



EMPLOYMENT TRIBUNALS

Claimants: Mr. G. Lala & Ms. K. Koncova

Respondent: Presman & Colard Limited

Heard at: London Central (by CVP)

On: 10 June 2022

Before: Employment Judge J Galbraith-Marten

Appearances

For the claimant: Mr. Bradley, HR Consultant

For the respondent: Mr. Andrews, HR Consultant

RESERVED JUDGMENT

- (a) The Tribunal has no jurisdiction to consider Mr. Lala's complaints as they were presented out of time. His complaints are dismissed.
- (b) Ms. Koncova's marriage discrimination claim is dismissed on withdrawal.
- (c) The Tribunal only has jurisdiction to hear Ms. Koncova's statutory redundancy payment claim. The Tribunal has no jurisdiction to consider her other complaints as they were presented out of time, and they are dismissed.
- (d) The Respondent's responses are rejected having been presented out of time.
- (e) The Tribunal awards Ms. Koncova, **£1,088.00 gross** in respect of her statutory redundancy payment claim.

REASONS

Introduction

1. Mr. Lala brings claims of wrongful dismissal, holiday pay and arrears of pay. Ms. Koncova brings claims of unfair dismissal, wrongful dismissal, holiday pay, arrears of pay, statutory redundancy payment and marriage discrimination. At the commencement of the hearing Mr. Bradley on behalf of Ms. Koncova withdrew her discrimination complaint.
2. Both cases were listed for an open Preliminary Hearing. The issues for the Preliminary Hearing were as follows: -
 - I. Whether any of the claims for either Claimant are brought out of time?
 - II. Whether it was not “reasonably practicable” to present any of the claims in time and if so whether the claims were presented within such a further period as was reasonable?
 - III. Whether an extension should be granted to extend time for presentation of the ET3 responses under rule 20 of the Employment Tribunal (Constitution & Rules of Procedure) Regulations 2013, Schedule 1 (“the Rules”)?
 - IV. Whether the claim of marriage (or more specifically divorce) discrimination brought by Ms. Koncova should be struck out under rule 37 of the Rules on the basis that there is no reasonable prospect of success or alternatively a deposit order made under rule 39 on the basis that there is little reasonable prospect of success?
 - V. Discussion of the issues that must be determined at any final hearing.
 - VI. Whether it is in the interest of justice for the two claims to be heard together, since Ms. Koncova’s claims is likely to be more complex.
3. The parties did not provide a bundle for the Preliminary Hearing. The Claimants each provided a short witness statement with appended documents. The Tribunal heard sworn evidence from Mr. Lala. For the reasons set out below, Ms. Koncova elected to rely on her witness statement.

Findings of fact – Mr. Lala

4. Mr. Lala commenced employment with the Respondent in February 2020, he can’t recall the exact date and does not have a copy of his contract of employment. He was employed by the Respondent as an Operations Manager and his gross salary was £32,000.00 per annum.
5. Without notice, Mr. Lala’s employment was terminated on 31 August 2021. The Respondent invoked no dismissal procedure and Mr. Lala was simply provided with his P45 by his colleague Ms. Koncova on 2 September 2021. He was not paid for the work he carried out in August 2021; he received no notice pay nor payment for his untaken but accrued annual leave upon termination of his employment. The Respondent provides no reason for his dismissal and Mr. Lala is currently unemployed.

6. Mr. Lala in evidence confirmed he was unaware of the time limit in which to submit his claims and he entrusted Mr. Bradley to take care of these matters on his behalf. Mr. Lala first spoke to Mr. Bradley in September 2021 shortly after his employment was terminated.
7. Mr. Lala submitted his claim to the Employment Tribunal on 6 January 2022. He relies on an early conciliation certificate numbered R191363/21/59 and dated 22 November 2021. The conciliation period lasted 4 days.
8. The original time limit to present all of Mr. Lala's complaints would have been 29 November 2021. As he contacted ACAS and received his early conciliation certificate on 22 November 2021, the new deadline to present his claims would have been 22 December 2021. Therefore, his complaints have been presented 15 days out of time.

