



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4101378/2023

Held via Cloud Video Platform (CVP) on 1 June 2023

Employment Judge P O'Donnell

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Mr A Fraser

**Claimant
In Person**

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EE Ltd

**Respondent
Represented by:
Ms Cope –
Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

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The judgment of the Employment Tribunal is that the claim was lodged out of time and it was reasonably practicable for it to have been lodged within the statutory time limit. The Tribunal does not, therefore, exercise its discretion to hear the claim out of time. The claim is hereby dismissed for lack of jurisdiction.

REASONS

Introduction

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1. The claimant has brought a complaint of unfair dismissal under s94 of the Employment Rights Act 1996 alleging that he was dismissed as defined in s95(1)(c) of the Act (commonly referred to as a “constructive dismissal”).
 2. The respondent resists the claim. They raise a jurisdictional defence of time bar alleging that the claim was lodged outside of the normal statutory period in the 1996 Act. The present hearing was listed to determine the time bar issue.
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3. At the outset of the hearing, the Tribunal asked the claimant if he accepted that his claim was lodged out of time. He did accept this. The only issue for determination was, therefore, whether the Tribunal exercised its discretion to hear the claim out of time.

5 **Evidence**

4. The Tribunal heard evidence from the claimant.
5. There was an agreed bundle of documents prepared by the parties.

Findings in fact

6. The Tribunal made the following relevant findings in fact.
- 10 7. The claimant commenced employment with the respondent in August 2018. He resigned on 25 March 2022 with immediate effect.
8. At the time he resigned, he had an understanding that there was a three-month time limit for lodging any claim in the Employment Tribunal. This was not the result of any specific research he had carried out at the time but was
15 simply something which was within his general knowledge. The claimant did not carry out any specific research into the Tribunal process and time limits prior to lodging his claim.
9. The claimant had made a data subject access request from the Respondent on 15 March 2022. He received an initial response on 11 April 2022 which
20 he considered to be inadequate and missing information. He engaged in further correspondence with the respondent and he received what he considered to be a full response on 30 June 2022.
10. The claimant had taken advice from a solicitor about the DSAR but did not seek advice on the Tribunal process and time limits from this solicitor. He
25 did not seek advice on the Tribunal process or time limits from any solicitor or other adviser.
11. The claimant had not wanted to lodge his claim prior to receiving a response to the DSAR as he considered that this would provide evidence to support his

case and prove that he was subject to bullying. He had expected it to be provided before the Tribunal time limit expired.

12. When he received the full reply on 30 June 2022, the claimant was aware that the Tribunal time limit had expired. By this point, he had commenced a grievance and considered that it would be more appropriate to lodge the Tribunal claim at the end of the grievance process. He considered that this would show that the respondent was not handling the internal processes properly and the end of those process would be the right time to bring his claim.
13. The grievance process concluded in December 2022. The claimant commenced ACAS Early Conciliation on 20 January 2023 and the Early Conciliation Certificate was issued on 23 January 2023. The ET1 was submitted on 3 February 2023.

Respondent's submissions

14. The respondent's agent produced written submissions and supplemented these orally.
15. Ms Cope submitted that the claim was lodged out of time, setting out the relevant dates. She submitted that the claimant had enough knowledge to be able to bring the claim in time and that it was possible for the claim to have been lodged within the statutory time limit.
16. In terms of the further period in which the claim was lodged, Ms Cope submitted that this was not reasonable given the period involved.

Claimant's submissions

17. The claimant did not seek to add to the explanations he had given in his evidence for why the claim was not lodged in time and why he delayed in lodging the claim until February 2023 other than to say that if the claim was not heard out of time then he would have no recourse to resolve his complaints.

