Case No. 1405835/2023

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Mr L Butt	AND	Tesco Stores Limited

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD REMOTELY **ON** 11 June 2024
By Cloud Video Platform

EMPLOYMENT JUDGE N J Roper

Representation

For the Claimant: Mr C Heath, Lay Representative, USDAW
For the Respondent: Miss M Sharp of Counsel

JUDGMENT

The judgment of the tribunal is that the claimant's claim for unfair dismissal was presented out of time, and it is hereby dismissed.

RESERVED REASONS

1. This is the judgment following a Preliminary Hearing to determine whether or not the claimant's claim for unfair dismissal was presented in time.
2. I have heard from the claimant, and I have heard from Mr C Heath, a lay representative from USDAW, on behalf of the claimant. I have heard from Miss Sharp of Counsel on behalf of the respondent. I find the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after listening to any factual and legal submissions made by and on behalf of the respective parties.
3. The Facts:
4. The respondent is the well-known national retailer. The claimant Mr Lee Butt was employed for approximately 27 years as an LGV driver. He was dismissed for gross misconduct with effect from 12 April 2023 after he had driven his large vehicle into a low bridge. By letter dated 7 April 2023 the respondent's Transport Manager Mr MacKay dismissed the claimant giving him five days' notice to 12 April 2023, with the proviso that he could if he wished accept a demotion to the position of Warehouse Operative. The letter made it clear that failure to accept that offer would result in the termination of the claimant's employment with

effect from 12 April 2023. The claimant declined to accept the demotion, and the effective date of termination of his employment was therefore 12 April 2023.

5. The claimant appealed against the decision to dismiss him, and he attended an appeal hearing on 5 May 2023. That hearing was adjourned for further investigation, and it was reconvened on 30 May 2023. On 2 June 2023 the claimant was notified that his appeal was unsuccessful. Under the relevant procedures the claimant was entitled to a second appeal, which he exercised. This was held on 30 June 2023. This appeal was also unsuccessful.
6. The claimant is a member of an independent trade union, namely USDAW, and he had access to advice and assistance from his union from the commencement of the disciplinary process. Mr Arding of USDAW accompanied the claimant on a number of formal meetings. These were on 6 and 7 April 2023 prior to the decision to dismiss him; and at the first and second appeal meetings on 5 May 2023 and 30 June 2023.
7. During this time the claimant had access to advice and assistance in connection with the Employment Tribunal process, ACAS Early Conciliation, and the relevant time limits.
8. The claimant commenced the Early Conciliation process with ACAS on 1 June 2023 ("Day A"), and ACAS issued the Early Conciliation Certificate on 30 June 2023 ("Day B"). The difference between Day A and Day B was 29 days. The normal time limit of three months (which would otherwise have expired on 11 July 2023) was thus extended by 29 days to 9 August 2023.
9. The claimant presented these proceedings on 12 November 2023. The originating application was completed by Mr Heath of USDAW as the claimant's named representative, and Mr Heath represented the claimant today.
10. The claimant did not prepare a witness statement for today's preliminary hearing, but he was present to be questioned by Miss Sharp. Mr Heath had also prepared on the claimant's behalf a written response to the respondent's application to strike out the claim on the basis that it was presented out of time. Paragraph 21.2 of the document suggests: "I tried my best to get hold of Lee, but he did not respond due to his mental health and his subsequent relationship breakup. We had to wait for me to contact us rather than place any more pressure on him. We helped Lee submit the claim once he felt he was in a stronger place to pursue it."
11. The claimant says that he suffered from depression following his dismissal and the breakup of his relationship and he did not feel well enough to engage in the process. However, no medical evidence has been adduced to support the contention that the claimant was too unwell to present these proceedings, nor to support any argument as to exactly when he had recovered sufficiently to be able to present them.
12. The claimant also conceded during his evidence that he and his trade union advisers had sufficient information before them to enter a claim within the relevant time limit, and particularly between the second appeal hearing on 30 June 2023 and the expiry of the time limit on 9 August 2023. When asked why they had not done so, the claimant replied: "I don't know why".
13. Having established the above facts, I now apply the law.
14. <u>The Law:</u>
15. The relevant statute is the Employment Rights Act 1996 ("the Act"). Section 111(2) of the Act provides that an employment tribunal shall not consider a complaint of unfair dismissal unless it is presented before the end of the period of three months beginning with the effective date of termination, or 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 period of three months.
16. 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.
17. Section 207B of the Act provides: (1) This section applies where this Act provides for it to apply for the purposes of a provision of this Act (a "relevant provision"). But it does not apply to a dispute that is (or so much of a dispute as is) a relevant dispute for the purposes of section 207A. (2) In this section - (a) Day A is the day on which the complainant or

applicant 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 complainant or applicant 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 a 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 a time limit set by a relevant provision would (if not extended by this subsection) 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 Act to extend a time limit set by a relevant provision, the power is exercisable in relation to the time limit as extended by this section.

