



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

Respondent

AND

Ms M Nippard

Mitchells & Butlers Retail
Limited

JUDGMENT OF THE EMPLOYMENT TRIBUNAL AT A PRELIMINARY HEARING

HELD AT Croydon **ON** 26th November 2020

EMPLOYMENT JUDGE A Richardson

Representation

For the Claimant: in person

For the Respondent: Mr Kay, Solicitor

JUDGMENT

The judgment of the Tribunal is that

- (1) The Claimant filed his complaint out of time when it was reasonably practicable for him to have filed in time.
- (2) The Tribunal has no jurisdiction to hear the claim.
- (3) The Claim is dismissed.

REASONS

1. The Claimant has brought a claim of unfair dismissal but filed it late with the Employment Tribunal. The issue before me was whether time should be extended to bring his claim in time.
2. At the commencement of the hearing I explained the issue to the Claimant. Time for filing an unfair dismissal complaint under S111 Employment Rights Act 1996 (adjusted for Early Conciliation) may be extended if the complaint was presented "within such further period [after expiry of 3 months from the effective date of termination] as the tribunal

consider reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented within three months: Employment Rights Act 1996 Section 111(2)(b).

3. It is a two stage test. First, was it not reasonably practicable for the claim to have been presented in time? The onus is on Claimant and requires him to show why he did not present his complaint in time; and second the Claimant must then show that it was then presented within a reasonable time.
4. After some initial technical difficulties which caused the hearing to start about an hour late, the Claimant was able to join the remote hearing by telephone. I heard his oral testimony and was also provided with a bundle of documents which included the pleadings, the dismissal letter, appeal hearing procedure documents and the ACAS Early Conciliation certificate.
5. The Claimant was employed by the respondent pub and restaurant group from June 2016, latterly from about January 2019 at the Respondent's Beachy Head Hotel as a chef until his summary dismissal on 22nd August 2019.
6. Early conciliation notice was filed on 30th October 2019 and the Early Conciliation Certificate was sent to the Claimant on 30th November 2019 by email under a standard ACAS covering email. The Claimant was required to commence his claim in the Employment Tribunal by midnight on 30th December 2019.
7. The Claimant filed his complaint on 22nd January 2020. The claim form is therefore clearly out of time by 22 days. The Claimant's evidence to support his claim that it was not reasonably practicable to have filed in time can be summarised as follows.
8. When the Claimant lost his job at Beachy Head Hotel on 22nd August 2019 by summary dismissal, he also lost his accommodation.
9. The Claimant urgently sought alternative employment and obtained a part time job as a delivery driver for a recruitment agency Best Connection on about 23rd September 2019.
10. When dismissed, the Claimant was informed that he had to leave his accommodation provided by the Respondent – he believed this was about 12th November 2019 or possibly a bit earlier at the end of October. Once the Claimant left his accommodation he was living in a van. He had a mobile phone. He travelled around the county of Sussex and also did deliveries/pickup in London. The part time driving job was a "life line" financially for the claimant.
11. On 11th September 2019 the Respondent received the Claimant's appeal against dismissal; his grounds of appeal being set out in two letters dated 29th and 30th August 2019 respectively.
12. The Claimant worked part time as a van driver October, November and December 2019, leaving that job after he obtained a trial shift as a chef at a restaurant, the Pilot Inn, in Eastbourne in December 2019. The trial shift went well and the Claimant started full time work at the Pilot Inn. After

- about a week and a half, shortly before Christmas, the Claimant left the restaurant because of the hostile atmosphere he experienced there.
13. After leaving the Respondent's occupational accommodation, the Claimant had lived in his van with no fixed address until he commenced living at his current address, he claimed in January 2020. The Claimant felt unable to deal with the papers because of his circumstances and peripatetic lifestyle enforced upon him by his dismissal. His life and his mental health, more particularly, were in disarray because of his dismissal. He said "*The period of stress I was suffering and losing my job and going beyond finding a new job and the nature of the allegations against me and the way I was treated was very stressful and hurtful as well.*"
 14. The Claimant commenced full time work again on about 20th January 2020.
 15. The Claimant was unsure when he had taken legal advice before, whether during or after the disciplinary process and his dismissal. He said he had taken advice sporadically and could not remember the specific occasions. However, he conceded that he was made aware of the time limits during the ACAS early conciliation process. The Claimant had been informed of the time limits on the basis of ACAS advice; that ACAS advice however had been based on the information the Claimant gave the ACAS officer, namely that he had been dismissed on 23rd September 2019 which was the date he said his appeal was unsuccessful, not the date of the dismissal on 22nd August 2019. In fact the outcome of the Appeal was on 25th September 2019 although that is not of material relevance to the issue in question.
 16. The Claimant's evidence is that in good faith, but mistakenly, he believed he had until 21st January 2020 to file his complaint, whereas time expired on 30th December 2019. He did not discover his error until he received the response form ET3.
 17. In mitigation of his error the Claimant submitted that he is a lay person dealing with a complex issue. He accepted that he had been wrong about the relevant date from which time started to run but he had given ACAS the date of the appeal hearing as the date of his dismissal because of the trauma of being made homeless, of losing his job through accusations which he maintained were untrue; the accusations had played upon him and had left him weaker. The Claimant had felt humiliated by having to live in his van.
 18. The Claimant had a mobile phone and received correspondence from the Tribunal, and his Early Conciliation certificate with the covering email by phone.
 19. I heard submissions from both parties and have taken a full note which I have reviewed and taken into account in my deliberations. I had already explained the law to the Claimant at the commencement of the Hearing and emphasised that the burden of proof was on him to show why it was not reasonably practicable for him to have filed his complaint in time.

