



EMPLOYMENT TRIBUNALS

Claimant

Mr P Shoyelu

v

Respondent

London Underground
Limited

Heard at: London Central

On: 26 January 2022

Before: Employment Judge B Beyzade

Representation

For the Claimant: In person

For the Respondent: Miss C Urquhart, Counsel

JUDGMENT

The judgment of the tribunal is that:

1. the claimant's claim of unfair dismissal pursuant to section 94 of the Employment Rights Act 1996 was submitted by the claimant on 17 June 2020 was presented outside the time limit of 3 months from the effective date of termination set down in s111(2) of the Employment Rights Act 1996. Further, that it was reasonably practicable for the claimant to have presented the claim within the relevant time limit. In these circumstances, the Tribunal does not have jurisdiction to hear the claimant's claim and it is dismissed.

2. The Tribunal records that the respondent is correctly designated as above and directs the Tribunal Clerk that the paper and electronic file records be amended forthwith to reflect the same and that thereafter the respondent be respectively so addressed in correspondence.

REASONS

Introduction

1. The claimant presented a complaint of unfair dismissal which the respondent denied.
2. A preliminary hearing was held on 26 January 2022. This was a hearing held by CVP video hearing pursuant to Rule 46. I was satisfied that the parties were content to proceed with a CVP hearing, that it was just and equitable in all the circumstances, and that the participants in hearing were able to see and hear the proceedings.
3. The parties prepared and filed a Joint Bundle in advance of the hearing consisting of 146 pages. In addition the respondent provided a document titled Respondent's Note for Hearing 26 January 2022 and copies of two cases that were relied upon during its submissions. The claimant also sent to the Tribunal two witness statements and a further document titled Claimant's Defence Against the Respondent and Appeal to Support to Justify Response Out of Time.
4. At the outset of the hearing the parties were advised that the Tribunal would investigate and record the following issues as falling to be determined, both parties being in agreement with these:
 - (i) Whether the claimant's claim for unfair dismissal was presented in time?

- (ii) If not, was it reasonably practicable to bring his claim within the time limit and was any additional time taken by the claimant to present his claim reasonable?
 - (iii) Whether any consequential directions are required?
- 5. The claimant gave evidence at the hearing on his own behalf.
 - 6. Both parties made closing submissions.

Findings in fact

- 7. On the documents and oral evidence presented the Tribunal makes the following essential findings of fact restricted to those necessary to determine the list of issues –
- 8. The claimant commenced employment with the respondent as a Customer Service Supervisor on 20 April 2007 and his employment came to an end on 12 January 2020.
- 9. The claimant had been off sick from work since 6 December 2019. The claimant resigned by giving notice to the respondent on 13 December 2019. His notice period expired on 12 January 2020.
- 10. The claimant spoke to a union representative in January 2020 who advised him to complete the ACAS Early Conciliation process, and that he will need to do this in order to be in a position to start an Employment Tribunal claim. The advice that the claimant received was limited to this matter as his union membership had expired more than 2 years prior to the date he contacted his union. On 13 January 2020 ACAS received the claimant's Early Conciliation Notification.
- 11. ACAS issued a Certificate on 13 February 2020 confirming that the claimant complied with the requirement under section 18A of the Employment Tribunals Act 1996 to contact ACAS before instituting proceedings in the

Employment Tribunal. The claimant therefore spent 31 days engaging in ACAS Early Conciliation.

12. In February 2020 the claimant contracted a viral infection. He experienced dizzy spells, loss of appetite, and breathlessness. The claimant subsequently discovered that he had COVID-19. He also suffered from symptoms of long COVID thereafter.
13. On 17 February 2020 the claimant discovered that his grandmother had passed away. The claimant struggled to cope with this, and he spent time planning her funeral which took place on 9 March 2020.
14. The claimant's son contracted COVID-19 on 21 March 2020. He had severe symptoms which lasted for a period of between 1 – 1.5 weeks. While his son was on the road to recovery, during April 2020, his youngest daughter contracted COVID-19 and her recovery time was between 2 to 3 weeks. The claimant was engaged in supporting his son and youngest daughter with their recovery.
15. Three days after the claimant's youngest daughter had started suffering from symptoms of COVID-19, the claimant's wife also began to experience COVID-19 symptoms. The claimant had to carry out all the household chores, including cooking and cleaning by himself for a period of time. The claimant's wife did not recover from her symptoms until 10-12 days had elapsed.
16. The claimant submitted his Tribunal claim on 17 June 2020.
17. The respondent presented its response on 28 October 2021 (this was the deadline for presentation of the respondent's response pursuant to Employment Judge E Burns' order dated 14 October 2021). Pursuant to paragraphs 3 and 4 of its response, the respondent averred that the claimant's claim was presented outside the statutory time limit.

