EMPLOYMENT TRIBUNALS

Claimant: Grey Thompson
Respondent: Leighton Buzzard Self Storage Ltd t/a Cinch Self Storage

RECORD OF A PRELIMINARY HEARING

Heard at: Watford Hearing Centre **On:** 26 January 2023
Before: Employment Judge Tobin

Appearances
For the claimant: Did not attend
For the respondent: Mr G Graham (counsel)

JUDGMENT

The Judgment of the Employment Tribunal is that:

1. The hearing proceeded in the claimant's absence pursuant to Rule 47 of Schedule 1 The Employment Tribunal's (Constitution and Rules of Procedure) Regulations 2013.

2. The claimant's claims of automatic unfair dismissal because of a protected disclosure pursuant to s103A Employment Rights Act 1996 ("ERA"), automatic unfair dismissal for health and safety reasons (s100 ERA), and breach of contract were presented outside the time limits contained in s111 Employment Rights Act 1996 and Article 7 of the Employment Tribunal's Extension of Jurisdiction (England and Wales) Order 1994 respectively. It was reasonably practical for these claims to be presented within the appropriate time limit.

3. Accordingly, the Employment Tribunal does not have jurisdiction to hear the complaints brought by the claimant on 6 May 2022 and proceedings are now dismissed.

REASONS

The hearing

1. By a Claim Form dated 6 May 2022 the claimant commenced proceedings against the respondent. The claimant identified that his employment ended on 14 September 2021. A Response was received by the Employment Tribunal on 16

July 2022 which contended that the claimant's claim was out of time and asserted that the Tribunal did not have the jurisdiction to hear these complaints because they had been brought out of time.

2. The respondent identified a claim of (ordinary) constructive unfair dismissal pursuant to s.94 ERA which said the claimant lacked the requisite 2-years' service pursuant to s.108(1) ERA although I am not determining that issue today.

3. The Tribunal identified the claimant as bringing a claim of health and safety dismissal, public interest protected disclosure dismissal (whistleblowing) and breach of contract.

4. Employment Judge Lewis ordered that there be a preliminary hearing today to consider the respondent's strike out application of 25 October 2022.

5. The respondent attended the hearing and provided an indexed hearing bundle of 88 pages. Neither the respondent nor the claimant had provided any witness evidence, although I note none had been ordered to do so.

6. The claimant did not attend this hearing.

The claimant's non-attendance

7. My first issue was to consider whether to proceed in the claimant's absence. Mr Graham told me that the claimant was aware of the hearing today because he had correspondence with his instructing solicitor and the hearing bundle and amended hearing bundle had been provided to him. He said that the respondent had incurred time and expense in preparing for and attending today's hearing. From the notice of hearing, it was clear that the hearing would proceed today, and he requested that I proceed in the claimant's absence.

8. I note that there had been no request for a postponement. I asked the clerk to telephone the claimant and he rang at just after 10am and left a message on the claimant's voicemail. There was no explanation as to the claimant's non-attendance and I could not see any point in adjourning the hearing on my own motion.

9. Accordingly, I determined that it was proportionate and appropriate – and within the over-riding objective at rule 2 of the Employment Tribunal's Rules of Procedure - to proceed in the claimant's absence. Once this decision had been made and communicated to the respondent, I received a telephone call saying that the claimant had been notified that todays hearing would be by telephone. Mr Graham said that was not the complete picture. The Employment Tribunal had scheduled this for a telephone case management hearing back in September 2022 [Hearing Bundle page 28]. However, that case management hearing was converted to an open preliminary hearing to consider the strike out application by Judge Lewis on 1 December 2022 [HB49] and on 7 December 2022 an amended notice of preliminary hearing determined that the hearing would be in person [HB50-51]. Mr Graham informed me that the preliminary hearing bundle and index was first sent to the claimant on 23 January 2023. This included a reference to "amended notice of preliminary hearing to hear the claim in person". So, the hearing bundle index

spelt this out, and the claimant was also provided with the document itself (in case he contended that somehow he did not receive this). Mr Graham contended that the claimant must have read through the bundle because he asked for additional document to be included and the bundle was finalised yesterday, so the claimant had 2 separate opportunities to note that the hearing had changed from a telephone hearing to an in person hearing if the claimant contends that he had not received the amended notice at pages 50 to 51 itself. Finally, Mr Graham said that the claimant did not query the non-provision of telephone detail at any time prior to the commencement of this hearing so his response was merely reacting to the employment tribunal's clerk message after the hearing was due to commence.

