



EMPLOYMENT TRIBUNALS

Claimant: Ms S Parkinson

Respondent: Carl Brownless

Heard at: Liverpool (by video hearing)

On: 9 March 2022

Before: Employment Judge Aspinall (sitting alone)

REPRESENTATION:

Claimant: In Person

Respondent: Ms Burke, Friend

REASONS

JUDGMENT having been given orally on 9 March 2022 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

1. By a claim form dated 26 April 2021 the claimant brought complaints of unfair dismissal, outstanding holiday pay and a claim for unpaid wages.
2. The respondent defended the claim and argued that the Tribunal did not have jurisdiction to hear it as it was brought out of time. The matter came to a preliminary hearing to determine the out of time point.
3. The claimant was a litigant in person. The respondent was also a litigant in person but he appeared with support from his friend and accountant to his business Ms Burke. Before we began I checked that everyone understood the time point, and that I was not here to decide the case overall. I used checking back questions to ensure that the claimant understood the potential consequences of today's decision. The claimant understood that the hearing might be the end of her case or that the case might be allowed to proceed and that there would then be another hearing to decide whether or

not she was unfairly dismissed and owed any money. Today was only about whether or not the claim was brought in time.

4. Each party had produced a different bundle of documents but that was not an issue as the documents related largely to the substantive issues in the case and not the preliminary out of time point. I saw electronic bundles of 31 pages and 148 pages. We agreed to be very practical and look at the documents but use them only to help me decide the time point.

5. The claimant had not prepared a written witness statement despite clear case management orders and despite this hearing having been adjourned last summer by the Regional Employment Judge because it was not ready. We discussed the options, adjourn to give time for a statement to be prepared, proceed by way of oral evidence given today with support from me and answer questions from respondent. Everyone wanted to proceed today. I decided it would not be in the interests of justice to adjourn as the likely outcome would be that the claimant would again attend next time unprepared. What she needed was assistance today in presenting her arguments. I had regard to the provisions of the Equal Treatment Bench Book and its guidance on supporting litigants in person. The respondent had no objection to me assisting the claimant to give oral evidence by asking questions of her about why she had not brought her claim in time and what had been happening to her at the relevant time to get in the way of her bringing her claim.

6. The respondent had included in its bundle witness statements from Mr Brownless, Ms Burke and Mr Rogan relevant to the substantive issues.

7. I took evidence in chief from the claimant and heard her responses to cross examination. I found the claimant to be an unreliable witness because she contradicted herself in responses to questions in cross-examination from what she had told me in evidence in chief. For example, she had told the Tribunal she had no phone and no email or internet access in October November and December 2020. The respondent took her to correspondence in the bundle and she reluctantly agreed in cross examination that she had given the respondent two email addresses and it had corresponded with her on them at the relevant times. She also accepted that she had provided the respondent with a third email address which she used in the name of her daughter. She accepted that she had seen social media posts for the respondent in October and November 2020. I saw documentation that showed that the claimant had emailed the respondent on 15 and 16 October 2020 to ask it to remove her phone number from the business marketing materials because she was getting calls. I found the documentary evidence from the time more reliable than the claimant's recollection.

8. The claimant had health problems and had had a difficult time financially but I found her to be a witness who overstated the impact of those health and financial problems *on her ability to pursue her claim*. There was no medical evidence in support of the impact she said her health problems had had on her ability to bring a claim. I accepted her oral evidence, having no reason to disbelieve her, that she had had mental health problems; a suicide attempt in summer 2020 and again in January 2021, that she took anti-depressant medication and that she had a broken leg requiring hospitalisation for six days in early February 2021.

9. I heard submissions from the respondent and the claimant.

The relevant law

10. The relevant law is contained in Section 111 Employment Rights Act 1996. It sets out the time limit for complaints of unfair dismissal. For the unauthorised deduction from wages complaint the law is set out in Section 23(2) and (4) of the Employment Rights Act 1996 and for the holiday pay complaint it is set out in the Working Time Regulations Annual Leave Regulation 30(2) (a) and (b). It is the same time limit as in Section 111 mirrored for deductions and holiday pay claims.

11. Section 111 says:

111 Complaints to [employment tribunal]

(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

8. This means, that we identify the date of dismissal (or last deduction, or breach of Working Time Regulations), count forward three months and back one day to get the date in section 2(a) but then we must add on any days that the claimant spent in ACAS early conciliation. That gives us the deadline for bringing the claim. If the claim is not brought by that date then we go on to look at section 2(b) and ask was it reasonably practicable for the claim to have been brought by the date in 2(a) and if it was then the claim is out of time and ends there as the Tribunal has no jurisdiction (authority) to hear the case. If it was *not* reasonably practicable the Tribunal goes on to see if the claim was brought within a reasonable period thereafter.

9. This is known as the “not reasonably practicable” test. It is for the claimant to show precisely why it was that the complaint was not presented in time Porter v Bandridge Ltd [1978] ICR 943 CA. The tribunal must look at what happened and decide what the facts were using practical common sense Walls Meat Co Ltd v Khan 1979 ICR 52 CA. The tribunal must give the words in section 111 “a liberal construction” when applying the law to the facts.

9. There is then the second stage of such further time as was reasonable to consider. Again, it will depend on the facts in the case.

10. There are examples in case law of reasons given as to why a claim was not presented in time. They might include things such as ignorance of rights, claimant's illness or disability and technical problems.

12. If the reason relates to illness then it will usually only succeed if it is supported by medical evidence and the claimant can show that it was the illness that prevented the claimant from submitting the claim on time.