18. On 30 December 2021 the respondent's representative applied to strike out the claimant's claim for the reasons stated in its response and for the final hearing that was due to commence today to be converted to a Preliminary Hearing to consider the application. On 21 January 2021 Employment Judge Burns converted today's final hearing to a Preliminary Hearing to determine whether the claimant presented his claim outside the statutory time limit.

Claimant's submissions

19. The claimant lodged his claim with the Tribunal on 17 June 2020, which he stated was due to suffering with COVID-19 and then he had long COVID-19 symptoms. He referred to receiving news of his grandmother's death shortly after receiving the ACAS Early Conciliation Certificate, preparations he had to undertake for her funeral, and members of his family contracting COVID-19 and the need for him to provide care and support to them.
20. In relation to the respondent's representative's submission that there were short periods of time where he could have brought his claim during the limitation period, he said it would be difficult to understand his position without having experienced his personal circumstances. He pointed out that he had dyslexia.
21. He submitted that he was not able to complete his claim until 17 June 2020 and even then it was not as thorough as he wanted it to be.
22. The claimant resisted the respondent's application for strike out and he sought to challenge the circumstances of his dismissal both on procedural and substantive grounds.

Respondent's submissions

23. The respondent submitted that the Tribunal should dismiss the claim as it was presented out of time, and it was reasonably practicable for the claimant to bring his claim in time. The respondent said that while the Tribunal would

have sympathy with the claimant's circumstances, there was no medical evidence provided to the Tribunal in the form of fit notes or even prescriptions. The respondent invited the Tribunal to take into consideration the lockdown period and that that COVID-19 was a relatively new disease. The respondent's representative stated that the claimant was not working during lockdown and that he would have had an opportunity in the months of March and April 2020 to complete and submit his ET1 Form.

24. The respondent's representative contended that the details of the ET1 Form were brief, and it would have taken the claimant between 1 and 2 hours to complete, which the claimant could have found time to do during the limitation period. He mentioned he had dyslexia today during submissions for the first time, he did not state what support he sought in respect of this, and he would have been able to complete his ET1 Form in time had he sought or obtained support. He confirmed during cross examination that he did not feel he had to ask a solicitor for support to complete his claim.
25. Additionally it was observed that the claimant's case was not that he was unaware of the deadline for submitting a claim but that he was too unwell to complete the claim form during the limitation period.
26. The respondent's representative stated that the claimant was undertaking household chores until 12 May 2020 during much of the time and he did not make an application for Universal Credit until April 2020. Taking ACAS Early Conciliation into account the primary limitation period expired on 12 May 2020. As he was not searching for work during this period, which gave the impression that he had time to submit the claim during the primary limitation period.
27. The respondent applied for the claimant's claim to be struck out both on the basis that the unfair dismissal claim was presented outside the statutory time limit and that any additional period of time taken to bring the claimant's claim was not within a reasonable time period.

28. The respondent submits that this test under the Employment Rights Act 1996 is stricter than the “just and equitable” test under the Equality Act 2010. The respondent says that the Claimant has failed to provide any explanation for the late presentation of his claim, and he was clearly capable of engaging with ACAS during this time period which suggests he would have been capable to bringing the claim in time.

