



EMPLOYMENT TRIBUNALS

Claimant: Mr Wladyslaw Czyzewski

Respondent: NK MOT Limited

Heard at: Reading **On: 25 and 26 May 2023**

Before: Employment Judge Gumbiti-Zimuto

Appearances

For the Claimant: Mrs Marta Inkin, lay representative

For the Respondent: Ms Faiqa Khawas, lay representative

JUDGMENT

The claimant's claim was presented outside the time limits for the presentation of the claimant's complaints in sections 11, 23, 93 and 111 of the Employment Rights Act 1996, it was reasonably practicable for the claimant to present his claim in time. The Tribunal cannot consider the claimant's complaint.

REASONS

1. In a claim form presented on the 17 September 2021 the claimant made complaints about unfair dismissal, failing to provide a statement of terms and conditions of employment, failing to provide him with written reasons for dismissal, and unpaid wages. The respondent defended the claims.
2. The claimant started early conciliation with ACAS for the first time on 28 June 2021 and ended on 30 July 2021. The second early conciliation started 10 September 2021 and ended on 13 September 2021.
3. The issues that I have had to consider in this case are:
 - a. Whether the Tribunal can consider the claimant's complaints having regard to the time limit for the presentation of complaints.
 - b. What was the length of the claimant's period of continuous employment with the respondent, was it at least 2 years.

- c. It is accepted that the claimant was dismissed for the supposed grounds of conduct, was conduct the real reason for the claimant's dismissal.
 - d. Whether it was reasonable for the respondent to dismiss the claimant for that reason.
 - e. Whether the respondent followed a fair procedure in dismissing the claimant.
 - f. What the claimant's correct rate of pay was, and whether the claimant is owed any unpaid wages by the respondent.
 - g. Whether the claimant is entitled to a notice payment.
 - h. Whether the claimant is entitled to compensation because of the respondent's failure to provide written reasons for the claimant's dismissal.
4. Having heard all the evidence presented by the parties I began by determining the question whether the claims have been presented in time and would only go on to consider the other issues if there is jurisdiction to consider the claims.
 5. The claimant gave evidence in support of his own case. The respondent relied on the evidence of Mr Tariq Khawas, Mr Ahmad Fayaz Noori, Mr Mohamad Shaiq Khawas, Mr Luis Gustavo Fogliato Caetano and Mr Ahmed Zai Ghafuri. All the witnesses produced written statements which stood as their evidence in chief. The parties also provided a bundle containing 116 pages of documents. From these sources I made the following findings of fact which I considered necessary to decide this case.
 6. The respondent is a garage business. The claimant was employed by the respondent as a mechanic. The claimant was initially employed on 1 June 2016 as a car mechanic by a company known as A&S MOT Slough Limited. This was a a business in which Mr Noori was a director. That business, operated by Mr Noori, closed down 2019 and the limited company was dissolved on 6 June 2020. On 3 June 2019 NK MOT Limited, the respondent, was incorporated with Mr Noori as director. Mr Noori then began trading in a garage business with this company. The claimant's employment transferred to NK MOT Limited.
 7. On 18 January 2021 the claimant resigned his employment with the respondent, he gave two weeks' notice. There is a dispute about how it came about but the claimant's resignation did not take effect and it was agreed that his employment would continue. On 27 January 2021, before the resignation took effect, the claimant and Mr Noori agreed that the claimant's employment would continue. There is a dispute between them as to whether there was a period of time between 29 January and Mid-February when the claimant was not at work. I am satisfied that this is not of importance as I find that the claimant and Mr Noori agreed on 27 January 2021 that the claimant's employment would continue and his resignation would not take effect. The claimant's employment with NK MOT Limited continued until his eventual dismissal on 1 May 2021.
 8. On the 1 May 2021, Mr Noori found that one of his tools, a tyre socket, was missing. Mr Noori asked the staff if they had seen it. They all said no. Mr Noori told them that he would check everyone's toolbox. After going through all the

toolboxes, he found the missing tool in the claimant's tool box. Mr Noori confronted the claimant.

