EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr L Piotrowski	v	**The Gateway Hotel Dunstable Limited**

PRELIMINARY HEARING

Heard at: **Amersham** **On: 17 July 2020**

Before: **Employment Judge Smail**

Appearances:
For the Claimant: **In person**
For the Respondents: **Mr Williams, Counsel**

JUDGMENT

The claims are dismissed having been presented out of time.

REASONS

1. By a claim form presented on 3 December 2018, the claimant claims unfair dismissal and religious discrimination. The claimant was the Head Chef at the Holiday Inn Express in Dunstable between 2 May 2017 and 28 June 2018 when he was dismissed ostensibly for gross misconduct. The claimant claims he was automatically unfairly dismissed for the principal reason of having made one or more protected disclosures. He does not have 2 years' service to claim general unfair dismissal. The religious discrimination, he asserts, is around having been required to work on Sunday mornings when he had made it clear he wished to go to church.

2. The respondent has asked for a preliminary hearing on time limits, three months less a day from the 28 June 2018 is 27 September 2018. Acas was contacted on 1 November 2018, a certificate was provided on 9 November 2018 and the claim was presented on 3 December 2018. The effective date of termination having

been 28 June 2018, the claim is outside the primary period of limitation by 2 months and 1 week.

3. It is instructive to look at the background to the case in a little detail.

4. On 30 May 2018, the claimant was given a final written warning in respect of repeated short-term absences as measured by the Bradford Scoring System.

5. On the evening of Wednesday 20 June 2018, the claimant refused to cook dinner for a group of 48 guests at the hotel and walked off duty and went home and exchanged words with his Deputy General Manager and a colleague. They proceeded to complete dinner for the guests.

6. A contemporary account from the Deputy General Manager, Lenka Doris, attributes the claimant's position to not having had advance notice of the need to cook for a large group. The claimant's desired case is that he was being asked to cook chicken which was not from an approved supplier and which was not properly defrosted and that it would have been unsafe for him to cook the meal. Two days later he sent in an email complaining - we will see the detail in a moment - with the conclusion that he would be staying at home until someone from Head Office contacted him.

7. He had previously written a grievance in March 2018 about staffing levels relating, in particular, to the level of work he had to perform and work scheduling, meaning he had been required to work Sunday mornings when he should have been at church. It seems that the claimant was initially recruited on a 25 hours a week contract which was then extended to a full-time 37 ½ hours contract. In March 2018 he moved back to a 25-hour contract but that still would, on occasions, require 5 hours to be worked on a Sunday. He then asked to have Sundays off, or repeated that position, and management responded to that by offering him a 20-hour contract which would ensure that Sundays would be off every week. The claimant agreed to this. This agreement was in place prior to the termination of his contract on 28 June 2018.

8. The claimant confirms to me that the matter of Sunday working was resolved prior to the termination of the contract. The claimant tells me that he does not complain about losing the 5 hours a week so as to ensure he could take all Sundays off. There had been a period when he was required to work many Sunday mornings; he had objected to that - and that had been resolved, he tells me, in this way.

9. Turning to the circumstances of his departure. The claimant, following the incident on the evening of 20 June 2018, described above, was invited to a disciplinary hearing by letter dated 21 June 2018. On 22 June 2018, he emailed in a letter of concern in which he complained about the standard of the cleanliness in the kitchen in general and, in particular about the requirement on Wednesday 20 June to cook dinner for the group of 48 people. He arrived at 5pm to be told that the dinner had to be ready for 7pm. He complained he was

not informed the day before or on the morning. He thought it would be impossible to be ready because the chicken breasts were still frozen, so he walked out. There is considerable corroboration here, it seems to me, with Lenka Doris' account that it was the short notice of the group dinner which caused him to walk out rather than any principled position in respect of having to defrost the chicken.

10. He was dismissed on 28 June 2018 for:

    (1) Refusal to carry out reasonable instructions from an immediately senior employee or more senior member of staff;

    (2) Wilful absence - job abandonment;

    (3) Abusive behaviour, and

    (4) this is tagged on as an afterthought – a Bradford Score of 10.53.

