



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mr A Uruthiraneson

v

Sainsbury's Supermarkets Ltd

Heard at: Watford (By CVP)

On: 18 July 2023

Before: Employment Judge Bansal (Sitting alone)

Appearances:

For the Claimant: In person

For the Respondent: Miss R Kight (Counsel)

JUDGMENT having been sent to the parties on 7 September 2023 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

1. By Notice of Hearing sent to the parties on 6 April 2023, this claim was listed for a final hearing, to determine the complaints of unfair dismissal and unpaid monies relating to unpaid overtime hours and incorrect pay for the suspension period.
2. By an Order of the same date, Employment Judge Tobin specifically directed:
“There is a dispute about timeline, which can be dealt with as a preliminary matter at the listed hearing. If the claimant has misled the Tribunal about his date of dismissal then there should be sufficient time to deal with any ensuing costs application.”
3. Upon reading the Claim Form, and the Response Form presented on 23 February 2023, I noted the respondent in their Grounds of Resistance raised a preliminary jurisdictional issue contending that the Tribunal had no jurisdiction to hear the claimant's complaints as the Claim Form was presented outside the statutory limitation date.
4. In the Claim Form the claimant asserted his dates of employment to be 12 October 2018 to 22 July 2022. The respondent asserted the correct dates of employment to be from 17 November 2018 to 23 June 2022.

5. The respondent contended that as the claimant's effective date of termination was 23 June 2022, the primary three months limitation date to present the Claim Form ended on 22 September 2022. The claimant did not present the Claim Form until 22 December 2022, which was two calendar months out of time. Further, the respondent pointed out that the claimant is not afforded additional time by way of ACAS early conciliation as the claimant did not make contact with ACAS until 14 October 2022.
6. By email dated 30 June 2023, the respondent's representatives made an application that the jurisdictional time issue be heard first as a preliminary point as this will determine whether it would be necessary to deal with the substantive hearing.
7. I gave consideration to this application and decided that this jurisdictional issue should be determined first as a preliminary issue. This was fully explained to the claimant. He raised no objection.

Hearing

8. The Hearing was held remotely by CVP. The claimant attended as litigant in person. Miss R Kight of Counsel appeared for the respondent. At the start of the hearing the claimant had some connection issues which took some 45 minutes to resolve, following which he was able to participate fully in the hearing.
9. I was presented with a bundle of documents of 159 pages prepared for the final hearing. This bundle was prepared by the respondent and contained relevant documents to determine this preliminary issue.
10. I was presented with a witness statement of Mr Jake Hope (Manager) for the respondent. This statement dealt with the substantive claim, which included evidence about the claimant's dismissal. The claimant provided no written witness statement. He gave oral evidence and was cross examined. I also asked him some questions for clarification. During his evidence, I found him to be evasive and more interested in highlighting the inconsistencies and behaviour of the respondent managers.
11. From the documents and evidence I heard, I made findings of fact as set out below. Reference to page numbers in this judgment is to page numbers in the bundle.

Findings of fact

12. Following a period of ACAS early conciliation which started on 14 October 2022 and ended on 25 November 2022, the claimant presented a Claim Form on 22 December 2022 making complaints of unfair dismissal and unpaid monies relating to unpaid overtime hours and incorrect pay during his suspension.
13. The claimant was employed by the respondent as an Online Delivery Driver based at the respondent's store at Hayes, Middlesex. The claimant, in his Claim Form stated his start date as 12 October 2018, and his dismissal date as 22 July 2022.

