Case Number: 1404791/2021

EMPLOYMENT TRIBUNALS

Claimant: **Mr J Evans**

Respondent: **Sentinel Group Security Ltd**

Heard at: **Bristol by VHS** **On: 29 June 2022**

Before: Employment Judge Midgley

Representation
Claimant: In person
Respondent: Mr Lomas, Lay Representative

JUDGMENT having been sent to the parties on 20 July 2022 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

PRELIMINARY HEARING

REASONS

Introduction

1. This hearing was listed to determine the preliminary issues of whether or not the claim was presented within time and, if not, whether it was not reasonably practicable for it to be presented within time such that the Tribunal still has jurisdiction to hear the claims.

Procedure, Hearing and Evidence

2. In preparation for the hearing, I was provided with a relevant bundle of documents of 55 pages, which had been prepared by the respondent, and a witness statement from Ms Jane Eden, the Human Resources and Compliance Manager for the respondent. I took time to read the witness statement of the key documents from the bundle before the hearing.

3. At the outset of the hearing, having sought the consent of the respondent to do so, I set out a summary of the relevant law to assist the claimant in his understanding of the issues that I had to consider the evidence that would be relevant to them.

4. The claimant had not prepared a witness statement, and so with the consent of the respondent, the claimant gave evidence by affirmation and I asked open questions relevant to the issues which I had to decide. Mr Lomas was then permitted to cross examine the claimant, and the claimant was given the opportunity to clarify any of the answers which he had given during his evidence (in place of re-examination by a representative). I then heard closing arguments from the claimant himself and from Mr Lomas for the respondent.

5. I took time to consider the evidence before delivering an extempore judgment. The claimant, having heard the judgement requested written reasons which are provided below.

Background Facts

6. These are the findings of fact that I have made from the evidence that I have heard and the documents that I have seen on the balance of probability which are relevant to the determination that I had to make.

7. The claimant was employed by the respondent as a Security Guard between 1 March 2018 and 6 September 2021 on which date he was dismissed on the grounds of gross misconduct.

8. It was a role which he enjoyed significantly. In or about June 2021, the claimant purchased a new house and notified the respondent of the change to his address by email.

9. The trigger incident for the events that bring the case before the Tribunal occurred on 17 August 2021. On that date the claimant was on duty with a colleague. The Regional Manager discovered that the claimant was not on site and called the claimant asking where he was. Eventually the claimant returned to site and accepted that he had left the site earlier than his contractual hours. The respondent's concern was that in so doing the claimant had caused the site to be understaffed and, therefore, vulnerable. The claimant was suspended.

10. A letter setting out the terms of the suspension and the reasons for it was sent to the claimant on 18 August. The letter identified that the claimant faced allegations of gross misconduct relating to the alleged unauthorised absence from duty, allegedly falsifying documentation, namely the Daily Occurrence Book, which showed that the claimant had attended the site until 7 PM, and further allegedly acting deceitfully in suggesting that the reason for his absence from site was that he was conducting an external patrol.

11. On 26 August the claimant attended a disciplinary investigation meeting. The respondent determined that there was sufficient evidence in relation to the allegations of gross misconduct as to merit a disciplinary hearing, and on 6 September the claimant duly attended a disciplinary hearing which was conducted by Mr Bull. Having heard the claimant's arguments Mr Bull

determined that the events amounted to gross misconduct and the appropriate sanction was summary dismissal. He notified Mr Evans of that decision during the disciplinary hearing itself.

12. The effective date of termination for the purpose of this hearing is therefore 6 September 2021. Confirmation of the reason for the claimant's dismissal was sent to the claimant by letter on 7 September.

13. Sometime prior to the disciplinary hearing on 6 September the claimant, who was at that stage concerned with the period of his suspension, spoke with a friend seeking to understand what he could do and what to his rights were. He was advised that he could make a claim in relation to his suspension and/or any other action to the Tribunal.

14. Following his dismissal on 6 September the claimant conducted a google search using the phrase, "what can I do if I have been wrongfully dismissed?" The web pages that he saw referred him to ACAS, and he was therefore became aware that he was entitled to bring a claim to the Tribunal (rather than to the County Court or other courts with their consequent costs regimes), and that to exercise that right he merely needed to complete the relevant form (the ET 1 form). He was not however aware at that time of the time limit within which he had to present a form, namely that in section 111 Employment Rights Act 1996 of three months from the date of termination.

