



EMPLOYMENT TRIBUNALS

Claimant: Mr S Sinnathamby
Respondent: Tesco Stores Ltd
Heard at: In Chambers **On:** Wednesday 11
November 2020
Before: Employment Judge Matthews

Representation:
Claimant: In Person
Respondent: Miss K Hosking of Counsel

Judgment and Reasons in this case were given orally on 11 November 2020. These written Reasons are provided at the written request presented by the Claimant on 30 November 2020, Judgment having been sent to the parties on 20 November 2020. The Judgment is repeated below for ease of reference.

JUDGMENT

Mr Sinnathamby's complaints of unfair dismissal by reference to sections 94, 98 and 103A of the Employment Rights Act 1996 were not presented to an employment tribunal before the end of the period specified in section 111 of the Employment Rights Act 1996. The Tribunal has no jurisdiction to hear those complaints which are, therefore, dismissed.

REASONS

INTRODUCTION

1. This is a Preliminary Hearing listed by Order of Employment Judge Morton sent to the parties on 18 June 2020 following a Telephone Case Management Preliminary Hearing on 11 June 2020 (the "Order"). The Order can be seen at pages 29-33 of the bundle. (All references in this Judgment are to pages in the bundle unless otherwise specified.)
2. By a claim form presented on 13 November 2019 Mr Sivanesan Sinnathamby brought complaints of unfair dismissal (sections 94 and 98 of the Employment Rights Act 1996 (the "ERA")) and unfair dismissal (section 103A of the ERA - "whistleblowing") against the Respondent Company.
3. The Company denies the claims. The Company also raises jurisdictional and preliminary issues, which are now to be decided.
4. The Order sets out the preliminary issues for determination as follows:

"2. The Claimant did not present his claim (or initiate early conciliation) before the end of the period of three months beginning with the effective date of termination. In relation to that the issues are as follows:

a. Was it reasonably practicable for the Claimant to present the complaint (by initiating ACAS early conciliation) before the end of that period of three months?

b. If not, did he present it within such further period as the tribunal considers reasonable?

The Tribunal will only be able to hear the full claim if it decides that it was not reasonably practicable for the Claimant to present his claim within the time limit and he then presented it within a reasonable time. The onus is on the Claimant to prove both matters."

5. The Tribunal heard from Mr Sinnathamby who produced a written statement. There was an "electronic" bundle of documentation.
6. The hearing was a remote hearing using the Common Video Platform consented to by the parties. A face-to-face hearing was not held because of the constraints placed on such hearings by precautions against the spread of Covid-19. Unfortunately, the parties were only able to join the video platform by telephone. Notwithstanding, the parties wished to proceed and the Tribunal is satisfied that, in this case, the overriding objective of dealing with cases fairly and justly could be met in this way.

FACTS

7. The Tribunal confines itself to the fact finding necessary to address the jurisdictional and preliminary issues which it must decide.
8. Mr Sinnathamby had worked for the Company for several years. Mr Sinnathamby was a Customer Service Assistant at the Company's Balham Express outlet.
9. Mr Sinnathamby did not attend for work on 13 March 2019.
10. It seems that, on 14 March 2019, Mr Sinnathamby took a flight to Australia to see his mother-in-law, who was ill. Mr Sinnathamby did not return to the United Kingdom until on or around 9 April 2019.
11. In the meantime, on 18 March 2019, the Company had written to Mr Sinnathamby requiring him to attend a disciplinary hearing on 22 March 2019.
12. Mr Sinnathamby did not attend the hearing on 22 March 2019 and, by letter of that date (34) was summarily dismissed by the Company. The reasons given were:

“Finding 1: failing to fulfil your contract of employment by taking an unauthorised leave and being absent from work without agreement from your Store Manager.

Finding 2: Showing disregard for the conversation with your Deputy Manger and failing to contact your Store Manager to agree that leave.”