14. The respondent stated the claimant's start date as 17 November 2018 and effective date of termination on the grounds of gross misconduct on 23 June 2022.
15. Following a formal disciplinary process which began with an investigation meeting held on 28 May 2022 and then a disciplinary hearing on 23 June 2022, the claimant was summarily dismissed for gross misconduct at that meeting. The claimant was found to have breached the stunt rules relating to discount cards.
16. In evidence the claimant was not able to explain why he understood his start date was 12 October 2018. As for the date of termination, the claimant said that at the disciplinary meeting he was not told that he was dismissed. He was told that he would receive a letter in the post, which he received on 22 July 2022. Accordingly he understood the termination date to be the date he received the letter of dismissal dated 6 July 2022. (p75-76)
17. In cross examination, the claimant was referred to the contemporaneous notes of the disciplinary meeting. Despite the notes clearly stating that the claimant was told that he was dismissed with immediate effect, the claimant disputed he was told this at all. He claimed he was told he would receive a decision in writing by post.
18. In support of the respondent's position, I was directed to four documents, namely;
 - (i) the respondent's Employee Relations (ER) Dept record document, which stated the claimant's continuous start date of 17 November 2018 and termination date of 23 June 2022. (p25)
 - (ii) to the contemporaneous handwritten notes of the disciplinary meeting held on 23 June 2022 held by Mr Hope. The notes of this meeting expressly record, "*Decision summary dismissal, effective immediately..*" (p70), and
 - (iii) Decision making summary form completed by Mr Hope on 23 June 2022 confirming the outcome of the disciplinary hearing. (p73-74)
 - (iv) the letter of dismissal dated 6 July 2022. (p75-76)
19. The letter of dismissal was dated 6 July 2022, and sent by recorded delivery to the claimant. The letter stated "*Your dismissal is effective from 23/06/2022 with immediate effect*"(p75-76)
20. The claimant referred me to a copy of the envelope in which he received the dismissal letter. The envelope had a postage label dated 21 July 2022. (p77) This supported the claimant's position that he received the dismissal letter on 22 July 2022.
21. On 21 July 2022, the claimant contacted the respondent ER Dept and spoke with Farah Khan. Following this conversation, the claimant emailed the ER Dept, that same day at 21.44. I set out below the relevant parts of this email (p77)

“ Further to the advice of Farhan Khan today, I am writing this mail regarding my unfair dismissal at Hayes store.

I am an online delivery driver worked at Hayes store since November 2018 and was dismissed unfairly on 23rd of last month.

Initially, I was asked to attend an investigation meeting regarding a gross misconduct of using more than one Easter staff voucher and following this meeting, I was suspended until the disciplinary meeting without any definite date being set. In the meantime, as and when the investigating manager wanted to take my nectar card and colleague discount card at the investigation meeting, I categorically refused to hand over them.

I also found another procedural error of not providing me any of the evidence that were used by the investigation manager with the invitation letter and found the evidence were not comprehensive either

While I was suspended I was asked again to attend a second investigation meeting with two further allegations of using two more coupons at a different store and insubordination for not handing over my nectar and colleague discount cards after the decision of deferral for the disciplinary meeting.

When I was asked to attend the disciplinary meeting on 23rd of last month, one of the additional allegations of insubordination was dropped out without any formal apology by unfairly dismissing me through using inconclusive evidence.

After the above unfair dismissal was made, I was advised that I can appeal against the decision of dismissal and that the appeal would be heard by Darren Gubbins with the assurance of all the relevant papers being sent to me within a few days by special delivery

However, I haven't yet received any correspondence from the Hayes store at all.

Having received no correspondence after repeatedly contacting the store, I was given what I perceived as, unethical replies.

Having experienced the unethical culture of staff at Hayes store, I contacted HR Today and spoke with Farhan and thus wrote this mail in accordance to what was advised by Farhan.

Finally, having said everything in the above with identifying how I was unfairly dismissed by using inconclusive evidence and not following the correct procedure. I heavily intend to appeal against this unfair dismissal and I would ask the HR to send me all the relevant papers and the guidance notes regarding the internal appeal before I consider to take any legal action against this unfair dismissal.

KR
A Uruthiraneson

22. In that email I noted the claimant expressly stated in Paragraph 2, that he was dismissed unfairly at that meeting.
23. By email sent on 21 July 2022, the claimant appealed his dismissal and claimed he was owed overtime hours and pay during his suspension period.
24. The appeal hearing was eventually held on 8 December 2022. It was before Mr Adil Patel. (Store Manager) The appeal was dismissed by letter dated 7

January 2023.

