Case No. 2300125/2021

EMPLOYMENT TRIBUNALS

Claimant: Mr Craig Hodges

Respondent: The Monarch Partnership Limited

Heard at: London South (By CVP) **On:** 28 April 2022

Before: Employment Judge Self

Appearances

For the Claimant: In Person

For Respondent: Mrs Petrie – Head of HR

JUDGMENT

1. Upon the Claimant failing to bring his claim within the statutory time limit and upon it having been reasonably practicable for him to have done so the Tribunal does not have jurisdiction to consider the Unfair Dismissal claim and that claim is dismissed.

2. It being agreed that the correct Redundancy payment was made by the Respondent the claim for a redundancy payment is dismissed upon withdrawal.

REASONS

(As requested by the Claimant)

1. The Claimant was dismissed on 15 September 2020 and entered ACAS Early Conciliation on 8 January 2021. That process concluded on 11 January 2021 and the Claimant brought claims of unfair dismissal and for a redundancy payment on 12 January 2021. The Claimant agreed at this hearing that he had been paid a redundancy payment and so withdrew the redundancy payment claim which I have dismissed.

2. The matter was listed today in order to consider whether or not the Claimant had lodged his claim with the Tribunal within the statutory time limit pursuant to section 111 of the Employment Rights Act 1996 and if he has not whether it was reasonably practicable for the Claimant to bring his claim within that time period and if it was not there is a consideration of whether it has been brought within such further period as the tribunal considers reasonable. Extensions can be made to take into account the ACAS conciliation period.

3. It was accepted in this case that the Claim had been lodged outside of the statutory time period. The last date for bringing a claim was 14 December 2020. ACAS Early Conciliation was not entered before that date and so cannot extend time. By my calculation the claim was lodged 29 days out of time.

4. The Claimant wrote the following, so far as is relevant for this application, on his Claim Form:

"Apologies this isn't within the three-month period as I spoke to ACAS and thought it was a 4-month period I had to report claiming which I have managed to do now. I ended my employment with Monarch on the 15th of September after a furlough period and a redundancy Consultancy. Reason for the delay for my claim is at the time I had been busy trying to find another employment which I started on the 16th of September so I was extremely busy training and learning that role unfortunately that has also ended now and I'm unemployed so I've realised I'm in this predicament because of Monarch and still feel unfairly treated as they've selected me unfairly for this redundancy".

5. It is clear from that statement that as at the date of submitting the Claim form the claimant was aware that he had submitted his claim out of time.

6. The Claimant gave sworn evidence and was cross examined briefly. He had not provided a witness statement and so I raised questions with the Claimant about the circumstances in an attempt to elicit the circumstances which gave rise to the later presentation.

7. The Claimant's evidence was characterised by a lack of precision and evasiveness. He would make an assertion and indicate that he had made contemporaneous notes which he could then not locate when given time to

do so. On another occasion he asserted that he would have phone records to show that when calls had been made to ACAS but then indicated that he now had another phone and so could not check.

8. The foundation of his assertion that time should be extended was that when he contacted ACAS before he was dismissed but during the redundancy process he was told that the statutory time limit was four months as opposed to three months and it was not until he contacted ACAS again on 8 January that he was told that he was out of time. At that point he entered Early Conciliation and put in a claim promptly thereafter. The initial point of contact was when the Claimant was going through the redundancy process and was considering whether or not to bring a claim.

9. I fully accept that the Claimant is not legally trained and he assured me he had not been involved in such claims before. The Claimant was sufficiently wise to research avenues of support when he was concerned about the work situation over the internet and I am satisfied that it was this research that led him to contact ACAS. The Claimant was aware that he might have a claim for unfair dismissal from his own general knowledge. It seems to me that if he was able to get that far he would have been quite able to discover what the statutory time limit was which is readily available on the internet to anybody considering an unfair dismissal claim.

10. Entering the words unfair dismissal in a search engine (e.g. Google Chrome) brings up as the first entry the www.gov.uk website which has a heading "unfair dismissal – your rights". Within that first page is a link to "what do you do if you are dismissed" and on that page one is told that one can bring a claim to an employment tribunal and there is a warning there that a claim must be brought within three months. I am quite satisfied that anybody who considers they have been dismissed and with the most rudimentary computer knowledge could discover within 5 minutes their rights and the fact that there is a time limit which is three months.

11. The second entry on a search for "unfair dismissal" directs an individual to the ACAS website and on the very page. one is taken to is the following extract:

"When and how to make a claim

A claim must be made within 3 months less 1 day of the date their employment ended. In almost all cases, the date someone's employment

ends is either the last day of their notice period or the day the employee was dismissed if the employer did not give notice.

The employee must tell Acas first that they want to make a claim. Acas will offer them the option of 'early conciliation', a free service where Acas talks to both the employee and employer. It gives them the chance to come to an agreement without having to go to tribunal.

Find out more about early conciliation and making a claim to an employment tribunal."

12. I am quite satisfied that the Claimant was quite able to discover what the time limit for bringing claims was by means which were readily available to him. I do not accept his evidence that he was told by a member of ACAS staff that the time limit was four months as I consider it inconceivable that an ACAS employee would be so misinformed about one of the most basic facts related to their job.

