



EMPLOYMENT TRIBUNALS

Claimants: Mr M Atkinson
Miss K Myers

Respondent: British Telecommunications plc

HELD AT: Newcastle

ON: 27 October 2021

BEFORE: Employment Judge Moss

REPRESENTATION:

Claimants: In person

Respondent: Mrs R Osman (Solicitor)

WRITTEN REASONS

Introduction

1. These are the written reasons for the Judgment delivered orally at the conclusion of the hearing on 27 October 2021, and sent out to the parties on 02 November 2021. Written Reasons were requested by the claimant, Mr M Atkinson, in an email of 03 November 2021.

Claims and issues

2. Mr Atkinson brought claims against the respondent for unfair dismissal and for entitlement to a redundancy payment, either under the statutory regime and/or for breach of contract.

3. Ms Myers brought a claim against the respondent for entitlement to a redundancy payment, either under the statutory regime and/or for breach of contract.
4. The preliminary issue to be determined (with the exception of any entitlement to a statutory redundancy payment which was brought within time) was whether the claimants' claims were presented in time. Should the breach of contract claims be allowed to proceed, the sums properly payable to each claimant on the termination of their employment by reason of redundancy would fall to be considered. In particular, whether shift allowance payments ought to be included in the definition of 'normal working hours' for the purpose of calculating a week's pay in accordance with Section 220 of the Employment Rights Act 1996. Should Mr Atkinson's unfair dismissal claim be allowed to proceed, that matter would be adjourned for a final hearing to take place at a later date.
5. On learning of the cap that applies to statutory redundancy payments, the claimants decided not to pursue those claims at the hearing.

Evidence and findings of fact

6. I find the following facts on a balance of probabilities after considering the whole of the evidence, both oral and documentary, and after listening to any factual and legal submissions made by or on behalf of the respective parties.
7. The respondent company is British Telecommunications Ltd. Mr Atkinson commenced his employment with the respondent on 6 September 1999. Ms Myers commenced her employment with the respondent on 1 March 1991. In 2020 the claimants were employed as Controllers at the respondent's Newcastle site.
8. As part of a reorganisation, the respondent decided to move its control services/functions to Ipswich and Cardiff, to be implemented 31 March 2020. The claimants' shift patterns were removed on 1 April 2020, as a result of which they received Compensation for Loss of Attendance Related Payments (CLARPS). Although the work moved to Ipswich and Cardiff as planned in April 2020, due to the impact of Covid-19 the Controllers were kept in role for a further month to help with the transition. From 1 May 2020, the claimants' roles were dedicated to looking for an alternative role within the business.
9. The respondent engaged in a redundancy exercise, during which Mr Atkinson attended individual consultation meetings on 14 August 2020, 7 October 2020 and 5 November 2020. Ms Myers attended individual consultation meetings on 14 August 2020, 26 October 2020 and 9 November 2020. A trade union representative from the Communication Workers Union (CWU) was also in attendance at the meetings.
10. Mr Atkinson's employment was terminated by reason of redundancy on 8 November 2020. Ms Myers' employment was terminated by reason of

redundancy on 15 November 2020. The claimants were paid enhanced redundancy payments that incorporated statutory redundancy payments.

11. Mr Atkinson contacted ACAS under the Early Conciliation Provisions on 27 March 2021. ACAS issued the Early Conciliation Certificate on 21 April 2021. Mr Atkinson presented these proceedings on 27 April 2021.
12. Ms Myers contacted ACAS under the Early Conciliation Provisions on 29 March 2021. ACAS issued the Early Conciliation Certificate on 21 April 2021. Ms Myers presented these proceedings on 6 May 2021.
13. Mr Atkinson's explanation for the delay in contacting ACAS can be summarised as follows:

He did not know of his right to bring a claim at the point of being made redundant. Although a union representative had been present during the consultation meetings, he did not feel that they offered support or had a real presence. He was disillusioned with the union and felt support was non-existent. He had access to a mobile device and could have conducted a search to discover his rights, but the redundancy had affected his mental health and he was struggling to carry out daily activities. He reached out to his GP in early February 2021 and was referred for counselling. He attended counselling sessions up until the end of March/beginning of April 2021 and was able to look at things more constructively towards the end of them. That is when he approached ACAS and was advised that he was technically out of time to bring an unfair dismissal claim but that it could still be worth pursuing. In respect of the redundancy payment claim, ACAS did not break it down as between statutory and breach of contract claims and advised him that he had 6 months to bring a claim.