Claimant's evidence concerning presentation of his claim form

25. In evidence, the claimant explained that he did not present his Claim Form within the limitation date, because he did know he was dismissed until 22 July 2022, the date he received the dismissal letter, and was waiting for the outcome of his appeal. The claimant gave no other reason or explanation on this point.
26. The claimant gave unclear and uncertain evidence as to when he first obtained advice about his legal rights in connection with his termination of employment. He said he first sought advice from his lawyer friends but did not give any details about these lawyer friends; how he received this advice and the date. He then sought advice from an organisation called "Just Answer Service" of which he is a member of; and then from ACAS. In terms of the timeline he gave no clear evidence about this although he mentioned he took advice sometime in the month of October. However, he repeatedly claimed he did as he was advised by ACAS. I did not find the claimant was open about this.
27. The claimant confirmed he had access to the internet, which he said he used all the time. He accepted that he could have done his research online. He was aware of the Citizen Advice Bureau (CAB) and that he could obtain legal advice from them too. He said he did not approach the CAB because they are too busy. He also did not want to pay for legal advice as it is expensive.

The Law

Effective date of termination -Section 97 Employment Rights Act 1996

28. Section 97(1) provides, Subject to the following provisions of this section in this part "the effective date of termination" –
 - (a) *in relation to an employee whose contract of employment is terminated by notice whether given by his employer or by the employee, means the date on which the notice expires.*
29. The effective date of termination has to be determined in accordance with the statutory definition. The belief of either party as to the correct termination date is not binding on an Employment Tribunal.
30. In the case of *Fitzgerald v University of Kent at Canterbury 20024 ICR 737 CA*, the Court of Appeal held that the effective date of termination of employment was a statutory construct which depended upon what had happened between the parties over time and not on what they might or might not agree to treat as having happened.

Applicable time limits

31. Subsection 18A(1) of the Employment Tribunals Act 1996 provides that, *"Before a person ("the prospective claimant") presents an application to institute relevant proceedings relating to any matter, the prospective claimant must provide to ACAS prescribed information, in the prescribed manner, about that matter".* S18A(8) provides *"A person who is subject to the requirements in*

subsection (1) may not present an application to institute relevant proceedings without a certificate under subsection (4)."

32. Section 207B Employment Rights Act 1996 describes how time limits are affected by early conciliation. In summary;
 - (i) where early conciliation commences after the time limit has expired then the time limit is not extended (see Para 29 below);
 - (ii) where early conciliation commences before the time limit expires then the claimant will have at least a calendar month from the end of the conciliation ("Day B") to present the claim;
 - (iii) in some cases they might have longer than one month from Day B (the period from the day after cancellation starts until Day B is ignored when calculating the time limit).

33. The extension provisions do not apply if by the time the claimant contacts ACAS to request early conciliation the three-month period has already expired. It is too late. **In Pearce v Bank of America Merrill Lynch and others UKEAT/0067/19/LA** it was held that although time may be extended to allow for ACAS Early Conciliation that is only possible where the reference to ACAS takes place during the primary limitation period.

34. Section 111(2) of the Employment Rights Act 1996 states;

"An employment tribunal shall not consider a complaint under this section unless it is presented to the tribunal-

 - (a) before the end of the period of three months beginning with the effective date of termination, or*
 - (b) within such further period as the tribunal considers reasonable in a case where it is satisfied it was not reasonably practicable for the complaint to be presented before the end of that period of three months"*

35. Article 7(a) of the Employment Tribunals Extension of Jurisdiction (England & Wales) Order 1994/1623 provides 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, (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 period as the tribunal considers reasonable.

36. Section 23(2) of the Employment Rights Act 1996 provides that an employment Tribunal shall not consider a complaint under this section unless it is presented before the end of the period of three months beginning with (a) in the case of a complaint relating to a deduction by the employer, the date of payment of the wages from which reduction was made. Section 23(4) provides that where an employment tribunal is satisfied that it was not reasonably practicable for a complaint under this section to be presented before the end of the relevant period of three months, the tribunal may consider the complaint if it is presented within such further period as the tribunal considers reasonable.

