



EMPLOYMENT TRIBUNALS

Claimant: Mr Basil Allen
Respondent: Atalian Servest Limited
Heard at: Watford Employment Tribunal (by CVP)
On: 17 January 2023
Before: Employment Judge Hutchings

Representation

Claimant: Mr Bryan of counsel
Respondent: Miss Matharu of counsel

JUDGMENT having been sent to the parties on 12 February 2023 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:

REASONS

Background

1. On 15 May 2023 I received a request for written reasons for the Judgment that I gave to the parties at the hearing on 17 January 2023.
2. By a claim form dated 21 April 2021 the claimant claims unfair dismissal (relating to the handing of a disciplinary process by the company into an alleged safety issue), age discrimination relating to the dismissal and unlawful deduction from wages for holiday pay and notice pay. The claimant refers to other payments in his claim form, but these are not specified. He is also seeking reinstatement and financial compensation for loss, distress and injury to feelings. Early conciliation with ACAS commenced 17 March 2021. The claimant has a conciliation certificate dated 21 March 2021.
3. The claimant was employed by the respondent, Atalian Servest Limited, as a Hygiene Operative, on the respondent's train cleaning contract with Alstom at Wembley Train Care Centre. He says his employment started on 1 July 2005; the respondent says his employment started on 20 October 2008 until his dismissal. The date of dismissal is disputed. The claimant says he was dismissed on 9 December 2021.
4. The respondent contests the claims, stating in grounds of response dated 17 June 2022 that the claimant was dismissed for gross misconduct following a disciplinary process which concluded that the actions of the claimant should result in his dismissal without notice on 19 August 2021, following his suspension on 13 July 2021. The

respondent submits that the disciplinary and appeal process was fair in all the circumstances, that the dismissal related to the safety issue and that all outstanding payments were made. The respondent submits that the claimant is not entitled to notice pay as he was summarily dismissed by reason of gross misconduct and that he is not entitled to holiday pay as all accrued but untaken holiday was paid to him upon his termination.

5. Further, the respondent submits that the claimant's claims are presented significantly out of time, stating 19 August 2021 and the claimant filed his claim with the Employment Tribunal on 21 April 2022, 8 months later. In its ground of response, the respondent requested that the Tribunal strike out the claims as out of time, submitting that the claimant has failed to present any evidence as to why it would be just and equitable for the Tribunal to extend the time limits in the circumstances.
6. By a notice of hearing dated 13 September 2022 this hearing was listed to determine "whether to issue a deposit order or strike out the claim because the [claimant] is not entitled to bring it if the statutory time limit has expired".
7. Further, by a letter dated 13 September 2022 Employment Judge Quill informed the parties that the issues to be determined at this hearing include:
 - 7.1. The termination date;
 - 7.2. The date of any alleged age discrimination; and
 - 7.3. The reasons that the claim was not submitted sooner.

Evidence

8. The claimant attended the hearing and was represented by Mr Bryan of counsel, who called evidence from the claimant. In addition to the claimant, I had witness statements from the claimant's union representative, Mr John Awobenu who did not attend the hearing. The respondent was represented by Miss Matharu of counsel and called sworn evidence from Ms Stonehouse on behalf of the respondent.
9. I had a hearing file of 63 pages. Ms Matharu and Mr Bryan made closing statements.

Preliminary matters

10. The claimant's literacy has been raised by his solicitor in correspondence in that he cannot read and write. Mr Allen told me his neighbour assists him with reading, as does his union representative. At the start of the hearing, we discussed the reasonable adjustments the claimant requires to fully participate in the hearing and give his best evidence. He was supported throughout the hearing by his solicitor, who I agreed be in the room with him and could read documents in the hearing file to him if referred to in questioning. The claimant agreed to proceed on this basis and confirmed that he did not require any further adjustments.
11. Ms Matharu drew the Tribunal's attention to the fact she was very recently instructed and was not being paid for her representation due to the claimant's financial issues. I note that these are not circumstances which relate to the substantive issues before this Tribunal and that they do not influence my decision. The claimant was represented by his solicitors when submitting his claim for and has had the benefit of legal advice, his solicitors corresponding on his behalf throughout the claim process.