10. I am satisfied that the claimant both had notice of this hearing and should have been aware that this was an in-person hearing on the basis of the above information.

11. Accordingly, I deemed it appropriate to continue to determine this issue in the claimant's absence.

Did the claimant issue proceedings in time?

12. The claimant did not provide a witness statement and he was not available to be cross-examined by the claimant. I took the claimant's written account and his Claim Form at their high point to make this determination. I considered the following documents in particular, the Claim Form [HB1-14] the ACAS Early Conciliation Certificate [HB15] the Response and grounds of resistance [HB16-27] and the claimant's email to the Employment Tribunal in respect of his reason to extend time dated 9 January 2023 [HB 55-68], I read all of these documents from the file the day before the hearing.

13. The claimant was employed by the respondent for little over 1 year from 8 September 2020 to 24 September 2021. He gave notice on 14 September 2021. The respondent said that the claimant resigned and claimed constructive dismissal and the claimant treated his resignation as terminating his employment for which he was paid in lieu up to 24 Septemebr 2021 and thereafter he was paid in lieu of notice. The claimant, in his claim form, contended that his employment ended on 14 September 2021.

14. The effective date of termination is a question of fact and law. The respondents says that they treated the claimant as resigning 7 days after the resignation was received and that this is the most beneficial to the claimant. The payment in lieu of notice did not alter the termination date except the claimant's employment ended on 24 September 2021 because this is 7 days after the claimant purports for it to end on his claim form [CHB 6].

15. There was an ACAS Early Conciliation Certificate issued between 18 November 2021 to 22 November 2021 [HB15]. The Early Conciliation Certificate was issued within the usual statutory time limit of three months pursuant to s111 Employment Rights Act and Article 7 Extension of Jurisdiction Order.

16. The Claim Form was presented on 6 May 2022 which meant the claimant could not take advantage of the usual 4-week extension to issue proceedings following

the provision of an Acas early conciliation certificate, but I am not sure that this would have made any difference anyway. The "stop the click" provision accordingly applies so 5 days is added to the normal 3 months less one-day limitation calculation. Therefore, I determine that the last day for issuing proceedings was 28 December 2021. As the claimant, in fact, issued proceedings on 6 May 2022 he was 4 months and 8 days out of time.

The law

17. The time limit for an automatic unfair dismissal complaint is set out in s111 ERA. The complaint must normally be presented to the employment tribunal within 3 months starting with the effective at of termination ("EDT") or within such further period as the tribunal considers reasonable where it was not reasonably practicable for the complaint to be presented within 3 months. The EDT for this purpose is defined in s98 ERA. For summary dismissal (i.e., dismissals without notice) the EDT will normally be the date that the employee is first informed of the dismissal, either directly or upon notification by post: see *Gisda CYF v Barratt [2010] UK SC 41* and *Robinson v Bowskill UK EAT/030312*. In a case of a resignation that date of termination is more obvious and that is when it is received by the respondent. If the resignation is on notice, then the EDT will be the date that notice expires unless the respondent brings the employment to an end sooner.

18. The 3-month calculation starts with (ie includes) the EDT: *see Trow v Ind Coope, (West Midlands) Ltd [1967] 2QB: Hammond v Haigh Castle & Co Ltd [1973] ICR 148*. So, effectively, this means 3 months less a day (see *Pacitti Jones v O'Brien [2005] IRLR 888/9 Court of Sessions)*.

19. Under both s111 ERA and the Extension of Jurisdiction Order, the Employment Tribunal's discretionary power to extend time limits is subject to a two-part test:
    (i) the Tribunal must be satisfied that it was not *reasonably practical* for the claim to be presented in time; and if not then
    (ii) the Tribunal must be satisfied that the claim was presented within such further period as the Tribunal considers reasonable.