9. Mr Noori stated in his oral evidence that he asked Mr Tariq Khawas to send the claimant home. Mr Khawas did send the claimant home. In his witness statement Mr Khawas falls short of stating that the claimant was dismissed. Mr Khawas completed the ET3 for the respondent. In it he stated that the claimant's employment ended on 1st May 2021. He also wrote that the claimant's "end date was when the manager decided to dismiss him for certain reasons explained to him". This part of the ET3 says the claimant was dismissed on 1 May 2021.
10. In his witness statement the claimant says that on 1 May 2021 he was told by Mr Khawas, *"get the fuck out of the company" and go home. This was my last day at work, and it seems that I was being dismissed with immediate effect without any procedure whatsoever. I therefore took all my tools and I left the premises.*
11. Although his explanation for being sent home is different the claimant in his witness statement is clear that he was dismissed on 1 May 2021. That is not what he submits to me today. The claimant says he was dismissed on 2 June 2021.
12. All five of the respondent's witnesses and the claimant agree that the claimant returned to the work place with his wife on 3 May 2021 when she acted as an interpreter for the claimant. It was explained on that occasion that the claimant was dismissed for theft. The claimant's account of what happened on the 3 May is as follows:

"I visited Respondent's office on **03.05.2021** and spoke with Mr Noori - I asked for a written explanation of my dismissal, my P45 and overdue payslips. I subsequently received my P45 but no payslips or explanation of the dismissal. I was also informed by Mr Khawas that I had been accused of theft of tools, which led to my dismissal."

It is clear from this passage of the claimant's statement that he considered that he had already been dismissed when he went back to the workplace on 3 May 2021.

13. The claimant makes the following submission on the effective date of termination.

Effective date of termination

56. Subsequently, we submit that the Claimant had a right to 4 weeks of notice under s.86 ERA, until 29.05.2021.
57. In practice it seems that the Claimant was placed on notice as:
 - a. The "leaving date" on his P45 was entered by the Respondent as 02.06.2021. The Claimant contacted the Respondent on 04.06 and 16.06.2021 (pages 57 and

61) to confirm this date, which the Respondent decided to keep unchanged.

- b. As shown on page 84G, the Respondent made a submission to the HMRC confirming that the Claimant received a payment of £1,040.00 for the month of May 2021. Even though this amount was never paid to the Claimant, clearly the Respondent's intention was for the Claimant's employment to end on 02.06.2021.
- c. Also, there was no dismissal letter confirming the termination date.
- d. It was only at the stage of submitting the ET3, that the Respondent changed the termination date as 01.05.2021.

58. We therefore submit that the effective date of termination in this matter should be 02.06.2021 under s.97(1)(a) ERA.

14. In my view the claimant's submissions are wrong on this point.

15. The test as to whether ostensibly ambiguous words amount to a dismissal is an objective one, all the surrounding circumstances (both preceding and following the incident) and the nature of the workplace in which the relevant circumstances arose must be considered.

16. If the relevant words are still ambiguous, the Tribunal should ask itself how a reasonable employer or employee would have understood them in light of those circumstances.

17. Where there remains ambiguity, it should be construed against the person who relies on it.

18. Dismissal takes place at the moment that the decision to dismiss the claimant is communicated.

19. In order for the effective date of termination (EDT) to run from the date when summary dismissal is communicated, it is necessary for the intention to dismiss with immediate effect to be expressed in unambiguous terms. Any ambiguity in this regard will be construed in favour of the employee.

20. Where summary dismissal is clearly communicated and there is no ambiguity the courts give short shrift to an employee who seeks to infer from the incidental actions of the employer after termination that the real date of termination is actually later. In London Borough of Newham v Ward [1985] IRLR 509, the Court of Appeal rejected the employee's argument that the EDT had not occurred until the employer forwarded his P45, which, despite repeated requests by the employee, was not sent until some considerable time after his summary dismissal. Where there is no doubt as to the date of dismissal the P45 has nothing whatsoever to do with the question of when employment was to be regarded as terminating for the purposes of the Employment Rights Act 1996.

21. The fact that the employee believes that employment is continuing will not postpone the EDT if the termination of employment was objectively clear at an earlier date.
22. I refer to section 97 (4) ERA to point out that this provision has no application in relation to section 111 ERA when determining the effective date of termination.

