



THE EMPLOYMENT TRIBUNALS

Claimant: Mr S Mitchison
Respondent: McDonald's Restaurants Ltd

Heard at: Newcastle Hearing Centre (by CVP) **On:** 8 April 2022

Before: Employment Judge Morris (sitting alone)

Representation:

Claimant: In person
Respondent: Mr S Proffitt of counsel

REASONS

The hearing, representation and evidence

1. This was a remote hearing, which had not been objected to by the parties. It was conducted by way of the Cloud Video Platform as it was not practicable to convene a face-to-face hearing, no one had requested such a hearing and all the issues could be dealt with by video conference.
2. The claimant appeared in person and gave evidence. The respondent was represented by Mr S Proffitt, of Counsel.
3. The evidence in chief of the claimant was given in a short written witness statement contained in an email to the respondent's solicitors dated 25 March 2022. The Tribunal also had before it a bundle of agreed documents comprising some 87 pages. The numbers shown in parenthesis below refer to the page numbers in the bundle.

The claimant's complaints

4. In a letter from the Employment Tribunal to the parties dated 16 March 2022, the claimant's complaints were identified as follows:

“(i) *wrongful dismissal (a claim for notice pay), and*

- (ii) *a complaint under section 11 Employment Relations Act 1999 that the Respondent failed to comply with section 10(2A) of that Act (the right to be accompanied at a disciplinary hearing by a companion within the meaning of section 10(3)(c) of the Act)."*

The issues

5. That letter from the Tribunal also identified the issues to be dealt with at today's Preliminary Hearing as being as follows:

"(1) whether the complaints of wrongful dismissal and the failure to allow the Claimant to be accompanied in contravention of section 10(2A) EReIA 1999 were brought within the periods set out in article 7 of the ETs Extension of Jurisdiction Order 1994 and section 11(2) EReIA respectively, namely:

- (a) *whether it was reasonably practicable to present the complaints within three months of the effective date of termination (subject to the application of EC time limit extensions) and if not,*
(b) *whether the complaints were brought within such further period as the tribunal considers reasonable?*

(2) whether the complaint of contravention of section 10(2A) Employment Relations Act 1999 should be struck out under rule 37 of the ET Rules of Procedure 2013 on the grounds that it has no reasonable prospects of success (based on the Respondent's contention that the Claimant's chosen companion at the disciplinary hearing was not a worker of the Respondent and therefore not a person within the meaning of section 10(3) Employment Relations Act 1999);

Alternatively,

(3) whether the Claimant's contention that his chosen companion was a worker of the Respondent within the meaning of section 10(3)(c) stands little reasonable prospect of success and if so whether it is appropriate to order the Claimant to pay a deposit under rule 39 ET Rules 2013."

6. At the commencement of the Preliminary Hearing the parties agreed that the issue set out at paragraph (1) above should be considered first as, if it were to be determined that the claimant had not presented his complaints in time, that could save time and expense in dealing with the remaining two issues, which would accord with the Overriding Objective.
7. As my decision was that neither of the complaints was presented in time, it follows that the remainder of these Reasons addresses only the first of the above issues and neither of the other two issues.

The law

8. So far as is relevant to the issues considered at this Preliminary Hearing the principal statutory provisions are as follows:

8.1 Contract claim (wrongful dismissal) – Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994

“7 Time within which proceedings may be brought

Subject to article 8B an employment tribunal shall not entertain a complaint in respect of an employee’s contract claim unless it is presented—

(a) within the period of three months beginning with the effective date of termination of the contract giving rise to the claim, or

.....

(c) where the tribunal is satisfied that it was not reasonably practicable for the complaint to be presented within whichever of those periods is applicable, within such further period as the tribunal considers reasonable.”

8.2 Right to be accompanied – Employment Relations Act 1999

“11 Complaint to employment tribunal.

(1) A worker may present a complaint to an employment tribunal that his employer has failed, or threatened to fail, to comply with section 10(2A), (2B) or (4).

(2) A tribunal shall not consider a complaint under this section in relation to a failure or threat unless the complaint is presented—

(a) before the end of the period of three months beginning with the date of the failure or threat, 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.”

