



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4109146/2021

Preliminary Hearing held by Cloud Video Platform (CVP) on 23 September 2021

Employment Judge A Jones

Mr D Dalgleish

**Claimant
Represented by:
Mr B McLaughlin ,
Solicitor**

McLaren Packaging Ltd

**Respondent
Represented by:
Ms V Nicholson,
Solicitor**

JUDGMENT

It was not reasonably practicable for the claimant to have lodged his claim before the Tribunal within three months of the date of his dismissal and he lodged his claim within a reasonable period thereafter. The Tribunal therefore has jurisdiction to consider his claim of unfair and wrongful dismissal and the case should be listed for a final hearing.

REASONS

Background

1 . A claim of unfair and wrongful dismissal was lodged on behalf of the claimant on 14 April 2021. The claim form recognised that the claim had not been lodged within the statutory time limit and that a preliminary hearing would be required in order to determine whether the Tribunal had jurisdiction to consider the claim.

2. At the preliminary hearing, which was conducted remotely, the claimant gave evidence on his own behalf. A joint bundle of documents was produced although there was some confusion regarding the numbering of the documents. In any event, the Tribunal was satisfied that all parties understood what documents were being referred to at the relevant time.

3. Having heard the evidence of the claimant, who was also cross examined, and considered the documentary evidence to which reference was made and submissions of the parties, the Tribunal made the following findings in fact:

4. The claimant is a 45 year old man who was employed by the respondent as

a machine operator for over 5 years.

5. The claimant was dismissed from his employment on 9 December 2020 following an altercation with a colleague which resulted in the claimant being taken to hospital for treatment to a head injury.

6. The claimant was not represented at the disciplinary hearing at which he was dismissed. He was not a member of a trade union. The decision to dismiss the claimant was confirmed to him in a letter dated 15 December.

7. The claimant appealed against his dismissal in an undated handwritten letter. His appeal was dismissed by letter dated 15 January 2021 .

8. Although the claimant thought his dismissal to be unfair (in the general sense of the word) at the time, he did not take any advice on any action he could take as a result.

9. The claimant did not consult his GP between 2015 and November 2020, when he consulted the practice in relation to mental health issues.

10. The claimant had been referred to a consultant psychiatrist by his GP prior to his dismissal and was assessed around 6 November 2020. At that time the claimant had been prescribed diazepam for anxiety.

11. The claimant was assessed by Inverclyde Primary Care Mental Health team on 26 January 2021 in relation to his mood and in order to develop coping strategies for anxiety. At that time he was taking Mirtazapine medication. The assessment recorded that the claimant reported that he had poor sleep and diet, that he rarely left his house, did not attend to his personal hygiene and had stopped seeing his two children. The claimant was advised to self-refer to another organisation.

12. From November 2020 to date the claimant has been in regular contact with his GP practice and has been referred for various other mental health support services. He has been prescribed diazepam and mirtazapine during that period.

13. From November 2020, the claimant has been suffering from severe anxiety, paranoid thoughts and suicidal ideation.

14. From January 2021 the claimant's condition deteriorated to the extent that until around the middle of April 2021 he could barely function. During this time he did not leave his house other than for essential shopping, had difficulties sleeping and did not attend to his personal hygiene, meaning that he did not regularly wash or change his clothes. He did not socialise, he was suffering from financial difficulties and had to use the services of a foodbank. He had deleted his social media accounts and ruminated constantly in a state of anxiety. He worried about repercussions from the altercation which had led to his dismissal and believed people were laughing at him.

15. The claimant contacted his local employment rights office on 13 April 2021 having googled 'employment rights'. The rights office contacted ACAS the following day, a certificate was issued that day and a claim form was lodged that day, 14 April 2021.