Issues

12. This hearing is to consider the application made by the respondent to strike out the claims for being out of time. This is recorded in the notice of hearing dated 13

September 2022. I must consider whether to issue a deposit order or strike out the claim because the claimant is not entitled to bring it if the statutory time limit has expired.

13. The purpose of the hearing for me to consider evidence from the claimant about whether, and if so why, his claims were late. In doing so I must also determine the following issues set out in the letter of Employment Judge Quill dated 13 September 2022:
 - 13.1. The termination date;
 - 13.2. The date of any alleged age discrimination; and
 - 13.3. The reasons that the claim was not submitted sooner.
14. Therefore, I will determine the date of termination and consider the deadline for claims brought in time, taking account of the dates of early conciliation (17 March to 21 March 2021).
15. For the claims of unfair dismissal / unauthorised deductions I will consider
 - 15.1. Were the unfair dismissal / unauthorised deductions made within the time limit in section 111 of the Employment Rights Act 1996? The Tribunal will decide:
 - 15.1.1. Was the claim made to the Tribunal within three months (plus early conciliation extension) of the effective date of termination / act complained of / date of payment of the wages from which the deduction was made?
 - 15.1.2. If not, was there a series of deductions and was the claim made to the Tribunal within three months (plus early conciliation extension) of the last one?
 - 15.1.3. If not, was it reasonably practicable for the claim to be made to the Tribunal within the time limit?
 - 15.1.4. If it was not reasonably practicable for the claim to be made to the Tribunal within the time limit, was it made within a reasonable period?
16. For the claim of age discrimination I will consider:
 - 16.1. Was made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:
 - 16.1.1. Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?
 - 16.1.2. If not, was there conduct extending over a period?
 - 16.1.3. If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?
 - 16.1.4. If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:
 - 16.1.4.1. Why were the complaints not made to the Tribunal in time?
 - 16.1.4.2. In any event, is it just and equitable in all the circumstances to extend time?
17. If I allow the claims to proceed as not being out of time, I must set out the date of the final hearing, a timetable and issue case management orders.

Finding of Fact

18. First, I make a general finding as to the credibility of witness evidence. The dismissal was communicated by letter. The question arises as to whether Mr Allen knew the

contents of the letter. I have read his witness statement and seen the tests awareness paper he completed as part of his training while employed. This document has his name at the top of the paper and at the end the signature matches that in his witness statement. I find these are signatures by the same person. The claimant told me that he signed the test at the bottom but did not write any of the other words in manuscript in that test paper.