14. I accept Mr Atkinson's explanation as being an honest account of events.
15. Within the relevant 3-month time limit for bringing an unfair dismissal and/or breach of contract claim, Mr Atkinson did make job applications online and attended an interview via Teams for one role.
16. Ms Myers' explanation for the delay in contacting ACAS can be summarised as follows:

At the point of being made redundant, she did not reach out for union advice. Other than for a few months, she had been a member of the CWU for 30 years and had not needed them once. The redundancy process started and they provided no support whatsoever. The particular union representative she was dealing with said 'you're out the door, they want you gone'. She felt he'd given up and she had no faith in him at all. She was in too much shock to make enquiries of the Citizens' Advice Bureau or of the Employment Tribunal. She did not expect to be made redundant, felt lost and was not thinking straight. She did not consider seeking legal advice, feeling that she could not waste money from the redundancy payment on legal advice. She was suffering with her mental health but is a private person and not one to seek

counselling. Also playing on her mind was a foot operation coming up (that eventually took place on 6 May 2021). When she did contact ACAS she was advised that she had 6 months to bring a claim.

17. I accept Ms Myers' explanation as being an honest account of events.
18. In January 2021, Ms Myers had a conversation with a colleague who had also been made redundant, Barry Booth, during which concerns were aired that their redundancy payments ought to have included a shift allowance.

Relevant law

19. Section 111(2) of the Employment Rights Act 1996 (the Act) provides that an employment tribunal shall not consider a complaint of unfair dismissal unless it is presented before the end of the period of three months beginning with the effective date of termination, 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 of three months.
20. There are similar time limit provisions relating to the claims for breach of contract, which are contained in article 7 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994.
21. With effect from 6 May 2014, a prospective claimant must obtain an early conciliation certificate from ACAS, or have a valid exemption, before issuing employment tribunal proceedings.
22. Section 207B of the Act provides: (1) This section applies where this Act provides for it to apply for the purposes of a provision of this Act (a "relevant provision"). But it does not apply to a dispute that is (or so much of a dispute as is) a relevant dispute for the purposes of section 207A. (2) In this section - (a) Day A is the day on which the complainant or applicant concerned complies with the requirement in subsection (1) of section 18A of the Employment Tribunals Act 1996 (requirement to contact ACAS before instituting proceedings) in relation to the matter in respect of which the proceedings are brought, and (b) Day B is the day on which the complainant or applicant concerned receives or, if earlier, is treated as receiving (by virtue of regulations made under subsection (11) of that section) the certificate issued under subsection (4) of that section. (3) In working out when a time limit set by a relevant provision expires the period beginning with the day after Day A and ending with Day B is not to be counted. (4) If a time limit set by a relevant provision would (if not extended by this subsection) expire during the period beginning with Day A and ending one month after Day B, the time limit expires instead at the end of that period. (5) Where an employment tribunal has power under this Act to extend a time limit set by a relevant provision, the power is exercisable in relation to the time limit as extended by this section.