Observations

29. On the documents and oral evidence presented the Tribunal makes the following essential observations on the evidence restricted to those necessary to determine the list of issues –
30. The claimant was clearly affected by the events leading up to his termination and thereafter, he found it difficult to obtain advice and assistance in January 2020 due to the expiry of his union membership, but notwithstanding this there was no evidence that the claimant had made any further attempts to obtain advice or information in relation to making a Tribunal claim. He was told by his union representative of the ACAS Early Conciliation requirements.
31. The claimant had completed ACAS Early Conciliation promptly. He presented his claim form on 17 June 2020, which was relatively brief. The claimant did not take any further steps to progress his claim from the date of issue of his ACAS Certificate on 13 February 2020 until 17 June 2020.
32. The claimant did not provide specific dates and details in his witness statement in relation to his illness or relating to his family members. Upon making enquiries with the claimant, he was able to provide approximate dates and timeframes only. It was difficult to decipher some significant gaps in the chronology of events such as what happened between 10 March and 20 March 2020 and mid/end of May 2020 until 17 June 2020. There was some confusion in terms of the claimant saying in his witness statement that his wife contracted COVID-19 three days after his daughter and in his oral

evidence advising that she was not able to recover until end of April to early May 2020. There was also a lack of medical evidence in relation to the claimant's ability to complete his claim form within the primary time limit.

Relevant law

33. To those facts, the Tribunal applied the law –
34. Section 94 of the Employment Rights Act 1996 (ERA) provides that an employee has the right not to be unfairly dismissed by his employer.
35. Section 111 (1) of the ERA sets out that a claim may be made to a Tribunal against an employer by any individual that he was unfairly dismissed by his employer.
36. Section 111 (2) of the ERA provides that “*an employment tribunal shall not consider a complaint under the 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”.
37. Section 97 (1) (b) identifies the “effective date of termination” in relation to an employee whose contract of employment is terminated without notice, as meaning the date on which the termination takes effect.
38. The burden rests on the claimant to persuade a Tribunal that it was 'not reasonably practicable' to bring a claim in time (*Porter v Bandridge Ltd [1978] ICR 943, CA* at 948).
39. The Tribunal will often focus on the 'practical' hurdles faced by the claimant, rather than any subjective difficulties such as a lack of knowledge of the law

or an ongoing relationship with the employer. In the case of *Dedman v British Building and Engineering Appliances* [1973] IRLR 379, per Scarman LJ who held that practicability does not always mean "knowledge". Where a claimant states a lack of knowledge as to the time limits, Scarman LJ found that the Tribunal should ask ([1974] ICR at 64): "*What were his opportunities for finding out that he had rights? Did he take them? If not, why not? Was he misled or deceived? Should there prove to be an acceptable explanation of his continuing ignorance of the existence of his rights, it would be inappropriate to disregard it, relying on the maxim 'ignorance of the law is no excuse'. The word 'practicable' is there to moderate the severity of the maxim and to require an examination of the circumstances of his ignorance'.*"

40. The respondent's representative relied on the following cases in addition to those, which the Tribunal found to be informative:

39.1 In *Lowri Beck Services Ltd v Brophy* [2019] EWCA Civ 2490, Underhill LJ noted at paragraph 11 that "The conditions for an extension are twofold: (a) that it was not reasonably practicable for the complaint to be presented in time; and (b) that it was presented within such further period as the tribunal considers reasonable." His Lordship set out the essential points of the test of "reasonable practicability" at paragraph 12:

- 1) The test should be given a liberal interpretation in favour of the employee;
- 2) The statutory language does not refer only to physical impracticability and might be paraphrased as whether it was "reasonably feasible" for the claimant to present their claim in time;
- 3) If an employee misses the time limit because of ignorance about a time limit, the question is whether that ignorance or mistake is reasonable. If it is, then it will have been reasonably practicable for them to bring the claim in time ... but when assessing whether ignorance or mistake are reasonable it is necessary to take into account any enquiries which the claimant or their adviser should have made;
- 4) Any unreasonable ignorance or mistake on the part of a skilled adviser

is attributed to the employee;

5) The test of reasonable practicability is one of fact and not of law.

39.2 As regards the second part of the test, the correct test is not whether the claim was brought as soon as was reasonably practicable after the expiry of the time limit, but whether it was brought in a reasonable time after the time limit expired (*University Hospitals Bristol NHS Foundation Trust v Williams*, UKEAT/0291/12/JOJ at paragraphs 6 and 7).

