



# EMPLOYMENT TRIBUNALS

BETWEEN

**Claimant**

Mr D Ward

AND

**Respondent**

Away Resorts Limited

## JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Bristol (by video) ON 7 December 2023

**EMPLOYMENT JUDGE** Bax

### Representation

**For the Claimant:** Mr D Ward (in person)

**For the Respondent:** Ms P Hall (solicitor)

### JUDGMENT

**The judgment of the tribunal is that:**

1. By consent the claim of unfair dismissal is struck out on the basis that the Claimant did not have 2 years' service and the Tribunal did not have jurisdiction to hear the claim.
2. The claim of breach of contract was presented out of time and it was reasonably practicable for the Claimant to have presented it in time. The Tribunal did not have jurisdiction to hear the claim and it is struck out.

### REASONS

1. This is the judgment following a Preliminary Hearing to determine whether or not the claimant's claims of unfair dismissal and breach of contract were presented in time.

**Procedural Background**

2. The Claimant presented his claim on 8 June 2023. He notified ACAS of the dispute on 3 March 2023 and the certificate was issued on 14 April 2023.
3. The claim was accepted. A letter dated 16 June 2023 was sent to the Respondent stating that it did not have to respond to the unfair dismissal claim at that stage, because a response was awaited from the Claimant to say why the 2 years' service requirement did not apply to him. A strike out warning was sent to the Claimant in respect of the unfair dismissal claim on 21 June 2023.
4. In the Grounds of Resistance the Respondent asserted that the Tribunal did not have jurisdiction to hear the unfair dismissal claim on the basis of lack of service. Further that the Tribunal did not have jurisdiction to hear either claim because they were presented out of time. The Respondent says that the compensation plan was non-contractual and the initial plan was superseded. The claims were denied.
5. On 20 September 2023, the Claimant was asked to respond to the letter dated 16 June 2023. He responded the same day and said he did not challenge the decision to strike out the unfair dismissal claim. At the start of the hearing the Claimant agreed that this claim should be struck out. The unfair dismissal claim was accordingly struck out by consent.
6. The claim was listed to determine whether the claim was presented in time and if not whether time should be extended.
7. At the start of the hearing it was clarified that the breach of contract claim related to a change of the Claimant's workplace, in that one of the sites he worked and had responsibilities for was revoked. He said that this had an effect on his commission. He accepted that the compensation plan was non-contractual. He raised a grievance about the situation and he then resigned.
8. After the oral judgment was given the Claimant said that a factual error had been made, in that some of his grievance was upheld and his son was 10 months old at the relevant time. This did not alter the decision or the reasoning behind it.

**The evidence**

9. I heard from the Claimant and was provided with a bundle of documents consisting of 86 pages.

**The facts**

10. I found the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after listening to the factual and legal submissions made by and on behalf of the respective parties.
11. There was a clause in the Claimant's contract which provided, "Your normal work base is currently St Helens Coastal Resort/The Lakes Rookley. We can require you to work at any reasonable operational location, now or in the future. This may occasionally include travel within the UK on our behalf. We determine your work location strictly by business need. We do not require you to work outside of the UK."
12. The Claimant had raised a grievance and a hearing took place on 20 December 2022.
13. The Claimant resigned on 23 December 2022. His notice expired on 3 January 2023, when his employment terminated.
14. He was sent the grievance outcome by letter dated 6 January 2023, when he was told that his complaints were partially upheld.
15. On 11 January 2023, the Claimant asked some questions about the outcome.
16. On 20 January 2023, the Claimant was informed that there would not be an appeals process because the outcome was reached after the end of his employment.
17. On 25 January 2023, the Respondent e-mailed the Claimant and said it was working on providing the information requested in a subject access request, this was the last e-mail he received from the Respondent. On 8 February 2023, the Claimant e-mailed the Respondent and raised queries about the documents he had been sent by the Respondent on 7 February 2023 in connection with the subject access request.
18. On 2 March 2023, the Claimant raised a dispute with the ICO about the Respondent's response to his subject access request.
19. The Claimant notified ACAs of the dispute on 3 March 2023. This was because a friend suggested that ACAS could help with employment disputes. At this point the Claimant was told that he could bring a claim in the Employment Tribunal.
20. On 15 March 2023, the Claimant's bio-mass heating system exploded and flooded his home. On 16 March he had to take time off work to sort out matters. The Claimant and his family moved into temporary accommodation

on 17 March 2023. The Claimant did not own a computer or laptop. He used his wife's desktop computer, however it was destroyed in the flood.

