



EMPLOYMENT TRIBUNALS

Claimant

Mr S K Dissanayake

v

Respondent

London Ambulance Service NHS
Trust

PRELIMINARY HEARING

Heard at: London South

On: 22nd March 2018

Before: Employment Judge Tsamados

Appearances

For the Claimant:

Mr K W Perera, Legal Assistant

For the Respondent:

Mr D O'Dempsey of Counsel

JUDGMENT

The Judgement of the Employment Tribunal is as follows:

- 1) The Tribunal has no jurisdiction to hear the Claimant's complaint of unfair dismissal and it is therefore dismissed:
- 2) The Claimant's complaint of damages for breach of contract is dismissed on withdrawal.

REASONS

Written reasons are provided at the behest of the Claimant's representative.

Background

1. By a claim form originally presented on 13th October 2017, the Claimant brought two complaints, one of unfair dismissal and the second for damages for breach of contract in respect of non-payment of notice pay. The claim is against his former employer, the Respondent.
2. Within his claim form, the Claimant cited an incorrect Acas Early Conciliation certificate number. Consequently, the claim was rejected by the Employment Tribunal. The Tribunal office wrote to the Claimant notifying him of the rejection by a letter dated 1st November 2017 which inter alia notified him of his ability to seek a

reconsideration. The Claimant responded by letter dated 2nd November 2017 which was hand delivered to the London South Employment Tribunal on 3rd November 2017, in which he provided the correct certificate number. The Tribunal office subsequently wrote to the Claimant on 14th November 2017 accepting the claim and indicating that it was treated as received on 13th October 2017.

3. The parties were sent notice of the claim and the date set for the full merits hearing by letter from the Tribunal office dated 14th November 2017. The Respondent presented its Response on 12th December 2017 in which it denied the claim in its entirety.
4. Within the Response, the Respondent raised a jurisdictional point as to whether the claim form had presented within the requisite time limit. As a result, an Employment Judge converted the full merits hearing listed for today to a preliminary hearing to deal with the time point.
5. The Respondent and the Claimant sent completed Agenda on Case Management to the Tribunal in advance of the hearing on 16th and 19th March 2018 respectively. Within the Claimant's Agenda, his representatives stated that the Claimant withdraws his claim for notice pay. I therefore record that the complaint of damages for breach of contract is dismissed on withdrawal.

Evidence

6. The Respondent provided a combined bundle of documents which I refer to as "R1" where necessary and the Claimant provided a smaller bundle which I refer to as "C1" where necessary. I heard evidence from the Claimant by way of a written statement and in oral testimony. Both parties provided written submissions and authorities in support.

Findings

7. By way of background, the Claimant was employed by the Respondent from 29th May 2001 until his dismissal on 25th May 2017. At the time of his dismissal he was employed as an Ambulance Person. His dismissal followed an internal investigation in he was interviewed on 19th September 2016 and disciplinary proceedings which commenced on 29th March 2017. In essence, the Respondent dismissed the Claimant because of criminal charges that had been brought against him which they found impinged upon his role and his duties. The Respondent cited the potentially fair reason for dismissal is either conduct or some other substantial reason. The Claimant avers that his dismissal was an unfair and that at the subsequent criminal trial he was found not guilty of all charges.
8. The Claimant was represented by his union through Mr Steve Johnson throughout the disciplinary process both at the disciplinary hearing and at the appeal hearing. He was told at the disciplinary hearing on 25th May 2017 that he was dismissed because of a breach of trust and confidence amounting to some other substantial reason, his last day of service was that day and that he would receive 12 weeks' payment in lieu of notice. I was referred to the typed and written notes of that meeting by way of confirmation of this. However, the Claimant did not deny that he was told of his dismissal with effect that day.

