



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case Number: 4103348/2022

**Hearing held in Glasgow by Cloud Video Platform (CVP) on 30 September
2022**

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Employment Judge R Sorrell

Mr J Brodie

**Claimant
In Person**

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DFS Trading Limited

**Respondent
Represented by:
Mr D Hay -
Advocate**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

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The judgment of the Tribunal is that the claim is time-barred. The Tribunal does therefore not have jurisdiction to hear the claim and the claim is accordingly dismissed.

REASONS

Introduction

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1. The claimant lodged a claim for unfair dismissal on 20 June 2022.

2. This hearing was scheduled because the claims appear to be time-barred. The Tribunal was therefore required to consider whether the claim can proceed to be heard at a Final Hearing. It was a virtual hearing held by way of the Cloud Video Platform.

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3. As the claimant was a party litigant, I explained the purpose and procedure for the hearing and that I was required to adhere to the Overriding Objective

of dealing with cases justly and fairly and to ensure that parties were on an equal footing.

4. The respondent lodged a bundle of productions lodged prior to the hearing. The claimant confirmed that there was no additional documentation he intended to rely upon. The importance of referring to the relevant documents when giving evidence was explained to the claimant.

Findings in fact

The following facts are found to be proven or admitted;

5. The claimant's date of birth is 10 March 1977.
6. The respondent is a furniture retailer.
7. The claimant commenced full-time employment with the respondent in April 2011. He was initially employed as a salesperson. He was subsequently promoted to sales manager and thereafter as branch general manager.
8. The claimant was dismissed by the respondent on 28 January 2022 with three month's payment in lieu of notice. (D37- 40) The effective date of termination of employment was 28 January 2022.
9. The claimant appealed against the decision to dismiss him and an appeal hearing was held on 21 February 2022. (D22) On the same date, the respondent informed the claimant that his appeal had not been upheld.
10. The claimant became aware of his right to claim unfair dismissal around the time of his dismissal after doing a Google search on the internet and speaking to friends. Soon after his dismissal, he contacted ACAS about it. He then had a consultation with a solicitor. As he could not afford to formally instruct a solicitor, he made contact with ACAS again around the middle of March.
11. The ACAS Early Conciliation process commenced on 14 February 2022 and the Certificate was issued on 1 March 2022. (D1)
12. The claimant was made aware of the statutory time limit to present a claim by ACAS before the expiry of the time limit.

13. After his dismissal, the claimant was in a dark place and his mental health suffered. He was under a lot of pressure and struggled to sleep. He did not know how he was going to pay his mortgage or bills. He consulted his GP who offered to prescribe him medication which he refused as he did not want
5 this to affect him when looking after his daughter. The GP also gave him advice about how to deal with the pressure. About six weeks later, he had a follow up appointment with the GP who gave him further advice.

14. The claimant secured alternative employment in April 2022.

15. The claimant presented the claim on 20 June 2022. (D2-13)

10 **Respondent's submissions**

16. Mr Hay submitted on behalf of the respondent that the effective date of termination of the claimant's employment is 28 January 2022, so the ordinary three month statutory time limit in which to present a claim would be 27 April 2022. In applying Section 207B (3) of the Employment Rights Act 1996, the
15 clock stopped for 15 calendar days during the ACAS conciliation process and therefore the time limit to present a claim has extended to 11 May 2022. Section 207B (4) of the ERA is not engaged in this case.

17. The burden of proof is on the claimant to prove that it was not reasonably practicable to present a claim in time; *Porter v Bandridge Ltd* [1978] IRLR
20 271. *Palmer & Saunders v Southend on Sea Borough Council* [1984] IRLR 119 defines reasonably practicable as whether it was reasonably feasible to present a claim within the relevant three months.

18. In the case of *Walls Meat Company Ltd v Khan* [1979] ICR 52 the Court of Appeal considered the issue of ignorance of rights and whether the claimant
25 had just cause or excuse for not presenting a claim within the prescribed period. The Court held that ignorance of rights or the time limit is not in itself a reasonable excuse unless it appears the claimant or his adviser could not reasonably be expected to be aware of them. If they could have been so reasonably expected, it was the claimant's or adviser's fault and the claimant
30 must take the consequences of that. The guidance set out in *Dedman v*

British Building and Engineering Appliances Ltd [1974] ICR 53, CA in approaching these issues was affirmed in *Marks & Spencer plc v Williams-Ryan* [2005] ICR 1293, CA namely; what the claimant knew regarding the time limit, what knowledge the claimant should have reasonably had, whether he was legally represented and if there was any fault of the legal adviser.

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19. If the tribunal is satisfied it was not reasonably practicable to present the claim in time, what period thereafter would have been reasonable? This is fact sensitive.