37. Regulation 30(2) of the Working Time Regulations 1998 provides an employment tribunal shall not consider a complaint under this regulation unless it is presented a before the end of the period of three months beginning with the date on which it is alleged that the exercise of the right should have been

permitted or as the case may be, the payment should have been made. ; and (b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that of three months.

Reasonable Practicability

38. When a claimant argues that it was not reasonably practicable to present the claim within the time limit, there are questions of fact for the tribunal to decide. In other words, whether it was, in fact reasonably practicable or not. The onus of proving presentation in time was not reasonably practicable rests on the claimant. That imposes a duty upon him to show precisely why it was that he did not present his complaint on time **Porter v Banbridge Ltd 1978 ICR 943 CA**. When doing so, the phrase “not reasonably practicable” should be given a liberal interpretation in favour of the claimant. **(Dedman v British Building and Engineering Appliances Ltd [1974] 1AER 520)**.
39. 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 **Walls Meat Co Ltd v Khan (1978) IRLR 499**).
40. The EAT ruled in **Bodha v Hampshire Area Health Authority ((1982) ICR 200** that the mere fact that an employee was pursuing an internal appeal was not by itself sufficient to justify a finding that it was not reasonably practicable to present a complaint to a tribunal within the time limit. This was expressly approved in **Palmer and others v Southend-on-Sea BC 1984 ICR 372**.
41. If the tribunal is satisfied that it was not reasonably practicable to present the claim within the time limit, then it is necessary to consider whether the period between the expiry of the time limit and the eventual presentation of the claim was reasonable in the circumstances.

Analysis and conclusions

42. I first determined the effective date of termination, which is a question of law taking into account all of the facts.
43. I found the claimant to be an intelligent and knowledgeable person. In evidence, he confirmed he had a degree in accountancy and was a qualified Accountant. I rejected the claimant’s understanding of the effective date of Termination, which was misconceived for the following reasons:
- 43.1 He attended the disciplinary hearing on 23 June 2022 at which he was verbally informed by Mr Hope of his immediate dismissal and right of appeal.
- 43.2 By his own admission, in his email sent on 21 July 2022 to the respondent, he confirmed his dismissal date as 23 June 2022. This is inconsistent to her claim that he was not told at the disciplinary meeting that he was being dismissed.
- 43.3 Had he not been dismissed, he would not have found alternative

employment on 29 June 2022, which he admitted he did. There would have been no reason for him to do so.

43.4 At no time did he question his termination date until he presented his ET1.

43.5 I am satisfied the claimant was under no illusion or misunderstanding about his termination date.

44. I therefore found as a matter of fact that the claimant's effective date of termination was 23 June 2022, and not 22 July 2022 as claimed.

45. I now turn to the primary time limits to present his Claim Form.

46. On the basis the effective date of termination was 23 June 2022, the time limit for presenting a claim for these complaints expired on midnight on 22 September 2022. The claimant does not benefit from an extension of time under the Early Conciliation provisions because he did not approach ACAS (Day A) until 14 October 2022 by which date the three month time limit had already expired. The Claim Form was presented on 22 December 2022, which was 92 days after the limitation date expired.

47. As I have stated above, the claimant came across intelligent and knowledge. He did not assert that he had a physical or mental impairment which made it not reasonably practicable for him to present his claim in time.

48. I was satisfied that the claimant had access to the internet, which he said he always used. He could have easily have made his enquires about his legal rights and about the applicable time limits. It is highly probable that he would have done so, but which he has not been prepared to admit to this Tribunal. He was aware of the CAB whom he could have contacted, but did not do so because, he considered were too busy. He could have paid for legal advice but chose not to do so because of the expense. That was his choice. Although he was not prepared to say when it was, nevertheless he did seek legal advice from his lawyer friends and an organisation called Just Answer Service, followed by ACAS. In all probability, the claimant would have been advised about the applicable time limits.