13. A charitable finding would be that the Claimant has misunderstood what was said to him and I acknowledge that this was possible but upon hearing from the Claimant today it is my finding that the Claimant initially decided he was not going to bring a claim because of his new job which he got the day after the dismissal. He made that decision because as he says in his claim form he had to train and work at the new job and additionally I find that he considered that it would not be financially worthwhile to do so.

14. There came a time when he lost / left that job when he had more time to consider matters and was able to reflect that the Respondent, as he says in his Claim Form, was responsible for his predicament. He reflected on the fact that the Respondent did not need in his view to make him redundant and that he was a loyal employee. He objected to the fact that they still had a large fleet of cars, were expanding premises and also he believed advertising for positions he could have done. I find that this fed his sense of grievance and ultimately spurred him onto contacting ACAS on 8 January. I do not accept that the reason why he delayed until that time was because ACAS had told him there was a four-month deadline for bringing claims.

15. I do not accept the Claimant's evidence on this point because the Claimant's evidence seemed to me to be unreliable. He told me that he had notes of all of his conversations with ACAS which would have been helpful evidence especially if those notes were made contemporaneously but when asked to produce them the Claimant was unable to do so. I find that there were no notes.

16. When the Claimant was asked about phone calls he was unable to recall with any precision when any phone calls were made but asserted that he would be able to check on his phone. After being given time to bring up

dates of calls etc the Claimant informed me that he had forgotten that he had recently changed phones and so the information was not there.

17. The Claimant was unable to assist with any precision at all to or produce anything that would fix dates and times when relevant emails or calls were made. The Claimant has had ample time to get his evidence together.

18. As stated earlier I consider it very unlikely that an ACAS employee would state that the time limit was four months. I canvassed with the Claimant that he might have been mistaken in that it is possible that 4 months could be a period taking into account ACAS Early Conciliation but the Claimant was quite certain that he was told that 4 months was the time limit in unequivocal terms. The Claimant gave evidence on oath and ultimately I was not satisfied on the balance of probabilities that what the Claimant said had happened was what had happened.

The Law

19. When a claimant tries to excuse late presentation of his or her ET1 claim form on the ground that it was not reasonably practicable to present the claim within the time limit, three general rules apply:

a) S.111(2)(b) ERA should be given a **'liberal construction in favour of the employee'** — **Dedman v British Building and Engineering Appliances Ltd 1974 ICR 53,** CA

b) What is reasonably practicable is a question of fact and thus a matter for the tribunal to decide.

c) The onus of proving that presentation in time was not reasonably practicable rests on the claimant. **'That imposes a duty upon him to show precisely why it was that he did not present his complaint' — Porter v Bandridge Ltd 1978 ICR 943, CA.**

20. Even if a claimant satisfies a tribunal that presentation in time was not reasonably practicable, that does not automatically decide the issue in his or her favour. The tribunal must then go on to decide whether the claim was presented 'within such further period as the tribunal considers reasonable'. Thus, while it may not have been reasonably practicable to present a claim within the three-month time limit, if the claimant delays

21. Judicial attempts to establish a clear, general and useful definition of 'reasonably practicable' have not been particularly successful. This is probably because cases are so different and depend so much on their particular circumstances. However, in **Palmer and anor v Southend-onSea Borough Council 1984 ICR 372, CA**, the Court of Appeal conducted a general review of the authorities and concluded that 'reasonably practicable' does not mean reasonable, which would be too favourable to

employees, and does not mean physically possible, which would be too favourable to employers, but means something like ‘reasonably feasible’.

22. Lady Smith in **Asda Stores Ltd v Kauser EAT 0165/07** explained it in the following words: **‘the relevant test is not simply a matter of looking at what was possible but to ask whether, on the facts of the case as found, it was reasonable to expect that which was possible to have been done’.**

23. I entirely accept that the principle position that the Claimant sets out before me could be grounds for accepting that it was not reasonably practicable to present the claim in time. In the majority of cases, an adviser’s incorrect advice about the time limits, or other fault leading to the late submission of a claim, will bind the claimant and a tribunal will be unlikely to find that it was not reasonably practicable to have presented the claim in time. However, much will depend on the circumstances and the type of “adviser” involved.

24. In **DHL Supply Chain Ltd v Fazackerley EAT 0019/18**. The Claimant contacted ACAS some days after his dismissal and he was advised that before considering any form of action such as tribunal proceedings he should first exhaust the internal appeal process. He did not seek any further advice and the employment judge found that it was reasonable for him to approach the matter on the basis of ACAS’s advice. The EAT observed that if Fazackerley had simply awaited the outcome of an appeal, this would not have been enough. However, the ACAS advice, while limited in scope, was relied upon and ‘tipped the balance’. The EAT declined to find that the judge’s decision had been perverse.

25. I am mindful that each case turns on its own facts and what **Fazackerley** tells me is that an incorrect steer / wrong statement of the law from ACAS has been held to be sufficient so as to render it not practicable to submit a claim within the statutory time limit and that was deemed by the EAT to not be perverse as was argued in the Court and therefore able to be upheld.

26. That establishes that the Claimant’s argument could lead to a finding in his favour but the problem for the Claimant is that I have not accepted the evidence he has given in relation to what he was told by ACAS. Once that fact has not been proven to the requisite degree the Claimant has no reason for the delay save for the fact he got another job and hoped to make a go of that, thereby delaying making a claim. That does not meet the statutory test for extending time and consequently I do not have jurisdiction to consider the unfair dismissal claim.

Employment Judge Self
Dated: 24 May 2022