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20. The claimant has failed to prove that it was not reasonably practicable for him to present his claim by 11 May 2022.

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21. The claimant has given evidence that he entered a dark place after dismissal. That is eminently understandable after a long employment with the respondent. He has also given evidence that he had some contact with his GP in early February regarding his mental health and sleeping and was offered medication but chose to decline it. He had a second check-up appointment in the middle of March. However, there is no evidence about the medication that was offered by the GP such as anti-depressants or the degree of the strength of medication and the claimant did have the opportunity to provide any such medical evidence before the hearing which he confirmed.

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22. What was the claimant able to do in the dark place? He spoke to an alteration in his mood regarding interactions with his daughter but for the whole period he was able to discharge parental and caring responsibilities for his daughter for half of every week. That would involve all the aspects of parenting due to her age. The claimant was able to appeal the decision to dismiss him with the respondent. He talked to friends about accessing advice, he was able to correspond and speak to ACAS, a solicitor and make an informed decision as to whether he could instruct legal representation and then go back to ACAS again. He attended an appeal hearing on 21 February and the claimant did most of the talking at that appeal. The claimant had bills to pay and was able to secure alternative employment. When this evidence is scrutinised, there is

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not enough to demonstrate that it was not reasonably feasible to submit a complaint by 11 May 2022.

23. In terms of the claimant's knowledge, the evidence is not clear about what the claimant knew and when. It is quite surprising that the claimant was not advised of the time limits when he contacted ACAS, particularly as ACAS early conciliation commenced on 14 February 2022. It is unlikely that at a paid consultation with a solicitor, the solicitor did not make reference to time limits. The tribunal is therefore entitled to conclude that the claimant did know of the existence of the time limit.
24. Even if the tribunal is not prepared to conclude that, what knowledge should the claimant reasonably have had in the circumstances? The claimant discussed the matter with friends and he was able to access resources online, the availability of which is substantial today. The claimant was also consulting with ACAS and then a solicitor for a short period. Therefore, if the tribunal is not satisfied that the claimant did not know the time limits, he should have reasonably known about it and if the fault lies with the solicitor or ACAS for not advising of that, that lies with the claimant and is not a reason for it not being reasonably practicable to lodge the claim in time.
25. It was reasonably practicable to lodge the claim timeously. The claim is therefore out of time and the jurisdiction to extend time has not been established. The claim should therefore be dismissed or struck out on the basis that the tribunal has no jurisdiction to consider it.
26. If the tribunal is not persuaded on that, it is submitted that the period between 11 May and 20 June 2022 was still a substantial period of time in which to present the claim. The tribunal has swift time scales to lodge claims and this period amounts to over one third of that time scale. It is not clear when the claimant's dark place ended and that time scale is not reasonable. The ACAS early conciliation certificate was issued promptly in this case, but the claim was not. Therefore, jurisdiction should not be exercised in this case as the further period of time it took the claimant to present the claim was not reasonable

Claimant's submissions

27. The claimant submitted that he knew that he presented the claim out-with the statutory time limit but wants his case to be heard. His GP offered to prescribe him anti-depressants, but he didn't want them as he was looking after his daughter. It is difficult to know where you are when you lose your job. He thought he would be working for the respondent for life. He worked 60-75 hours per week and takes cares of his daughter for half of the week. He has a large mortgage to pay as well as child support. He lost his car after being dismissed. He was not eating and suffered from sleep deprivation. He was in a dark place. So there were a number of reasons why he was not focussed at all after he was dismissed. He did speak to his friends about bringing a claim, but they are not clued up as they sell cars. He was applying for jobs he didn't want in order to earn an income. He took a massive wage reduction when he secured alternative employment.
28. He apologises for presenting his claim late which was not through ignorance but because of these factors which his brother has helped him to overcome. He just wants a fair hearing because his case was so mishandled. The Directors wanted to get rid of the old guard and another employee has recently won his case at tribunal. He put sweat and blood into the respondent company and was then cast aside.

Relevant law*ACAS Early Conciliation Scheme*

29. Details of the Early Conciliation Scheme are set out in sections 18A and 18B of the Employment Tribunals Act 1996. An employee must obtain an Early Conciliation certificate before presenting a claim of unfair dismissal. This certificate will extend the usual time limits. The extension provision is set out in section 207B (3) – (4) of the Employment Rights Act 1996. This states that in working out when a time limit set by a relevant provision expires, the period beginning with the day after Day A (when ACAS are contacted under Early Conciliation) and ending with Day B (the date the Early Conciliation Certificate is issued) is not to be counted. If a time limit set by a relevant provision would

expire during the period beginning with Day A and ending one calendar month after Day B, the time limit expires instead at the end of that period. The authority of **Luton Borough Council v M Haque** UKEAT/0180/17/JOJ sets out the correct approach to adopt in calculating the new time limit.

