



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr J Giles

**Respondent:** Poundland Ltd

**Heard at:** Manchester (by VHS video)      **On:** 16 August 2022

**Before:** Employment Judge Parkin

## **Representation**

Claimant: In person

Respondent: Ms J Laxton, Counsel

## **JUDGMENT AT A PRELIMINARY HEARING**

### **The Judgment of the Tribunal is that:**

- 1) The claimant's claim was presented out of time but it was reasonably practicable for him to present it in time. It is dismissed for want of jurisdiction.
- 2) The respondent's application for costs is refused.

## **REASONS**

### **1. The claim and response**

1.1 The claimant presented his claim on the 3 March 2022 complaining of unfair constructive dismissal from his position as Workshop Team manager for the Respondent. He set out that he had resigned orally from that position on 17 March 2021 in circumstances whereby he was concerned at being required to take a management course late in his employment when he was soon to retire and especially concerned at the treatment and behaviour of an HR manager towards him and his wife when he suddenly went sick; in essence, he maintained that he was forced to retire early by the respondent's treatment of him.

1.2 The respondent resisted his claim in full, contending that it was presented well out of time but in any event denying any constructive unfair dismissal or breach of contract entitling him to resign.

### **2. The Preliminary Hearing**

2.1 By a notice of hearing dated 30 May 2022, this hearing was listed to determine whether the tribunal had jurisdiction to hear the claim, namely “whether the claim was presented within time and whether the tribunal can exercise discretion to extend time as set out in section 111(2) of the Employment Rights Act 1996”.

2.2 At the hearing which was held remotely by VHS video, there was an agreed electronic Bundle of documents (1-80) and the claimant gave oral evidence expanding upon his letter to the tribunal of 16 June 2022, giving his evidence as to the reasons for late presentation of the claim (80). He had earlier written to the tribunal on 11 May 2022 (47), setting out the history of his dealings with the respondent after his resignation. The Bundle having been agreed and including these documents, I refused the claimant’s application to search for and rely as an aide-memoire upon some other informal notes he had made which had never been disclosed to the respondent. After delivery of my judgment and reasons orally, the respondent applied for the claimant to pay its costs on the basis that he had acted unreasonably in bringing his claim or conducting the proceedings.

### **3. The facts**

From the oral and documentary evidence, I made the following key findings of fact on the balance of probabilities.

3.1 The claimant was born on 28 March 1957.

3.2 Having commenced employment with the respondent as Workshop Team Manager at its Wigan site in 2017. By late 2020 he was hoping to retire within a couple of years.

3.3 He was aggrieved to be required to complete a training course online to improve management skills in terms he considered wholly irrelevant to his work, including learning Algebra and some non-workplace English; when he queried whether he could opt out, he was told expressly by the HR manager that it was compulsory to do the training.

3.4 This prospect caused him stress and so much so that in particular such that driving to work on Saturday 13 March 2021, he had a near accident which shocked him and caused him to go back home rather than into work that day. ; he sent a short message that he was not fit to come in.

3.5 He felt very stressed and was then highly aggrieved when the HR manager persisted in making contact trying not only to telephone him but also his wife and questioning the genuineness of his sickness absence.

3.6 As a result, at a time of great stress, in a telephone call with HR and his line manager on 17 March 2021, he resigned abruptly orally but confirmed that resignation later the same day by text and with a very short letter of resignation (68). Under cross-examination, he described this as a resignation “under duress”.

3.7 The claimant then provided sick notes to the respondent which covered periods both up to and after the resignation, 13-24 March 2021 and then 26 March-2 April 2021, showing as the reason for unfitness for work as “stress at work”; no further sick notes or medical evidence were provided.

3.8 The claimant's GP did not prescribe any medication but only recommended rest for him, which the claimant was happy with because he had a past history of stress and depression and did not wish to be dependent on medication.

3.9 However, once he felt somewhat better on 9 April 2021, he wrote a detailed letter of complaint to the respondent. Whilst that letter is not in the Bundle, it was summarised in his letter of 11 May 2022 (47). He complained both about the requirement to attend the training course and his treatment by the HR manager in connection with that course and particularly during his sudden sickness absence.

3.10 There was then massive delay by the respondent in dealing with the claimant's complaint; progress was generally made at his prompting rather than the respondent's activity.

