



EMPLOYMENT TRIBUNALS

Claimant

Ms Angela Sivyer

v

Respondent

Asda Stores Limited

Heard at: Bury St Edmunds (by CVP) **On:** 23 February 2022

Before: Employment Judge R Wood

Appearances

For the Claimant: Miss D Jeromson, Lay Representative.

For the Respondent: Mrs W Miller, Counsel.

RESERVED JUDGMENT

The Claim is dismissed. The Claimant failed to establish that it had not been reasonably practicable to bring a claim within the three month limitation period.

RESERVED REASONS

Claims and Issues

1. The Claimant states that she was unfairly dismissed. She had been employed by the respondent as a home shopping picker from 18 April 2015. Her employment came to an end on 23 October 2020. It was asserted by the respondent that she was dismissed on the grounds of theft. The claimant avers that the dismissal was in breach of the company's internal disciplinary procedure, and that the sanction of dismissal was disproportionate in the circumstances. Of course, I do not go into more detail about the claim, because we have not yet reached that stage. It suffices to say that she states she had inadvertently taken a medication, which combined with her ongoing health issues, had made her drowsy and not in control of her actions. She otherwise had an exemplary employee record and stated that

the conduct with which she was accused was completely out of character. Unfair dismissal is denied by the respondent.

2. At this stage, the question for me relates to the jurisdiction of the Tribunal. The respondent states that the limitation period for bringing this claim expired on 22 January 2021 and that the claimant failed to lodge a claim within that time frame. It is asserted that the claimant lodged an early conciliation notification in 23 January 2021, with ACAS issuing an early conciliation certificate on 25 January 2021. As all this occurred outside of the primary limitation period, then the 'stop the clock' provisions do not apply. The claim was then submitted on 25 January 2021 which, it is submitted, places it 3 days out of time.

Procedure, Documents and Evidence Heard

3. The Hearing took place on 23 February 2022. I heard evidence from the claimant, Miss Angela Sivyer, who was represented by her daughter, Miss Jeromson. There were no other witnesses. I also had an agreed Main Bundle of documents which comprises 58 pages, and a witness statement from the claimant, which was undated.
4. What appears below is a summary of the evidence. I have chosen to focus on the key aspects of the testimony so far as my relevant findings of fact are concerned.
5. Ms Sivyer adopted the content of her witness statement and confirmed that the contents were true. She stated that she had not understood the alleged grounds of the dismissal at the disciplinary hearing on 23 October. She had thought it was on the grounds of ill health. She had then received a letter from the respondent on 17 November 2020 (dated 12 November 2020) [see page 46 of the bundle] which outlined that she had been dismissed on the grounds of misconduct. She was also sent a P45 which suggested that her employment had come to an end on 22 October 2020.
6. After she had been dismissed, the claimant stated that her mental health had plummeted. Only then did she visit her GP and obtain a diagnosis [50]. For a long time, she was unable to perform day to day activities and was left in an almost catatonic state for a lot of the time. She was suffering with the symptoms of depression, anxiety and the effects of medication. Only when her symptoms improved was she able to make sound and reasoned decisions about the conduct of the claim. At the time the claim was submitted, she had not been to seek any advice, and being a lay person, was unaware of the rules, processes, and deadlines surrounding the submission of a claim. At the time when the statement was made, the claimant was still suffering from depression and anxiety.
7. The claimant answered questions which in part supported the content of her witness statement. I also heard helpful submissions, which I have incorporated into my findings and reasons. At the conclusion of the Hearing, I reserved my decision.

Legal Framework

8. In this context, a claim for unfair dismissal which is brought outside the primary limitation period of 3 months, may still be brought 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 the period of 3 months.
9. There are two limbs to this formula. First, the employee must show that it was not reasonably practicable to present his claim in time. The burden of proving this rests firmly on the claimant (Porter v Bandridge Ltd [1978] IRLR 271, [1978] ICR 943, CA). Second, if she succeeds in doing so, the tribunal must be satisfied that the further time beyond the primary time limit within which the claim was in fact presented was reasonable. Thus the question at the second stage is purely one of reasonableness, but the question at the first stage is at least a little stricter: though it involves reference to reasonableness, the test is not simply whether it was reasonable to miss the deadline for the claim, but whether it was not reasonably *practicable* to meet that initial time limit.
10. In Walls' Meat Co Ltd v Khan [1978] IRLR 499 it was stated: 'The performance of an act, in this case the presentation of a complaint, is not reasonably practicable if there is some impediment which reasonably prevents, or interferes with, or inhibits, such performance. The impediment may be physical, for instance the illness of the complainant.' Whether physical or mental ill health justifies the application of the escape clause will necessarily depend upon all the circumstances. Although the overall period should be considered, the focus should be upon the later stages of the three months, reflecting the reality that in most cases this is when litigants focus their minds on lodging a claim.