    Reasonably practical does not mean reasonably or physically possible but, rather something like "reasonably feasible": See *Palmer v Southend on Sea BC [1984] ICR 372 CA*. The determination of what is reasonably practical is a question of fact for the tribunal: *Miller v Community Links Trust Ltd UK EAT/0486/07.* The burden of proof is on the claimant.

20. What is reasonably practical is a question of fact and therefore a matter for the Tribunal to decide based on evidence and the onus of proving that presentation in time was not reasonably practical rests on the claimant: see *Porter v Bandridge Ltd [1978] ICR 943 CA* and *Sterling v Unite Learning Trust EAT 0439/14*

21. The remedy of unfair dismissal is considered to be sufficiently well known that ignorance of the remedy will not normally be accepted as an excuse (see *Read in Partnership Ltd v Fraine UKAEAT/0520/10*, *John Lewis Partnership v Charmaine UKEAT/0079/11* and *Walls Meat Co Ltd v Khan [1979] ICR 52*.

Reasonable practicality

22. The respondent confirmed that the claimant made a formal grievance on 5 July 2021, and he also complained about the substance of what led to his constructive dismissal on 26 July 2021. The claimant appealed against his grievance on 11 August 2021 although he said on 18 August 2021 that he was not going to attend any appeal hearing because of his ill health. He then resigned on 14 September 2021 complaining of a fundamental breach of contract which had destroyed the employment relationship and resulted in his constructive dismissal. So, the claimant had engaged in a formal process to challenge the matters which are the substance of this claim sometime before his employment ended and he used clear legal terms when he terminated his employment. The respondent contends that the claimant must have had sufficient legal advice. Mr Graham referred to an email that had been sent to the respondent yesterday which the claimant had sent to the GMB when he was still employed on 23 July 2021. This email made reference to the claimant taking advice from ACAS, the GMB trade union and Protect (the whistleblowers union) in July 2021. Mr Graham said that was consistent with the Claim Form (at page 14) which makes reference to the claimant consulting his union Protect and ACAS. So, at a very early stage, the claimant had obtained independent legal advice.

23. The claimant said in his email to the Tribunal [HB57] that he found a new job shortly after his employment ended and that was as a Kitchen Designer. That job began on 3 October 2021 according to his claim form [HB7]. It appears that the claimant was working on computers, learning software and able to engage with his new employment. The claimant was able to maintain that the demands of new employment until he said that employment came to an end in May 2022 [HB57], 6 or 7 months later. It would appear that he issued proceedings after he had left that job because he issued proceedings on 6 May 2022. Mr Graham said immediately prior to issuing proceedings the claimant wrote to London Central Employment Tribunal with a query as follows:

> I believe I have missed a timings for lodging a case against my employer. I did all the Acas bits and thought that was all that was required.
> I was hospitalised after a chemical leak at work. I "whistleblew" and contacted the HSE.
> I thought I had begun the tribunal process but now release not.

24. This was the claimant's first explanation about being out of time. He made little reference of ill health and did not refer to this as an explanation about why he was late in issuing proceedings. The explanation was that he thought that he had issued proceedings but realised he had not, so the reason was his mistake.

25. An administrative officer at the Tribunal wrote back to the claimant promptly:

> You need to submit your ET1 claim form stating clearly at section 15 on the ET1 claim form in other information" why you submitted your claim form late. It is in order for the employment judge to consider accepting your claim out of time as out of time issue is a very important issue. If your out of time reason is good enough then the employment judge may consider accepting". [HB76-77]

26. Mr Graham said that the explanation that the claimant had made a mistake did not appear again after the claimant issued proceedings. He said, in fact, the claimant raised issues concerning his health on his claim form [HB14].