Observations on the evidence

16. The Tribunal found the claimant to be a credible witness. The Tribunal accepted his evidence that he found it very difficult to function between January and April 2021 and indeed has still not recovered his health. He now takes things one day at a time and is trying to get back to the person he was before November 2020. The Tribunal accepted that between January and April 2021 the claimant found it very difficult to leave his house, would take diazepam in order to go shopping for food and would return as soon as possible and ultimately made arrangements for his brother to do his food shopping for him.

17. The Tribunal also accepted that during this period the claimant felt that his mental health was so severe that he could not see his two children, that he had paranoid thoughts throughout this time and would not wash or change his clothes for days or weeks. The Tribunal also accepted the claimant's evidence that during this period he suffered financial hardship and was referred to a foodbank. He continued to wait for a referral to Crown House which was a mental health support service and this was delayed due to the pandemic. The claimant painted a picture of himself as someone who was barely existing, and the Tribunal accepted this as credible.

18. It was suggested to the claimant in cross examination that a reference in his medical notes to needing an 'advocate' was evidence of the claimant seeking legal advice to pursue a claim. The Tribunal did not accept that the word advocate was being used in that manner. Rather, the entry in his medical records referred to the claimant requiring someone to assist him in general with his mental health issues.

19. The Tribunal accepted the claimant's evidence that although he made reference to taking his employer to court to his GP on 29th March 2021, this had been said 'off the cuff as the claimant did not at that stage have the wherewithal to take any such steps to take such action.

Submissions

20. It was said that the claimant had submitted compelling evidence that it was not reasonably practicable for him to have submitted his claim in time and that his mental health and lack of capability was an impediment which made him incapable of doing so.

21. Further, there was not only compelling evidence regarding the claimant's mental health from the date of dismissal but a picture of declining mental health from November 2020. In addition to his mental health issues, the claimant had also suffered a severe physical injury when he had an open wound to the head for which he had received stitches.

22. Reference was made to a number of authorities on behalf of the claimant, *Schultz v Esso Petroleum Ltd* 1999 ICR 1202, *Marks and Spencer plc v Sabrina Williams-Ryan* 2005 ICR 1293, *Asda Stores Ltd v Kauser* UKEAT/1 65/07, *Norbert Dentressangle Logistics Ltd v Hutton* UKEAT/1 1/13 and *University Hospitals Bristol NHS Foundations Trust v Williams* UKEAT/291/12.

23. On behalf of the respondent it was said that the Tribunal did not have

jurisdiction to consider the claimant's claim. The question of what is reasonably practicable is a question of fact for the Tribunal to determine and the onus is on the claimant to establish that it was not reasonably practicable to have lodged a claim in time. It was said that the claimant had failed to provide sufficient evidence to discharge that burden. There was no explanation in the claimant's ET 1 as to why it had not been lodged in time and the explanation given in evidence was insufficient. While it was accepted that medical records had been provided there was nothing in those records which addressed the issue of whether the claimant had been capable of seeing advice. The claimant had failed to establish that he was too ill to seek advice.

24. While it was accepted that the claimant had difficulties in his life, he had submitted a letter of appeal in early January 2021 and had been looking to get his job back. It was submitted that the difficulties he was suffering from and the fact that he was taking medication was not a basis for alleging that it had not been reasonably practicable to lodge his claim in time. It was clear that he had concerns over the decision to dismiss him and if he had been uncertain as to what steps he could take, he ought to have investigated the matter.

25. Reference was made to *Porter v Bandridge IRLR 1978 943* and the Court of Appeal judgment which considered whether a claimant ought to have known about his rights to bring a claim. It was said that ignorance of rights was no defence.

26. It was said that there was nothing remarkable in the claimant's medical records which made him unable to seek advice on his rights. He sought advice on his financial issues and could articulate his difficulties. While oral evidence had been given regarding the nature of his condition and effect on his health this had not been raised at the time the claim was brought. It was also said that the claimant had been able to submit a letter of appeal and send an email on 8 January to the respondent.