23. I have considered the following cases in determining the question of whether or not it was reasonably practicable for the claimants to have presented their claims in time:
Palmer and Saunders v Southend-on-Sea BC [1984] 1 All ER 945; Porter v Bandridge Ltd [1978] 1 WLR 1145; Wall's Meat Co v Khan [1978] IRLR 499; London Underground Ltd v Noel [1999] IRLR 621; Dedman v British Building and Engineering Appliances [1974] 1 All ER 520; Asda Stores v Kauser UAEAT/0165/07/RN; Schultz v Esso Petroleum Ltd [1999] 3 All ER 338.
24. In *Palmer and Saunders v Southend-on-Sea BC*, and following its general review of the authorities, the Court of Appeal (per May LJ) 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".
- The Tribunal should consider: (1) the substantial cause of the claimant's failure to comply with the time limit; (2) whether there was any physical impediment preventing compliance, such as illness, or a postal strike; (3) whether, and if so when, the claimant knew of his rights; (4) whether the employer had misrepresented any relevant matter to the employee; and (5) whether the claimant had been advised by anyone, and the nature of any advice given; and whether there was any substantial fault on the part of the claimant or his adviser which led to the failure to present the complaint in time.
25. Subsequently in *London Underground Ltd v Noel*, Judge LJ stated at paragraph 24 "The power to disapply the statutory period is therefore very restricted. In particular it is not available to be exercised, for example, "in all the circumstances", nor when it is "just and reasonable", nor even where the Tribunal "considers that there is a good reason" for doing so.
26. In *Wall's Meat Co v Khan* Lord Denning, (quoting himself in *Dedman v British Building and Engineering Appliances*) stated "it is simply to ask this question: has the man just cause or excuse for not presenting his complaint within the prescribed time?"
27. A claimant is unlikely to be able to show that it was not reasonably practicable to present a complaint because of ignorance of the right to make the claim. If the claimant ought reasonably to have known of his right to claim, then it will probably be held that it was reasonably practicable to present a complaint within the time limit whether they knew of the right or not - *Porter v Bandridge*.
28. A claimant may know of his or her rights but prevented from exercising them through either "illness, absence, some physical obstacle, or by some untoward an unexpected turn of events" which would make it not practicable to have presented the claim in time. Where the claimant is pleading ignorance of the law, questions had to be asked as to what were his or her opportunities for finding out their rights? Did they take them? If not, why not? Were they

misled or deceived? Were there acceptable explanations for a continuing ignorance of the existence of their rights? Ignorance of his or her rights does not mean that it was impracticable for him to present a complaint in time.”, Scarman LJ, in *Dedman v British Building and Engineering Appliances*.

29. Where the employee is prevented by serious illness from claiming in time, it will normally be held not to have been reasonably practicable to present the claim in time, *Schultz v Esso Petroleum Ltd*.
30. *Asda Stores v Kauser UKEAT/0165/07/RN* per Lady Smith at paragraph 24 in respect of the time limit issue in that case: The Tribunal appears to have relied, for that part of their considerations on her ignorance of time limits and her being very stressed; whilst I note that the Tribunal takes the view that the Claimant “must have been in some turmoil”, the finding in fact is as I have stated it. The former does not, however, answer the question of why she did nothing at all. The latter is very general. There is no finding of illness or incapacity. The circumstances are not comparable, for instance, to those of the Claimant who fell ill seven weeks into the three month period, in the case of *Schulz v Esso Petroleum Co Ltd [1999] ICR 1202*. It cannot be sufficient for a Claimant to elide the statutory time limit that he or she points to having been “stressed” or even “very stressed”. There would need to be more.

Conclusion

31. Mr Atkinson’s complaints were presented out of time. To be in time, the complaints were required to be presented no later than 3 months from the effective date of termination which was 8 November 2020 ie by no later than midnight on 7 February 2021. In the event Mr Atkinson did not present his ET1 on or before 7 February 2021, and did not contact ACAS – a precondition of presenting an ET1 – until 27 March 2021 by which time 48 days had passed since the filing deadline. Mr Atkinson presented his complaints on 27 April 2021.
32. Ms Myers’ complaint was presented out of time. To be in time, the complaint was required to be presented no later than 3 months from the effective date of termination which was 15 November 2020 ie by no later than midnight on 14 February 2021. In the event Ms Myers did not present her ET1 on or before 14 February 2021, and did not contact ACAS – a precondition of presenting an ET1 – until 29 March 2021 by which time 43 days had passed since the filing deadline. Ms Myers presented her complaint on 6 May 2021.
33. The normal three months’ time limit had already expired by the time the claimants approached ACAS under the Early Conciliation Provisions, and the claimants do not therefore enjoy any extension of time under s207B of the Act.
34. The claimants bear the burden of proving both that it was not reasonably practicable for him or her to have presented their claim in time and then that they presented it within a reasonable time thereafter. Although there are some