19. I have reviewed the signatures and the handwriting contained within the test paper documents. It is the same handwriting. I find that the claimant did complete the test paper and signed it following completion. He can write.
20. During the hearing, when cross examined about the test paper, the claimant told me that he can read some things. His openness in sharing this and my finding that he completed the test paper, reading the questions to answer, does not accord with the claimant not being able to read. This is relevant to his ability to read letters which formed part of the disciplinary process and his dismissal, which I address below. It is not credible that the claimant could not read or write. I find that the claimant's literacy challenge is not at the level presented by his instructing solicitors who say the claimant cannot read or write. I have seen evidence of his writing and find that he would have had to read the questions in order to write his answers on the script, which he did. I find that the claimant was able to read and complete the track assessment.
21. Next, I address the date of termination of the claimant's employment. I have seen the dismissal letter dated 19 August 2021. Ms Stonehouse sent this to the claimant's home address; the claimant confirmed to me that the address at the top of the letter was his correct and his home address at the time the letter was sent. This letter was sent following a disciplinary meeting on 16 August 2021. It is addressed directly to the claimant and states that his employment would "terminate without notice on 19th August 2021". The claimant says he did not receive this letter. This is simply not credible. The claimant signed a letter dated 25 August 2021, the contents of which refer and reply to the 19 August letter sent by Ms Stonehouse. At the hearing the claimant confirmed to me that the signature at the bottom of the letter dated 25 August 2021 is his signature. The claimant told me that any letter he receives he gives to John, his union representative, and this was the reason he initially told me that he did not receive the letter dated 19 August 2021, but in any event, he did not give the letter of 19 August 2021 to his union representative.
22. Mindful of the passage of time and taking account of the fact the union representative did not attend the hearing to enable to Tribunal to ask questions of him about whether he received the 19 August letter from the claimant, I find that the claimant did receive the letter dated 19 August 2021, informing him of his date of termination. It was sent to his home address. He gave it to his union representative as was his usual practice and this informed the letter of reply dated 25 August 2021 which the claimant signed.
23. The witness evidence of the union representative is that he spoke with the claimant during the week after the letter of 19 August 2021. I find that, given the claimant's literacy challenges, he did not write the letter of response dated 25 August 2021. This was written by the union representative, which accords with the evidence that the claimant's practice was to pass letters he received to him and the evidence that the two men spoke following receipt of this letter, with the union representative drafting the appeal letter dated 25 August 2021. The claimant signed this, knowing its contents from their discussions. It is simply not credible that the claimant signed this letter to his employer, having gone through a disciplinary hearing on 16 August 2021, without knowing its contents.
24. At this time, I find that, based on his discussion with the union representative about the contents of the letters of 19 and 25 August 2021 the claimant was in no doubt he

had been dismissed without notice and he was aware of the date the respondent had terminated his employment.

25. By his own admission, the claimant was in contact with and being supported by his union representative throughout this period, discussing the alleged safety issue breach and subsequent disciplinary process. Mindful of the claimant's literacy and the support he told me he received from John it is simply not plausible that he signed a letter appealing his dismissal without knowing anything about what it said, which is what he told the Tribunal. I find that the claimant knew the contents of the appeal letter, even if he did not read it, and attended the appeal as a result.
26. There were issues with the payments the claimant received on termination, in that the claimant continued to receive wages after 19 August. Given the clear statement in the 19 August 2021 letter that employment was being terminated without notice on this date, I prefer Ms Stonehouse's evidence that this was a processing error rather than an intention by the respondent to continue paying the claimant, as the payments continue after the appeal has concluded, with the claimant receiving an extra 9 days' pay (31 October to 9 November 2021), as evidenced by the pay documents in the hearing file.
27. There is no evidence before me that employment continued up to the 9 December 2021. When asked what he thought his situation at work was after the disciplinary hearing, the claimant told me that he went into work in the morning and received a phone call while at the yard from his manager who told him not to come back into work. He said that his manager told him he was suspended. I find that Mr Allen was told not to come back into work, but the use of the word suspended in this timeframe by the manager was implausible. The claimant was told on the day after his disciplinary hearing on 16 August 2019 not to come into work. This was confirmed in the 19 August 2021 letter as dismissal. Employment had terminated; he was not suspended.
28. For these reasons I find that the claimant's employment ended on 19 August 2021. Early conciliation with ACAS commenced 17 March 2022. The claimant has a conciliation certificate dated 21 March 2022. As contact with ACAS is after the initial period (3 months less a day) for filing a claim with the employment Tribunal (as the date for unfair dismissal and age discrimination relating to dismissal is 19 August 2021). ACAS consultation does not extend the time period. The deadline for the claim is 18 November 2021.
29. The claimant says he did not receive the appeal outcome letter dated 20 October 2021. He accepted that it was properly addressed. I have seen the receipt of posting and Royal Mail Tracking document, which confirms delivery of the letter to the claimant's home address. I find he did receive the letter. The claimant's evidence as to whether he sent this letter to the union representative was confused. First, he said he did not receive it at all; then he said he could not remember if he sent this letter to the union representative. Given the passage of time I understand that the claimant may not recall exactly what happened to this letter. Based on his certainty in oral evidence that any letter he receives gets sent to John and my finding that the union representative did receive the October letter, I find that Mr Allen did send this letter to representative, and the representative supported him in how to respond. Indeed, ultimately, in his oral evidence the claimant accepted that the representative had seen the October letter. As it was only sent to the claimant's address there was no other way for the representative to obtain this letter other than for the claimant to have given it to him, which was their practice.
30. I find that the letters from claimant's solicitor that the claimant did not receive the respondent's letters do not accurately reflect events.