Relevant law

18. Section 111(2)(a) of the Employment Rights Act 1996 (ERA) states that the Tribunal shall not consider a complaint of unfair dismissal unless it is presented within three months of the effective date of termination.
- 5 19. The Tribunal has discretion under 111(2)(b) to hear a claim outwith the time limit set in s111(2)(a) where they consider that it was not reasonably practicable for the claim to be presented within the three month time limit and it was presented within a further period that the Tribunal considers to be reasonable.
- 10 20. Under s207B ERA, the effect of a claim entering ACAS Early Conciliation is to pause the time limit until the date on which the Early Conciliation Certificate is issued. The time limit is then extended by the period the claim was in Early Conciliation or to one month after the Certificate is issued if the Early Conciliation ends after the normal time limit.
- 15 21. The burden of proving that it was not reasonably practicable for the claim to be lodged within the normal time limit is on the claimant (*Porter v Bandridge Ltd* [1978] IRLR 271).
22. In assessing the “reasonably practicable” element of the test, the question which the Tribunal has to answer is “*what was the substantial cause of the employee's failure to comply*” and then assess whether, given that cause, it was not reasonably practicable for the claimant to lodge the claim in time (*London International College v Sen* [1992] IRLR 292, EAT and [1993] IRLR 333, Court of Appeal and *Palmer and Saunders v Southend-on-Sea Borough Council* [1984] IRLR 119).
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- 25 23. One of the most common reasons why a claimant will not lodge their claim within the normal time limit is either ignorance of, or a mistake regarding, the application of the relevant time limit. The leading case on this is *Wall's Meat Co Ltd v Khan* [1978] IRLR 49 where, at paras 60-61, Brandon LJ stated :-
- 30 “*the impediment [to a timeous claim] may be mental, namely, the state of mind of the complainant in the form of ignorance of, or mistaken belief with regard*

to, essential matters. Such states of mind can, however, only be regarded as impediments making it not reasonably practicable to present a complaint within the period of three months, if the ignorance on the one hand, or the mistaken belief on the other, is itself reasonable.”

- 5 24. The test for whether it was reasonable for the claimant to be aware of the time limit is an objective one and the Tribunal should consider whether a claimant ought to have known of the correct application of the time limit (see *Porter, Khan, Avon County Council v Haywood-Hicks* [1978] IRLR 118).
- 10 25. Ignorance or mistake “*will, further, not be reasonable if it arises from the fault of the complainant in not making such inquiries as he should reasonably in all the circumstances have made*” (as per Brandon LJ in *Khan*).
- 15 26. Where the Tribunal concludes that it was not reasonably practicable for the claimant to have lodged his claim in time then it must go on to consider whether it was lodged in some further period that the Tribunal considers reasonable.
27. This is a question for the Tribunal to determine in exercising its discretion (*Khan*) but it must do so reasonably and the Tribunal is not free to allow a claim to be heard no matter how late it is lodged (*Westward Circuits Ltd v Read* [1973] ICR 301).
- 20 28. In assessing the further delay, the Tribunal should take account of all relevant factors including the length of the further delay and the reason for it. It will also be relevant for the Tribunal to assess the actual knowledge which the claimant had regarding their rights (particularly the application of the time limit) and what knowledge they could reasonably be expected to have or
- 25 investigations they could reasonably be expected to make about their rights (*Northumberland County Council v Thompson* UKEAT/209/07, [2007] All ER (D) 95 (Sep)).

Decision

- 30 29. As noted above, the claimant accepts that the claim was lodged out of time, and he is quite correct to do so as there is no question that the claim was

lodged late; the effective date of termination was 25 March 2022 and so the normal time limit expired on 24 June 2022. ACAS Early Conciliation was not engaged until 20 January 2023, approximately 7 months after the expiry of the normal time limit. The claimant does not, therefore, benefit from the extension of time under s207B ERA. The ET1 was presented on 3 February 2023, almost 8 months after the normal time limit expired.

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30. The sole question for the Tribunal is whether it exercises its discretion to hear the claim out of time and the first issue to be determined in that exercise is whether it was reasonably practicable for the claim to have been lodged in time.

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31. The claimant does not seek to argue that there was any impediment to the claim being lodged in time. He does not, for example, suggest he was unaware of the time limit (indeed, he takes the opposite position) nor does he say that anything else prevented him for lodging his claim in time. In cross-examination, it was put to him that it was possible for the claim to be lodged in time and he accepted that it was.