49. If the claimant was ignorant about his legal rights and the applicable time limits, (which he did not argue), that was because he took no reasonable steps to seek advice about his legal rights during the primary time period. The fault lies with the claimant. Accordingly, applying the guidance in Walls Meat Co Ltd v Khan, I consider that this ignorance was not reasonable.

50. Neither did I find that pursuing an internal appeal process prevented the claimant from presenting his claim in time. The fact is that had he made his enquiries timeously, he would have found that the existence of an impending internal appeal is not itself sufficient to justify a finding that it was not reasonably practicable to present a claim to a Tribunal within the time limit.

51. For the reasons stated above, I was satisfied that it was reasonably practicable for the claimant to present his claim within the statutory limitation period.

The money claim

52. The final pay was made on 1 July 2022. The limitation period for this expired on 30 September 2022. Again, taking the date ACAS was first contacted 14 October 2022 (Day A), this was outside the statutory time limit. Again, this claim has also been presented out of time.
53. For the same reasons as set out above, I was satisfied that it was reasonably practicable for the claimant to present his claim within the statutory limitation period.
54. Accordingly, the Tribunal determined it did not have jurisdiction to hear the claimant's complaints which are dismissed.

Costs Application

55. Miss Kight made an application for costs against the claimant pursuant to Rule 76(1)(a) and (b) of the Employment Tribunals Rules of Procedure 2013. The basis of the application was that the claimant had acted vexatiously and unreasonably in bringing this claim, which had no reasonable prospect of success.
56. Miss Kight submitted that the claimant knew full well that he had been summarily dismissed at the disciplinary meeting on 23 June 2022. This is clear from the contemporaneous notes of the meeting, and by an acknowledgement by the claimant in his email to the respondent on 27 July 2022. Again, he was made aware of the dismissal date in the Respondent's Grounds of Resistance dated 20 February 2023. Employment Judge Tobin in the Notice of Hearing dated warned the claimant about misleading the Tribunal about the termination date. Thus, the claimant by continuing to claim that his dismissal date was 22 July 2022 was misleading and unreasonable conduct.
57. Miss Kight, made the point that, notwithstanding the claimant was a litigant in person, he did not need to be professionally advised to know when his employment had ended.
58. Miss Kight, referred to the case of Yerrakalva v Barnsley Metropolitan Borough Council and another [2012] ICR 420, and invited the Tribunal to exercise its discretion to make a costs order against the claimant.
59. The claimant opposed the application. He maintained he genuinely understood his dismissal date to be 22 July 2022. He did not know what summary dismissal was. He did not mislead the Tribunal, and was advised to inform the Tribunal Judge about his understanding of the dismissal date. He accepted the Tribunal's decision about the date of dismissal.
60. In terms his financial position he explained he was dismissed from his current employment on 27 March 2023 for gross misconduct. He was working temporarily as a delivery driver, through an agency, and his earnings were dependent on the hours he worked. He had only worked 2 days in the last two weeks. He did not have information about his earnings. He is searching for permanent work, and has also been looking at self-employment. He

explained that he is a qualified accountant with a degree in accounting. He previously worked an accountant in a Nursing Home and lost his job as the Home lost its registration in 2014. His income is limited.

Decision

61. I carefully considered the application. Taking all of the circumstances into account, I refused the application for costs on the following grounds;

(i) Although the claimant may have acted unreasonably I was not satisfied that he deliberately misled the Tribunal regarding his termination date. It appears that his view was misconceived.

(ii) Prior to this application made today, the respondent did not warn the claimant that he would be pursued for costs.

(iii) I took guidance from the ruling in AQ Ltd v Holden UKEAT/0021/CEA, and the fact that it is unusual for costs to be awarded in Tribunal claims.

62. Finally, I apologise to the claimant for the delay in sending this written judgment. The claimant has already been notified separately that the explanation for this delay has not been intentional but due to oversight with the administration process.

Employment Judge Bansal

Date: 25 March 2024

Judgment sent to the parties on

.26 March 2024.....

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For the Tribunal office