



EMPLOYMENT TRIBUNAL

Claimant: Mr J Fenny

Respondent: First Trenitalia West Coast Rail Limited

HELD AT: Remote Hearing **ON:** 26 February 2024

BEFORE: Employment Judge Kelly

REPRESENTATION:

Claimant: In person

Respondent: Ms Grace
(counsel)

Judgment

1. The Claimant's claim is rejected as being one that the tribunal has no jurisdiction to determine.

Written Reasons

1. These are the written reasons as requested by the Claimant following the open preliminary hearing on 26 February 2023 listed to consider the Respondent's applications.
2. The preliminary hearing was directed by Employment Judge Wedderspoon on 13 October 2021. Her case management order recorded a summary of the key facts and set out the preliminary issues for determination, and essentially they are as follows:
 - a. Does the Tribunal have jurisdiction to determine the Claimant's claim of unfair dismissal in circumstances where the effective date of termination was 13 May 2022. The claimant contended that an ACAS certificate was granted on 7 June 2022, albeit, it erroneously named the Claimant as the Respondent due to an error by the Claimant. A further notification was made to ACAS in March 2023, the ACAS

conciliation certificate was issued on 21 March 2023, with the ET1 being presented on 28 March.

- b. Was it reasonably practicable for the Claimant to have lodged his complaint before the end of the primary limitation period and whether, in all of the circumstances, it would have been reasonably practicable to have obtained the ACAS certificate earlier, and if it was not reasonably practicable to present within that time, was it presented within such further reasonable period as the Tribunal considers and in the alternative, should the Tribunal strike out the claim on the grounds that there is no reasonable prospects of success.
- c. Further, in the alternative, the Claimant seeks to strike out the claim on the basis that it stands no reasonable prospects of success.

The background

3. The facts are relatively straightforward. The Claimant was employed by the Respondent since November 2008. He was an onboard customer service assistant. He considers himself to have been a loyal, devoted employee that has spent a considerable time working for this Respondent.
4. On 18 October 2021 a colleague of the Claimant made a complaint of sexual assault and that same day he was arrested by British Transport Police. He was ultimately charged with an offence relating to the alleged sexual assault. It transpires that the Claimant was in fact charged with another sexual assault and informed of that in January 2022, quite unrelated to the underlying employment with the Respondent, although the detail behind that has not been explored in any detail, save to recognise that it was an allegation of sexual assault.
5. An investigation was undertaken by British Transport Police and the Claimant was bailed with a number of conditions. Essentially, those conditions were that he could not enter Euston Station (the station from which he initially worked), not contact the complainant and that he must reside at his home address between certain hours.
6. A meeting took place between the Claimant and the Respondent and various others on 2 February 2022 which was an investigation hearing, or said to be an investigation hearing, and which recommended that disciplinary proceedings be commenced against the Claimant.
7. A disciplinary hearing then took place on 13 May 2022. The Claimant was accompanied by his union rep, Paula Ford, and the Claimant was told that the Respondent's view was that he was unable to fulfil his role, and had been since October 2021, due to the bail conditions, that they were no longer able to keep him on full pay and that they believed that there was a risk of reputational damage if the Claimant was found guilty in the criminal proceedings. As such, the Respondent informed the Claimant that he was dismissed that day for "some other substantial reason", that being one of five potentially fair reasons for the dismissal.
8. The Claimant says that he felt like his guilt was pre-judged. He says that he felt the dismissal was unfair, he says he could have performed some other role. He did not, he

says, necessarily have to start work at Euston Station where the complainant was likely to have been, such that he may not necessarily have come into contact with her.

9. He says he worked for the Respondent for a very long time, thirteen years, and he makes particular assertions in relation to a CCTV recording which would have been important evidence in relation to the criminal proceedings, which it transpired was not available, due to it is said, two of the cameras on the train not working. He has a particular difficulty accepting that.
10. Essentially, the Claimant says that mentally and psychologically he could not think straight and that he has had issues with concentration, although he accepts that he has never sought medical assistance. He says it was not so much illness as opposed to an inability to focus properly and deal with these proceedings.