3.11 On 8 July 2021, he engaged in a long telephone discussion lasting some 1½ hours with the senior HR manager dealing with the matter, Leanne Slater.

3.12 Following yet further extensive delay, resolution was only achieved in December 2021 again after prompting by the claimant. Ms Slater met the claimant in person on 15 December 2021 and explained that the training course should always have been optional rather than compulsory and said she could not follow up his concerns about the HR manager who had by then left business; she confirmed this in an email on 21 December 2021 (78-9) expressing that this was the final resolution of matters. By then, the claimant was aware other managers had wished to opt out of the training course like him.

3.13 Having always felt aggrieved and that he had been unfairly treated and forced out by the respondent, he then considered his position more fully.

3.14 In early February 2022, he contacted ACAS for advice and was advised to take legal advice. He remembered he may have legal expenses cover under his home insurance policy and sought advice first from his family solicitor and then other solicitors but effectively he received no legal advice of substance; in his own words, the solicitors were "not interested" in his potential claim.

3.15 He made further contact with ACAS. It was only during the conversations with ACAS in February 2022 that he learnt about the time limit for bringing an unfair dismissal claim to the tribunal (as distinct from the right to make a claim generally to enforce his employment rights, which he was already aware of).

3.16 He commenced Early Conciliation on 18 February 2022 and the EC Certificate was issued on 21 February 2022. He presented his claim 10 days later.

3.17 The claimant had internet access at home and he was aware of the respondent's grievance procedure.

#### **4. The parties' submissions**

4.1 The respondent contended the claim was presented substantially out of time; the test was jurisdictional, not a discretion per se. What was the claimant's evidence why he did not present his claim in time? In his statement he said he was not well enough to start with and was waiting for the internal procedures to be completed. The case law did not support the claimant's claim especially after such

a long delay. Asda v Kauser UKEAT/0165/07 shows that stress was not enough, there needed to be some real impediment to presenting the claim. Palmer v Southend BC shows that waiting for internal procedures to be completed did not make it not reasonably practicable and this was not an appeal case, but a grievance after resignation. John Lewis Partnership v Charman [2011] IRLR 300 shows that not knowing of his rights is not enough, was it reasonable not to know? The claimant had recovered enough by 9 April 2021 to complain about the issues he said were wrong: the training course and the behaviour of the HR manager; he could equally have presented this claim to the tribunal since he had the internet and access to legal resources, whether he thought about it or not at that time. It was reasonably practicable for him to present his claim in time. In any event, there was no explanation for his delay from 21 December 2021 to 18 February 2022 and certainly no justification for it.

4.2 The claimant submitted that he felt he was being fair to the respondent in making his complaint as soon as he could in April 2021. There was huge delay by the respondent which it apologised for, for instance in Leanne Slater's email dated 4 October 2021 (50). He understood that the HR manager was being investigated on another matter and he was strung along by his complaint being linked with this other investigation. Therefore he was not the only one causing a delay; it was not all his fault. Once he had concrete evidence in writing from the respondent that the training course was optional, he took action and presented his claim within the next three months. He left the decision to the tribunal's discretion.

## **5. The Law**

5.1 This was an unfair dismissal claim within the statutory provisions of part X of the Employment Rights Act 1996 and in particular section 111 as to time limits:

- (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...

5.2 The Early Conciliation time provisions under section 207B are not material since the primary time limit had expired before Early Conciliation commenced.

5.3 Over the years there has been extensive guidance to first instance tribunals from the Employment Appeal Tribunal and the Court of Appeal as to the correct approach to the time limit in unfair dismissal claims, based on the “reasonably practicable” test. Notwithstanding the wording of the notice of hearing, this is a strict test with the claimant bearing the burden of proving that it has jurisdiction to determine the claim at a final hearing. The stages are first to consider whether the claim was actually presented in time; if not, then to consider whether it was reasonably practicable to do so, and only finally, if it was not reasonably practicable

to present it in time, whether it was nonetheless presented within such a further period as the tribunal considers reasonable, enabling it to proceed to a final hearing. The authorities show that the “reasonably practicable” test is an empirical factual test, based on common sense. In Palmer & another v Southend-on-Sea Borough Council [1984] ICR 372, it was held by the Court of Appeal that it meant whether it was “reasonably feasible to present the complaint to the employment tribunal within the relevant three months” and that many factors may be relevant in reaching that decision including, for instance, the reason for and manner of dismissal, use of internal appeals procedures, substantial cause for late presentation, knowledge of right to claim and time limits, extent of advice and any fault by the claimant or adviser in missing the time limit. The mere fact of appealing the decision to dismiss does not make it not reasonably practicable to present the claim in time and the tribunal will need, if it finds the claimant was ignorant of the right to claim or the time limit, to determine whether the claimant’s ignorance was reasonable in the circumstances or not so.

