



EMPLOYMENT TRIBUNALS

Claimant: Mr El-Hadj Haouari

Respondent: Royal Mail Group Ltd

Heard at: Watford (by CVP)

On: 31st August 2022

Before: Employment Judge Dick

Representation

Claimant: Mr Leonard Robert-Ogilvy

Respondent: Miss Zakia Tahir, solicitor

RESERVED JUDGMENT

1. The claim is out of time and is dismissed on the basis that the Tribunal has no jurisdiction to hear it.

REASONS

Key to references: [x] = page x of agreed bundle

Claim and Issues

1. This case was listed for a preliminary hearing under rule 53 in order for the Tribunal to consider whether it had jurisdiction to hear the Claim as it seemed to have been presented out of time. The Claimant presented his claim for unfair dismissal on 15th September 2021. The Claimant's case is that he was dismissed unfairly; the date of that dismissal, he says, is unclear. The Respondent's case is that he was dismissed, fairly, with his last day of service being 23rd July 2020, i.e. almost 14 months before he presented his claim.
2. Despite what the Claimant says are uncertainties regarding the date of his dismissal, there was no real dispute that the claim was out of time. The issues for me were whether it was not reasonably practicable to have presented the claim in time and, if so, whether the claim was submitted within such time as the Tribunal considers reasonable.
3. The Respondent puts its case as follows. The Claimant was dismissed on capability grounds, following a long absence due to spinal pain, on the basis of

an independent medical expert's report dated 16th June 2020, which said that the Claimant's condition had become long-term and there was no foreseeable return date. The Claimant was given pay in lieu of notice (amongst other payments) and his last day of service was 23rd July 2020. The Claimant appealed the decision to dismiss. The decision was upheld and the Claimant was informed of this in writing on 19th January 2021. The Claimant made a "Stage 2" appeal on 21st January 2021 and this appeal too was not upheld.

4. The Claimant's case is that a dismissal letter was never sent to him (in July 2020 or at any other time). He agrees that he made the first and second appeals. As regards the first appeal, he received the letter of 19th January 2021, but not the medical evidence upon which the decision-maker relied. As regards the second appeal, the decision letter dated 23rd March was not sent to him until September 2021. The Claimant submits that, in the absence of a dismissal letter, the only plausible Effective Date of Termination ("EDT") is 19th January 2021, when the Claimant agrees he was informed in writing of the decision to refuse his first appeal. The delay in presenting the claim should not, the Claimant says, be held against him. It was only having received the full reasons for the Respondent's decision, in September 2021, that it was practicable for the Claimant to bring his claim to the Tribunal.

Procedure and Evidence

5. The hearing was conducted with all participants bar me appearing over the Cloud Video Platform. Some initial problems with one of the participant's connection and working environment led to some delay before all were able to see and hear each other properly. As a result, though I had time to hear evidence and submissions, I did not have time to give an oral judgment. I therefore reserved judgement.
6. The written evidence which I take account of was contained in a bundle agreed by the parties. I also heard oral evidence from the Claimant and had the benefit of written and oral submissions from both parties.

Fact Findings

7. I make the following findings of fact on the balance of probabilities. I do not set out all the evidence which I heard, only that which enabled me to make findings on the matters relevant to my decision.
8. The Claimant was paid a lump sum on 24th July 2020 (see [61]) in consequence of the Respondent's decision to dismiss him, made the day before. I accept the Claimant's evidence that he never received a dismissal letter, noting that the Respondent did not produce such a letter in evidence. However, as the Claimant went on to tell me, having seen that the lump sum payment had been made, he spoke to his employer on 1st or 2nd August to query the point and was told he had been dismissed; he spoke to his manager, who also told him he could appeal the decision. I also accept the Claimant's evidence on this point. So, while the Claimant may not have been aware of the full reasons for his dismissal, it is clear in my judgment that he was aware he had been dismissed by 2nd August 2020.
9. Letters from the Claimant's union dated 23rd September and 5th October 2020 [62, 63] refer to an "Appeal against IHR [i.e. Ill-Health Retirement] for

Reinstatement". From this I conclude that the Claimant's union were aware, on or before 23rd September 2020, that the Claimant's employment had been terminated.

