



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4102693/2019

5

Held in Glasgow on 17 May 2019

Employment Judge P O'Donnell

10

Mr S Merry

**Claimant
Represented by:
Mr C Robertson *
Solicitor**

15

Levenseat Ltd

**Respondent
Represented by:
Mr A Maxwell
Solicitor**

20

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that the claim was lodged out of time and that it had been reasonably practicable for the claim to be lodged in time.

25 Accordingly, the Tribunal does not have jurisdiction to hear the claim.

REASONS

Introduction

1. The Claimant has brought a complaint of constructive unfair dismissal (both ordinary unfair dismissal and automatically unfair dismissal on the grounds of public interest disclosure). The claim is resisted by the Respondent.

30

2. The hearing was listed as a case management preliminary hearing to be followed by an open preliminary hearing to deal with the issue of time bar.

E.T. Z4 (WR)

Preliminary issues

3. At the outset of the hearing, the Employment Judge raised with the parties that the Claimant's representative had worked with the Employment Judge in the same department at the firm at which the Employment Judge is presently
5 a partner (he was not a partner at the time). The Claimant's representative had left the firm three years ago and there had been no interaction between them since then. No objection was made to the Employment Judge sitting in the hearing.

Case Management

- 10 4. The Tribunal made the following case management directions to have effect if the issue of time bar was resolved in the Claimant's favour.
5. The Claimant was to provide the following Further & Better Particulars of the claim within 21 days of the date of the judgment on time bar if it was in his favour:-
- 15 a. Protected disclosures
- i. The Claimant to set out what the disclosures were in the sense of the information he provided in making each disclosure.
 - ii. To whom did the Claimant make each disclosure?
 - iii. When did the Claimant made each disclosure?

20 iv. In which sub-section of s43B Employment Rights Act 1996 does the Claimant say each disclosure falls.
- b. Constructive dismissal
- i. What terms of the contract, specifying whether it is express or implied, does the Claimant say was breached?

25 ii. What acts by the Respondent does the Claimant say amounted to a breach of contract and when did those occur?

- iii. Whether the Claimant raised any grievance with the Respondent?
 1. If so, when did he raise this and with whom?
 2. What was the outcome of any grievance?
- 5 c. The Claimant to specify which sections of the Employment Rights Act he says renders his dismissal unfair and why.
6. Within 21 days of the date on which the Claimant lodges the Further and Better Particulars, the Respondent will revise their ET3 in light of those Particulars.
- 10 7. 21 days after the judgment on time bar, the Claimant to prepare a provisional schedule of loss and provisional schedule of mitigation and send it to the Respondent.
 - a. 7 days before any final hearing, the Claimant to lodge revised schedules.
- 15 8. A joint bundle of productions will be prepared for any final hearing and lodged 7 days before that hearing. Parties to disclose the documents to be included in the bundle 28 days before any final hearing.
9. If the Claimant intends to pursue a claim that he was subject to a detriment for making a public interest disclosure then he will require to make an application to amend the ET1 to add such a claim; it is not pled as the ET1 is presently drafted. Any such application to be made at the same time as the Claimant lodges his Further & Better Particulars.
 - a. The Respondent will then have 21 days to lodge any objections to such an application. The Respondent to confirm if they wish to have a hearing to determine the application when lodging any objections.
- 20 25 b. The Claimant to confirm whether he wishes to have a hearing on the application within 7 days of the Respondent's objections.
10. A date listing stencil to be issued once parties have revised their pleadings.

11. Parties to confirm their respective position on judicial mediation once the pleadings are revised.

Time Bar

12. The Tribunal closed the case management preliminary hearing and moved to
5 determine the issue of time bar.

Evidence

13. The Tribunal heard evidence from the Claimant. The Respondent did not lead any evidence.

Findings in Fact

10 14. The Tribunal makes the following relevant findings in fact:-

14.1 The Claimant commenced employment with the Respondent on 19 September 2003. His employment came to an end of 7 September 2018 when he resigned.

15 14.2 The Claimant engaged the ACAS Early Conciliation Process on 28 November 2018 and the ACAS Early Conciliation Certificate was issued on 21 December 2018.