31. At the hearing the claimant told me he first spoke to his solicitor in November 2021 and then he lost contact with his solicitor.

Law

Time limits: unfair dismissal and payments

32. Section 111(2) of the Employment Rights Act 1996 provides that an Employment Tribunal shall not consider a complaint of unfair dismissal unless it is presented within 3 months of the effective date of termination 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 the 3 months. It states: "...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." (2A)
33. Section 207B (extension of time limits to facilitate conciliation before institution of proceedings) applies for the purposes of subsection (2)(a). The case authorities which I must follow on this provision are clear in that the power to disapply the statutory time limit is very restricted. Only in very restricted circumstances can I disapply the clear 3-month (less a day, as extended by ACAS consultation) timeline. The statutory test is one of practicability; to give clear times for documents to be sent to a Tribunal. I cannot extend that time limit just because it was reasonable not to do what could be done as per *Bodha (Vishnudut) v Hampshire Area Health Authority [1982] ICR 200*. In *London Underground Ltd v Noel [1999] ICR 109* it was held that it is not just a question of considering what was reasonable but of considering what was reasonably practicable.
34. In claims of breach of the Working Time Regulations 1999 ("WTR"), a similarly worded escape clause applies, save that the date in which time starts to run is the date of the alleged breach of the WTR (see reg.30(2) of the WTR). Likewise, in a contract claim for other payments, the time limit is three months beginning with the effective date of termination of employment or last working day with a similarly worded escape clause (Article 7, [Employment Tribunals] Extension of Jurisdiction (England and Wales) Order 1994).
35. The first day of the three-month period is the date of termination itself (*Trow v Ind Coope (West Midlands) Ltd [1967] 2 QB 899, [1967] 2 All ER 900*). Hence, the date in which the time period runs out is three months, less one day, from the date of termination. In *Palmer and Saunders v Southend-on-Sea Borough Council [1984] IRLR 119 at [34]*, the Court of Appeal held: "was it reasonably feasible to present the complaint to the [employment] tribunal within the relevant three months?"—is the best approach to the correct application of the relevant subsection.....It may be relevant for the Industrial Tribunal to investigate whether at the time when he was dismissed, and if not then when thereafter, he knew that he had the right to complain that he had been unfairly dismissed....It will frequently be necessary for it to know whether the employee was being advised at any material time and, if so, by whom; of the extent of the advisors' knowledge of the facts of the employee's case; and of the nature of any advice which they may have given to him."
36. In *Porter v Bandridge [1978] IRLR 271 at [12]*, the Court of Appeal held: "The onus of proving that it was not reasonably practicable to present the complaint within a period of three months was upon the applicant. That imposes a duty upon the applicant to show precisely why it was that he did not present his complaint. He has to satisfy the Tribunal that he did not know of his rights during the whole of the period of eleven

months and that there was no reason why he should make enquiries or should know of his rights during that period.”