21. The Claimant was involved in making arrangements for claiming for damaged items and his temporary accommodation. The Claimant and his family left the temporary accommodation on 22 April 2023. He then had involvement with snagging issues over the repairs in May 2023. The time line provided by the Claimant [p64-71] ,only referred to e-mails being sent on 2 and 5 May 2023 in the run up to the end of the time limit. He travelled home for a meeting with the developer on 17 May 2023 and then returned back to London. The Claimant and his family returned home from London on 28 May 2023.
22. The Claimant spoke to ACAS on 16 March 2023 and asked them to call him back and he successfully made contact on 28 March 2023 by telephone. In that conversation the Claimant was made aware of his rights to bring a claim in the Tribunal and the time limits involved.
23. On 14 April 2023 the Claimant received the early conciliation certificate. At this time discussions were ongoing, via ACAS, with the Respondent. The Claimant waited to see what the outcome of those ongoing discussions were.
24. On 23 April 2023, the Claimant's 10 month old son was admitted to hospital. He was then transferred to Hospital in London. Whilst the Claimant's son was in hospital, the Claimant and his wife stayed at the hospital with their son. In the hospital letter dated 2 May 2023, addressed to 'whom it may concern', it was said that it was essential the patient's parents were resident at the hospital in London to learn about the condition. The Claimant was not attending work or working remotely at this time
25. I accepted the Claimant's evidence, that understandably everything else took a back seat and his priority was his son. The Claimant accepted he did not focus as much on the dispute as he would have liked. In reply to the Respondent's submissions he said that his son was his priority, followed by organising his home and that the claim was at the bottom and he was of the opinion that it could wait. He said that it was a conscious choice. The Claimant said nothing was physically stopping him from presenting the claim, but his son was his priority.
26. I accepted that the Claimant was unable to borrow a laptop. The Claimant accepted that, whilst in London, he could have gone to a library or internet café to use a computer. He said that they were in financial difficulty at the time and his priority was his son and home. The Claimant had a mobile telephone and was able to access the internet and e-mails from it.

27. It was suggested in cross-examination that the Claimant could have spent an hour to prepare his claim form one evening. The Claimant said that he preferred to spend time with his wife and son.
28. On 5 June 2023, the Claimant contacted ACAS for an update, but they had not received a response from the Respondent. On 7 June 2023 he received an offer from the Respondent, which he declined.
29. The Claimant said he notified ACAS within the time limits and that he was aware that he had at least 1 month to present the claim, after receiving the ACAS certificate, and he had processed his claim within 8 weeks of the certificate and the time limits known to him.

### Submissions

30. The Claimant did not seek to add anything to what he had already said, although he did reply to the Respondent's submission.
31. The Respondent's submission included that the claim form was short and, as the Claimant said, it mirrored his grievance and he had always known of the facts. It was also submitted that the Claimant's contact enabled the Respondent to require the Claimant to work at locations it specified and therefore the Claimant had poor prospects of success in any event. The later part of the submission was not relevant to the question of reasonable practicability.

