.

10. Reasonably practicable means what is reasonably feasible, that is the case of Palmer v Southend Borough Council 1984 IRLR 119 CA.

11. It is for the claimant to satisfy the Tribunal that it was not reasonably practicable for him to have brought the claim in time, see Porter v Bandridge Ltd [1978] ICR 943 CA.

12. The tribunal should have regard to what, if anything, the employee knew about the right to complain and the time limit. Ignorance itself is not necessarily enough to render it not reasonably practicable to issue the claim in time. One has to ask oneself what the claimant ought to have known if he had acted reasonably, see Marks and Spencer v Williams-Ryan 2005 IRLR 565.

13. Where a professional advisor is involved and if that advisor makes a mistake, then the cause of action for the claimant if the claim is out of time, is against the advisor. An error by the advisor is not a basis for extending time. The well-known authority for that is Dedman v British Building and Engineering Appliances Limited [1974] ICR 53.

The Facts

14. I have already explained that Mr Mosakowski was dismissed on 8 March 2020 and that time would therefore expire on 7 June 2020, if there is no extension of time by reason of early conciliation. He consulted a solicitor on 10 March 2020, having already carried out some research on the internet about bringing claims and solicitors that he could consult. He said in evidence that he did not recall if the question of time limits was mentioned in that consultation, but he acknowledged that it was possible. He said he did not remember if his conversations with the solicitor included a discussion about the need to engage with ACAS, but it was possible.

15. It is right to say that in the period after his dismissal, Mr Mosakowski was upset, stressed and distressed at the situation he faced. He did seek medical advice; there was no subsequent treatment or medication prescribed. Whatever his mental state, he was able on 10 March to consult with a solicitor, after conducting internet research.

16. Mr Mosakowski has a brother-in-law called Mr Miotka. He had been Head Chef at the same restaurant that Mr Mosakowski had worked at. On Mr Mosakowski's behalf, Mr Miotka consulted with the CAB on a date somewhere between 16th and 20th March. During the consultation with the CAB, Mr Miotka spoke again to the solicitor Mr Mosakowski had previously consulted. Mr Mosakowski acknowledges that arising out of the CAB consultation, Mr Miotka reported back to him that he had been told that consultation with ACAS was in his words, "mandatory" and he was told that the Judge would not consider a claim without an early conciliation certificate number. Mr Mosakowski acknowledges he was told that a claim had to be issued within 3 months and that Employment Judges do not like claims being left to the last moment. In evidence he said that the CAB used these words:

> "No, no, no you have to contact ACAS. If you don't do it, it won't be considered by a judge."

17. Mr Mosakowski says that it was suggested that he contact ACAS as soon as possible if he does not like his appeal outcome. At that point his appeal against dismissal was outstanding, scheduled to be dealt with in April.

18. Mr Miotka subsequently told Mr Mosakowski that he had discovered that the Law Commission and the President of the Employment Tribunals had extended the time limit for employment tribunal claims to 6 months. Unfortunately, that is not correct. He also says that he had been told by a friend that it was not worth contacting ACAS, that it was a waste of time to do so, which is unfortunate.

19. Mr Mosakowski's appeal against dismissal was, because of Covid, moved and did not go ahead until 3 June. Mr Mosakowski told me that he wanted to issue the proceedings beforehand, but that Mr Miotka had dissuaded him from doing so, telling him that his possible compensation would be reduced by 25% if he had not exhausted all procedures before issuing the claim. I can understand why a lay person might misunderstand the provisions about not following the ACAS Grievance Procedure before bringing a claim, but I am afraid that too is incorrect advice.

20. On the day after the appeal meeting, 4 June, (the outcome was not known until 17 June) Mr Mosakowski issued the first set of proceedings but unfortunately, without having contacted ACAS and therefore he did not provide an early conciliation certificate number on the claim form. That claim was rightly, properly, inevitably, rejected by the Tribunal. On receipt of the rejection, Mr Mosakowski got on with it, obtained an early conciliation certificate and issued the first claim.

21. I should note that in his statement (page 85, paragraph 1.3.7) Mr Mosakowski wrote, *"I consider myself as highly educated and intelligent person frequently using an internet not having problems with understanding English"* and I have to say that seemed to me an accurate self-description, if I may say so.

Conclusions

22. The fact of the matter is, Mr Mosakowski was able to consult with solicitors and the Citizen's Advice Bureau. He clearly obtained correct advice from those sources and unfortunately, for whatever reason, did not take it. He apparently made the mistake of relying upon his brother-in-law, Mr Miotka. It was, I am afraid, plainly feasible, it was plainly reasonably practicable, for the unfair dismissal claim to have been brought in time. It is a strict test. I do not have any discretion beyond that and I am afraid, Mr Mosakowski's unfair dismissal claim must be dismissed because it was brought out of time.

23. That brings me to the application to amend the claims to include claims of Breach of Contract and the Working Time Regulations. The same test applies and Mr Mosakowski has the same difficulties. Within the 3 month period of his employment coming to an end, of not being paid his notice pay, of any issues there may have been arising out of the hours that he was working, or the lack of sufficiently lengthy breaks between shifts, he was able to consult with a solicitor, to obtain information on the internet and obtain advice via the CAB. It was therefore reasonably practicable for him to have brought his claims in respect of those matters in time. The application to amend was made almost a year after time expired, with no explanation for the delay in the intervening period. For those reasons, I am afraid, having regard to the overriding objective and the balance of prejudice, that Mr Mosakowski's applications for leave to amend are refused.

24. I deal briefly with some of the other matters raised in the document Mr Mosakowski submitted to the tribunal:

    24.1 He sought a strike out of the response on the grounds that there was no prospects of the respondent succeeding. That application is ill-founded; one cannot possibly say whether or not the respondent has any prospect of its defence succeeding.

    24.2 He asked for the response to be struck out because the respondent had failed to comply with case management orders. He was referring to case management orders that had been issued, as they automatically are, on receipt of an unfair dismissal claim. Those case management orders were made in respect of the unfair dismissal aspect of the claim and were superseded by the two proceedings being consolidated and the matter coming before EJ Reed on 6 May and of course now, by the unfair dismissal claim now having been ruled by me as out of time. The relevant case management orders for the respondent to comply with are those set out by EJ Reed in the preliminary hearing summary of 6 May: copy documents are to be exchanged on 10 December. I explained to Mr Mosakowski, that is when the respondent is obliged to provide him with the documents which are relevant to his claim and if they

do not provide him with documents they have which he thinks are relevant, then he may apply for an order for disclosure of those specific documents. The bundle is going to be prepared by 14 January, witness statements are to be exchanged on 11 February and the hearing is in March.

24.3 His last strike out application was on the grounds that the respondent had made untrue statements. He acknowledged in our conversation at the outset, that the tribunal cannot know if those statements are untrue until it has heard the evidence.

Employment Judge M Warren

Date: 27 October 2021
17 November 2021
Sent to the parties on: .....

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For the Tribunal Office