Findings and Reasons

11. In arriving at my findings of fact and reasons in this case, I have been careful to consider all matters in the round, rather than to look at any one issue in isolation of others.
12. Firstly, I find that the limitation period began on 23 October 2020. It is clear that the claimant was dismissed on that day. She was told about her dismissal in the hearing, which is when it would have been effective. The dismissal is not dependent on the sending of a letter if, as in this case, employment was clearly terminated on a face to face basis.
13. In which case, the question of when the letters dated 23 October and 12 November 2020 were sent and/or arrived is not determinative. For the sake of completeness, I find that the letter of 23 October 2020 was sent to, but did not arrive with, the claimant. Otherwise, the appellant would not have chased clarification by letter dated 8 November 2020. I am also satisfied that the claimant did not receive the second letter until 17 November 2020. However, none of this detracts from the fact that as a matter of law the

claimant was dismissed on 23 October 2020 on a face to face basis, and that she was well aware she had been dismissed on that occasion. If there was some confusion as to the grounds (which I doubt very much), then it is not a material factor.

- (i) *Was it reasonably practicable to present the claim in time?*
- 14. In the context of this case, it is for the claimant to prove that it was not reasonably practicable to bring the claim on time, i.e. no later than 22 January 2021. She must do so on a balance of probabilities.
- 15. In my judgment, it was reasonably practicable for the claim to have been made within time. I have come to this conclusion for the following reasons.
- 16. The main or sole reason for the failure to bring the claim within time put forward by the claimant relates to her mental health. In respect of her health conditions during the relevant period, I of course accept the evidence contained in the letter from Dr A Banane dated 23 November 2020. This letter appears to relate to a consultation on 26 October 2020 when the Doctor saw the claimant and diagnosed mixed anxiety and depression. She was prescribed medication, although the letter is silent as to the precise mature of the prescription. I accept this evidence. Of course, the mere fact of such a diagnosis does not necessarily provide sufficient evidence that it was not reasonably practicable to make claim in time in this case.
- 17. Unsurprisingly, the letter does not provide any indication as to the severity of the conditions diagnosed. One can infer from the mere fact of there being a consultation that the symptoms would have been significant. However, there is no independent confirmation of the extent to which the claimant was prevented from completing day to day activities, or in any other regard to the level to which her function was impaired by her conditions. The letter is dated 23 November 2020, and relates to events on 26 October. There is nothing in this letter, and no other medical evidence, relating the end of the 3 month limitation period i.e. January 2021.
- 18. The claimant states that she was prevented from making a claim because she was unable to perform normal day to day activities, and was almost catatonic for a lot of the time. I am afraid that this is not supported by the independent evidence. There is no mention of this extreme level of disability in the GP's letter. I accept that the claimant would have experienced periods of low mood and anxiety as a result of her conditions. However, it is not usual for a patient with depression to be almost catatonic. I also note that there appears to have been no history of severe mental health condition in the claimant's case. There is no evidence of mental health treatment or medication preceding this matter.
- 19. Moreover, an examination of what the claimant was able to manage in the context of the claim suggests that she was not so severely impaired. Firstly, the claimant worked for the respondent for 5 years. There is no evidence which suggests that the claimant was incapacitated previously due to ill

health. Indeed, she maintained in her witness statement that any health issues did not prevent her from carrying out her duties.

20. Further, there is limited suggestion that the claimant was not able to effectively participate in the disciplinary proceedings. She attended the hearing on 23 October 2020 on her own, and seemed to answer questions in a cogent fashion. She also sent the respondent a letter dated 8 November 2020 [49] which I have not seen, but appears to have been chasing up the letter from the respondent dated 23 October 2020. Furthermore, the claimant was able to understand and engage with the appeal process, and to attend the appeal hearing on 23 November 2020. There is no suggestion that she could not answer questions at the hearing. She was also able to arrange someone to accompany her on that occasion.
21. As a result, it is my judgment that the claimant would have been able to a claim in November 2020. I can see no evidence of significant mental incapacity as alleged. It is my view that she could have made a claim herself and/or sought appropriate advice and representation from a lawyer who could have taken the necessary steps for her.
22. Of course, I am required to focus on the remainder of the 3 month period, and in particular the last few weeks. This is when most people tend to submit claims. Firstly, there is no evidence that her medical conditions worsened between the end of November 2020 and 22 January 2021. Indeed, there is no medical evidence at all about this period in particular.
23. However, I note that the claimant was able, either by herself or someone representing her, to engage with ACAS for the purposes of conciliation. I find that the claimant had been able to acquire sufficient knowledge of the need to do this, and no doubt the potential implications of failing to do so in the context of making a claim of this nature. In my view, it is unlikely that she was not also advised about the impact of obtaining a certificate on the limitation period. I find that by this stage, the claimant had obtained some advice about these matters, although I was not privy to what that advice might have been, or from where it had come. This was not part of the claimant's case.
24. Finally, I also note that the claimant was able to fill out the claim form, with particulars of her claim, and to submit it on 25 January 2020. Either she had managed this on her own or, more likely, she had received some help. However, there was no satisfactory explanation provided as to why it was not reasonably practicable to present the claim on 22 January, but had been feasible on 25 January 2020. If, as is alleged, the reason for the failure was her mental health, no evidence was adduced of a rapid improvement in that 3 day period. In my judgment, it is highly unlikely that there was such a change in her mental health. It leads me to the conclusion that mental health was not the active reason for her failure to submit the claim.

25. In summary, it is my judgment that it was reasonably practicable for the claim to have been lodged in time. The claim is therefore dismissed.

Employment Judge R Wood

Date: 25 March 2022

Sent to the parties on: 1 April 2022

For the Tribunal Office