13. Mr Sinnathamby had obviously seen the letter of dismissal sometime before 16 April 2019 because, on that date, his solicitors, Nantha and Co, wrote to the Company asking that Mr Sinnathamby be reinstated (39-40). The letter opened:

“We are instructed by Sivanesan Sinnathamby to act on his behalf in his unfair dismissal by the Store Manger Shariff and the person in attendance of the meeting Amanda Deacon on 14th March 2019.”

14. On 16 May 2019 the Company wrote to Nantha and Co to confirm that their letter of 16 April was being treated as an appeal by Mr Sinnathamby.
15. On 5 July 2019 the Company wrote to Mr Sinnathamby inviting him to attend an appeal hearing on 17 July 2019 (43).

16. Mr Sinnathamby was travelling out of the United Kingdom between 8 and 29 July 2019 and was not able to attend the appeal hearing.
17. The appeal hearing was rescheduled for 13 August 2019 on which date the Company wrote to Mr Sinnathamby dismissing his appeal (46).
18. Mr Sinnathamby made attempts to get advice from Clapham Law and South London Tamil Welfare Group. It seems that neither mentioned time limits to Mr Sinnathamby and he did not raise the subject himself. Finally, Mr Sinnathamby made a personal visit to the office of the employment tribunals in Croydon.
19. Mr Sinnathamby contacted ACAS for Early Conciliation on 12 November 2019 and ACAS issued an Early Conciliation Certificate the same day (1).
20. Mr Sinnathamby's claim form was presented to the tribunals on 13 November 2019.

APPLICABLE LAW

21. Section 111 of the ERA, so far as it is relevant, provides:

“111 Complaints to employment tribunal”....

“(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.

(2A)”....“section 207B (extension of time limits to facilitate conciliation before institution of proceedings) apply for the purposes of subsection (2)(a)”

22. The Tribunal was referred to Dedman v British Building & Engineering Appliances Ltd [1974] ICR 53.

CONCLUSIONS

23. Mr Sinnathamby was dismissed with effect from 22 March 2019 although it seems he was not aware of that until on or around his return from Australia on 9 April 2019. Mr Sinnathamby's solicitors wrote to the Company on 16 April 2019, so it is clear that Mr Sinnathamby knew he had been dismissed no later than that date. Even if that latter date of 16 April 2019 is taken, to have been in time the claim should have been lodged no later than 15 July 2019. There is no extension for early conciliation as it was not initiated within that period. The claim was not presented until 13 November 2019, nearly four months out of time. Mr Sinnathamby's complaints of unfair dismissal were not presented to the tribunal before the end of the period of three months specified in section 111(2)(a) of the ERA including any extension for conciliation.
24. The Tribunal must, therefore, decide whether or not it was reasonably practicable to present the claims in time and, if it was not, whether it was presented within such further period as the Tribunal considers reasonable. The onus of proving that presentation was not reasonably practicable in time is on Mr Sinnathamby.
25. On the evidence, Mr Sinnathamby's case is that it was not reasonably practicable for him to present the claims in time because he was unaware of the applicable time limits.
26. The difficulty with this is that Mr Sinnathamby instructed solicitors no later than 16 April 2019. In their initial letter to the Company the solicitors mentioned "*unfair dismissal*". From that it is fair to assume they had some concept of what that entailed. It is trite law that a failure of this sort by professionally qualified advisers will not save an out of time unfair dismissal claim.
27. In addition, it seems to the Tribunal that Mr Sinnathamby had ample opportunity to enquire about his rights and any time limits applicable to exercising them. In the event, he was able to contact the employment tribunals and ACAS and follow the process through.
28. Mr Sinnathamby has failed to show that it was not reasonably practicable for him to present his unfair dismissal claims within the period allowed by the legislation. Accordingly, an employment tribunal cannot consider those complaints and they are dismissed.
29. It is not, therefore, necessary for the Tribunal to decide whether or not the complaint was presented within such further period of time as was reasonable.

Case No: 2305096/2019(V-CVP)

Employment Judge Matthews

Date: 20 January 2021