EMPLOYMENT TRIBUNALS

Claimant: Mr A Cebers

Respondent:
(1) Montgomery Facilities Management Limited

(2) SportsDirect.com Retail Limited

Heard at: **By videolink**

On: 18.12.2020

Before: Employment Judge Dyal (sitting alone)

Representation:

For the Claimant: Mr I Steel, Solicitor

For the First Respondent: Ms M Harding, CEO and Mr E Montgomery, Director

For the Second Respondent: Mr J Bryan, Counsel

JUDGMENT

1. It was reasonably practicable for the Claimant to present the claim against the Second Respondent in time but he did not do so.

2. The tribunal therefore has no jurisdiction to hear the claim against the Second Respondent and it is dismissed for that reason.

3. The Second Respondent is dismissed from the proceedings.

REASONS

Introduction

1. The Claimant complains that the Second Respondent ('Sports Direct') subjected him to detriment on the grounds of protected disclosures contrary to s.47B Employment Rights Act 1996. The detriment complained of, as identified at today's hearing, is that the Second Respondent pressured the First Respondent ('Montgomery') to dismiss the Claimant or remove him from the Second Respondent's site. The Claimant contends that this pressure was applied at an unknown time (or times) and in an unknown way (or

ways) between 18 December 2019 and the date of the decision to dismiss him on 6 March 2020.

2. Since the Claimant could not be more precise than saying the Second Respondent's unlawful conduct occurred between 18 December 2019 and 6 March 2020, it was agreed that I should for the purposes of today's hearing proceed on the basis that time ran from 6 March 2020. Even on that basis, the Claimant accepts that the complaint was presented outside the primary limitation period. The issue for the tribunal to decide is whether or not time should be extended.

3. Had the limitation issue been decided in the Claimant's favour some further issues would have fallen for adjudication. As it is they do not arise.

The hearing

4. The hearing took place by CVP. The Claimant initially had difficulty connecting to the call. However, once he joined his connection worked well, save that he occasionally had to be asked to repeat things. Mr Steel had significant problems. He had difficulty joining the call and the start of the hearing was delayed accordingly. Having joined he dropped off the call several times for extended periods. From what I understood he was having problems with his laptop and problems with his internet connection. However, each time he dropped off the call the hearing paused and waited for him to reconnect. For a part of the hearing Mr Steel's image was frozen (though he could see everyone else). I invited him to leave the call and re-join as that usually corrects that particular problem. However, he preferred to simply carry on since all were able to hear him and he was able to hear all. I was content to carry on since that was his preference.

5. I had before me an agreed hearing bundle running to 160 pages. To those documents, the Early Conciliation (EC) certificate naming the Second Respondent and the Particulars of Claim were added.

6. The Claimant's witness statement had been served a couple of working days late. The Respondents objected to him relying on it and giving any evidence. I ruled that he could rely on it and give evidence for reasons I gave during the hearing. The Claimant gave evidence and was cross examined.

7. I heard closing submissions from Mr Steele and Mr Bryan. Mr Bryan also relied upon a skeleton argument which was helpful.

8. The Second Respondent was present throughout the hearing but had no active role to play in relation to the issues discussed in these reasons. It was present because there had been a misunderstanding about the agenda for the hearing. However, it was fortuitous that it did attend because there were case management issues that were usefully dealt with that did concern it. These are distinct from the matters considered here and are dealt with under separate cover.

Facts

9. The Claimant was employed by the First Respondent ('Montgomery'). However, his place of work was the Second Respondent's ('Sports Direct') warehouse. His job was to service and maintain warehouse machinery.

10. On 18 December 2019, the Claimant was involved in workplace accident in which the tips of two of the fingers on his left hand were severed. This was an horrific traumatic injury. The Claimant believes that Sports Direct's response to the incident was wholly

inadequate, for instance, those who assisted him did not know the code to the first aid room and refused to call him an ambulance.

11. The Claimant underwent surgery to terminalize the affected fingers within days of the accident. He returned to work within a remarkable timeframe – just a couple of days after the operation. His case is that over the course of the following months he made a variety of complaints, including to employees of Sports Direct, about health and safety, including in respect of the response to the index accident (see p91). He contends that those complaints amounted to protected disclosures for which he was ultimately dismissed.