18. The relevant law relating to Early Conciliation ("EC") and EC certificates, and the jurisdiction of the Employment Tribunal to hear relevant proceedings is as follows. Section 18 of the Employment Tribunals Act 1996 defines "relevant proceedings" for these purposes. This includes in subsection 18(1) the discrimination at work provisions under section 20 of the EqA. Section 140B EqA sets out how the EC process is taken into account. Where the EC process applies, the limitation date should always be extended first by section 140B(3) or its equivalent. However, where this date as extended by section 140B(3) or its equivalent is within one month of the date when the claimant receives (or is deemed to receive) the EC certificate, time to present the claim is further extended under section 140B(4) for a period of one month (applying Luton Borough Council v Haque [2018] ICR 1388 EAT). In other words, it is necessary first to calculate the primary limitation period, and then add the EC period. Having reached that date, it is necessary to ask whether it is before or after one month after Day B (the date of issue of the EC certificate). If it is before then the limitation date is extended to one month after Day B. Otherwise, if it is after one month after Day B, then limitation will be extended to that later date.
19. I have been referred to and have considered the following cases, namely: Palmer and Saunders v Southend-on-Sea BC [1984] ICR 372; Porter v Bandridge Ltd [1978] IRLR 271 CA; Wall's Meat Co v Khan [1978] IRLR 499; London Underground Ltd v Noel [1999] IRLR 621; Dedman v British Building and Engineering Appliances [1974] 1 All ER 520; London International College v Sen [1993] IRLR 333 CA; Asda Stores Ltd v Kauser UKEAT/0165/07; Schultz v Esso Petroleum Ltd [1999] IRLR 488 CA; Cullinane v Balfour Beattie Engineering Services Ltd UKEAT/0537/10; Wolverhampton University v Elbeltagi [2007] All E R (D) 303 EAT; Cygnet Behavioural Health Ltd v Britton [2022] IRLR 906 EAT; Royal Mail Group v Jhuti (UKEAT/0020/16/RN);
20. The Normal Time Limit:
21. In this case the claimant's effective date of termination of employment was 12 April 2023. The normal time limit of three months for the unfair dismissal claim therefore expired at midnight on 11 July 2023. The claimant commenced the Early Conciliation process with ACAS on 1 June 2023 ("Day A"), and ACAS issued the Early Conciliation Certificate on 30 June 2023 ("Day B"). The difference between Day A and Day B was 29 days. The normal time limit of 11 July 2023 was thus extended by 29 days to 9 August 2023. The claimant presented these proceedings on 12 November 2023.
22. Judgment:
23. 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 Lord Denning, (quoting himself in Dedman v British Building and Engineering Appliances) 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. In addition, the Tribunal must have regard to the entire period of the time limit (Elbeltagi).
24. In Palmer and Saunders v Southend-on-Sea BC 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] IRLR542, 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 on this point were preferred to those expressed in Lawal:-

25. 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.
26. 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".
27. Subsequently in London Underground Ltd v Noel, 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).
28. The Employment Tribunal must make clear findings about why the claimant failed to present his originating application in time, and then assess whether he has demonstrated that it was not reasonably practicable to have presented it in time (London International College v Sen.
29. Any application for extension of time must be supported by evidence. An employee seeking to avoid the application of the primary time limit must put the relevant material before the Tribunal (see Royal Mail Group v Jhuti)
30. If the claimant is relying on ill-health then he must discharge the burden of demonstrating that any ill-health meant that it was not reasonably practicable to have presented the originating application in time. This will ordinarily require evidence to support both the existence of the health condition relied upon; and secondly that this prevented the claimant from submitting the claim in time (or where appropriate within a further reasonable period) see Asda Stores Ltd v Kauser; Schultz v Esso Petroleum Ltd.

31. 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 (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."
32. In conclusion therefore this is a case in which the claimant is not asserting that he was unaware of the relevant Employment Tribunal and ACAS Early Conciliation procedures and time limits. The suggestion is that the claimant was suffering from depression as a result of his dismissal and was unable to engage in the process. However, there is no medical evidence to support this contention. The claimant has conceded that he and his advisers had all the necessary information available then to enable them to present these proceedings within time, particularly between the second appeal on 30 June 2023 and the expiry of the time limit on 9 August 2023, but he was unsure why between them they had not done so.
33. Furthermore, in circumstances where the claimant has to establish that it was not reasonably practicable for him to have presented these proceedings within the extended time limit which expired on 9 August 2023, I have no information from the claimant to suggest when it first became reasonably practicable for him to have done so, in what amount of time thereafter can be said to have been reasonable before the presentation of these proceedings on 12 November 2023.
34. Put simply, the claimant has not discharged the burden of proof upon him that (i) it was not reasonably practicable for him to have presented the proceedings within the relevant time limit; nor (ii) that he did so within such further time as was reasonable.
35. For these reasons I conclude that the claim was presented out of time. This tribunal does not have jurisdiction to hear it, and the claimant's unfair dismissal claim is therefore dismissed.
36. For the purposes of Rule 62(5) of the Employment Tribunals Rules of Procedure 2013, the issues which the tribunal determined are at paragraph 1; the findings of fact made in relation to those issues are at paragraphs 4 to 12; a concise identification of the relevant law is at paragraphs 15 to 19; how that law has been applied to those findings in order to decide the issues is at paragraphs 23 to 35.

Employment Judge N J Roper
Dated 11 June 2024

Judgment sent to Parties on
03 July 2024 By Mr J McCormick

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