Discussion and decision

41. On the basis of the findings made the Tribunal disposes of the issues identified at the outset of the hearing as follows –
42. The Tribunal finds that the claim for unfair dismissal was not presented within the relevant time limit under s 111(2) of the ERA. The claimant's employment terminated on 12 January 2020. The primary time limit for lodging his claim expired on 11 April 2020. The claimant contacted ACAS to commence Early Conciliation within the primary time limit; the case was in Conciliation for 31 days from 13 January 2020 until 13 February 2020 and so the primary time limit was extended until 12 May 2020 (pursuant to section 207B(3) of the ERA 1996. The Tribunal claim was lodged on 17 June 2020, which was 36 days after the expiry of the primary time limit.
43. The Tribunal considered whether it would exercise its discretion under s111(2)(b) ERA to hear the claim out of time. For the reasons set out below, the Tribunal considered that it would not do so. I took into account that the burden of proof in terms of s 111(2)(b) of the ERA is on the claimant and that the statutory time limits in unfair dismissal claims are applied strictly.
44. The Tribunal considered that it was reasonably practicable for the claim to have been presented in time. Whilst the Tribunal has the utmost sympathy with the position in which the claimant found himself with having little knowledge of his legal rights and obtaining advice and assistance from a third party (in relation to ACAS from his trade union representative in

January 2020), it was clear that the claimant was able to contact ACAS to seek advice and he promptly engaged with the Early Conciliation process so he could equally have engaged with the process for lodging his Claim Form within the primary time limit and providing the prescribed information including the ACAS Early Conciliation number.

45. Further the claimant was aware he needed to start his claim and to quote his ACAS Early Conciliation number when he received the ACAS Early Conciliation Certificate. He did not take legal advice or conduct online research for example from the Citizens' Advice Bureau website in order to discover that there was a short time limit for lodging the claim in the Tribunal. He confirmed that he did not require support from a solicitor to complete his ET1 Form. The claimant ought reasonably to have taken steps to find out the limitation period during the primary time limit (which, in any event, does not normally provide a valid excuse for lodging a claim late).
46. The claimant took no steps to progress his claim between 10 March and 20 March 2020 and mid/end of May 2020. This is a rather lengthy period during which no steps appear to have been taken. Additionally, no steps were taken by the claimant to progress his claim between 12 May 2020 and 16 June 2020. There was no evidence that the claimant sought alternative advice and assistance other than limited advice from a union representative in January 2020. It is for the claimant to seek advice or information about his right to claim unfair dismissal before the Tribunal. Furthermore, the claimant had access to ACAS's telephone advice service and website.
47. The claimant outlined a number of personal circumstances including contracting COVID-19 in February 2020, his grandmother sadly passing away and the funeral arrangement for the funeral which took place on 9 March 2020, his daughter, his son, and his wife contracting COVID-19 thereafter (the claimant was required to support his family and to carry out household chores). This was undoubtedly a difficult time for the claimant.

48. There was no medical evidence before the Tribunal to confirm that the claimant was not capable of presenting his Tribunal claim within the primary limitation period, which expired on 12 May 2020 or that the claimant was not capable of presenting his claim until 17 June 2020. The claimant was able to submit his ACAS Early Conciliation request in January 2020 and to engage with ACAS thereafter.
49. The claimant's claim was relatively brief. The claimant acknowledged that he did not require support from a Solicitor to complete his claim.
50. The claimant stated in his submissions that he suffers from dyslexia. It was not clear what impact this had on the claimant in terms of his ability to submit his claim within the primary limitation period or thereafter. There was no medical evidence before the Tribunal in relation to the claimant's dyslexia and its impact on him.
51. Notwithstanding this the claimant's claim was submitted on 17 June 2020.
52. For these reasons, the Tribunal considered that it was reasonably practicable for the Claimant to have lodged his claim in time.
53. Even if the Tribunal found that it was not reasonably practicable for the claimant to have lodged his claim within the primary time limit, the Tribunal would have decided that the further 36 days that the claimant delayed in terms of lodging his claim was not reasonable in all the circumstances.
54. In these circumstances, the claim for unfair dismissal being lodged out of time and the Tribunal not being willing to exercise its discretion to hear the claimant's claim out of time, the Tribunal does not have the jurisdiction to hear the claimant's claim dated 17 June 2020.
55. As the Tribunal has no jurisdiction to hear the claimant's claim, it is not necessary to make any consequential directions.

Conclusion

56. The claimant's claim for unfair dismissal is dismissed for the reasons set out above.

Employment Judge Beyzade

Dated: 18 April 2022

Sent to the parties on:

.19/04/2022.

For the Tribunal Office