12. There was an incident on 2 March 2020 in which the Claimant was challenged by Sports Direct's health and safety officers for not wearing a hard hat. The Claimant says that he had never previously been required to wear a hard hat in like circumstances. The incident became heated. On the Claimant's account (and I use my own words to summarise his position) he raised further complaints and concerns about the inadequacy of the response to his accident and the incongruousness of requiring him to wear a hard hat for purported safety reasons having been uncaring following the index accident. On Sports Direct's account the Claimant was highly abusive including by telling the staff who approached him to '*f*** off*'.

13. The Claimant then attended a disciplinary hearing with Montgomery on 5 March 2020. He was given notice of dismissal by a letter of 6 March 2020. The effective date of termination was 13 March 2020. Montgomery says that the reason for the dismissal was that the Claimant had responded aggressively on 2 March 2020 and that he had form for doing so.

14. The Claimant has a variety of complaints against the First Respondent, including in respect of dismissal.

15. As against Sports Direct the Claimant's complaint is that he made protected disclosures and on grounds of those disclosures Sports Direct subjected him to a detriment as set out above.

16. The Claimant commenced early conciliation against Montgomery on 6 April 2020. The certificate was obtained on 20 May 2020.

17. On 19 June 2020 the Claimant commenced early conciliation against the Second Respondent. On the same day the certificate was obtained. Also on the same day the claim was presented against both Respondents.

18. The claim against the First Respondent, at least in respect of dismissal, was presented in time. However, the Claimant accepts that his claim against the Second Respondent was presented out of time and he seeks an extension of time.

Explanation for missing primary limitation period

19. In his witness statement the Claimant's evidence as to why it was not reasonably practicable to present his claim against the Second Respondent in time is dealt with particularly at paragraph 21 to 28. In summary the Claimant's evidence is that he did not commence Early Conciliation in respect of Sports Direct until 19 June 2020 and did not present a claim against them until that date because he was unaware, as a lay person, that this was something he could do until he spoke to Mr Steel on 19 June 2020. His evidence is that he assumed that any employment tribunal claim would be against Montgomery since it, not Sports Direct, was the employer.

20. In his statement, the Claimant also gives further evidence to explain why his ignorance of the right to make a claim against Sports Direct was reasonable ignorance. First and foremost, the Claimant was suffering from significant mental health problems particularly in the months following the index accident and this hampered his ability to engage with potential litigation.

21. The Claimant's evidence in his witness statement is that he made contact with a Personal Injury solicitor in April 2020. He was then put in touch with Mr Steel, employment solicitor, on 8 April 2020. They had only a brief conversation and Mr Steel asked the Claimant to send some documents but he did not do so because he did not feel up to it on account of anxiety and depression. On 4 June 2020 he says that he spoke to Mr Steel again who asked him for some proof of identification so he could open a file. It was not until 19 June 2020 that he spoke to Mr Steel properly and at that point he was advised to issue the claim against both respondents. Mr Steel reviewed the claim form and Particulars of Claim for the Claimant though he did not draft it.

22. The Claimant's oral evidence painted a very different picture. The Claimant explained that he had spoken to ACAS numerous times over a period of months following his accident. He said that ACAS had told him that he could bring a claim against both Montgomery *and* Sports Direct. His best estimate of when he started being given this advice was February 2020. He was very clear, adamant even, that he had received this advice from ACAS.

23. In re-examination the Claimant was asked whether he had been told by ACAS that he could bring a claim against Sports Direct of the sort he now wishes to bring as described above. The Claimant confirmed that he had. Again he was adamant about this.

24. In his oral evidence the Claimant's explanation as to why he had not commenced Early Conciliation against Sports Direct at or around the time that he did so in relation to Montgomery, was because ACAS had made a mistake. He said there was an email chain confirming that. The email chain was not in evidence but Mr Steel was aware of it and asked the Claimant whether in fact, the chain he was referring to related to an inaccurate early conciliation number rather than a failure to issue a certificate in relation to Sports Direct. The Claimant confirmed that it was.

25. I was thus faced with inconsistent evidence from the Claimant.

26. In closing submissions Mr Steel submitted that I should accept the Claimant's evidence as given in his witness statement not his oral evidence. He submitted that the Claimant's recollection in oral evidence was inaccurate on account of his anxiety and depression.