15. Following his dismissal, the claimant appealed by email on 9 September. The grounds for the appeal were as follows (insofar as they are relevant to the determination that I have to make). Firstly, the claimant expressed concerns about disparate treatment. In particular, he suggested that the day following his suspension a manager had been on site all alone and the site was therefore vulnerable because understaffed. Secondly, he identified another security guard whom he alleged was constantly sick and took leave without authority but had only received a verbal warning in comparison to the summary dismissal. In regard to the substantive fairness, he also raised concerns that his role had been advertised on a job website within approximately four hours of the point of his suspension.

16. An appeal hearing was conducted by Mr Al Shabaghi on 14 September 2021. The claimant attended the hearing, which was adjourned for further investigations to be made in relation to the claimant's allegations about the manager, the advertisement of his role and the other security guard amongst other matters.

17. The respondent at that stage had employed an HR Officer, Ms Jane Eden (who gave evidence before me). She is not legally qualified and had no understanding of time limits applicable to the Tribunal. Consequently, when she received the claimant's appeal, she passed the papers to "Citation," an external legal team that was engaged by the respondent to provide legal advice.

18. There then followed a lengthy period of delay before the outcome of the appeal was communicated to the claimant. The material facts of that period are as follows:

19. On 21 September, the claimant chased the outcome of the appeal by email sent to Ms Eden. Ms Eden informed the claimant by return of email that the respondent would investigate the allegations and hope to provide him with a response by the end of that week.

20. On 30 September, the claimant again sent a chaser by email seeking the outcome of the appeal. Again, Ms Eden replied indicating that the respondent was carrying out investigations. There was no further response and on 14 October the claimant sent a further chaser by email again. Ms Eden replied saying that the respondent was conducting the final meetings that week and hoped to give him an outcome soon. On any basis that explanation was untrue for the reasons that I will detail below.

21. On 2 November, Ms Eden emailed the claimant to say that she had returned from annual leave and apologised for the continuing delay and the communication of the outcome of the appeal.

22. It was only on 2 November that the respondent conducted the first interview in relation to the grounds of appeal that the claimant had raised. Two interviews were conducted in total; the first with a manager to understand whether there was a general practice of staff leaving early by agreement with those on site without concerns being expressed; the second on 12 November with the individual security guard against whom the claimant had made allegations.

23. On 9 November the claimant again chased the outcome of the appeal. Ms Eden again replied, but in her reply made no reference to the fact that the respondent had conducted the first interview on 2 November or indeed that it planned to conduct another one shortly.

24. On or about the 11th or 12th of November, the claimant spoke to the Citizens Advice Bureau by telephone. He expressed concerns about the delay in the appeal outcome and asked what he could do. He was told that he should push HR to provide him with the outcome as soon as possible and if he was unhappy that he should then take the matter to ACAS. He did not receive any advice in relation to time limits, nor did he seek it.

25. On 16 November, the claimant again chased the outcome of the appeal and Ms Eden replied suggesting that she was in discussions with the legal team and hoped to respond as soon as possible.

26. On 23 November, the claimant received his P45. Given that he had not yet received the outcome of his appeal he was obviously concerned about that and consequently emailed Ms Eden raising his concerns and stating that he presumed that his appeal had not gone well. Ms Eden replied, apologising and stating that she was still in discussions with the legal team but there was no outcome yet. She did not identify what the discussions were that she was having or why they were necessary. In particular, she did not indicate whether for example, they were giving advice on the outcome (which was a matter for Mr Al Shabagi) or the process.

27. At or about the same time on 23 November, the claimant began a new role having given up hope of being re-employed which was the purpose of his appeals.

28. On 5 December the primary time limit for bringing a claim of unfair elapsed.

29. By 7 December the claimant had lost patience with the respondent and therefore initiated conciliation through ACAS. On 9 December the ACAS certificate was issued. It is unclear whether that was because the respondent refused to conciliate or because the claimant had no interest in conciliation having secured alternative employment. In any event the reason is not material to the decision I have to make.

30. On 16 December the claimant presented the ET1. That was eleven days outside the primary time limit.

31. On 17 December the respondent sent the appeal outcome letter, rejecting the claimant's appeal, to his former address rather than the correct address.

The relevant Law

32. Section 111 ERA 1996 provides as follows

(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, and 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.

