EMPLOYMENT TRIBUNALS

Claimant: **Mr P Sarr**

Respondent: **DSG Retail Limited**

Heard at: **East London Hearing Centre** **On:** **30 September 2019**

Before: **Employment Judge C Lewis**

Representation

Claimant: In person
Respondent: Mr P Gelitz - Counsel

JUDGMENT

The claim has been brought outside the time limit provided by s111(2) of the Employment Rights Act 1996 and the claim is therefore dismissed.

REASONS

Judgment with reasons having been given orally at the hearing the written reasons are provided at the request of the Claimant

1. The Claimant, Mr Sarr, seeks to bring a claim of unfair dismissal against his former employer DSG Retail Ltd. This preliminary hearing was listed to determine whether he had brought his claim in time. The relevant time limit is contained in s 111(2) (b) of the Employment Rights Act 1996.

2. I heard evidence from Mr Sarr and I was provided with a bundle of documents and a further document from Mr Sarr on the morning of the hearing (the acknowledgement of claim submission dated 20 June 2019). Mr Ghazi provided a skeleton argument and a chronology and he also provided copies of the authorities referred to in the skeleton. I carefully read the relevant paragraphs and skeleton argument and considered the evidence heard from Mr Starr.

Findings of fact

3. On the evidence that I heard I reached the following findings as far as they are relevant to the issues I have to decide.

The relevant dates – whether the claim was in time

4. It was agreed by the parties that the date of dismissal was 21 January 2019.

5. The early conciliation certificate shows that the period of early conciliation began on the 22 April 2019 and ended on 22 May 2019. The claim was brought on 20 June.

6. Mr Sarr relied on the acknowledgement of claim dated 20 June 2019 to show that the claim had been brought in time. Mr Sarr initially stated that his claim was in time by one day, he relied on the claim having been issued within one month of the end of the early conciliation period.

7. I explained to Mr Sarr that given the effective date of termination was 21 January 2019 I found that the three month time limit for bringing a claim expired on 20 April 2019. This meant that the early conciliation was started after the three month time limit had expired which in turn meant that there was no extension to the time limit, the one-month extension relied on by Mr Sarr did not apply.

Whether it was reasonably practicable for the claim to have been brought in time

8. Mr Sarr told me that he was not aware that his time limit had expired on 20 April until the respondent raised it in their response to the claim.

9. Mr Sarr gave evidence and in respect of the steps he had taken to inform himself about the time limit and he stated plainly that he had relied on advice received from his local Citizens' Advice Bureau and he accepted very honestly and frankly that he knew about the right to bring a claim for unfair dismissal and bringing proceedings in the employment tribunal. He told me he was aware of that right and he was also well aware that legal proceedings, including employment tribunal proceedings as with any other type of judicial process, involved time limits. In answer to a question about what advice he had sought in relation to these proceedings and any time limits, the claimant explained he had first contacted his local Citizens' Advice Bureau during his period of suspension, before his dismissal. He had sought advice about defending himself because the allegation against him was of gross misconduct and he was concerned about that and he was also aware at that time of the right to claim unfair dismissal.

10. The CAB had advised him to contact a solicitor to seek legal advice if he was dismissed and he had been provided with an information pack, or leaflet, by the CAB. Mr Sarr told me that he didn't simply rely on that pack, he also looked up the information on the internet to make sure he knew what questions to ask when he spoke to an adviser and to inform himself more generally. He contacted ACAS through the number provided by the CAB and spoke to an adviser, he thought he first contacted ACAS around February 2019 and he was given a reference number so that when he rang again his notes would be identifiable. He confirmed that he spoke to ACAS on a number of occasions.

11. Mr Sarr told me he was advised that he should exhaust his employers internal appeal process first. Mr Sarr blames the respondent and accuses them

of deliberately seeking to delay his appeal to frustrate his ability to bring this claim in time. He pointed out that he was invited to meetings for his appeal, which were to take place in Clacton and Southend, that he was unable to attend due to the distance and the cost of travel. He was only able to attend the meeting on 3 April when the venue was changed to Chelmsford, which is where he lives. Although he did attend that meeting it did not go ahead because the respondent refused his request to record the proceedings, a request he made after taking advice from ACAS and explaining his concerns to them about the conduct of the respondent. Mr Sarr then commenced the early conciliation process on 22 April, although by this time his appeal had not been heard and the entire process had not been exhausted. His appeal was heard in his absence on 1 May 2019.

12. At the start of the hearing Mr Sarr explained that he believed that his claim was issued in time, however after being questioned by Mr Gelitz he said he didn't know when time started to run against him and he was not aware that he was out of time.

13. I am satisfied on the evidence before me that the claimant did believe that his claim was brought in time but that there was an error in the calculation of the time limit. By the time Mr Sarr started the conciliation process he was two days out of time.

The relevant law

14. Section 111(2) of the Employment Rights Act 1996 provides that:
an employment tribunal shall not consider a complaint [of unfair dismissal] unless it is presented to the tribunal –

> (a) before the end of the period of three months beginning with effective date of termination, or
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> (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.