Findings of Fact – Ms. Koncova

9. It was accepted by the Respondent that Ms. Koncova commenced employment on 1 August 2019. Ms. Koncova asserts that her employment was also terminated on 31 August 2021 although, her P45 records her date of termination as 6 August 2021. The Respondent did not dispute Ms. Koncova's date of termination and accepted she had two years' service at the date of her dismissal.
10. Ms. Koncova was employed by the Respondent as a Lead Consultant on a gross salary of £60,000.00 per annum. She does not have a contract of employment. Again, without process or warning, Ms. Koncova was issued with her P45 by the Respondent on 2 September 2021 when she queried why she had not been paid for August 2021. The Respondent asserts no reason for her dismissal.
11. As Ms. Koncova was on holiday and with a poor internet connection, she elected to rely on the evidence as set out in her witness statement. Therefore, she provided the Tribunal with no evidence in respect of why all but one of her complaints were presented outside the relevant time limits. Notwithstanding that, Mr. Bradley confirmed that he works as an HR Consultant for another of Ms. Koncova's businesses and she instructed him to deal with this matter on her behalf.
12. Ms. Koncova submitted her claim to the Employment Tribunal on 6 January 2022. She relies on an early conciliation certificate numbered R191359/21/95 and dated 22 November 2021. The conciliation period lasted 4 days.
13. The original time limit to present all Ms. Koncova's claims, save for her statutory redundancy payment complaint, would have been 29 November 2021 given she was dismissed on 31 August 2021. As she contacted ACAS and received her early conciliation certificate on 22 November 2021 the new deadlines for all her complaints save for the statutory redundancy payment, would have been 22 December 2021. Therefore, her unfair dismissal, wrongful dismissal, holiday pay and arrears of pay complaints have been presented 15 days out of time.

14. The statutory time limit to present a statutory redundancy payment complaint is 6 months less one day from the relevant date of termination and Ms. Koncova's claim was presented in time.

Findings of Fact - Respondent

15. The Respondent was required to submit its response to the claims by 25 February 2022. The Respondent sought an extension of time to submit its response on the basis that its directors were abroad. The Tribunal granted an extension of time until noon on 28 March 2022. The responses for both claims were received by the Tribunal on 6 April 2022 some 10 days late.
16. The Respondent's representative was unable to provide any further information regarding the delay in submission.

The Law

17. **Section 111 Employment Rights Act 1996** provides: -

(2) 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 the period of three months.

18. **Section 23 Employment Rights Act 1996** provides: -

(2) An [Employment Tribunal] shall not consider a complaint under this section unless it is presented before the end of the period of three months beginning with-

(a) in the case of a complaint relating to a deduction by the employer, the date of payment of the wages from which the deduction was made,

(4) Where the [Employment Tribunal] is satisfied that it was not reasonably practicable for a complaint under this section to be presented before the end of the period of three months, the Tribunal may consider the complaint if it is presented within such further period as the Tribunal considers reasonable.

19. **Section 7 [Employment Tribunals] Extension of Jurisdiction (England & Wales) Order 1994** provides: -

[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.

20. **Regulation 30 Working Time Regulations 1998** provides: -

(2) [An Employment Tribunal] shall not consider a complaint under this regulation unless it is presented-

(a) before the end of the period of three months beginning with the date on which it is alleged that the exercise of the right should have been permitted or as the case may be, the payment should have been made:

(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...

21. **Section 163 Employment Rights Act 1996** provides: -

(1) Any question arising under this Part as to –

(a) The right of an employee to a redundancy payment, or

*(b) The amount of a redundancy payment,
shall be referred to be determined by an [employment tribunal].*

(2) For the purposes of any such reference, an employee who has been dismissed by his employer shall, unless the contrary is proved, be presumed to have been so dismissed by reason of redundancy.

22. **Section 164 Employment Rights Act 1996** provides: -

(1) An employee does not have any right to a redundancy payment unless, before the end of the period of six months beginning with the relevant date –

(c) a question as to the employee's right to, or the amount of, the payment has been referred to an [employment tribunal].

23. The burden of proof for establishing that it was not reasonably practicable to present their claims in time is on the Claimants and it is for them to set out precisely why they did not present their complaints in time as set out in *Porter v Bandridge Limited 1978 ICR 943, CA.*

24. What is reasonably practicable is a question of fact for the Tribunal to determine in accordance with *Wall's Meat Co Ltd v Khan 1979 ICR 52, CA.* Furthermore, reasonably practicable does not mean reasonable or physically possible as the Court of Appeal concluded in *Palmer and anor v Southend-on-Sea Borough Council 1984 ICR 372, CA.*

25. Complete ignorance of his or her right to pursue an Employment Tribunal claim may make it not reasonably practicable to present a claim in time, but the Claimant's ignorance must itself be reasonable. Again, as set out in *Porter v Bandridge Limited 1978 ICR 943, CA,* the correct test is not whether the Claimant knew of his or her rights but whether he or she ought to have known.