27. Mr Graham said that the claimant had not provided any evidence at all to support either ill health or incapacity.

My determination

28. If the claimant contends that he was unaware of his rights the Tribunal must ask further questions: What were his opportunities for finding out that he had rights? Did he take them? If not, why not?" See *Dedman v British Building and Engineering Appliances Ltd [1974] ICR 53 CA*, where a claimant is generally aware of his rights, ignorance of the time limit will rarely be acceptable as a reason for delay. This is because when a claimant knows of his or her right to complain of unfair dismissal, he or she is under an obligation to seek the information and advice about how to enforce that right. If there is a failure to do so that will not normally be accepted as a sufficient explanation, see *Trevelyans (Birmingham) Ltd v Norton [1991] ICR 488 EAT*.

29. The claimant provided no evidence. It is essential in a hearing such as this that I make findings of fact. If I am to find it was reasonably practicable that he did not issue proceedings in time. If I take the claimant's account at its high watermark, I see that he was able to engage with his trade union, with ACAS and with a whistleblowing organisation prior to resigning. His resignation quoted fairly sophisticated legal terms so it would appear to me that the claimant had some advice in respect of his options and legal rights. It is difficult for me to accept, and there is no evidence to the contrary, that the claimant did not receive any advice in respect of time limits prior to commencing proceedings. Both ACAS and his trade union, at least, will have raised time limit issues and it is difficult to believe any assertion to the contrary.

30. Accordingly, I reject the claimant's narrative that he was unaware of his legal rights. He knew sufficiency of these right to secure early on an ACAS Early Conciliation Certificate. In any event, the claimant was not a juvenile nor did he have special educational needs or any learning disability. He was an adult who was able for some time to hold down, at least, 2 reasonably demanding jobs.

31. The claimant was subsequently able to engage with ACAS for a second time prior to the issue of an early conciliation certificate. It is inconceivable that either he would not know or ACAS would not have informed him of appropriate time limits once he entered the early conciliation process.

32. In respect of any illness, a debilitating might may prevent the claimant from submitting a claim in time. However, this will usually only constitute a valid reason for extending the time limit if it is supported by medical evidence, particularly if the claimant has taken legal advice or was aware of the time limits. Any medical evidence must not only support the claimant's illness, but it must also demonstrate that that illness prevented the claimant from submitting his claim on time, see *Pittuck v DST Output (London) Ltd, ET case number 92500963/2015* and *Midland Bank Plc v Samuels EAT 672/92.* Stress or depression – as opposed to evidence

of illness or incapacity is unlikely to be sufficient, see *Asda Stores Ltd v Kauser EAT 0165/07* and *Cygnet Behaviour Health Ltd v Britton [2022] EAT 108*.

33. I have the benefit of carefully reviewing an agreed bundle of documents. The claimant did not provide and medical or corroborative evidence to support his ill-health or incapacity. In contrast, the claimant held a new job which appears to be reasonably demanding and he was able to maintain that job for the period prior to issuing proceedings. Consequently, if he was able to cope with the rigours and demands of work, I do not accept that it was not reasonably practical and he could have issued proceedings by 28 December 2021, particularly as he had started and held down a new job. If the claimant was diagnosed with something akin to post traumatic stress disorder, which he contends, we do not know whether this was a particularly debilitating condition. The claimant has not provided any information whereby I could assess whether the condition was fluctuating and whether he had any engagement with any medical practitioner. It is wholly unsatisfying that the claimant has not produced any corroborative evidence, for example, GP, hospital records, confirmation of diagnosis, report from medical practitioners or counsellor.

34. Consequently, I conclude that it was reasonably practical for the claimant to issue proceedings by 28 December 2021.

35. So far as the second limb of the test is concerned whether the claimant was precluded from issuing proceedings for the 4 months 8 days thereafter such that he issued proceedings within a reasonable period, there is nothing that explains why the claimant was able to issue proceedings in early May 2022 but could not do so from the end of December 2021 until early May 2022.

36. In all the circumstances the claimant's claim is out of time as it was reasonably practical for him to issue proceedings within time. In any event, the delay thereafter was not reasonable until he did, in fact, issue proceedings.

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Employment Judge Tobin

Date: 11 September 2023

JUDGMENT SENT TO THE PARTIES ON
12 September 2023

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