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32. The reason advanced by the claimant to explain why he did not lodge the claim in time is that he was waiting for the full response to his DSAR. However, he did not suggest that this was an impediment to the claim being lodged and, rather, that this was about ensuring that he had evidence to support his claim.

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33. Even if the claimant had sought to suggest that he could not lodge his claim without the response to his DSAR, the Tribunal would not have considered this to be reasonable. The claim is one of constructive unfair dismissal with the claimant already having resigned (there would be no basis to such a claim if he had not) and the reasons for that resignation (that is, the basis on which he considered that there had been a fundamental breach of contract by the respondent) must have been within the claimant's knowledge by the time he resigns. If the claimant had sought to argue that he could not set out a statable claim without the response to the DSAR then this would almost fatally undermine any argument that there had been a constructive dismissal.

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34. Whilst the claimant should not be criticised for seeking to ensure that he had the evidence he considered necessary to advance his claim, this does not mean that it was not reasonably practicable for the claim to be lodged in time. All that was needed by the claimant to be able to present his ET1 was a
5 statable basis for his constructive dismissal claim and there was no suggestion that he did not have this without the response to the DSAR.
35. It is clear that the claimant has fallen into error but his mistake was not reasonable. The Tribunal notes that he did not seek legal advice or carry out any research into the operation of the Tribunal time limits. If he had, then the
10 Tribunal considers any competent legal adviser or online resource would have made it clear that meeting the time limit was paramount and that there would be a very narrow scope for the claim to proceed if lodged out of time.
36. In these circumstances, the Tribunal considers that it was reasonably practicable for the claim to be lodged in time; the claimant was aware of the
15 time limit; there was no impediment to the claim being lodged timeously; the claimant's explanation for the delay is not one which the Tribunal considers to be a reasonable explanation.
37. For this reason alone, the Tribunal would decline to exercise its discretion to hear the claim out of time. However, for the sake of completeness, the
20 Tribunal will address the second element of the test, that is, whether the claim was lodged in a further period that was reasonable.
38. The claimant received the full response to the DSAR on 30 June 2022 but did not take any action to progress the Tribunal process for a further 7 months until 20 January 2023 when he engaged ACAS Early Conciliation and then
25 presented his ET1 a few weeks later.
39. The Tribunal does not consider a delay of 7-8 months in lodging the claim to be reasonable. The claimant was engaged in the internal grievance process but he does not suggest that this prevented him from lodging the ET1.
40. There is a very common mistake amongst claimants where they believe that
30 they cannot lodge a claim with the Tribunal until they have exhausted the

internal processes (or that time limits do not run until the end of such processes) but this is not suggested by the claimant as the reasons why he delayed in lodging his claim.

41. The explanation advanced by the claimant as to why he delayed lodging the
5 ET1 after receipt of the DSAR response was that he considered that the handling of the grievance process would show that the respondent was not handling their processes properly and assist his case.

42. However, the grievance process, having been commenced after the claimant had resigned, would have had little or no relevance to the substantive issues
10 to be determined in the constructive dismissal claim. For example, nothing which occurred after the claimant's resignation is capable of amounting to the fundamental breach of contract for which he resigned.

43. Again, had the claimant taken advice or carried out research into the provisions relating to time limits then any competent advice would have
15 identified the need to lodge the claim as soon as possible if it was already out of time and that any delay would be potentially fatal to the claim being heard out of time.

44. In these circumstances, the Tribunal does not consider that the claim was presented within a further period that was reasonable.

20 45. The claim has been presented out of time and, for the reasons outlined above, the Tribunal is not prepared to exercise its discretion to hear the claim out of time. The Tribunal does not, therefore, have jurisdiction to hear the claim and it is hereby dismissed.

25 **Employment Judge: P O'Donnell**
Date of Judgment: 02 May 2023
Entered in register: 05 May 2023
and copied to parties