37. Smith J in *Nolan v Balfour Beatty Engineering Services* EAT 0109/11 (unreported) held that: ‘In summary, when deciding what would have been a reasonable time within which to present a late claim, employment tribunals plainly require to bear in mind the context, namely a primary time limit of three months and the general principle that litigation should be progressed efficiently and without delay. They then require considering all the circumstances of the case, an exercise which will inevitably include taking account of what the claimant did and what he knew about time limits, what he, reasonably, ought to have known about them, and they require to ask themselves why it was that the further delay occurred.’
38. Accordingly, the power to dis-apply the statutory time limit is, “...very restricted. In particular, it is not to be exercised, for example, ‘in all the circumstances,’ nor even when it is ‘just and reasonable’ nor even where the Tribunal ‘considers that there is good reason’ for doing so.” The onus of proving that presentation in time was not reasonably practicable lies on the claimant – *Porter v Bandridge* [1978]ICR 943.

Time limits: discrimination

39. The test is different for discrimination claims. It is a wider test. Section 123 of the Equality Act 2010 provides:
- (1) Proceedings on a complaint within section 120 may not be brought after the end of—*
- (a) the period of 3 months starting with the date of the act to which the complaint relates, or*
- (b) such other period as the employment tribunal thinks just and equitable.*
- (2) Proceedings may not be brought in reliance on section 121(1) after the end of—*
- (a) the period of 6 months starting with the date of the act to which the proceedings relate, or*
- (b) such other period as the employment tribunal thinks just and equitable.*
- (3) For the purposes of this section—*
- (a) conduct extending over a period is to be treated as done at the end of the period;*
- (b) failure to do something is to be treated as occurring when the person in question decided on it.*
- (4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—*
- (a) when P does an act inconsistent with doing it, or*
- (b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.*

40. A balancing exercise is required, weighing factors against the claimant and those in their favour, considering which carry more weight. Then I must consider the prejudice to the respondent as part of this balance. Appeal courts suggest consideration of section 33 of Limitation Act 1980 as a useful checklist but should not be adhered to slavishly (confirmed by the CA in *Southwark London Borough Council v Afolabi* 2003 ICR 800, CA.).

Conclusions

41. I have found that the effective date of termination of the claimant’s employment was 19 August 2019. Based on my finding on the date of termination, the deadline for claims brought in time is 18 November 2021. The initial 3 months less a day period is not extended by the period of ACAS consultation as this took place after this deadline (17 March to 21 March 2022). The claim form was presented on 21 April 2021, 5

months after the deadline for presentation of the claim form to the Employment Tribunal. Therefore, the claim was not made to the Tribunal within three months of the effective date of termination of 19 August 2021, as it was made after 18 November 2021.

42. Next, I must consider whether it was reasonably practicable for the claim for unfair dismissal to be made to the Tribunal within the time limit, ie by 18 November 2021. In considering whether it was reasonably practicable I am mindful that, for claims of unfair dismissal, the power to dis-apply this statutory time limit is very restricted. In particular, it is not to be exercised, for example, 'in all the circumstances,' nor even when it is 'just and reasonable' nor even where the Tribunal 'considers that there is good reason' for doing so." A reason for the delay may be genuine and well-meaning but this is not the test. I must consider what was reasonably practicable to file a claim for UDL in time. The onus of proving that presentation in time was not reasonably practicable lies on the claimant who show precisely why it was not reasonably practicable for him to present the claim before the end of the 3 months. Court of Appeal cases guide how the words reasonably practicable should be interpreted by a Judge deciding whether to extend time: was it feasible to present the complaint to the [employment] tribunal within the relevant three months.
43. In summary, when deciding what would have been a reasonable time within which to present a late claim, employment tribunals plainly require to bear in mind the context, namely a strict, primary time limit of three months and the general principle that litigation should be progressed efficiently and without delay. I must consider all the circumstances of the particular case, an exercise which will inevitably include taking account of what the claimant did and what he knew about time limits, what he, reasonably, ought to have known about them, and in this context, I must ask why it was that the delay occurred. That is what I had in mind in relation to the unfair dismissal claim in reaching my decision.
44. I have found that the claimant was aware of his date of dismissal on 19 August 2021 and that he was complicit in the appeal letter. This was in August 2021, and he was advised on an on-going basis at that time by the union representative. He has admitted seeking legal advice in November 2021. In this context I conclude it was reasonably practicable for the claimant to present his claims for unfair dismissal by 18 November 2021. There is no evidence before me explaining why he did not do so by this time or why the claimant took 5 months to bring his claim. In these circumstances I conclude that it was reasonably practicable for the claimant to present his claim form in time.
45. Therefore, as I have found was it was reasonably practicable to bring the claim in time do not need to consider whether the claim was presented within a reasonable period after the expiry of the primary three-month time limit. I make the observation that, in any event, there is no evidence before me explaining this delay. I conclude the claim for unfair dismissal is out of time and therefore it is not within the jurisdiction of the Tribunal to consider this claim.
46. I turn now to the claim for holiday pay and wages. This is also out of time as the deadline for these claims was 9 December 2021 and 19 August 2021 respectively. Again, there is no evidence before me explaining the lengthy delays in submitting these claims to the Tribunal. I conclude it was reasonably practicable for the claimant to bring these claims within the statutory deadlines set by law. Accordingly, these claims are out of time and therefore it is not within the jurisdiction of the Tribunal to consider this claim.
47. Next, I must consider whether the claim for age discrimination resulting from dismissal is out of time. I have found that the dismissal was 19 August 2021 so the deadline for bringing the age discrimination applying section 123 of the Equality Act 2010 is 18