### **The Law**

32. Art. 7 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994, in respect of employee contract claims, provides:

[Subject to [[article] 8B], an employment tribunal] shall not entertain a complaint in respect of an employee's contract claim unless it is presented—

- (a) within the period of three months beginning with the effective date of termination of the contract giving rise to the claim, or
- (b) where there is no effective date of termination, within the period of three months beginning with the last day upon which the employee worked in the employment which has terminated,

[[ba) where the period within which a complaint must be presented in accordance with paragraph (a) or (b) is extended by regulation 15 of the Employment Act 2002 (Dispute Resolution) Regulations 2004, the period within which the complaint must be presented shall be the extended period rather than the period in paragraph (a) or (b)], or

(c) where the tribunal is satisfied that it was not reasonably practicable for the complaint to be presented within whichever of those periods is applicable, within such further period as the tribunal considers reasonable.

33. Art. 8B provides:

Extension of time limit to facilitate conciliation before institution of proceedings

**8B.**—(1) This article applies where this Order provides for it to apply for the purposes of a provision of this Order (“a relevant provision”).

(2) In this article—

(a) Day A is the day on which the worker 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 worker 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 the 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 the time limit set by a relevant provision would (if not extended by this paragraph) 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 Order to extend the time limit set by a relevant provision, the power is exercisable in relation to that time limit as extended by this regulation.

34. Put simplistically, with effect from 6 May 2014 a prospective claimant must obtain an early conciliation certificate from ACAS, or have a valid exemption, before issuing employment tribunal proceedings.

35. Where the EC process applies, the limitation date should always be extended first by art. 8B(3), and then extended further under art 8B(4) where the date as extended by art 8B(4) is within one month of the date when the claimant receives (or is deemed to receive) the EC certificate to present the claim — *Luton Borough Council v Haque* 2018 ICR 1388, EAT. In other words it is necessary to first work out the primary limitation period and then add the EC period. Then ask, is that date before or after 1 month after day B (issue of certificate). If it is before the limitation date is one month after day B, if it is afterwards it is that date.

36. The question of whether or not it was reasonably practicable for the claimant to have presented his claim in time is to be considered having regard to the following authorities. In Wall’s Meat Co v Khan [1978] IRLR 499, Lord Denning, (quoting himself in Dedman v British Building and Engineering

Appliances [1974] 1 All ER 520) stated "it is simply to ask this question: has the man just cause or excuse for not presenting his complaint within the prescribed time?" The burden of proof is on the claimant, see Porter v Bandridge Ltd [1978] IRLR 271 CA. In addition, the Tribunal must have regard to the entire period of the time limit (Wolverhampton University v Elbeltaji [2007] All E R (D) 303 EAT).

37. In Palmer and Saunders v Southend-on-Sea BC [1984] IRLR 119 the headnote suggests: "As the authorities also make clear, the answer to that question is pre-eminently an issue of fact for the Industrial Tribunal taking all the circumstances of the given case into account, and it is seldom that an appeal from its decision will lie. Dependent upon the circumstances of the particular case, in determining whether or not it was reasonably practicable to present the complaint in time, an Industrial Tribunal may wish to consider the substantial cause of the employee's failure to comply with the statutory time limit; whether he had been physically prevented from complying with the limitation period, for instance by illness or a postal strike, or something similar. It may be relevant for the Tribunal to investigate whether, at the time of dismissal, and if not when thereafter, the employee knew that he had the right to complain of unfair dismissal; in some cases the Tribunal may have to consider whether there was any misrepresentation about any relevant matter by the employer to the employee. It will frequently be necessary for the Tribunal to know whether the employee was being advised at any material time and, if so, by whom; the extent of the advisor's knowledge of the facts of the employee's case; and of the nature of any advice which they may have given him. It will probably be relevant in most cases for the Industrial Tribunal to ask itself whether there was any substantial failure on the part of the employee or his adviser which led to the failure to comply with the time limit. The Industrial Tribunal may also wish to consider the manner in which and the reason for which the employee was dismissed, including the extent to which, if at all, the employer's conciliatory appeals machinery had been used. Contrary to the argument advanced on behalf of the appellants in the present case and the obiter dictum of Kilner Brown J in Crown Agents for Overseas Governments and Administrations v Lawal [1978] IRLR 542, however, the mere fact that an employee was pursuing an appeal through the internal machinery does not mean that it was not reasonably practicable for the unfair dismissal application to be made in time. The views expressed by the EAT in Bodha v Hampshire Area Health Authority [1982] ICR 200 at p 204 on this point were preferred to those expressed in Lawal:-

38. To this end the Tribunal should consider: (1) the substantial cause of the claimant's failure to comply with the time limit; (2) whether there was any physical impediment preventing compliance, such as illness, or a postal strike; (3) whether, and if so when, the claimant knew of his rights; (4) whether the employer had misrepresented any relevant matter to the

employee; and (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.