13. The test is about practicability, what could and could not be done on the facts in the particular case.

The facts

14. The claimant worked for the respondent at his business The Saddle Chip Shop from 11 September 2017. Issues arose around (i) whether or not an employee was having an affair and the claimant and her daughter's knowledge of that and actions in relation to it and (ii) some rotten chips having been served to a customer who had posted a picture of them on social media. The claimant had phoned in sick on 25 June 2020. A letter was delivered to her home that evening dated 19 June 2020 about her conduct in the workplace and in relation to food standards. The letter imposed a disciplinary warning. It put her on furlough.

15. The claimant was unwell due to stress and depression brought on by financial hardship. She was taking anti-depressant medication. She had no pay and was at risk of losing her home. The claimant made a suicide attempt in summer 2020 and following this was appointed a social worker to help her. Their difficulty was that her claims for benefits could not be processed as the HMRC records showed her as on furlough and in receipt of furlough pay.

16. The claimant contacted ACAS on 3 September 2020 and achieved her ACAS Certificate on 3 October 2020. On 15 and 16 October 2020 the claimant was messaging the respondent asking it to take her name and number off its marketing materials.

17. Her employment came to an end on 20 October 2020 when she received a letter terminating her employment for gross misconduct with immediate effect. The letter acknowledged payment due to her of £ 3486.25

18. The claimant rejected an offer sent in an open letter to her by the respondent of furlough pay of £3486.25 in October 2020 and signed for a delivery of a cheque sent to her for that amount though did not present it. She did this during her limitation period and because she had worked out that she was owed nearer £ 8000 in pay. She contacted ACAS and there were discussions in late October and early November between the claimant and respondent through ACAS about the amounts the claimant says she was due.

19. The claimant worked with support from a social worker to make an application for universal credit and to contact her local MP Mr Benton to get his support. The claimant

was able with the social worker's support to contact the council and to obtain food parcels from the council. Mr Benton helped to expedite payment of an emergency payment to her. With assistance from her social worker she was able to manage the administration of her utility bill payments and contact the provider and cut her Sky TV package in November and December 2020. The claimant had support from her daughter. She had her own mobile phone and email access and she had the use of her daughter's phone and email. Her daughter was able to manage internet use and email for her on the phone. The claimant suffered financial hardship and was feeling isolated and stressed during late December and early January 2021.

20. In January 2021 the claimant made another suicide attempt. She was hospitalised for a short time then back at home. She had support from her social worker and her family and friends. In early February 2021 the claimant broke her leg and was in hospital for six days. She was then home and again supported by her daughter and social worker. From mid February to 26 April 2021 the claimant was feeling better.

Applying the law

21. The claimant's deadline for bringing her claims was 19 January 2021. That is three months less one day from the date of her dismissal and the date on which the last of her deductions was made and the date on which her outstanding holiday pay was due to her. I did not need to add on ACAS time as the claimant had been to ACAS before her dismissal. She brought her claim on 26 April 2021 over three months out of time.

22. Applying the not reasonably practicable test I find that it was reasonably practicable for the claimant to have brought her claim in time overall. She could have done it before Christmas with support from her social worker and daughter. She had internet access through her daughter's phone and had been able to manage her other affairs, cancelling Sky subscriptions, achieving universal credit payments and getting support from her MP to get food parcels from the Council. This was understandably a difficult time for her as she faced financial hardship but she was able, in late October 2020, to form a view about not cashing the cheque that was sent to her. The reason she did not accept that cheque is because she thought her claim was worth more money. She was talking to ACAS and seeking to get a negotiated settlement for a higher amount. That showed me that she was capable of forming a view about her case and its value. Although this must have been a very difficult time for her she was not so unwell at that time that her ill health was preventing her from bringing a claim.

23. In January, in the weeks leading up to her deadline of 19 January 2021 she had attempted to take her own life. There was no medical evidence to support the claimant's argument that she had been hospitalised following a suicide attempt nor that she was too unwell to think about a tribunal claim in January. The only evidence of the claimant having mental health problems was oral evidence in response to questions from me about her wellbeing and about medication. I accept her oral evidence about her suicide attempt in January. I was sorry to hear about it. I accept that she very unwell in the last 19 days of her time limit period in January. Those last 19 days were important because the clock was counting down on her deadline but the law requires me to look at the period overall. Overall, from 20 October 2020 to 19 January 2020 for most of that period

it was reasonably practicable for her to have brought her claim in time. I decide the Tribunal has no jurisdiction to hear her complaint as it was reasonably practicable for her to have brought it in time.

24. If I had decided that it was not reasonably practicable then I would have gone on to look at whether or not the claimant brought her claim in such further period as was reasonable. I would have found that she did not. The claimant delayed until 26 April to bring her claim. The claimant was hospitalised for 6 days in February 2021 but after coming out of hospital in February she again had support from her daughter and social worker and told me that her mental health was improving at that time. I asked her why she did not bring the claim in late February or March or at any time before 26 April and the claimant was unable to say why, other than that she had just not got round to it. The claimant did not bring her claim in such further period as was reasonable after 19 January.

25. The complaints not having been brought in time, and there being no grounds on which to extend time, the claimant's claim is dismissed.

26. Following my decision Ms Burke for the respondent indicated its willingness to resend the cheque it had offered to the claimant in October 2020 for £ 3486.25 being its calculation of monies due to the claimant up to the termination date. I made no determination on this point, having no jurisdiction to do so, but assisted the parties to exchange bank details so that a payment could be made.

Employment Judge Aspinall
DATE: 13 April 2022

JUDGMENT SENT TO THE PARTIES ON
26 April 2022

FOR THE TRIBUNAL OFFICE

Note

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

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