9. The Claimant was aware of the time limit of 3 months within which to present a claim of unfair dismissal to the Employment Tribunal. However, he mistakenly believed that this period started to run from the date on which he received written confirmation of his dismissal from the Respondent. This was by letter dated 31st May 2017 which the Claimant did not open and read it until 7th June 2017 (R1 46-49), having been on leave from 30th May to 6th June 2017).
10. That letter refers to payment in lieu of notice of 12 weeks. The Claimant was not aware whether his contract of employment allowed this or not but did not have a copy to confirm the position. The Respondent did not disclose a contract of employment in advance of this hearing. The Claimant's representative specifically asked for it although only belatedly yesterday evening. However, the Respondent has been unable to locate a copy.
11. After receiving the letter confirming his dismissal, the Claimant made some attempts to contact his union to obtain assistance in submitting a claim to the Employment Tribunal but would appear to have left it very late in so doing.
12. He presented his claim form online on 13th October 2017. By his understanding, the time limit was running from 7th June 2017 (when he opened and read the letter confirming his dismissal) and so expired on 6th September 2017.
13. He notified Acas under the Early Conciliation process on 1st September 2017, the certificate ending the process was issued on 29th September 2017 and at that point the process had been engaged for 28 days. This means that the time limit was extended by the Early Conciliation process to 27th October 2017.
14. The Claimant did not have the complete Early Conciliation reference number. The last two digits were missing. The number he had was as communicated to him by Mr Johnson in e-mails received in September 2017 (C1 4). Mr Johnson had acted as the Claimant's representative during the Early Conciliation process and communicated with Acas on his behalf. The Claimant did not have a copy of the Early Conciliation certificate which would have contained the full reference number (the last two digits are issued at that stage). Presumably this had been sent to Mr Johnson as his representative. The Claimant did not have a copy.
15. The Claimant was not able to contact Mr Johnson and drafted the Claim Form himself with the assistance of a friend. When he drafted the Claim Form he had to insert the Early Conciliation certificate number. However, he had a number that was two digits short. In order to submit the Claim Form online he added two randomly chosen digits to the number that he had at box 2.3 of the Claim Form (R1 3). The Claim Form was then successfully submitted on 13th October 2017.
16. Thereafter, the Claimant took no steps to ascertain the correct last two digits until after the Employment Tribunal had written to him rejecting the claim form on 1st November 2017 (R1 14). He then provided the correct Early Conciliation certificate number by letter dated 2nd November 2017 (R1 15). The Employment Tribunal wrote to him on 14th November 2017 (R1 16), advising that after reconsideration by Employment Judge Elliott, his claim was accepted and that the date of receipt was taken as 13th October 2017 (this being the original date of presentation).

Submissions

17. I heard submissions from both parties' representatives in which they amplified their written submissions. The Claimant maintains that his claim was presented in time because the effective date of termination ("EDT") was not 25th May 2017, but as a matter of law can only run from the date of receipt of the letter confirming dismissal of 7th June 2017 (relying on Société Générale v Geys [2012] UKSC 63) or alternatively from the date on which the Claimant received his payment in lieu of notice of 27th June 2017 (as evidenced by the pay slip at C1 3). His application to Acas was therefore timely.
18. The Respondent's Counsel submits that the EDT is not affected by these events, the Claimant having been told and having accepted today that he was told of his dismissal with immediate effect on 25th May 2017 (relying upon Duniec v Travis Perkins Trading Company Ltd UKEAT/0482/13/DA 11th March 2014, Rabess v The London Fire And Emergency Planning Authority [2016] EWCA Civ 2017 17th May 2016 and Robert Cort & Son Ltd v Charman [1981] ICR 816, EAT. The Respondent's Counsel avers that the Claimant should have commenced Early Conciliation by 24th August 2017 but did not do so until 1st September 2017. His claim was therefore presented out of time as he has not shown that it was not reasonably practicable to have presented the claim within the time limit.
19. The Respondent's Counsel also submits that it was not open to Employment Judge Elliott to determine the date of receipt of the claim form as being 13th October 2017 (the original date of presentation). He states that as a matter of law, rule 13(3) of schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 ("the 2013 Regulations") does not require any finding to be made as to the date on which the claim is presented after a substantial defect is rectified. This is automatically taken to be the date on which the defect is rectified. In this case, either the Claimant's letter of 2nd November 2017 or the date of receipt on 3rd November 2017.

Relevant law

20. Section 97 Employment Rights Act 1996 ("ERA")

"Effective date of termination"

- (1) *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,*
 - (b) *in relation to an employee whose contract of employment is terminated without notice, means the date on which the termination takes effect, and*
 - (c) *in relation to an employee who is employed under a limited-term contract which terminates by virtue of the limiting event without being renewed under the same contract, means the date on which the termination takes effect.*
- (2) *Where—*
- (a) *the contract of employment is terminated by the employer, and*

(b) the notice required by section 86 to be given by an employer would, if duly given on the material date, expire on a date later than the effective date of termination (as defined by subsection (1)), for the purposes of sections 108(1), 119(1) and 227(3) the later date is the effective date of termination.

(3) In subsection (2)(b) “the material date” means—

(a) the date when notice of termination was given by the employer, or

(b) where no notice was given, the date when the contract of employment was terminated by the employer...”

21. Section 111(2) ERA states that:

“... [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 that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.”

Analysis

22. There are two limbs to the formula in section 111(2) ERA. First, the Claimant must show that it was not reasonably practicable to present his claim in time. The burden of proving this rests firmly on the Claimant (Porter v Bandridge Ltd [1978] IRLR 271, CA). Second, if he succeeds in doing so, the Tribunal must be satisfied that the time within which the claim was in fact presented was reasonable.

