EMPLOYMENT TRIBUNALS

Claimant: Mr K Wisdom

Respondent: Pro Environmental Recycling Solutions Ltd

JUDGMENT

The Claimant's application dated 8 May 2024 for reconsideration of the judgment sent to the parties on 24 April 2024 is refused.

REASONS

1. Although said to be an "appeal" (which can only be made to the Employment Appeal Tribunal), the claimant's email of 8 May 2024 is treated as an application for reconsideration.

2. The issue for consideration is, therefore, whether there is a reasonable prospect of the original decision to dismiss his claim being varied or revoked.

3. The claimant claimed unfair dismissal and deductions from wages. The case came before the Tribunal at a preliminary hearing on 22 April 2024 to determine whether the claimant had submitted his ET1 claim form within the statutory time limit.

4. The claimant was dismissed on 8th August 2022. That was the effective date of termination.

5. With regard to unpaid wages, the claimant said they were due for payment in the period May 2021 to September 2021.

6. The claimant contacted ACAS on 8th November 2022.

7. By section 111(2) of the Employment Rights Act 1996 a tribunal shall not consider a complaint for unfair dismissal unless it is presented to a tribunal:
   7.1. before the end of the period of three months beginning with the effective date of termination or;
   7.2. 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 have been presented before the end of that period of three months.

8. Section 23(2) of the Act makes provision for similar time limits in relation to claims for unpaid wages, the time limit applying from the date of payment from which deductions were made or the last in a series of deductions.

9. Thus, the claimant's claim for unfair dismissal had been presented one day outside the time limit unless the tribunal was satisfied that it was not reasonably practicable for the claim to have been presented before the end of the three month time limit. The claimant's claim for unpaid wages had been presented nearly one year outside the time limit unless the tribunal was satisfied that it was not reasonably practicable for the claim to have been presented before the end of the three month time limit.

10. The burden of proof in showing that it was not reasonably practicable to present a claim in time rests on the claimant; Porter v Bandridge Limited 1978 ICR 943 CA.

11. In Asda Stored Ltd v Kauser EAT 0165/07 Lady Smith described the reasonably practicable test as follows: *"the relevant test is not simply looking at what was possible but to ask whether, on the facts of the case as found, it was reasonable to expect that which was possible to have been done".*

12. In the period following his dismissal, the claimant told the Tribunal that he was separated from his partner and living in his car at the respondent's site. He said that his mental health suffered stating that he had "no knowledge of space and time". However, the claimant provided no medical evidence to support his contention that he was suffering from mental health problems at the time: he said he had not visited a doctor for 14 years. In the period following his dismissal the Claimant continued to carry out on-call unpaid work for the respondent. About five or six weeks after his dismissal, he contacted ACAS by telephone because he was minded to commence legal proceedings against the respondent in respect of his dismissal and the moneys is he said were owed to him. He said he again contacted ACAS two days before the expiry of the time limit. The claimant submitted that it was mainly his mental health difficulties and his living arrangements that prevented him making his unfair dismissal claim within the time limit. The claimant provided no further explanation as to why he waited for such a long time to commence legal proceedings for the recovery of unpaid wages.

13. The Tribunal concluded that it would have been reasonably practicable for the claimant to have presented his claims in time. He was able to contact ACAS following his dismissal and had access to his ex-partner's computer. It was reasonable to expect the Claimant to have enquired of the relevant time limits if he did not know what they were, or for him to have made a straightforward search on the internet. ACAS would have been able to inform him of the applicable time limits. The Tribunal accepted that, in certain cases, mental health might make it not reasonably practicable for a claim to be presented in time. But here, the claimant had provided no medical evidence to support his contention that ill health prevented him from doing so and, the Tribunal noted, he was able to both carry out work and contact ACAS in the relevant period.

14. The rules relating to reconsideration applications are set out in rules 70 to 73 of the Employment Tribunals Rules of Procedure 2013.

15. The Tribunal may reconsider any judgment where it is in the interests of justice to do so. On reconsideration, the original decision may be confirmed, varied or

revoked. If it is revoked it may be taken again. If there is no reasonable prospect of the original decision being varied or revoked, the application is to be refused.

16. There is an underlying public interest in the finality of litigation. Reconsideration is therefore not a means by which a disappointed party to litigation can get a "second bite of the cherry" if they do not agree with the original decision. In Flint v Eastern Electricity Board [1975] ICR 395 (High Court, Queen's Bench Division) it states at 404: *"But over and above all that (the interests of the parties), the interests of the general public have to be considered too. It seems to me that it is very much in the interests of the general public that proceedings of this kind should be as final as possible; that is should only be in unusual cases that the employee, the applicant before the tribunal, is able to have a second bite at the cherry."*

17. In Newcastle City Council v Marsden [2010] ICR 743 (EAT) it was said, at paragraph 17: *"In particular, the weight attached in many of the previous cases to the importance of finality in litigation—or, as Phillips J put it in Flint (at a time when the phrase was fresher than it is now), the view that it is unjust to give the losing party a second bite of the cherry—seems to me entirely appropriate: justice requires an equal regard to the interests and legitimate expectations of both parties, and a successful party should in general be entitled to regard a tribunal's decision on a substantive issue as final (subject, of course, to appeal)."*

18. Contrary to the claimant's assertion, the Judge was not biased. Nor did he prejudge the claimant's case. The Judge applied the law to the facts as described by the claimant. The claimant was given full opportunity to make his case to the Tribunal. It was open to the claimant to have presented medical evidence had he wished to do so. This is not such an unusual case that the claimant should have a "second bite of the cherry"

19. There is no reasonable prospect of the original decision to dismiss the claim being varied or revoked.

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Employment Judge Pritchard
Date: 23 May 2024