33. The provisions of section 207B ERA 1996 apply to claims under section 111 and the other provisions in the paragraph above. Section 207B of the Act provides:

(1) This section applies where this Act provides for it to apply for the purposes of a provision of this Act (a "relevant provision"). But it does not apply to a dispute that is (or so much of a dispute as is) a relevant dispute for the purposes of section 207A.

(2) In this section -

(a) Day A is the day on which the complainant or applicant concerned complies with the requirement in subsection (1) of section 18A of the Employment Tribunals Act 1996 (requirement to contact ACAS before instituting proceedings) in relation to the matter in respect of which the proceedings are brought, and

(b) Day B is the day on which the complainant or applicant concerned receives or, if earlier, is treated as receiving (by virtue of regulations

made under subsection (11) of that section) the certificate issued under subsection (4) of that section.

(3) In working out when a time limit set by a relevant provision expires the period beginning with the day after Day A and ending with Day B is not to be counted.

(4) If a time limit set by a relevant provision would (if not extended by this subsection) expire during the period beginning with Day A and ending one month after Day B, the time limit expires instead at the end of that period.

(5) Where an employment tribunal has power under this Act to extend a time limit set by a relevant provision, the power is exercisable in relation to the time limit as extended by this section.

34. Three general rules apply to that test:

34.1. What is reasonably practicable is a question of fact and thus a matter for the tribunal to decide. An appeal will not be successful unless the tribunal has misdirected itself in law or has reached a conclusion that no reasonable tribunal could have reached. As Lord Justice Shaw put it in Wall's Meat Co Ltd v Khan [1979] ICR 52, CA: 'The test is empirical and involves no legal concept. Practical common sense is the keynote and legalistic footnotes may have no better result than to introduce a lawyer's complications into what should be a layman's pristine province. These considerations prompt me to express the emphatic view that the proper forum to decide such questions is the [employment] tribunal, and that their decision should prevail unless it is plainly perverse or oppressive'

34.2. the tribunal must have regard to the entire period of the time limit (Wolverhampton University v Elbeltagi [2007] All ER (D) 303 EAT);

34.3. 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. Accordingly, if the claimant fails to argue that it was not reasonably practicable to present the claim in time, the tribunal will find that it was reasonably practicable — Sterling v United Learning Trust EAT 0439/14.

35. In Palmer and anor v Southend-on-Sea 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'. Lady Smith in Asda Stores Ltd v Kauser EAT0165/07 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'.

36. Subsequently in London Underground Ltd v Noel [1999] IRLR 621, Judge LJ stated at paragraph 24 "The power to disapply the statutory period is therefore very restricted. In particular it is not available to be exercised, for example, "in

all the circumstances", nor when it is "just and reasonable", nor even where the Tribunal "considers that there is a good reason" for doing so." As Browne Wilkinson J (as he then was) observed: "The statutory test remains one of practicability … the statutory test is not satisfied just because it was reasonable not to do what could be done" (Bodha v Hampshire Area Health Authority [1982] ICR 200 at p 204).

37. To this end the factors the Tribunal should consider, as identified in Palmer are:

    37.1. the substantial cause of the claimant's failure to comply with the time limit;
    37.2. whether there was any physical impediment preventing compliance, such as illness, or a postal strike;
    37.3. whether, and if so when, the claimant knew of his rights;
    37.4. whether the employer had misrepresented any relevant matter to the employee; and
    37.5. whether the claimant had been advised by anyone, and the nature of any advice given; and whether there was any substantial fault on the part of the claimant or his adviser which led to the failure to present the complaint in time.

38. The objective consideration requires that tribunals should have regard to all the circumstances of a case, including what the claimant did; what he or she knew, or reasonably ought to have known, about time limits; and why it was that the further delay occurred (see Nolan v Balfour Beatty Engineering Services EAT 0109/11)

Ignorance of Rights

39. The question of whether or not it was reasonably practicable for a claimant to present his claim in time, in circumstances where it is argued that they were ignorant of their rights to claim requires the Tribunal to be satisfied, both as to the truth of that assertion and that the ignorance was reasonable on an objective inquiry; see Porter v Bandridge Ltd [1978] ICR 943, CA; Avon County Council v Haywood-Hicks [1978] ICR 646 EAT and Riley v Tesco Stores Limited [1980] ICR 323 .

Discussion and Conclusions

40. I reiterate the following key provisions in relation to the test that I have to apply. As was said by Lady Justice Smith in Asda Stores v Cowser the relevant test is not simply a matter of looking at what was possible but to ask whether on the facts of the cases found it was reasonable to expect that which was possible to have been done. The test does not permit me to consider whether it would be just and equitable to extend time. That is not the nature of the statutory requirement. That test applies to claims brought under the Equality Act.