15. Provision is made for extending the statutory limitation periods for instituting tribunal claims to allow for early conciliation. Sections 207B(3) and s 207B(4) were inserted into the Employment Rights Act. Broadly, s 207B(3) in ERA 1996 adds on to the ordinary three-month limitation period the period of time that has been spent in early conciliation. Whereas section 207B(4) ensures that where the time limit would otherwise expire during the period of conciliation (where claimants engage in conciliation towards the end of the ordinary three-month limitation period) a claimant benefits from an extension so that they have at least one month to submit their ET1 from the day on which the early conciliation period ends.

16. Where a claim is brought outside the time limit (or the extended time limit where s 207B (3) or 207B (4) applies) first, the claimant must show that it was not reasonably practicable to present his claim in time. The burden of proving this is on the claimant (*Porter v Bandridge Ltd [1978] IRLR 271, [1978] ICR 943, CA*). Then, if he succeeds in doing so, the tribunal must be satisfied that the time within which the claim was in fact presented was reasonable.

17. The Court of Appeal undertook a comprehensive review of the authorities in *Palmer and Saunders v Southend-on-Sea Borough Council [1984] 1 All ER 945, [1984] IRLR 119, [1984] ICR 372, CA*. In that case, May LJ, who gave the judgment of the court proposed a test of 'reasonable feasibility' as follows:

> ''[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—different, for instance, from its construction in the context of the legislation relating to factories: compare *Marshall v Gotham Co Ltd [1954] AC 360, HL*. In the context in which the words are used in the 1978 Consolidation Act, however ineptly as we think, they mean something between these two. Perhaps to read the word “practicable” as the equivalent of “feasible” as Sir John Brightman did in [*Singh v Post Office [1973] ICR 437, NIRC]* 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.'' ([1984] ICR at 384, 385)

18. Unless there are additional circumstances, the mere fact of invoking an internal appeals procedure is not regarded as sufficient to justify a finding that it was not reasonably practicable to present the claim in time: *Palmer v Southend-on-Sea Borough Council*, in which the Court expressly approved the following passage in *Bodha (Vishnudut) v Hampshire Area Health Authority [1982] ICR 200, EAT* per Browne-Wilkinson J:

> ''There may be cases where the special facts (additional to the bare fact that there is an internal appeal pending) may persuade an [employment] tribunal, as a question of fact, that it was not reasonably practicable to complain to the … tribunal within the time limit. But we do not think that the mere fact of a pending internal appeal, by itself, is sufficient to justify a finding of fact that it was not “reasonably practicable” to present a complaint to the … tribunal'.'

19. Other relevant factors depend on the circumstances of each case and include the question of the claimant's state of knowledge of his or her right to claim for unfair dismissal and of the time limit, and whether the employer had misrepresented any relevant matter to the employee; 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 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.

20. 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' (as the Court of Appeal said in *Schultz v Esso Petroleum Ltd [1999] 3*

All ER 338, [1999] IRLR 488)

Conclusions

21. The question for me was whether it was reasonably practicable for the claimant to bring his claim in time or whether his mistaken belief, or misunderstanding, in respect of the calculation of the time limit meant that it was not reasonably practicable for him to bring the claim time. The claimant was asked about his understanding and about the explanation for any delay and he put forward an explanation that he was doing what ACAS had advised him throughout. However he had accepted that he had done his own research at an early stage, prior to his dismissal, and he had spoken to the CAB who had suggested seeking legal advice or contacting ACAS. According to Mr Sarr ACAS's advice had been to exhaust the internal process, but that in itself is not an answer to whether it was reasonably practicable to bring the claim in time, or even to start the early conciliation period within time. Indeed, despite this advice the early conciliation period was commenced before his appeal had been heard and concluded.

22. The authorities I have been referred to are quite clear that the onus is on the claimant to show that it was not reasonably practicable for him to bring his complaint in time. Mr Sarr did not put forward any physical impediment or other reason such as ill-health to explain why it was not possible to have complied with the time limit. The question is whether it is reasonable in the circumstances to expect him to have done so.

23. Having weighed up the evidence that the claimant put before me I have come to the conclusion on the balance of probabilities that the explanation for not doing so was the error in respect of calculating the time limit. I am not persuaded that he did not know that any time limit was running, contrary to the claimant's assertion to that effect. He clearly had some indication at the outset of time limits and confirmed that he took advice but also that he did not solely rely on that advice but undertook his own research on the internet. I am not able to find that he was specifically advised by ACAS in respect of the specific dates or time limits otherwise the claimant would not have said to me that he was not aware of what the time-limit was. I find that he was relying on his own calculation of the relevant time limit which unfortunately was an erroneous one. It was open to him to have followed up the suggestion from the CAB to seek legal advice or even to have asked this CAB themselves.

24. In the circumstances I find that it was reasonably practicable for the claimant to have presented the claim in time.

25. I therefore do not need to make a finding as to whether it was brought within such further period as was reasonable. However in respect of the later period I do find that the period is itself consistent with the conclusion that I have been drawn to, namely that the claimant believed he was in time because of the miscalculation of the time limit. I am satisfied that also explains the further period of delay which was for the early conciliation period and then a further one month before he brought his claim.

Summary

26. The claim has not been brought within the time limit contained in s111(2) of the Employment Rights Act 1996 and the claimant has failed to show that it was not reasonably practicable to bring the complaint in time. The claim therefore falls to be dismissed.

Employment Judge C Lewis

25 October 2019