27. Therefore it was reasonably practicable to have sought advice and lodged a claim in time.

28. The Tribunal was reminded that it was not relevant to consider the question of prejudice or lack thereof to the respondent in considering whether it had jurisdiction to consider the claim. Time limits should be strictly enforced and extensions exceptional.

29. It was said that even if the Tribunal was satisfied that it was not reasonably practicable to have lodged the claim in time, then it was not presented with a further reasonable period. There was a five week delay between the expiry of the time limit and the lodging of the claim, which was not an insubstantial period. Reference was made to the claimant having been recorded as informing his GP that he was taking his employer to court on 29 March.

30. It was said that the claimant should have acted promptly following 29 March and the period of delay was not reasonable. On that basis the Tribunal should decline jurisdiction to consider the claim.

Relevant law

31 . Section 11(1) of the Employment Rights Act 1996 provides:

(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 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.

32. Whether an employment tribunal has the jurisdiction to consider a claim of breach of contract is subject to similar provisions being whether it was 'reasonably practicable' to have lodged the claim within a three month period and whether the claim was lodged within such further period as was considered reasonable.

Discussion and decision

33. While the Tribunal was referred to a number of authorities, and took these into account when deliberating, the question of whether it was reasonably practicable to lodge a claim within the statutory time limit is ultimately one of fact for a Tribunal to determine, taking into account all the circumstances of the case.

34. In the present case, the Tribunal considered the following matters particularly relevant.

35. The claimant was incapacitated by his mental health condition during the limitation period such that he effectively shut himself off from the outside world other than seeking help for his mental health condition. The Tribunal accepted that his focus was on getting through each day and he was unable for the period between January and April 2021 to perform the most basic of functions.

36. The claimant was not a member of a trade union, and had not received advice from any source in relation to his dismissal. He was not represented at his disciplinary hearing and his appeal letter was handwritten by him.

37. He was not aware of his rights or relevant time limits. While ignorance of statutory rights is not of itself sufficient to have rendered it not reasonably practicable to have lodged a claim in time, it can be a relevant factor to take into account. The circumstances of the claimant at the relevant time were such that it was not reasonable to expect him to investigate these matters when he could barely function on a day to day basis.

38. Taking into account all the circumstances of this particular case, the Tribunal is satisfied that it was not reasonably practicable for the claimant to have lodged his Tribunal claim within the statutory time limit. The Tribunal is particularly mindful that it will only be in exceptional circumstances that an extension to the statutory time limits will be appropriate. However, the Tribunal is of the view that this is one of those cases. The Tribunal accepted that the claimant had given compelling evidence regarding the difficulties he suffered during the relevant period. The claimant could barely function throughout the limitation period and the Tribunal has little hesitation in accepting that it was

simply not reasonably practicable for him to have taken steps to lodge a Tribunal claim when he was not even able to attend to the most basic daily tasks and had isolated himself from his children as he in his own words 'could not be a dad' because of his mental health.

39. The Tribunal then went on to consider whether the claimant had lodged his claim within a reasonable period after the expiry of the statutory time limit. The claim ought to have been lodged by 8 March and was not lodged until 14 April 2021 . It was lodged the day after the claimant first contacted anyone for advice on the matter. Taking into account the circumstances of the claimant at that time, the Tribunal is satisfied that the claim was lodged within a reasonable period after the expiry of the time limit. The Tribunal was again mindful that any extension to the statutory time limit should only be made in exceptional circumstances and should only be for such period as is reasonable. However the Tribunal was of the view that the claimant took the step of obtaining advice and lodging a claim as soon as was reasonable for him to do so.

40. In all these circumstances, the Tribunal is satisfied that it was not reasonably practicable for the claimant to have lodged his claim within three months of his dismissal and that the claim was lodged in a reasonable period thereafter.

41 . The Tribunal therefore has jurisdiction to consider the claimant's claims and the case should be listed for a final hearing.

Employment Judge: Amanda Jones
Date of Judgment: 24 September 2021
Entered in register: 04 October 2021
and copied to parties