Conclusion on the date of dismissal

23. The evidence is clear and in fact agreed by all the witnesses that on 3 May 2021 the claimant was told that he had been dismissed for theft of tools. There was no ambiguity about his dismissal. All witnesses agree it was made clear to the claimant on 3 May that the claimant had been dismissed.
24. I am satisfied that it was explained to the claimant that his employment had been brought to an end. To the extent that there was any ambiguity, it concerned the question whether what had happened on 1 May 2021 was a dismissal. The claimant in his witness statement is clear that it was, in his submissions he takes a different position based on the date contained on the P45. As the Ward case illustrates where there is no doubt as to the date of dismissal the date on the P45 has nothing whatsoever to do with the question of when employment was to be regarded as terminating for the purposes of the Employment Rights Act 1996.
25. Section 97 Employment Rights Act 1996 provides that the effective date of termination, in relation to an employee whose contract of employment is terminated without notice, in relation to an employee whose contract of employment is terminated without notice, is the date on which the termination takes effect. In this case 1 May 2021, which was conformed on 3 May.
26. The relevant time limit for all the claimant's complaints is before the end of the period of three months beginning with the date the employment ended or within such further period as the Tribunal considers reasonably practicable for the application to be made before the end of that period of three months. The relevant provisions are at sections 11, 23, 93 and 111 Employment Rights Act 1996.
27. This claim has been presented out of time the question is whether there should be an extension of time to present the complaint. The claim should have been presented no later than 1 September 2021, it was in fact presented on the 17 September 2021.
28. In the case of Palmer and Saunders v Southend-On-Sea Borough Council [1984] IRLR 119, it was stated, in relation to the meaning of the words "reasonably practicable", contained in section 111(2) that: *"...to construe the words 'reasonably practicable' as the equivalent of 'reasonable' is to take a view too favourable to the employee. On the other hand 'reasonably practicable' means more than merely what is reasonably capable physically of being done... In the context in which the words are used in the... Act ... they mean something*

between these two. Perhaps to read the word 'practicable' as the equivalent of 'feasible'... and to ask colloquially and untrammelled by too much legal logic- 'was it reasonably feasible to present the complaint to the Industrial Tribunal within the relevant three months?'- is the best approach to the correct application of the relevant sub section."

29. The claimant relies on the following matters in support of an extension of time.

Application for extension

59. The Claimant submitted this matter to ACAS on 28.06.2021. He then obtained legal advice and representation, and this claim was submitted to the Tribunal on 17.09.2021.

60. The ACAS submission was therefore made in time.

61. However, if the Tribunal agrees with the Respondent, that the correct termination date was on 01.05.2021, this claim would be out of time by 17 days.

62. In the circumstances, the Claimant would rely on s. 111(2)(b) ERA 1996, in that it was not reasonably practicable for the complaint to be presented before the end of the period of three months, for the following reasons:

- a. At the time the Claimant was 65 years old
- b. He is a Polish national, who needs help of a Polish interpreter
- c. This was a very chaotic and uncertain period of Covid-19 lockdowns, where the Claimant had limited access to legal advice
- d. The Claimant was convinced that 02.06.2021 was the correct date because:
 - i. He was chasing the Respondent for the P45 until 03.06.2021 as shown on pages 43 – 50 of the bundle
 - ii. The date of 02.06 was entered by the Respondent as the termination date on the P45 (page 53 of the bundle)
 - iii. The Claimant messaged the Respondent between 04.06.2021 and 16.07.2021 (pages 57-62) asking for the correct date to be entered on the P45. His e-mails remained unanswered, the Respondent thus confirmed that the correct date was 02.06.2021 by their failure to change or correct the date, and the Claimant accepted it as the termination date.

63. The Claimant also submits that the Respondent was always aware of the ACAS conciliation request against him and a possibility of a claim.

30. The claimant relies on his age but there is no evidence that his age, 65 years,

meant that it was not feasible for him to present his claim in time. The same applies to the fact that the claimant is Polish and needs the help of a Polish interpreter, the claimant has not explained how this affected his ability to present his claim in time. I recognise that there was some discombobulation cause to normal society by Covid-19, but the claimant has given no evidence supporting how this impacted on him so as to lead to a conclusion that it was not feasible for the claimant to present his claim in time.

31. I reject the claimant's submission that he was convinced that 2 June 2021 was the correct date. I reject it because it was clearly not his belief at all. The claimant in claim form refers to 2 June 2021 but it is clear from his witness statement that the claimant knew that he was dismissed on 1 May 2021. In his witness statement the claimant refers to the effort he made to get his P45, but it does not disclose that the claimant was ever in fact deceived by the date on the P45 as his dismissal date. In my view a reasonably informed person would consider that a P45 was an important document for the purpose of showing his next employer information to make sure he does not overpay (or underpay) tax. It is not a document that the claimant could have had any reason to consider determined the question whether his employment was continuing or not, indeed it is the very fact of dismissal that triggers the need for a P45. It is clear from his witness statement that the claimant does not consider that the P45 is determinative of his dismissal, he is clear on the distinctness of the dismissal and the P45. The claimant knew he had been dismissed P45 or no P45. There was no ambiguity in the claimant's mind, the claimant knew he had been dismissed on 1 May 2021 not on the 2 June 2021.
32. The claimant's claim was presented outside the time limits for the presentation of the claimant's complaints, it was reasonably practicable for the claimant to present his claim in time. The Tribunal cannot consider the claimant's complaint.

Employment Judge Gumbiti-Zimuto

Date: 26 May 2023

03/07/2023

Sent to the parties on:

J Moossavi

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For the Tribunals Office

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