EMPLOYMENT TRIBUNALS

Claimant: Mr L Sebe

Respondent: Modus Care (Plymouth) Limited

OPEN PRELIMINARY HEARING

Heard at: Bristol (by video) **On:** 11 August 2022

Before: Employment Judge C H O'Rourke

Representation
Claimant: in person
Respondent: Ms R Mellor - counsel

JUDGMENT

The Claimant's claims of unfair dismissal, automatic unfair dismissal and breach of contract in respect of notice pay are dismissed, for want of jurisdiction.

REASONS

Background and Issues

1. The Claimant was employed by the Respondent as a support therapist, for approximately eleven years, until his dismissal with effect 3 August 2021. He is a Ghanaian national and the reason relied upon by the Respondent for dismissal was that he had failed to provide evidence of a continuing right to work in UK, which would have placed the Respondent in breach of immigration law. This is disputed by the Claimant. He alleges that the true reason for his dismissal was that he had raised whistleblowing concerns about care standards and that therefore he was also automatically unfairly dismissed. He also brought a claim in respect of alleged arrears of notice pay.

2. There is no dispute that the primary limitation period for presenting his claims expired on 2 November 2021. The Claimant entered into early conciliation with ACAS on 23 November 2021 and the certificate was issued on 8 December 2021 [2]. The claim was presented on 23

December 2021, so approximately seven weeks out of time. The Claimant accepted that the claims were out of time, mentioning this fact in his claim form and asking for an extension of time [9].

3. This hearing was therefore listed to determine, as a preliminary issue, whether or not the Tribunal had jurisdiction to consider these claims.

The Law

4. S.111(2) of the Employment Rights Act 1996 (with similar wording in s.48(3) and Article 7 of the ET Extension of Jurisdiction Order 1994, in respect of the claims of automatic unfair and breach of contract) states:

   (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.

5. I was referred by the Respondent to the case of **Dedman v British Building and Engineering Appliances [1974] ICR 53 EWCA**, which established the 'Dedman principle', namely that '*If a man engages skilled advisors to act for him and they mistake the time limit and present the claim too late – he is out. His remedy is against them'*. I reminded myself also as to the guidance in the cases of **Wall's Meat Co Ltd v Khan [1979] ICR 52, EWCA**, as to the Tribunal's discretion in such matters and also that as stated in **Porter v Bandridge Ltd [1978] ICR 943, EWCA**, the burden of proof is upon the Claimant.

The Facts

6. I heard evidence from the Claimant (albeit that he had not provided a witness statement) and both he and Ms Mellor made submissions.

7. 'Not Reasonably Practicable'. I summarise the Claimant's evidence and submissions on this point and my findings in respect of it, as follows:

   a. He had access to advice from his union. He met with his union representative on or about 22 October 2021, who, he said, drafted his ET1 for him, in particular the details of claim at section 8.2 (and which effectively mirrored his grounds of appeal to the Respondent on 4 August 2021 [62]). He said that the representative told him that he had three months from the date of his dismissal to bring his claim, so, accordingly, I find that he understood, at that point, that the time period expired on 2 November 2021.

   b. He set out his beliefs as to the unfairness of his dismissal in his grounds of appeal, the day after his dismissal. That appeal was refused on 29 September 2021 and he agreed that he was told by the Respondent that all internal procedures were now exhausted

and that it was suggested that if he wished to, he could seek advice from his union.

c. When asked why, if he knew on 22 October 2021 that the time limit would expire eleven days later, he had not immediately presented his claim, he said, in effect that despite the Respondent having refused his appeal, he still hoped that they would reconsider their decision and re-instate him. This was clearly a vain hope on his part and is not a valid reason for delaying presentation of his claim.

d. Secondly, he made reference to 'language difficulties', being from Ghana, but I don't consider that this is a valid excuse. He has lived and worked in UK for at least thirteen years, is able to express himself very clearly in written English (as in his grounds of appeal and in the undated handwritten statement he provided to the Tribunal on 15 July 2022). He gave evidence in English and was perfectly understandable.

e. Thirdly, he blamed his union for the delay in progressing his claim, stating that he had to chase them to get advice and for them to take action in presenting his claim. He said he referred everything he received from either the Tribunal, ACAS or the Respondent to them, for advice and action. However, even if it were the case that the union was at fault as described (and I make no finding that it was, as there is insufficient evidence for me to do so), the alleged error of any professional advisor does not excuse the Claimant from missing the deadline, as established in the 'Dedman principle' (above), which, as well as including legal advisors or solicitors, also extends to union advisors.

8. Conclusion on 'not reasonably practicable' test. I find therefore, considering that the burden of proof is on the Claimant in this respect that he has failed to satisfy me that it was not reasonably practicable for him to have presented his claim in time.

9. 'Within such further time as was reasonable'. However, even if I had found that it was not reasonably practicable to present the claim in time, I would nonetheless have concluded that it was then not presented within such further time as was reasonable. The Claimant knew, on 8 December 2021 that he had missed the primary time limit (by then, by some five weeks), that there was no indication from the Respondent that they were going to reinstate him and that early conciliation was concluded. There was, therefore, nothing to justify any further delay on his part, but he nonetheless further delayed by some fifteen days, indicating to me the lackadaisical approach he took to the progress of his claim and his lack of urgency, generally. He again sought to blame his union for this further delay, but I refer again to the 'Dedman principle' in this respect.

Judgment

10. For these reasons, therefore, the Claimant's claims of unfair dismissal, automatic unfair dismissal and breach of contract in respect of notice pay are dismissed, for want of jurisdiction.

Employment Judge O'Rourke
Date: 11 August 2022

Judgment & reasons sent to parties: 22 August 2022

FOR THE TRIBUNAL OFFICE