5 *The presentation of a complaint*

30. Section 111 (1) and (2) of the Employment Rights Act 1996 provide that where a complaint relates to an unfair dismissal of an employee by an employer, an employment tribunal shall not consider it unless it is presented before the end of the period of three months beginning with the effective date of termination,
10 or 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.

31. The authority of **Porter v Bandridge Ltd** [1978] ICR 943, CA held that the burden of proving that presentation of a claim in time was not reasonably
15 practicable rests on the claimant.

32. What is reasonably practicable is a question of fact for the Tribunal to decide. In the well established authority of **Wall's Meat Company Ltd v Khan** [1979] ICR 52, CA LJ Shaw stated that: "*The test is empirical and involves no legal concept. Practical common sense is the key note and legalistic footnotes may
20 have no better result than to introduce a lawyer's complications into what should be a layman's pristine province.*" **Palmer & Saunders v Southend on Sea Borough Council** [1984] IRLR 119 defines reasonably practicable as whether it was reasonably feasible to present a claim within the relevant three months.

25 **Issues to be determined**

33. The Tribunal identified the following issues as requiring to be determined:-

- a. What is the (extended) time limit to lodge a claim in accordance with the ACAS Early Conciliation provisions?

- b. Has the claimant shown that it was not reasonably practicable to present his claim within the three month statutory time limit / or as extended by the ACAS Early Conciliation provisions?
- c. If so, was the further delay in presenting his claim reasonable?
- 5 d. Does the Tribunal have jurisdiction to consider the claim?

Conclusion

34. In applying the ACAS Early Conciliation provisions and the approach to be adopted in accordance with *Luton Borough Council v M Haque* UKEAT/0180/17/JOJ, I have calculated the time limit in which the claimant was required to present the claim was 12 May 2022. This is because the claimant was dismissed on 28 January 2022 and the ordinary three month statutory time limit in which to present the claim was therefore 27 April 2022. The claimant made contact with ACAS under the Early Conciliation Scheme on 14 February 2022 and the ACAS Early Conciliation certificate was issued on 1 March 2022. In terms of Section 207B (3) of the ERA, the clock therefore stopped for 15 calendar days during the ACAS conciliation process and accordingly, the time limit to present the claim extended to 12 May 2022. Section 207B (4) of the ERA does not apply in this case as the ordinary three month time limit did not expire during the period between the claimant's first contact with ACAS and one calendar month after the ACAS certificate was issued.
35. In reaching the view that the claimant's effective date of termination of employment was 28 January 2022, I have noted that in applying *Calor Gas Ltd v Dorey* EAT 651/97, this is clearly stated in the termination of employment letter dated 1 February 2022 and the claimant did not dispute his understanding of that, albeit he was understandably slightly confused by the fact he was entitled to retain the company car during the three month notice period.
36. The claimant was clear in his evidence that he became aware of his right to claim unfair dismissal around the time of his dismissal. However, although he

gave evidence that in the end ACAS did make him aware of the statutory time limit to present a claim, he could not recall when that was. He also had difficulty in remembering the specific timescales in respect of his contact with ACAS and the solicitor after his dismissal and prior to presenting his claim.

5 37. Having carefully considered this evidence, together with all the evidence in the round, I am satisfied that the claimant did know about the statutory time limit to present a claim before the expiry of the time limit on 12 May 2022. This is because he was in contact with ACAS on or before 14 February 2022 when the early conciliation process commenced and he gave evidence in
10 cross examination that it was around two weeks after contacting ACAS that he had a consultation with a solicitor and about two weeks after that when he decided to contact ACAS again, which works out to be approximately the middle of March 2022.

15 38. The claimant also gave honest evidence about the challenging circumstances he faced following his dismissal in terms of his both his mental health that led to him seeking professional medical advice and his financial difficulties and how these factors contributed to him not presenting the claim in time.

20 39. Whilst I have sympathy for the claimant in such circumstances, the legal test I am required to apply is whether it was not reasonably practicable to present the claim in time. As I have found the claimant did know the time limit to present the claim before the expiry of the time limit and that during the period between his dismissal and the expiry of that time limit, he was still able to engage with ACAS, seek legal advice, secure alternative employment and continue caring for his daughter, I have concluded that he has not shown it
25 was not reasonably practicable to lodge his claim within the statutory time limit.

40. In these circumstances, I am not required to determine whether the further delay in presenting his claim was reasonable.

41. For these reasons, I have determined that the claim is time-barred and the Tribunal does not have jurisdiction to consider this claim further.

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Employment Judge: R Sorrell
Date of Judgment: 17 October 2022
Entered in register: 19 October 2022

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and copied to parties