10. The Claimant appealed against the Respondent's decision and was originally offered a date for his appeal of 23rd December 2020 [64] but was unable to attend as he was self-isolating. It was agreed that the Claimant would present his case in writing [70]. A letter setting out the result of the Claimant's appeal is in the bundle [78] – the appeal was not upheld. The letter is dated 19th January 2021, and although it incorrectly has the Claimant's postcode as ending 2SZ rather than, as it should be, 3SZ, I accept the Claimant's evidence that he did receive the letter, albeit 3 days late.
11. An appeal against that decision was heard by telephone on 23rd March 2021. The decision is recorded in a document at [81] and full reasons are set out in a letter addressed to Royal Mail Pension Appeals – not the Claimant – also dated 23rd March 2021 [83]. The conclusion was that while the original decision was correct at the time, it was now apparent that the Claimant had made a good recovery; the author suggested that consideration be given to reviewing the Claimant's application for re-instatement. I was not presented with any evidence to suggest that that recommendation was acted upon. I accept the Claimant's oral evidence, which was also supported by written evidence from his Trade Union, that the 23rd March documents were not in fact provided to him until September 2021.
12. There was no dispute that the Claimant presented his claim to the Tribunal on 15th September 2021, having been in Early Conciliation with the Respondent from 31st August to 15th September 2021. I accept the Claimant's evidence that he had not contacted ACAS before August 2021 as he had been waiting for the decision on his second appeal.
13. On the subject of the Claimant's Trade Union, the Claimant's recollection in evidence initially was that he did not receive assistance from his Trade Union until January 2021, though he accepted that he must have had contact with them before then given the letter of 5th October 2020. In the bundle there was an email from a Mr Bharrat, the Branch Secretary of the Claimant's union. It says that the Claimant was "ill-health retired" on an unspecified date in 2020. During the period of the Claimant's appeal, the Union contacted the "dismissal manager" on several occasions to request the result of the appeal, but received no response. On another unspecified date, the Claimant was provided with an email from the dismissal manager explaining that the wrong paperwork had been sent to the Claimant. The union, says Mr Bharrat, was never provided by the Respondent with any documents relating to the appeal. I accept all of this, particularly in the absence of any evidence to the contrary.

Law

14. By s 111(2) Employment Rights Act 1996 ("the Act"), the Tribunal "shall not" consider a complaint about unfair dismissal unless it is presented (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. (Although the time limit may be subject to an extension under the provisions of

s 207B(3) of the Act, that is not relevant to this case since the Claimant contacted ACAS on 31st August 2021, i.e. after the expiry of the three-month time limit.)

15. So far as is relevant to this case, s 97(1) of the Act provides that the EDT:
- (a) in relation to an employee whose contract of employment is terminated by notice, whether given by his employer or by the employee, means the date on which the notice expires,
 - (b) in relation to an employee whose contract of employment is terminated without notice, means the date on which the termination takes effect, and
16. By s 97(2), when notice shorter than the statutory notice period is given, the EDT in certain circumstances is taken to be when the statutory notice period would have expired. However this only applies when calculating qualifying service and compensation, i.e. it does not apply to time limits.
17. In the absence of any provision in an employment contract to the effect that employment would continue over the course of an internal appeal (and I was presented with no evidence of such a term in the Claimant's contract) the EDT is not affected by an ongoing internal appeals procedure - *J Sainsbury Ltd v Savage* 1981 ICR 1, CA, expressly approved by the House of Lords in *West Midlands Co-operative Society Ltd v Tipton* 1986 ICR 192, HL.
18. As to whether it was not reasonably practicable to present the claim within the time limit, three general rules apply (see *IDS Employment Law Manual*, Volume 5, 5.46):
- a. S.111(2) 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.
 - c. The burden of proving that presentation in time was not reasonably practicable rests on the claimant.
19. Should that burden be satisfied, the Tribunal must then go on to consider whether the claim was presented 'within such further period as the tribunal considers reasonable'.
20. The EAT ruled in *Bodha v Hampshire Area Health Authority* 1982 ICR 200 that the existence of an impending internal appeal was not in itself sufficient to justify a finding that it was not reasonably practicable to present a complaint to a tribunal within the time limit and this view was expressly approved by the Court of Appeal in *Palmer and anor v Southend-on-Sea Borough Council* 1984 ICR 372, CA. Those authorities which may appear to have departed from that general rule have in done so in cases where, as well as the fact that there was an internal appeal, there was also another factor. For example, in *Marks & Spencer plc v Williams-Ryan* [2005] EWCA Civ 470, to which I was referred by Mr Robert-Ogilvy, the other factor was that the Claimant was also reasonably ignorant of the time limits.
21. Mr Robert-Ogilvy also referred me to the Supreme Court's decision in *Gisda*

Cyf v Barratt [2010] UKSC 41, in which it was decided that it would be unfair for time to begin to run against an employee in relation to an unfair dismissal complaint before the employee knew, or at least had had a reasonable chance to find out, that she had been dismissed and that, therefore, where dismissal without notice was communicated to an employee in a letter, the contract of employment did not terminate until the employee had actually read the letter or had had a reasonable opportunity of discovering its contents.