11. In other words that there was a still a problem with repeated short-term absences.

12. That decision was made by Will Glenn, the General Manager at St Albans. That decision was upheld on appeal by Steve Foster, a Divisional Director. The appeal hearing was held on 6 August and the letter was sent out on 8 August 2018. He found that the reason for dismissal was indeed that the claimant had abandoned his shift on 20 June 2018, that he failed to follow a reasonable management instruction, and because of his behaviour to his manager and a colleague which was abusive. Poor attendance was taken into account also. Mr Foster wrote, and I quote:

> "I do not find any evidence to support your allegation that you felt that your termination was linked to your feedback on some of your concerns you had with regards to the health and safety of the kitchen as outlined in your email and the statement which you submitted at your appeal meeting. I can confirm that I have considered your feedback on health and safety standards and practices within the hotel. Many of your points are subjective and I am sure that the hotel adheres to robust management of health and safety.
>
> The Company has a process involving unannounced health and safety auditors and unannounced environmental health officer visits both of which this year have scored well and indicate that there is no risk to how the kitchen is managed."

13. Of course, I am not deciding the point here but it does seem to me that the claimant would have his work cut out to raise even a prima facie case that the principal reason for his dismissal was protected disclosure rather than having walked out on his shift that day and having refused to return and having spoken to his manager and colleague as alleged. It seems to me that this potentially is a more compelling narrative than the explanation for the decision that the claimant would wish to put forward. I merely observe that it cannot be said that the claimant has a very strong case of establishing that the principal reason for his dismissal was protected disclosures.

14. The Sunday working matter, having been resolved prior to 27 June 2018, cannot play any causative role on the fact that the claimant lost his job or on consequent loss of future earnings. The fact that he lost his job, sadly, was all down to the events of 20 June 2018.

15. Looking then at late presentation. Section 111 ss.2 of the Employment Rights Act 1996, provides as follows:

> "Subject to the following provisions of this section an employment tribunal shall not consider a complaint under this section unless it is presented to the tribunal:
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> (a) Before the end of the period of three months beginning with the 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 the period of three months."

16. We have approached reasonable practicability as meaning in more accessible language - reasonably feasible. The explanation the claimant has put forward for presenting his claim late is that having been aware of a three-month rule from his research on the internet and having consulted the CAB, he assumed it was three months from the dismissal of the appeal, not from the original dismissal. He accepted, of course, that he was not paid in the meantime between the dismissal and the appeal. He accepts he investigated his rights in the library by use of the library computer. He started compiling his ET1 after the dismissal of the appeal. He is not clear on dates and he is not entirely clear when he started that process but he then consulted a CAB, he tells me, on several occasions by telephone. He then approached Acas and, ultimately, he submitted his claim, the ET1.

17. So, I have to ask, objectively, in the light of all the facts that I know, was it reasonably feasible for him to present the claim in time? I note that the appeal was concluded by letter sent on 8 August 2018. The expiry of the primary period of limitation was 27 September 2020. So, the claimant still had one and a half months to get his claim in on time. Whilst he is of Polish origin, he reads English perfectly well as he has demonstrated to us in the tribunal today. He speaks English perfectly well. He was able to interrogate the internet and establish the correct position by taking care, in my judgement.

18. In my judgment, it was reasonably feasible that he could present the claim in time within the primary period of limitation by 27 September 2018 with such extensions that the Acas process would allow. He made an error of calculation based on an incorrect assumption. This is not one of those cases where the employer has contributed to the mistaken assumption. The responsibility sadly is all the claimant's.

19. Accordingly, the unfair dismissal claim is dismissed for having been presented out of time. In any event, as I have explained, it cannot be said that the claimant had a strong case of establishing even a prima facie case that the principal reason for his dismissal was that he had made protected disclosures. A more

likely narrative is that the principal reason for his dismissal was that he had walked out on his shift.

20. Turning then to the religious discrimination claim. By s.123, ss.1 of the Equality Act 2010:

> "proceedings on a discrimination complaint concerned with employment, may not be brought after the end of:
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> a. The period of three months starting with the date of the act to which the complaint relates, or
> b. Such other period as the employment tribunal thinks just and equitable."

21. The religious discrimination claim is also plainly out of time. The position on Sunday working had been resolved to the claimant's satisfaction, he tells me, before the termination of his contract on 28 June 2018. The claim was almost six months out of time, therefore. The matter having been resolved to his satisfaction, as he tells me, it would not be just and equitable to extend time to hear this complaint. It had, as I have said above, no causative significance to the reason why the claimant lost his job and incurred future loss of earnings. The issue in the claimant's employment was no longer his Sunday working but became the analysis of the rights and wrongs of the conduct on 20 June 2018.

22. I have said in the course of the hearing that these time limit matters are very technical legal matters. That is the way the legislation is framed. The tribunal is a creature of statue. It can only adjudicate claims as against the rules in the statutes and, applying them as objectively as I can to the facts in this case, I conclude that the claims are both out of time. There is no basis to extend time and they are therefore dismissed.

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Employment Judge Smail

9 October 2020

Sent to the parties on:

9 October 2020

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For the Tribunal:

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