41. Applying the law to the facts as I have found them, I reach the following conclusions.

42. Firstly, the claim was presented some eleven days out of time. I therefore have to consider what the primary causes were of the late presentation. I am

satisfied, having found the claimant to be a credible and honest witness, that the claimant's ignorance of the time limit was the primary driving factor. The second causative factor was the delay caused by the respondent in the appeal process and in particular the delay in waiting for a response from the legal department or team. The interviews that were necessary for the appeal had been concluded by the 12 November. It was, therefore, as it seems to me, a simple matter for Mr Al Shabagi to review that evidence in light of the grounds of appeal and determine whether to uphold or dismiss the appeal. There was no explanation offered to me (and certainly no coherent explanation) as to why it would take a further month and five days for those conclusions to be reached. Although there is reference in Ms Eden's statement to annual leave and/or sickness there is nothing specific stated about the causes of the delay between the conclusion of the further investigations and the appeal outcome letter being sent.

43. The claimant's case is that the delay was one deliberately manufactured and extended by the respondent and/or their legal team to exhaust the primary time limit for him to bring his claim of unfair dismissal. Although there is no clear evidence before me on which I could reach such a conclusion, I observe that the facts as they stand could support that conclusion, and I have considerable sympathy for the claimant insofar as his frustrations and his suspicions about the delay are concerned.

44. However, I have to consider whether the delay rendered it was reasonably feasible for the claimant to present the claim in time in circumstances where he was ignorant of the applicable time limits, but I must do so having assessed whether his ignorance of the time limits was itself reasonable. If it was not, then it would have been incumbent on the claimant to present his claim within time, notwithstanding any unreasonable delay by the respondent.

45. As Mr Lomas argued in submissions, it is a trite point of law that for the purposes of the reasonable practicability test an employee's decision to await the outcome of an internal process (such as a grievance or an appeal) does not of itself make it not reasonably feasible for a claim to be presented in time. It was certainly open to Mr Evans to present the claim during the period of the delay in relation to his appeal. The primary issue therefore is whether the claimant's ignorance of the time limit applicable to his rights was objectively reasonable. I have to conduct that assessment in the circumstances of the world as it is.

46. The following facts are material to that determination. First, the claimant is not in his words, 'strong at reading and writing' and therefore whilst he can complete forms, and can look at documents online and elsewhere, undertaking those tasks is not without difficulty and may of themselves take longer than for someone who does not suffer from the same difficulties.

47. Secondly, we live in an age where an individual may through the use of Google or other search engines rapidly and without great difficulty identify the applicable time limits for their respective rights. Mr Lomas argues that once you are aware of the fact that you can bring a claim it is only reasonable to look for the time limit that applies as, as he put it, one cannot expect that you would be entitled to bring a claim at any stage - it is only logical to assume there must be and end point for doing so. It seems to me that there is force in that

argument; if you are aware of the right to bring the claim it is only in very unique circumstances in this day and age that it could be said that it is objectively reasonable not to be aware of the time limits that are applicable to those rights. Any number of web pages providing free advice, including the Tribunal Service web page, provide information which identifies the time limit for a claim for unfair dismissal.

48. Whilst I am incredibly sympathetic towards Mr Evans for the predicament that he found himself in as a consequence of the respondent's wholly unreasonable and unexplained delay, I cannot say that it was objectively reasonable for him not to be aware of the time limit.

49. I am satisfied that if he knew there was a three-month time limit, he would have presented his claim within it, and it is of no credit to the respondent whatsoever that had the outcome of the appeal been communicated even within a few days of the final interview in November then I am certain that the claimant would have presented his claim in time (as the time limit did not expired until 5 December).

50. However, the irresistible conclusion from the fact that the claimant's ignorance was not objectively reasonable is that I cannot find (as much as I might wish to) that it was not reasonably feasible for the claimant to present the claim in time.

51. The consequence is that I conclude it was reasonably feasible for the claimant to present the claim by 5 December 2021 and therefore the Tribunal has no jurisdiction to hear the claim of unfair dismissal. The claimant's claim is therefore dismissed.

Employment Judge Midgley
Date: 5 August 2022

Reasons sent to the Parties: 5 August 2022

FOR THE TRIBUNAL OFFICE