common themes pertaining to both, the claimants are dealt with separately below.

35. The Tribunal is not satisfied that Mr Atkinson has discharged his burden of proving (on the balance of probabilities) that it was not reasonably practicable ie. reasonably feasible, for him to have presented his complaints in time. The Tribunal reaches that conclusion on the following grounds:
36. It is not enough that Mr Atkinson was ignorant of his rights, he had to have been reasonably ignorant of his rights, which requires him to show that he took reasonable steps to acquire the necessary knowledge. It was incumbent upon Mr Atkinson to make some proactive enquiries in that regard but he did not do so. Although Mr Atkinson was disillusioned with the union, there is no evidence to suggest that the union misled Mr Atkinson or provided inaccurate advice about his rights. The fact that ACAS, once contacted, may have suggested a 6-month time limit applied generally to the redundancy payment claim does nothing to explain, let alone justify, the several weeks' delay in contacting ACAS in the first place.
37. Although Mr Atkinson's mental health undoubtedly suffered as a consequence of being made redundant, such that he was referred for counselling sessions by his GP in February 2021, there is no medical evidence before the Tribunal to suggest that Mr Atkinson was not physically or mentally well enough in the period 8 November 2020 – 7 February 2021 to have made enquiries about his legal rights, or contacted ACAS, or a solicitor, or his former union, or presented an ET1. A cursory internet search would have revealed the basic information required to pursue a claim. Mr Atkinson was admittedly functioning to the extent of being able to make job applications online and even attend an interview for one role during the relevant period.
38. The Tribunal is not satisfied that Ms Myers has discharged her burden of proving (on the balance of probabilities) that it was not reasonably practicable ie. reasonably feasible, for her to have presented her complaint in time. The Tribunal reaches that conclusion on the following grounds:
39. It is not enough that Ms Myers was ignorant of her rights, she had to have been reasonably ignorant of her rights, which requires her to show that she took reasonable steps to acquire the necessary knowledge. It was incumbent upon Ms Myers to make some proactive enquiries in that regard but she did not do so. Although Ms Myers had no faith in the union, there is no evidence to suggest that the union misled Ms Myers or provided inaccurate advice about her rights. The fact that ACAS, once contacted, may have suggested a 6-month time limit applied generally to the redundancy payment claim does nothing to explain, let alone justify, the several weeks' delay in contacting ACAS in the first place.
40. Although Ms Myers was undoubtedly in shock and struggling to come to terms with being made redundant after a lengthy period of service with the respondent, there is no medical evidence before the Tribunal to suggest that

Ms Myers was not physically or mentally well enough in the period 15 November 2020 – 14 February 2021 to have made enquiries about her legal rights, or contacted ACAS, or a solicitor, or her former union, or presented an ET1. A cursory internet search would have revealed the basic information required to pursue a claim. Ms Myers admitted to a conversation with a colleague in January 2021 during which the respondent's failure to include a shift allowance as part of the redundancy payment was discussed. Had it not occurred to Ms Myers previously to make enquiries, that discussion alone could reasonably have been expected to prompt such an enquiry to be made.

41. The claimants have failed to establish that it was not reasonably practicable for them to have presented the proceedings within time. I find that it was reasonably practicable for the complaints to have been presented before the end of the relevant 3-month period. On that basis, I need not consider further the reasonableness or otherwise of the additional delay beyond that point.

Employment Judge Moss

Date 29/11/2021

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.