Strike out: Reasonable prospects of success

11. Dealing with the application for strikeout on the basis of reasonable prospects of success first, during the course of submissions I gave an indication to the parties, which I emphasised I would reconsider in the light of any submissions that they wished to make, that I was unlikely to be satisfied that there were no reasonable prospects of success if the claim proceeded and I stand by that position.
12. During the course of the Claimant giving evidence, he told me that he felt he could have continued to work with the Respondent without attending at Euston Station, without making contact with the complainant and that whilst he recognised that the Respondent had raised and relied upon potential concerns of adverse publicity, he felt that essentially that was prejudging his guilt and that he had then stopped receiving support which he recognises he had in fact previously received and that the Respondent had to an extent been particularly supportive.
13. However, it seems to me that it would be wrong of me to conclude that there is no reasonable prospect of the Claimant being able to show that the dismissal was unfair, or perhaps put another way, of not succeeding in relation to its claim, recognising of course that it is for the Respondent to show a fair reason for the dismissal. It seems to me there were potentially alternative roles that could have been undertaken by the Claimant, certainly he seems to think this was possible. There was no evidence given before me today that would suggest otherwise. Further, I wonder just how justifiable it was to dismiss on the basis of some other substantial reason, due to the concern of adverse publicity if the Respondent was found guilty at his criminal trial, which was a ground relied upon by the Claimant to justify the dismissal. It does rather feel like the Respondent's position is that the moment somebody is alleged to have behaved inappropriately, no matter what merit exists in that allegation, if there are criminal proceedings that might refer to it as employer, that this could cause it adverse publicity and as such it can fairly dismiss the employee. I doubt the soundness of that line of argument.
14. I cannot conclude therefore that there was no prospect of succeeding in a claim for unfair dismissal.

Strike out: was it not reasonably practicable to make the claim in the primary limitation period or such other period as is considered reasonable

15. The focus is really on the issue of whether the Tribunal has jurisdiction to hear this claim because the ET1 was not submitted within the primary limitation period, the three month period from the date of dismissal as may have been extended by the ACAS conciliation process.
16. The question is whether it was not reasonably practicable for the Claimant to present the claim within that period of time or such period thereafter as the Tribunal considers reasonable.
17. It is worth just noting that the allegation of sexual assault was made on 18 October 2021, and the Claimant was arrested that same day. There is a difference in view it seems as to the date of his release on bail, but the difference is irrelevant in context, and I assume the Claimant was released on the later date he says, of 1 November 2021. The Claimant was initially denied bail due, it he says, to inaccurate submissions being made to the Crown Court that he had been detailed previously in mental hospitals. He tells me he adduced evidence to show this was untrue and this is what secured his release on 1 November 2021. He was then subject to electronic tagging whilst on bail. This has all been an extremely traumatic and stressful experience the Claimant says, and I do accept that indeed, being subjected to the criminal process and experiencing such issues as a prolonged detention and inaccurate submissions would only heighten the stress for the Claimant.
18. In January 2022 he was told that he was being charged with another assault. In February 2022, the Claimant had a meeting with the Respondent's representatives and a disciplinary hearing was recommended and which took place on 12 May 2022. The claimant was dismissed at that meeting. On 18 May, so a week later or so, notification was made to ACAS, it turns out, regrettably for the Claimant, naming himself as the Respondent. The Claimant says this was due to the stresses he was under from the criminal proceedings.
19. The Respondent undertook an appeal hearing takes on 31 May 2022. ACAS issues its certificate 7 June 2022. There was a line of questioning from the Respondent's counsel as to the reason for that certificate being issued at that time, because it suggests it was requested by the Claimant, however, he says not, and that in fact he had no idea it had been sent to him. On 20 June 2022 there was a hung jury, and the Claimant was subject to a retrial. In August 2022, the Claimant attended in Nigeria to his father's funeral, returning to the UK, he told me, the first week in September 2022.
20. That is largely the period that the Claimant deals with in his written witness statement. There is then a period of around six months until the next key date, which is 6 March 2023, which is when the Claimant is acquitted at the second criminal trial. A week after that acquittal, the Claimant makes a notification to ACAS, obtains the certificate a week later, then finally presents the ET1 claim form on 28 March 2023.
21. I start by noting that this is not a case in which the Claimant says the ACAS certificate was not sent to him. Indeed, he says it was sent to him, but he did not see it in his emails at the time. He says he saw it only when searching through them in March 2023. It was only in March 2023 that, he says, he was able to focus fully and deal with the ET claim.
22. The Claimant says that he was unaware of the certificate having been sent to him by ACAS, and that he expected prompt from it, so he knew that he had to proceed with the