The claimant’s evidence and finding of fact

9. Having taken into consideration all the relevant evidence before the Tribunal (documentary and oral), the submissions made by or on behalf of the parties at the Preliminary Hearing and the relevant statutory and case law (notwithstanding the fact that, in pursuit of some conciseness, every aspect might not be specifically mentioned below), I record the following facts either as agreed between the parties or found by me on the balance of probabilities.

9.1 The claimant’s employment by the respondent was terminated on 11 August 2021. The date of receipt by ACAS of the Early Conciliation notification was 19 October 2021 and the Early Conciliation Certificate (1) was issued on 29 November 2021. Thus the last date for the claimant to

have presented his claim form (ET1) to the Employment Tribunal so as to comply with the primary time limit in respect of each claim was 29 December 2021. The claim form was not presented until 28 January 2022 (2).

- 9.2 The claimant submitted an appeal against his dismissal by email dated 25 August 2021 (43). In that email he referred to his “statutory right to accompaniment to a disciplinary hearing” and the “legal definition of a worker” in both cases referring to the relevant sections of the Employment Relations Act 1999. The claimant continued that he had been in contact with ACAS and was hoping to reach agreement “without the need for an employment tribunal”.
- 9.3 The claimant’s appeal was heard on 24 September 2021 at which he was accompanied by a full-time employee of the Bakers and Food Workers Union. The outcome was that the original decision to terminate the claimant’s employment was upheld (47).
- 9.4 In the grounds of complaint attached to the claimant’s claim form (16) the claimant stated as follows:

“I have been working on my case (researching the legal issues) on the understanding that I had, including the conciliation period, 4 months and 11 days from 20 September to make a claim. Given this date marked McDonald’s Restaurants Ltd.’s final decision on the problem at hand, I believed I had until 31 January 2022 to submit my claim.

*Having come to submit this claim, following extensive research for my case into the legal issues around employment status and contract law, I have only now become aware that the 3-month time limit is applied from the date employment ended and **not** from the date of final appeal. Applied in my case, this would mean my claim falls outside the 3-month time limit, given my employment ended on 11 August.*

Regrettably, this means I am submitting my claim late. Therefore, I humbly ask the tribunal to hear my claim, in light of the exceptional circumstances that I genuinely and honestly misunderstood when the 3-month time limit period for bringing a tribunal case against an employer began? I mistakenly understood it to be three months from when an employee’s official dealings with them ended, including the period of appeal (entered into in good faith) and up until a final decision from the employer 20 September.”

- 9.5 When giving evidence at this Preliminary Hearing the claimant explained that he had realised his error on the day or the day before he came to submit his claim form. When he realised that his claim form would be submitted late he asked the Tribunal to hear the claims on the ground that it would be just and equitable to do so. He also thought that the respondent would be okay with this and recognise that he had made a simple mistake.