Conclusions

22. Applying *Gisda Cyf* (above) and having accepted that the Claimant did not receive any dismissal letter, the EDT cannot be 23rd July 2020 (i.e. the date taken by the Respondent to be the Claimant's last day of service). However, I do not need to go on to consider the issue of whether the Claimant had a reasonable chance to learn of his dismissal, because I have found as a fact that the decision to dismiss the Claimant was communicated to him, however unsatisfactory the circumstances may have been, by 2nd August 2020. I therefore find that the EDT was 2nd August 2020. In doing so, I reject the submission made on behalf of the Respondent that the only plausible effective date of termination is 19th January 2021, i.e. the date on which the Claimant first appears to have received any written correspondence about his dismissal. There is no rule of law that a dismissal must be in writing, and in my judgment *Gisda Cyf* does not go so far as to say that if a dismissal letter is not received, the only way employment can then be terminated is in writing. The point is that the employee must be told of the decision (or at least have a reasonable opportunity to find out about it), however that may be. The Claimant himself accepted that he had been aware of the dismissal by 2nd August and it is also clear that the Claimant's Trade Union knew of it by 23rd September at the latest. The January letter had of course been written following an appeal process instigated by the Claimant himself, so the Claimant's dismissal must have taken place before the letter was written.
23. With an EDT of 2nd August 2020, by operation of s 111(2) of the Act, the latest date for presenting a claim would have been 1st November 2020. The Claimant's claim was therefore presented ten months late.
24. It seems to me that I am bound by the authorities discussed above to conclude that the Claimant has failed to show that it was not reasonably practicable for the complaint to have been presented in time; I find as a fact that it was reasonably practicable for the Claimant to have presented his claim on time. The Claimant did not assert that he was ignorant of the time limits or of his rights to present a claim. Nor did he explicitly seek to blame his Trade Union advisors for any delay (though of course, even if he had, that would be unlikely to assist him in this Tribunal - see the line of cases at *IDS Employment Law Manual* Volume 5, 5.76). Nor did the Claimant suggest that he had been too unwell to present a claim. Rather, the Claimant's case was simply that it was not practicable to present a claim until he had received the Respondent's decision on his second appeal. This is in my judgment amounts to the Claimant saying that the sole reason for the delay was waiting for a conclusion to the internal appeal process. The authorities make clear that in such a case time limits cannot be extended, even where it might have seemed to the Claimant that the reasonable thing to do was to wait until that internal process had been concluded. I cannot see that delays in the process, even where they are not attributable to the Claimant, can change that position. Put another way, the fact

that the Claimant had not received reasons from the Respondent did not prevent him from presenting a complaint to the Tribunal, however unreasonably long might have been the delay in providing the reasons, since it is possible to make a claim on the basis that no reasons were provided. To find otherwise would be to conclude that a person who is never provided with reasons for their dismissal is not subject to any time limit, which cannot be right. The Claimant knew (on his case) that he had never been provided with adequate reasons for his dismissal and could therefore have presented his claim in time.

25. Having concluded that the Claimant has failed to prove that it was not reasonably practicable to have presented his claim in time, I do not need to go on to consider what period beyond the usual three months would have been reasonable. However, even if I am wrong about it being reasonably practicable to have presented a claim within three months of 2nd August 2020, the Claimant accepts that he did receive the letter of 19th January 2021, which sets out the result of his first appeal, albeit with scant reasons. On the basis of the authorities discussed above, the fact that he was waiting for the outcome of his second appeal, however reasonable that might have seemed to him, does not mean that it was not reasonable for him to have presented a claim within, say, three months of 19th January 2021, but he did not do so until September 2021.
26. It follows that claim is out of time and must therefore be dismissed for want of jurisdiction.

Employment Judge **Dick**

4th October 2022

JUDGMENT & REASONS SENT TO THE PARTIES ON

12 October 2022

FOR THE TRIBUNAL OFFICE