26. Even if a Claimant can establish it was not reasonably practicable to present the claim in time, the Tribunal must also determine whether it was submitted within such further period as was reasonable. *In Nolan v Balfour Beatty Engineering Services EAT 0109/11*, the Employment Appeal Tribunal held that when deciding what would have been a reasonable time within which to present a late claim, Tribunals should have regard to all the circumstances of the case including what the Claimant did, what he or she knew, or reasonably ought to have known about time limits and why it was that the further delay occurred.
27. In these circumstances, the Tribunal must also have regard to the Dedman principle as set out by the Court of Appeal in *Dedman v British Building and Engineering Appliances Limited 1974 ICR 53, CA*. Lord Denning stated, “*If a man engages skilled advisers to act for him and they mistake the time limit and present [the claim] too late he is out. His remedy is against them.*”
28. In *Ashcroft v Haberdashers’ Aske Boys’ School 2008 ICR 613, EAT*, the Employment Appeal Tribunal held the Dedman principle that negligence or delay by an adviser in presenting a Tribunal claim is to be ascribed to the Claimant, also applies to employment law consultants.

Submissions

29. The Respondent maintains all the Claimants’ complaints are out of time and as such the Tribunal does not have jurisdiction to consider them and all the complaints should be struck out. The Respondent did not comment on Ms. Koncova’s statutory redundancy payment claim.
30. Mr. Bradley on behalf of the Claimants did not accept the claims had been presented out of time but if the Tribunal finds they have been, he asserted it was not reasonably practicable for the Claimants to present their claims within the relevant statutory time limits as they were engaged in correspondence with the Respondent regarding their situation and that delayed the presentation of their claims. The Tribunal was provided with one letter that was exchanged between the representatives in which the Respondent refuted all the claims made by both Claimants. That letter was dated 1 December 2021.
31. The Respondent offers no explanation in relation to its failure to present its responses in time. Mr. Bradley submitted the Respondent’s delay in responding to correspondence and orders was a theme in these proceedings and he also asserted there may have been a deliberate effort on the part of the Respondent to backdate Ms. Koncova’s P45 dishonestly. However, and as the Respondent accepted the dates of employment as confirmed by Ms. Koncova, that point is mute.

Conclusions

32. The Tribunal finds that it was reasonably practicable for the Claimants to submit their claims in time.

33. The only reason the Claimants relied on to suggest it was not reasonably practicable for them to present their complaints in time was an alleged continuing dialogue between the parties. However, that concluded prior to the deadline on 22 December 2021.
34. Mr. Lala asserted an ignorance of his rights, but both he and Ms. Koncova knew they may have potential Employment Tribunal claims and instructed Mr. Bradley accordingly to advise and represent them. He holds himself out as a skilled HR and employment law consultant and on this occasion the Claimants are caught by the Dedman principle.
35. As the Tribunal finds it was reasonably practicable for the Claimant to have submitted their claims in time, it does not need to consider whether they were presented with such further period as was reasonable. However, and for the sake of completeness, and no application to extend time having been raised by the Claimants, had the Tribunal been required to determine this issue, it would have concluded the claims were not submitted with a further reasonable period following the expiry of the original time limits for the same reasons as provided above.
36. Accordingly, the Tribunal has no jurisdiction to consider any of Mr. Lala's claims and they are struck out on the grounds they have no reasonable prospects of success in accordance with rule 37(1)(a) of the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013.
37. The Tribunal also has no jurisdiction to consider Ms. Koncova's unfair dismissal, wrongful dismissal, holiday pay and arrears of pay complaints and they are struck out on the grounds they have no reasonable prospects of success in accordance with rule 37(1)(a) of the Employment Tribunal's (Constitution & Rules of Procedure) Regulations 2013. The Tribunal does have jurisdiction to consider Ms. Koncova's statutory redundancy payment complaint.
38. In relation to the Respondent's failure to present their responses in time, no application for a further extension of time was sought by the Respondent to extend the limit that was previously extended to 28 March 2022.
39. In the circumstances, the Tribunal of its own violation and in accordance with rule 5, considered whether to extend the time limit in respect of the responses and it declines to do so. The Respondent has provided no information to support any extension of time. Furthermore, the responses set out no demonstrable defence to the claims. Therefore, and in accordance with rule 18 and rule 20, no extension of time is granted to the Respondent and the responses are rejected.
40. In conclusion, the only remaining complaint is Ms. Koncova's statutory redundancy payment claim and as the Respondent's response is rejected, the Tribunal considered whether it was able to properly determine that complaint based on the information available in accordance with rule 21.
41. As set out in section 163(2) Employment Rights Act 1996, an employee who has been dismissed by her employer shall, unless the contrary is proved, be

presumed to have been dismissed because of redundancy. The Respondent is not able to prove the contrary as its response has been rejected and therefore, Ms. Koncova's claim for a statutory redundancy payment succeeds.

42. The Tribunal awards Ms. Koncova £1,088.00 gross based on her age, service and weekly salary capped at £544.00 per week at the date of dismissal.

Employment Judge J Galbraith-Marten

13/06/2022

REASONS SENT TO THE PARTIES ON

14/06/2022

FOR THE TRIBUNAL OFFICE