- 9.6 In his witness statement the claimant explained that it was not reasonably practicable for him to bring his claim by 29 December 2021 “for a combination of two inextricably linked factors”. The first factor was that referred to above that he had misunderstood when the 3-month time limit began. He added, however, a second factor that he suffers with Type I Diabetes and that the stress and anxiety of losing his job (with all the consequences to which that gave rise) had, due to his disability, a direct and significant negative impact on his short-term and potentially long-term health. He stated that one impact of stress on diabetes is difficulty in maintaining and controlling healthy blood sugar levels, which can result in intellectual confusion and difficulty dealing with day-to-day tasks. He maintained that on account of his disability it was not reasonably practicable for him to have brought his claim any sooner than he did. He had then presented his claim within a reasonable further period of less than one month.
- 9.7 In cross examination, having been referred to his email of 25 August 2021 in which he appealed against his dismissal (43), the claimant confirmed that within a couple of weeks of his dismissal he was aware of ACAS and the Employment Tribunal, and he explained that he had referred to the correct legislation as a result of having looked into the right to be accompanied on the government legislation website. He stated that he thought that the period of three months ran from the date of his appeal against his dismissal. He worked out that he had three months from the end of September to submit his claim, he thought by 30 January 2022. The claimant explained that he had researched various websites in which it had been stated that the three months ran from the date of the incident or the date of dismissal. He was not clear when the incident had occurred and it was only after the appeal was concluded that he felt he had a clear position from the respondent in relation to the right to be accompanied. He later restated that in conducting his research he had read that the time limit was three months from the date of his dismissal.
- 9.8 The claimant also confirmed in cross examination that he was considering presenting a complaint to the employment tribunal at the time that he contacted ACAS for the purposes of Early Conciliation and could have done so on 29 November 2021 in the sense of having the resources to present the claim but he felt that, due to his medical condition, he lacked the capability to submit the claim in the timeframe in which it was supposed to have been submitted. As he put it, “If I had to submit it by 28/29 December, I would not have been able to do it on account of my health. I just barely managed at the time I did”.
- 9.9 In this connection, the claimant had attached two documents to his witness statement, which also appear in the bundle of documents.
- 9.9.1 The first is headed “Prescription Start Date: 18/01/22 Prescription Expiry Date: 18/07/2022” in which is set out “Patient Medication History”, which the claimant confirmed was diabetes medication (81).

- 9.9.2 The second is a leaflet headed “Stress and Diabetes” (82) in which it is explained, amongst other things, that stress can affect sugar levels and make it harder for insulin to work (known as insulin resistance); if blood sugar levels go too high it’s called going ‘hyper’ (hypoglycaemia); stress can put an individual at higher risk of diabetes complications and affect emotional health.
- 9.10 In this regard the claimant stated that he had submitted evidence to show the effect of his condition and the links between stress and diabetes, and that stress does have a negative effect because insulin becomes less effective. As the claimant accepted in cross examination, however, he had produced no evidence of seeing his doctor in respect of mental health or stress and confirmed that he had not contacted his GP in respect of stress but that did not mean that it was not real.

Submissions

10. After the evidence had been concluded Mr Proffit and the claimant made submissions; Mr Proffit by reference to a written skeleton argument, which addressed the matters in issue in the context of relevant statutory and case law that he cited. It is not necessary for me to set out those submissions in detail here because they are a matter of record and the salient points will be obvious from my findings and conclusions below. Suffice it to say that I fully considered all the submissions made and the parties can be assured that they were all taken into account into coming to my decision.
11. That said, the key points made by Mr Proffit on behalf of the respondent, included as follows:
- 11.1 It can be assumed from the claimant’s references in his appeal email of 25 August 2021 to ACAS and the Tribunal process that he was fixed with the requisite knowledge and resources at that time and, given his references to relevant legislation, he was able to find out the real time limit at that point.
- 11.2 The claim form had been presented 30 days late, which is not a minor default.
- 11.3 Ignorance of time limits can only assist the claimant where that ignorance is reasonable. The question is not what the claimant actually knew but what he ought to have known: Porter v Bandridge Ltd [1978] ICR 943 CA. The claimant was aware of the law. Even if the mistake was genuine it was not reasonable. Three months from dismissal is a basic aspect and is referred to by the claimant; and today he confirmed that he had read that the limit was “three months from dismissal”.
- 11.4 The idea that the claimant’s health impacted has no basis. He has produced no medical evidence and made no reference to it in his claim form where he explained the lateness. The existence of a medical condition is not enough; the claimant must show that the effect of that

condition at the material time made it not reasonably practicable: Chouafi v London United Busways Ltd [2006] EWCA Civ 689. Additionally, the explanations are contradictory. The explanation that he mistook the calculation of the time limit is wholly different to saying that he knew the limit but his health was too bad. Once he realised his mistake he submitted his claim so it can be assumed that he could have submitted it at any time. It is for the claimant to establish that his health impeded the presentation of his claim, which he has not done. He may have been stressed but the threshold is reasonable practicability and the claimant does not get there.