20. This is not a case where a Claimant relies on having been given erroneous advice by a legal representative or ACAS. He acknowledged he was given correct advice by ACAS based on the outcome of the appeal hearing not the date of dismissal. The Claimant had made an assumption that the date of the outcome of the appeal hearing was the appropriate date and he exonerated ACAS from any error by saying that they had accepted that date from him as the dismissal date, because that is what he had thought was the correct date. It is what he had told them. It therefore did not assist him that the covering email from ACAS with the Early Conciliation attached, stated "*Acas cannot advise you about when a tribunal claim should be submitted. It is your responsibility to ensure that any tribunal claim is submitted on time.*"
21. Was it reasonably practicable for the Claimant to have submitted his claim form on time? He was dismissed on 22nd August 2020. His difficulties at work with the Respondent at Beachy Head had started shortly after commencing work there in about February /March 2019. The Claimant stated that he had subsequently had sought legal advice from solicitors on a sporadic basis but could not remember when he had done so. It was not clear whether he was referring to legal advice in 2019 or 2020.
22. The Claimant bases his assertion that it was not reasonably practicable to file his claim form in time principally on two points – that he made a genuine mistake in taking the appeal outcome of 23rd September 2019 as the correct date for calculating time, and that his loss of accommodation, living in a van, financial predicament and the mental stress he was under consequently, had a negative effect on him.
23. I am not unsympathetic to the difficulties the Claimant faced living in a van. I also understand and accept that he had made a genuine mistake as to the time limits. The question for me is to decide whether (1) it was reasonably practicable for the Claimant to make a complaint to the Employment Tribunal having regard to what if anything the Claimant knew about the right to complain, and (2) the time limit for making such a complaint. Ignorance of either, does not necessarily render it not reasonably practicable to bring a complaint in time. I must consider not only what the Claimant knew but also what knowledge the Claimant *should have had*, had he acted reasonably in all the circumstances.
24. What was the cause of the Claimant filing late? The Claimant said that after his dismissal he lived in his fixed accommodation provided by the Respondent for more than two months: he lived there for at least one month after his dismissal and at least one month after his appeal hearing outcome on 25th September 2019.
25. The Claimant vacated his occupational accommodation on 12 November, or possibly at bit earlier at the end of October. He contacted ACAS on 30th October 2020. The Early Conciliation Certificate was sent by email to him and bears the address in Seaford which is also on the ET1 form. The Claimant claims that he moved to this address in January 2020.

26. Was he physically prevented from seeking advice and checking that belief? The Claimant was living in a van. He was working part time 2 – 3 days a week. He was driving in the area of Seaford and also up to London. There was no medical evidence before me to suggest that the Claimant was so mentally distressed or physically disabled by his dismissal and the appeal outcome and the loss of his accommodation that he was unable to address this situation and reflect whether he should take professional advice. He knew he was entitled to bring an unfair dismissal claim. He did not have a computer/laptop but he had a mobile phone. He was receiving correspondence from the Tribunal and ACAS on his phone.
27. I find that there was no persuasive evidence why the Claimant could not have sought legal advice on the correct application of the time limit for filing his claim. He could have informed ACAS of the two dates – the dismissal date and the appeal outcome date. He could have checked himself on-line on his mobile phone as to the correct application of the dates. But he did not.
28. The Claimant was throughout the relevant period able to work, he was able to attend a trial shift the Pilot Inn and commence work as a chef again.
29. Was it reasonable that the Claimant made an assumption about time running from 25th September 2019 and for over four months made no effort to check the situation either by phoning a solicitor or asking ACAS specifically or researching it on line ?
30. I find that it was not reasonable for the Claimant to have relied on an assumption as to when time started to run for the filing of his claim without taking the precaution to check. I find that it was reasonably practicable for the Claimant to have filed his complaint in time. The warning from ACAS on 30th November 2019 was a red flag to the Claimant to check his belief that he could wait until 21st January 2020 to file his complaint. He ignored it and that is not reasonable.
31. Because of the assumption the Claimant made as to the correct time limit and from what date it started to run, the Claimant did not file his complaint until 22nd January, 22 day late. He did so because of his erroneous assumption and therefore I also find that he did not file it within a reasonable time.
32. Time is not extended. The Tribunal has no jurisdiction to hear the claim and it is dismissed.

Signed by: Employment Judge Richardson
Signed on: 8th December 2020