November 2021. The claim form was filed on 21 April 2022 and is therefore outside the statutory time limit. Therefore, I must consider my discretion to extend time.

48. At the hearing, the claimant confirmed the only claim is age discrimination relating to his dismissal. This is a one-off event. Therefore, there is not a series of similar acts or conduct extending over a period for the Tribunal to consider. Next, I must consider if the claims made within a further period that the I thinks is just and equitable and, in any event, is it just and equitable in all the circumstances to extend time.
49. The claimant is represented at the hearing. He told me he first sought legal advice about his dismissal in November 2021. The notice of hearing is clear that this hearing was to consider the time limit tests. The claimant has not presented any evidence or made his case as to why it is just and equitable for me to extend time beyond the limit. In determining whether it would be just and equitable to extend time requires an objective consideration of the factors causing the delay and what period should reasonably be allowed in those circumstances for proceedings to be instituted having regard, certainly, to the strong public interest in claims in this field being brought promptly, and against a background where the primary time limit is three months.
50. I must also balance the prejudice to the respondent is the delay and its ability to fully investigate matters surrounding the claim of age discrimination. This claim was not raised at the time of dismissal; it was not raised until April 2022, 8 months after the dismissal. This is a considerable period of time. I consider the delay by the claimant in bringing this claim, with no explanation for the delay and with no issues being raised about his age when he was dismissed, on balance, puts the respondent at a disadvantage in fully investigating this claim and presenting evidence. The greater the passage of time, the more likely it is that the relevant manager's memory will have faded: such a witness would be more likely to fall back on the contemporaneous notes as an aid to recollection. The Tribunal can read contemporaneous documents, but what cannot be replaced is a manager's direct recollection of events and thought processes. Second, R has been prevented from investigating the claims while matters were fresh. Such forensic prejudice to a respondent is "crucially relevant": *Miller v The Ministry of Justice UKEAT/0003/15/LA at [13]*. Having regard to the delay, I consider that the evidence adduced or likely to be adduced by the respondent will be less cogent than if the action had been brought within the time (for example, by preventing or inhibiting the respondent from investigating the claim for age discrimination while matters are fresh. I conclude the claim for age discrimination is out of time and therefore the Tribunal does not have jurisdiction to consider it.
51. For these reasons, it is my judgement that the claimant's claims of unfair dismissal, age discrimination relating to dismissal, wages and holiday pay are dismissed as out of time and therefore the Tribunal does not have jurisdiction.

Employment Judge Hutchings

26 May 2023

REASONS SENT TO THE PARTIES ON

2 June 2023

FOR THE TRIBUNAL OFFICE