23. Whether it was reasonably practicable for the Claimant to submit his claim in time is a question of fact for the Tribunal to decide, having looked at all the surrounding circumstances and considered and evaluated the claimant’s reasons.

24. The Court of Appeal in Palmer & Anor v Southend on Sea Council [1984] IRLR 119 considered the meaning of the words “reasonably practicable” and concluded that this does not mean “reasonable”, which would be too favourable to employers and does not mean “physically possible”, which would be too favourable to employees, but means something like “reasonably feasible”, ie “was it reasonably feasible to present the complaint to the [employment] tribunal within the relevant three months?”

25. May LJ in Palmer stated that the factors affecting a Claimant’s ability to present a claim within the relevant time limit are many and various and cannot be exhaustively described, for they will depend on the circumstances of each case. However, he set out a number of considerations from the past authorities which might be investigated ([1984] IRLR at 125). These included the manner of, and reason for, the dismissal; whether the employer’s conciliation machinery had been used; the substantial cause of the Claimant’s failure to comply with the time limit; whether there was any physical impediment preventing compliance, such as illness, or a postal strike; whether, and if so when, the Claimant knew of his rights; whether the employer had misrepresented any relevant matter to the Claimant; 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. When considering whether or not a particular step is reasonably practicable or feasible, it is necessary for the Tribunal to answer this question “against the background of the surrounding circumstances and the aim to be achieved”. This is what the 'injection of the qualification of reasonableness requires' (Schultz v Esso Petroleum Ltd [1999] IRLR 488, CA).

Conclusions

27. The difficulty for the Claimant is that he knew that he had been dismissed on 25th May 2017 and he knew that there was a three month time limit in which to present a claim and that this ran from dismissal. However, he erroneously believed this to run from the date of receipt of a letter which merely confirmed his dismissal on that date and set out the reasons in writing. He was advised by his union throughout the disciplinary process and this extended to the appeal which took place on 8th September 2017 at which the Claimant was told that his dismissal was upheld. In these circumstances and the absence of anything compelling from the Claimant I find that it was reasonably practicable for him to have presented to claim in time. He waited until the very end of what he believed to be the time limitation period and he had the means to seek advice via his union who were involved throughout the disciplinary process. Whether the union advised him or not or whether they correctly or wrongly advised him is not known but that is not a matter to be visited upon the respondent.
28. The Claimant's representative focused on the argument that the EDT was at the date that the Claimant received his letter of dismissal or was paid his payment in lieu of notice. I simply do not accept the submissions made by the Claimant's representative. With regard to Geys he appears to misunderstand that this is a case that has decided a principle applicable to claims of damages for breach of contract and not claims of unfair dismissal. Unfair dismissal is a creature of statute and is governed in respect of the EDT by section 97 ERA 1996. The principles within Robert Cort, Duniac and Rabess are clear. I refer specifically to paragraph 20 of Rabess which approves Robert Cort and paragraph 14 of Duniac. Geys is not applicable to an unfair dismissal claim.
29. Under section 97(1)(b) ERA, when the contract of employment is terminated without notice, the EDT is the date on which termination takes effect. With a summary dismissal for gross misconduct, this will be the last day worked.
30. In the Claimant's case, dismissal took effect on 25th May 2017 when he was told that he was dismissed without notice and not on the later receipt of written confirmation. That letter added nothing to what the Claimant knew about his dismissal and when it took effect, save for the written reasons.
31. Further, I find no legal basis for the proposition that the EDT could take place only on receipt of the payment in lieu of notice, the Claimant's representative's alternative submission.

32. For the above reasons, I find that it was reasonably practicable for the Claimant to have presented his claim form in time by commencing the Early Conciliation process within the original time limit of 3 months running from the date on which he knew he had been dismissed. The primary time limit expired on 24th August 2017 and he did not notify Acas under the Early Conciliation procedure until 1st September 2017.
33. Having found as above, I do not need to go on to consider the position regarding rectification under rule 13(3) of schedule 1 of the 2013 Regulations, although I would comment that whether or not the decision of the Employment Judge Elliot is correct or not, I do think that it would not have been a matter for me to change it but more properly it would have been a matter for the Respondent to have taken up either by way of reconsideration or appeal.
33. The Claimant's claim of unfair dismissal is therefore outside the jurisdiction of the Employment Tribunal and is dismissed. The Claimant already indicated that he withdrew his claim of breach of contract in the Agenda on Case Management submitted by his representative on 19th March 2017. That claim is therefore dismissed on withdrawal.

Employment Judge Tsamados
Date: 4th April 2018