claim in the Employment Tribunal. However, the Claimant did accept, in his evidence before me, that he was aware of the requirement to lodge a claim in the Employment Tribunal within three months of the dismissal, he said he was told this on or around 18 May 2022. At around this time, the Claimant had assistance from his RMT representative and a solicitor, and he accepts he was told about the need to make the claim within three months, but he did not say who told him. It is fair to infer this was the subject of legal advice from the solicitor, and perhaps also, the RMT representatives.

23. The Claimant's position essentially is that he has had considerable pressure from the criminal proceedings. He referred to the accusations having been made by a manager, the facts that he had little evidence to prove his innocence, the shock of finding out that CCTV evidence which he felt would show his innocence was said not to be working, and the stress that came with engaging in the criminal process.
24. The Claimant's says he could not focus on these proceedings and could not think about it in reality, but I have some difficulty with accepting that evidence. This is because the underlying issues in these proceedings are the same issues in the criminal proceedings – they stem from the allegations of sexual assault - and there is no suggestion of him being unable to focus on those allegations in the criminal proceedings. Indeed, I could readily accept that he might consider the criminal proceedings far more serious than the civil proceedings, such that he would wish to put his energies into defending those, especially given the potentially more serious sanction to them, but that he was able to engage in the criminal proceedings leads me to conclude he could, if he wanted to, have engaged appropriately in the employment proceedings too.
25. The Respondent's position is that the Claimant was able to proceed and to present a complaint within the primary limitation period and/or a reasonable period thereafter which it says exceeded on the facts of this case in any event. The Respondent speculates that the real reason proceedings have not been pursued by the Claimant is because the Claimant wanted to wait for the outcome of the criminal proceedings, no doubt hopeful that he would be acquitted (and perhaps he felt the employment proceedings would be futile if he was convicted).
26. As it happens, on 6 March 2023 he was acquitted and almost immediately thereafter, within the space of a week, it seems that the considerable burden the Claimant says existed, such that he simply could not focus or deal with the employment case in any way, had had been lifted, and he was then able to notify ACAS once again, obtain the certificate and present the ET1 complaint all within a few weeks thereafter. One might think that, after such a difficult and extended period, on the Claimant's case, he would want some breathing space from becoming engaged in yet another set of proceedings.
27. As I have said the majority of the focus in the written evidence is up to the point of the funeral in August 2022 and there is no mention of the position in the six-month period thereafter and the Claimant tells me today that it was more of the same difficulties in terms of focus.
28. I referred the Claimant, in particular, to the case of *Asda Stores -v- Kausara UK EAT 0165/07* in the Employment Appeals Tribunal which concerned a case of criminal proceedings having been instigated where there was a suspected theft from tills by an operative at Asda, and the Employment Tribunal found in those proceedings that it was not reasonably practicable for the proceedings to have been commenced within the

three month period because of the stress and difficulties that the claimant experienced due to the criminal process.

29. The Employment Appeals Tribunal overturned the Employment Tribunal decision holding that it was not sufficient that *Kausar* was simply very stressed or in turmoil during the period of the relevant police enquiry and the criminal proceedings. Lady Smith said something more than that was required to avoid the effect of the statutory time limit. I have that case in mind when I give consideration to what is meant by what is reasonably practicable.
30. Having identified the *Kausar* case to the Claimant he tells me the difference between that case and his case is the nature of the allegations; he says that allegations of sexual assault are serious and impactful that allegations of theft as in *Kausar*. This might be so, but fundamentally, the difference needs to be in the effect of the criminal proceedings, such that they actually cause an illness, or disability, or otherwise prevent the feasibility of a claimant taking steps in the other proceedings.
31. I have in mind the Court of Appeal's decision in *Palmer -v- Southend on Sea Borough Council* [1984] IRLR 119, CA in which May LJ said:

"[W]e think that one can say that to construe the words "reasonably practicable" as the equivalent of "reasonable" is to take a view that is too favourable to the employee. On the other hand, "reasonably practicable" means more than merely what is reasonably capable physically of being done..... 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 [employment] tribunal within the relevant three months?" - is the best approach to the correct application of the relevant subsection."
32. I have in mind *Lowry Beck Services -v- Brophy* [2019] EWCA Civ 2490, where the Court of Appeal said that the Employment Tribunal is required to give a liberal interpretation of the test in favour of the employee and that statutory language is not to be taken as referring to physical impracticability and the test essentially is broader than that and ultimately the issue of reasonable practicability is one of fact, and not one of law.
33. In *Schultz -v- SO Petroleum*, a Court of Appeal decision, it was recognised that illness may well justify the late submission of claims, but mere stress as opposed to an illness or incapacity is unlikely to be sufficient and there is an observation that Employment Tribunals would usually expect some medical evidence of illness if it is relied upon as the basis for extending the time limit, especially where the Claimant has the benefit of legal advice or was otherwise aware of the limitation period.
34. The Claimant lost his legal representation in relation to the employment matters after losing his job, so from that point on, he was very much on his own in this context. His legal support was in respect of the criminal trial only.
35. The Respondent referred me to various decisions in relation to criminal proceedings, saying that the existence of criminal proceedings themselves is not enough to justify the suggestion that one could not lodge a claim in time and it was not reasonably practicable to do that. I noted at the hearing that those authorities are perhaps not of the greatest assistance to the Respondent, because they refer to the fact of criminal proceedings

rather than the effect of them, which is what the Claimant relies upon in this case. I expect the Respondent identified these authorities in particular because its view is that a conscious decision was likely taken by the Claimant to await the outcome of the criminal proceedings before deciding to pursue the employment case.

36. Fundamentally it comes down to this, that the Claimant's position is really all about an inability to focus on the employment proceedings. I cannot accept his evidence in relation to that; there is no medical evidence of inability to cope, of focus, or otherwise perform tasks of the kind that would be required to address the employment case. As I have said, it is clear that the Claimant was able to deal with the criminal proceedings and he does not suggest otherwise.
37. I recognise that there has been a very unfortunate, stressful and tumultuous period for the Claimant since the allegations were made and he was arrested on 18 October 2021, all the way up to his acquittal in March 2023, but in my judgment, he chose to focus on the criminal proceedings throughout and that he could feasibly deal with those, means he could feasibly have lodged an ET1 claim form in these employment proceedings.
38. The burden of establishing that the Claimant could not practicably have presented an Et1 in time rests firmly on him. I am not satisfied that he has discharged that burden on the balance of probability.
39. I would additionally add, even if I had have concluded that it was not feasible for the Claimant to have lodged the ET1 within three months of the dismissal, I would have concluded that he ought to have done so within three months following the hung jury trial on 20 June 2022. That would mean that the claim form should have been lodged by midnight on 19 September 2022. It might have been possible to persuade me, had there been evidence of any adverse effect specifically from attending at his father's funeral, to extent that time period out again, perhaps by a month, but the evidence does not support that and it is academic in any event given that the ET1 was not lodged until late March 2023.
40. For the reasons I have given, therefore, I am not persuaded that it was not reasonably practicable for the Claimant to lodge the ET1 within either the primary limitation period to which I refer, or by 19 September 2022, and as such, the tribunal has no jurisdiction to entertain this claim and as such, it is rejected.

Appeals

41. At the conclusion of the hearing, the Claimant asked whether he had rights of appeal. The Claimant was informed that he had 42 days by which to lodge any appeal.
42. The Claimant requested written reasons at the hearing and so, he has 42 days from receipt of these reasons to lodge an appeal to the Employment Appeals Tribunal. He is referred to the guidance on appealing to the Employment Appeals Tribunal here: <https://www.gov.uk/government/publications/how-to-appeal-to-the-employment-appeal-tribunal-t440>

**Employment Judge Kelly
27 February 2024**