- 11.5 The trigger for the claim was not the claimant's health being impeded but he realised that he had made a mistake, which it was not reasonable for him to make so it was reasonably practicable for the claim to have been presented in time.
12. The key points made by the claimant included as follows:
 - 12.1 It was not reasonably practicable to present the claims in time for two inextricably linked reasons: first, I misunderstood the timeframe; secondly, there were the negative effects of losing my job and having to move house all of which was very, very stressful and I could feel the effects on my health. To my mind the submission was on time but when I was about to do so I realise that it was late and asked the Tribunal to hear it.
 - 12.2 When I realised that it should have been 29 December, I thought there was absolutely no way I could have done that due to 'hypers' occurring much more frequently than in the past.
 - 12.3 The respondent was adamant it was in the right and I had a lot of work to do despite lacking the capability. This had been thrown back by the respondent that had suggested that because I had the ability to do some things I should have had the ability to do all. No regard had been shown for people with chronic illness. I feel it is just so callous.

Application of the facts and the law to determine the issues

13. The above are the salient facts relevant to and upon which I based my judgment having considered those facts and submissions in the light of the relevant law and the case precedents in this area of law.
14. The claimant has brought the two claims referred to above of wrongful dismissal (i.e. notice pay) and that the respondent having failed to comply with its duty to permit the claimant to be accompanied at a disciplinary hearing.
15. The statutory time limits for presenting each of those claims are set out above. In essence, each requires that they should be presented to the Tribunal within a primary time limit of three months from, respectively,
 - 15.1 the effective date of termination of the contract giving rise to the claim,

- 15.2 the date of the failure to allow the employee to be accompanied.
16. Although the wording of the statutory approaches to the calculation of the time periods is slightly different, in this case the commencement date of the primary time limit in respect of both claims is 11 August 2021 as that was the date of the dismissal (the termination of the contract) and the date of the disciplinary hearing at which the claimant asserts the respondent failed to allow him to be accompanied.
17. In the grounds of complaint attached to the claimant's claim form he accepted that his claim "falls outside the 3-month time limit" and that he was "submitting my claim late".
18. There is, however, what might be called a 'loophole' or 'escape clause' in that, in respect of both the claimant's claims a Tribunal can extend time if,
- 18.1 it was not reasonably practicable for the complaint to be presented in time, and
- 18.2 it was then presented within a reasonable period thereafter.
19. In the final three paragraphs of the grounds of complaint (which are set out above) the claimant explained at some length why he was submitting his claim late. In that explanation the focus of the claimant was upon only one explanation of, "the exceptional circumstances that I genuinely and honestly misunderstood when the 3-month time limit period for bringing a tribunal case against an employer began"; by which he meant the outcome of his appeal on 30 September 2021.
20. In his evidence before this Tribunal, however, the claimant has added another factor, which he says is inextricably linked to the above factor of misunderstanding the commencement of the time period. His evidence is that that additional factor is that he suffers from Type I Diabetes and that the stress and anxiety he suffered as a result of wrongfully losing his job had a direct and significant negative impact on his health including intellectual confusion and difficulties dealing with day-to-day matters.
21. In the interests of clarity I will address these two factors in turn although acknowledging the important point made by the claimant that they are inextricably linked.

Misunderstanding the time limit

22. It is clear from the claimant's appeal email of 25 August 2021 that he had by then undertaken research of relevant legal issues, had been in contact with ACAS and was aware of the prospect of pursuing his claims in the employment tribunal. In this regard I also note that at least by the time of his appeal hearing on 24 September 2021 the claimant had the support of a full-time employee of the Bakers and Food Workers Union.