5.4 The power to award costs is set out in rules 74-84 of the Employment Tribunals Rules of Procedure 2013, in particular at rule 76. When the threshold of acting vexatiously, abusively, disruptively or otherwise unreasonably in bringing the claim or in conducting the proceedings is reached, the tribunal retains a residual discretion as to whether to award costs and, if so, in what amount, including having regard to ability to pay under rule 84.

## **6. Conclusion**

6.1 The claim was presented well out of time. The effective date of termination was 17 March 2021 when the claimant’s resignation was communicated to the respondent and he gains no assistance in terms of extra time from the Early Conciliation provisions at section 207B of the 1996 Act. He did not notify Early Conciliation within the 3-month primary time limit, so his claim should have been presented by 16 June 2021; it was presented on 3 March 2022, about 8½ months late. However, I conclude that it was reasonably practicable for the claimant to present his claim in time. He knew when he resigned of his major concern at the HR manager requiring him to undergo the training course which he disagreed with and of the treatment of him and his wife by that HR manager which aggravated the position; that triggered the resignation on 17 March 2021 which he felt forced into when under stress. There is no medical evidence showing even unfitness to work after early April 2021 and, whatever his overall state of mental health, the claimant was then able to write a clear letter of complaint as early as 9 April 2021 and to pursue his complaint during 2021 including in a long telephone call in July and then a face-to-face meeting with Ms Slater in December 2021. He had internet access by which he could have researched very readily his employment protection remedies such as an unfair dismissal claim, albeit with the intermediate step of ACAS Early Conciliation; there is no evidence of any difficulty on his part finding out or contacting ACAS for advice when he did so in February 2022. Although he was waiting upon an outcome or resolution to his complaint, he could have made those enquiries sooner and he has not proved it was not reasonably practicable for him to present his claim before the expiry of the primary time limit in June (or a little later with some Early Conciliation leeway). Waiting for the outcome of an appeal against an actual dismissal does not of itself justify not presenting a claim of unfair dismissal; still less does waiting for a full reply to a letter of complaint or

grievance following upon a resignation. Accordingly, his claim is dismissed for want of jurisdiction because it was presented out of time.

6.2 However, the matter does not end there because (had I been persuaded that it was not reasonably practicable for him to present his claim before the outcome of his complaint was known in December 2021), he still did not act expeditiously thereafter. He had the personal meeting with Ms Slater on 15 December 2021 and learned that it should not have been compulsory for him to do the training course; this was confirmed in writing on 21 December 2021. Yet the claimant did not act until early February 2022 in seeking advice and guidance through ACAS, which of course alerted him to the time limit difficulties he faced. He had no explanation and certainly no justification for that further delay from mid or late December 2021 and the initial notification of Early Conciliation to ACAS on 18 February 2022. Indeed after the issue of the Early Conciliation certificate on 21 February, he delayed still further before presenting his claim. This would not have been a reasonable further period.

## **7. Costs application**

The respondent made an application for its whole costs, totalling £4,506, to be paid by the claimant on the basis that he had acted unreasonably in bringing and pursuing his claim, especially since it had warned him of its intention to make a costs application if he proceeded. The claimant professed himself shocked at the application but resisted it. I refused the application determining that although he had failed in his claim, on a jurisdictional basis with his claim presented several months out of time, this did not amount to unreasonably bringing the claim and still less him conducting the proceedings unreasonably. I commented on the irony of the fact that the respondent had relied heavily upon the claimant being months out of time when it was itself guilty of massive delay in dealing with the letter of complaint he raised after his resignation. In the circumstances, had I found he commenced claim or conducted the proceedings unreasonably, I would not have exercised my judicial discretion to order costs against him in any event.

Employment Judge Parkin

Date: 17 August 2022

JUDGMENT & REASONS SENT TO THE PARTIES ON

22 August 2022

FOR THE TRIBUNAL OFFICE

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