14.3 The ET1 was lodged on 26 February 2019. The Claimant lodged this online from his home and with his wife's help.

20 14.3 The Claimant is the sole caregiver for his wife who has multiple sclerosis and osteoporosis. She has frequent falls and the Claimant provides care on a 24/7 basis.

14.4 The Claimant contacted ACAS after his dismissal but could not remember the exact date. ACAS advised him that there was a time limit of 3 months from the last day of his employment.

25 14.5 The Claimant did not seek any other legal advice prior to lodging his claim.

- 14.6 He received an email from ACAS with the Early Conciliation on 21 December 2018 and he believed that he had 30 days from either the 30 or 31 December 2018 but could not recall why he believed this.
- 5 14.7 The need to lodge his claim went out of his mind as his primary concern was caring for this wife. He could not recall why he remembered about the claim in February; it simply came back into his mind.

Relevant law

- 10 15. Section 111(2) of the Employment Rights Act 1996 (ERA) sets out the time limit for bringing a claim for unfair dismissal :-

“an employment tribunal shall not consider a complaint under this section unless it is presented to the tribunal—

- 15 (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.”*

- 20 16. The primary time limit set down in s111(2) is adjusted by the "stop the clock" provisions of the ACAS Early Conciliation process.

Claimant's submissions

17. The Claimant's agent made the following submissions on his behalf.
18. It was accepted that the ET1 was lodged outside the extended time limit and so the question was whether the Tribunal would exercise its discretion to hear the claim out of time.
- 25 19. There was a two part test for the Tribunal to consider and the first part was concerned with whether it was not reasonably practicable for the claim to be

lodged in time. It was submitted that it was not reasonably practicable and the following factors were relied upon by the Claimant:-

- a. The Claimant was the sole caregiver for his wife which had taken an emotional toll on him. The Claimant suffered from stress and anxiety.
- 5 b. It was this reason that the claim was not submitted in time as the Claimant had given priority to the care of his wife.
- c. The Claimant was not a lawyer and had not taken legal advice.

20. The second stage of the test was whether the claim was lodged within such further period as the Tribunal considers reasonable. The Claimant's agent
10 submitted that it was lodged within a reasonable time and made reference to the following factors:-

- a. The delay in lodging the claim would cause little or no prejudice to the Respondent and would not cause any issue with any witnesses' recall of events.

15 **Respondent's submissions**

21. The Respondent's agent made the following submissions.
22. The test was set out in section 111(2) and was a two part test. It was a high bar with the burden of proof of the Claimant.
23. There was no medical evidence to support any argument that the Claimant
20 was prevented from lodging his claim in time due to his wife's medical condition. The medical condition of the Claimant's wife had not prevented him from lodging his claim when he did so.
24. The further 36 days delay was not reasonable.

Decision

- 25 25. It was not in issue that the Claimant lodged his ET1 out of time; the extended time limit expired on 21 January 2019 and the claim was not lodged until 26 February 2019.

26. The question is, therefore, whether the Tribunal was willing to exercise its discretion to hear the claim out of time and the first issue to be determined is whether it had not been reasonably practicable for the claim to be lodged in time.
- 5 27. In the Tribunal's view, it was reasonably practicable for the claim to have been lodged in time; the Claimant was aware that there was a time limit; he may have been in error about when that expired but that does not appear to have been the cause of the delay as he lodged his claim almost a month after the date when he thought the extended time limit expired; the Claimant had no
10 apparent difficulty in lodging his claim when he came to do so in February.
28. Whilst the Tribunal has the utmost sympathy with the Claimant's personal circumstances and the fact that he has made caring for his wife his priority, the reality is that the reason why the claim is out of time is that the Claimant forgot to lodge his claim and did not recall this until after the time limit had
15 expired.
29. This does not provide an adequate explanation for the delay and it was clear that it would have been reasonably practicable for the Claimant to lodge his claim timeously had he recalled the need to do so.
30. In these circumstances, the Tribunal is not prepared to exercise its discretion
20 to hear the claim out of time. The claim is, therefore, out of time and the Tribunal has no jurisdiction to hear the claim.

25 Employment Judge: P O'Donnell
Date of Judgment: 11 June 2019
Entered in register: 17 June 2019
and copied to parties

30