23. Against that background the claimant then approached ACAS for the purposes of Early Conciliation on 19 October 2021 and the Certificate was issued on 29 November 2021. He confirmed in cross examination that when he contacted ACAS he was considering making a complaint. On the basis of the evidence before me, I am satisfied that at that point (29 November 2021) the claimant could have submitted his claim. Indeed, had he submitted his claim up to one month thereafter it would have been in time.
24. In cross examination the claimant accepted that he had the resources to do that but he introduced the second factor of his lacking the capability to do so. In answer to a subsequent question the claimant volunteered that in the course of his researches he had identified that the three-month period commenced either with the date of the incident or, crucially, the date of the dismissal; and later confirmed that he had read that the time limit was three months from the date of his dismissal.
25. That notwithstanding, in essence, the claimant explained that he misunderstood and thought that he had three months from the appeal outcome in which to present his claim to the Tribunal. In Palmer and Saunders v Southend-on-Sea Borough Council [1984] ICR 372 CA the Court of Appeal said that the existence of an internal appeal cannot itself justify extending the time limit although in John Lewis Partnership v Charman EAT 0079/11 the Employment Appeal Tribunal upheld a decision that it was not reasonably practicable for a claimant to present his unfair dismissal claim because he was awaiting the outcome of an internal appeal. In that case, however, it was considered that the claimant was reasonably ignorant of the existence of the time of limit whereas on the evidence before me I am not satisfied that in this case it can be said that this claimant was reasonably ignorant of the existence of a time limit: see Porter.

The impact of stress

26. A significant difficulty for the claimant in regard to this factor is that, as set out above, in his grounds of complaint he made no mention of his health whatsoever but referred solely to his mistaken understanding of the calculation of the time periods. Given that the claimant explained in some detail in the three paragraphs of his grounds of complaint that are set out above the factor of his misunderstanding when the time limit began I am not satisfied that if, as he now says, the stress and anxiety he experienced negatively impacted on his health, including intellectual confusion and difficulties dealing with day-to-day matters, he would not have made at least some mention of that factor.
27. As the claimant clearly recognised that he was submitting his claim late and, that being so, humbly asked the Tribunal to hear his claim it is a reasonable assumption that he would have deployed all the arguments available to him to persuade the Tribunal to do so, including the impact of stress on his health. Instead, he referred only to, “the exceptional circumstances that I genuinely and honestly misunderstood when the 3-month time limit period for bringing a tribunal case against an employer began”, without making even the briefest mention of his health. In this respect I did not find satisfactory the claimant’s answer in cross examination that he did not raise this second factor at the time he presented his

claim because, “medical information is private and personal and should not have to be submitted. I do not like to use it to garner sympathy.”

28. An additional factor in this regard is that although the claimant now states that the stress and anxiety he experienced negatively impacted on his health including as set out above, it seems to be the case that he had no such difficulties when he was engaging in the internal appeal process or with ACAS at the very time when he might have been presenting his claim.
29. A further difficulty for the claimant in this regard is that while he has produced evidence of the medication that he takes in relation to diabetes and the general (and as far as I can identify, unattributed) leaflet referred to above headed “Stress and Diabetes”, he has presented no personal evidence in the form, for example, of medical records or a letter or statement from his doctor to the effect that he had approached his doctor or other relevant professional (as he put it in submissions) when he realised that the due date for presenting his claim was 29 December 21 he thought to himself there was absolutely no way he could have done that due to his having ‘hypers’ much more frequently than in the past. In fact, the claimant has produced no personal evidence at all regarding having suffered stress or anxiety or the impact of that on his diabetes including his mental health, intellectual confusion and difficulties dealing with day-to-day matters. Indeed, he stated in cross examination that he had not contacted his GP about these issues.
30. For the above reasons, the claimant has failed to satisfy me that his medical condition made it not reasonably practicable for him to submit his claims in time, whether taken in isolation or considered as an explanation for his misunderstanding of the commencement of the three-month time limits.

Conclusion

31. Having considered all of the evidence and submissions before me in the round, and having had regard to what the claimant refers to as the inextricably linked factors of his misunderstanding of the three-month time and the consequences of his diabetes, I am satisfied that it was reasonably practicable for the claimant to have presented his claims in time. That being so, it is unnecessary for me to consider the question of whether the complaints were then brought within such further period as the Tribunal considers reasonable.
32. In short, as the claimant did not present his claims to the Employment Tribunal within the respective primary periods of three months the Tribunal is precluded from considering either of his claims, which are dismissed.

EMPLOYMENT JUDGE MORRIS

**JUDGMENT SIGNED BY EMPLOYMENT JUDGE
ON 25 April 2022**

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