27. I accept and find as a fact the Claimant was suffering from depression and anxiety with significant symptoms following the index accident and for the duration of the limitation period. I think this is corroborated by the medical evidence before me and the letter of Julie Fry, Counsellor, of 1 April 2020 is a good example.

28. However, while I can see that there is a possibility that the Claimant's oral evidence about what ACAS told him was inaccurate on balance I accept it. Firstly, it was given with confidence and assurance. The Claimant appeared to be very sure that he had spoken to ACAS and been given the advice described. This contrasted with other parts of his evidence where he was unsure. Where he was unsure it was obvious either because he said so or because his answers were equivocal. Secondly, it seems to me very plausible that the Claimant did speak to ACAS numerous times. It is just the kind of thing that someone in his position with limited knowledge of employment law and litigation would do. The ACAS helpline is a frequent port of call. Thirdly, I find it entirely

credible that ACAS told the Claimant that both Montgomery and Sports Direct were potential respondents.

29. I therefore reject the Claimant's evidence as given in his witness statement that he was unaware until June 2020 that he could, if he wanted to, bring a claim in the employment tribunal against Sports Direct. I find he was aware of that from February 2020 onwards.

Law

30. The applicable provisions in respect of time-limits appear at s.48(3) Employment Rights Act 1996 as follows:

> *(3) An [employment tribunal] shall not consider a complaint under this section unless it is presented*
>
> *(a) before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates or, where that act or failure is part of a series of similar acts or failures, the last of them, 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.*

31. It is clear that the onus of proving that it was not reasonably practicable to present the complaint within a period of three months is upon the employee. That imposes a duty upon him to show precisely why it was that he did not present his complaint (***Porter v Bandridge Ltd*** *1978 ICR 943, CA 1150.)*

32. It is clear from ***Palmer v Southend-on-Sea Borough Council*** [1984] 1 WLR 1129, that:

    a. "*not reasonably practicable" is best understood as meaning "not reasonably feasible*";
    b. the tribunal should investigate the effective cause of failure to comply with statutory time limit.

33. There is some learning on the relevance and proper analysis when a claim is lodged late because of the employee's ignorance of the law or time-limit.

34. Lord Denning MR said this in ***Dedman v. British Building & Engineering Appliances Ltd*** [1974] 1 W.L.R. 171 at p177

> *"It is difficult to find a set of words in which to express the liberal interpretation which the English court has given to the escape clause. The principal thing is to emphasise, as the statute does, 'the circumstances.' What is practicable 'in the circumstances'? If in the circumstances the man knew or was put on inquiry as to his rights, and as to the time limit, then it was 'practicable' for him to have presented his complaint within the four weeks, and he ought to have done so. But if he did not know, and there was nothing to put him on inquiry, then it was 'not practicable' and he should be excused."*

35. Scarman LJ said this at p. 180:

> *"Contrariwise, does total ignorance of his rights inevitably mean that it is impracticable for him to present his complaint in time? In my opinion, no. It would be necessary to pay regard to his circumstances and the course of events. What were his opportunities for finding out that he had rights? Did he take them? If not, why not? Was he misled or deceived? Should there prove to be an acceptable explanation of his continuing ignorance of the existence of his rights, it would not be appropriate to*

disregard it, relying on the maxim 'ignorance of the law is no excuse.' The word 'practicable' is there to moderate the severity of the maxim and to require an examination of the circumstances of his ignorance."

36. In ***Porter v Bandridge*** *Ltd 1978 ICR 943, CA 1150* the issue was put succinctly like this:

"…ought the plaintiff to have known and, if he did not know, has the applicant given a satisfactory explanation of why he did not know"

37. In ***Marks & Spencer v Williams-Ryan*** [2005] IRLR 562, Lord Phillips MR said this:

20. The first principle is that s.111(2) should be given a liberal interpretation in favour of the employee. Lord Denning MR so held in Dedman v British Building & Engineering Appliances Ltd*. In that case the relevant provision was more draconian than s.111(2), in that it required a complaint to the employment tribunal to be made within four weeks of the dismissal unless the employment tribunal was satisfied that this was not 'practicable'. When the provision was changed to its present form, the EAT held that the same approach to construction should be adopted (see* Palmer *at pp.123–124) and, so far as I am aware, that approach has never been questioned.*