39. In addition, in Palmer and Saunders v Southend-on-Sea BC, and following its general review of the authorities, the Court of Appeal (per May LJ) 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".
40. 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).
41. Underhill P as he then was considered the period after the expiry of the primary time limit in Cullinane v Balfour Beattie Engineering Services Ltd UAEAT/0537/10 (in the context of the time limit under section 139 of the Trade Union & Labour Relations (Consolidation) Act 1992, which is the same test as in section 111 of the Act) at paragraph 16: "The question at "stage 2" is what period - that is, between the expiry of the primary time limit and the eventual presentation of the claim - is reasonable. That is not the same as asking whether the claimant acted reasonably; still less is it equivalent to the question whether it would be just and equitable to extend time. It 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."

## Conclusions

42. This was not an easy decision to reach.
43. Time for a claim of breach of contract starts running from the date of effective termination of the employee's contract, in this case 3 January 2023. The Claimant therefore needed to notify ACAS of the dispute by 2 April 2023, which is also the time limit, subject to pausing for early conciliation. ACAS was notified on 3 March 2023. The certificate was issued



on 14 April 2023. By applying art. 8B the time for presenting the claim was extended to 14 May 2023. The claim was therefore presented 3 weeks 4 days out of time.

44. It was significant that the Claimant notified ACAS of the dispute on 3 March 2023 and at that stage he was aware that he could bring a claim in the Tribunal.
45. On 28 March 2023, the Claimant spoke to ACAS and was told about his rights to bring the claim in the Tribunal and the associated time limits. This was before limitation expired and before the early conciliation process had finished. The Claimant was aware of the time limits, although he thought he had more time. It was incumbent on him to ascertain when his claim should have been presented. This was something which it was reasonably feasible to do on his smart phone.
46. The reason put forward by the Claimant for not presenting the claim in time was that he had prioritised his son and getting his home repaired. The Claimant was faced with a difficult situation and he was naturally concerned about his son and wanted to spend time with him. He also had a home which had been significantly damaged and it needed to be repaired. It is recognised that in such circumstances the Claimant wanted to prioritise what he was doing and the Tribunal had great sympathy with the situation.
47. The Claimant accepted that he could have used a library or internet café to present his claim. Although he said that his finances were tight, the claim form was a short document and it mirrored his grievance. This would not have taken a large amount of time or cost much to prepare.
48. Waiting for the outcome of negotiations does not stop time from running. Time limits are to be exercised strictly and there was no suggestion in the present case that the Respondent suggested he should wait before presenting his claim. There was no misrepresentation to the Claimant by the Respondent in respect of bringing the claim or the associated time limits. This was not a good reason for failing to present the claim in time.
49. The Claimant said that he made a conscious decision to prioritise his family and family home and he thought that the claim could wait. Time limits in the Tribunal are exercised strictly and the circumstances in which they can be disapplied are restricted. The Claimant knew he could bring a claim and that there were time limits. He was not physically prevented from presenting his claim, however he prioritised his family over it. The Tribunal had great sympathy for the Claimant. However, his conscious decision to prioritise, in combination with that there were places from which he could have presented his claim from, meant that I was not satisfied that he established it was not reasonably feasible to present the claim. It was therefore

reasonably practicable for the Claimant to have presented his claim in time. The claim was presented out of time and the Tribunal does not have jurisdiction to hear it and the claim was dismissed.

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Employment Judge J Bax  
Dated 7 December 2023

Judgment sent to Parties on 03 January 2024

For the Tribunal Office