21. In accordance with that approach it has repeatedly been held that, when deciding whether it was reasonably practicable for an employee to make a complaint to an employment tribunal, regard should be had to what, if anything, the employee knew about the right to complain to the employment tribunal and of 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. It is necessary to consider not merely what the employee knew, but what knowledge the employee should have had had he or she acted reasonably in all the circumstances. So far as that question is concerned, there is a typically lucid passage in the judgment of Brandon LJ in Wall's Meat Co Ltd v Khan *[1978] IRLR 499 at p.503 which I would commend:*

'With regard to ignorance operating as a similar impediment, I should have thought that, if in any particular case an employee was reasonably ignorant of either (a) his right to make a complaint of unfair dismissal at all, or (b) how to make it, or (c) that it was necessary for him to make it within a period of three months from the date of dismissal, an industrial tribunal could and should be satisfied that it was not reasonably practicable for his complaint to be presented within the period concerned.

For this purpose I do not see any difference, provided always that the ignorance in each case is reasonable, between ignorance of (a) the existence of the right, or (b) the proper way to exercise it, or (c) the proper time within which to exercise it. In particular, so far as (c), the proper time within which to exercise the right, is concerned, I do not see how it can justly be said to be reasonably practicable for a person to comply with a time limit of which he is reasonably ignorant.

While I do not, as I have said, see any difference in principle in the effect of reasonable ignorance as between the three cases to which I have referred, I do see a great deal of difference in practice in the ease or difficulty with which a finding that the relevant ignorance is reasonable may be made. Thus, where a person is reasonably ignorant of the existence of the right at all, he can hardly be found to have been acting unreasonably in not making inquiries as to how, and within what period, he should exercise it. By contrast, if he does know of the existence of the right, it may in many cases at least, though not necessarily all,

> *be difficult for him to satisfy an industrial tribunal that he behaved reasonably in not making such inquiries.'*

38. In ***Cullinane -v- Balfour Beatty Engineering*** unreported UKEAT/0537/10, considered the second limb of the limitation test. In a passage that should be better known than it is, he stated that:

> *"…the question of whether a further period is reasonable or not, 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. Instead, 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 to the strong public interest in claims being brought promptly and against the background where there is a primary time limit of 3 months."*

Discussion and conclusion

39. I start by noting that this is a case in which there is no suggestion that the Claimant was *generally* unaware of the need to commence early conciliation before bringing proceedings against a party and no suggestion that he was unaware of the applicable time limits. The Claimant's case, as put by Mr Steel, is that it was not reasonably practicable for the Claimant to commence Early Conciliation in relation to Sports Direct, or present the claim within the primary time limit because the Claimant was reasonably ignorant that he had a potential claim against Sports Direct.

40. I reject that submission in light of my findings of fact. The Claimant was aware from February 2020 that he could make a claim against Sports Direct. He was told this by ACAS. In those circumstances, which are quite different to the circumstances described in the Claimant's witness statement, I find that it was reasonably practicable to present the claim against Sports Direct within the primary limitation period.

41. It is unclear why the Claimant did not commence Early Conciliation with Sports Direct in or around April 2020 when he did so with Montgomery. He suggested in his oral evidence that the explanation was that ACAS made a mistake in failing to issue a certificate. However, he then accepted in response to a question from Mr Steel that the mistake was not a failure to issue an EC certificate relating to Sports Direct, but a mistake in respect of an EC certificate number. Further, and in any event, Mr Steel did not pursue this point and did not suggest in closing submissions that it was a basis for extending time. To be clear, then, I do not accept an error by ACAS explains or was in any way material to the late presentation of the claim.

42. I have considered whether the explanation may simply be that the Claimant was suffering from mental health problems. Whilst I accept that he was suffering from mental health problems I do not accept that they were such as to make it not reasonably practicable to present the claim in time. The fact is that the Claimant did commence Early Conciliation against Montgomery in a timely way and did present the claim against Montgomery in time. It was, in my view, reasonably feasible in the circumstances for him to do the same in respect of Sports Direct.

43. All in all, there is no explanation left standing as to why it was not reasonably practicable to present the claim in time. Thus I conclude that it was reasonably practicable to present the claim against Sports Direct in time. Unfortunately the Claimant failed to do this and I am unable to extend time.

Employment Judge Dyal

Date: 21.12.2020

SENT TO THE PARTIES ON

29/12/2020.....

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FOR THE TRIBUNAL OFFICE