



EMPLOYMENT TRIBUNALS

Claimant: Ms I Stoyanova-Bennadji

Respondent: David Lloyd Leisure Limited

**Heard at: London Central (By CVP with the Claimant joining by telephone)
On: 20 May 2021**

Before: Employment Judge Heath

Representation

Claimant: In person

Respondent: Ms Walmsley (Counsel)

JUDGMENT

The claim is struck out because the tribunal does not have jurisdiction to consider it.

REASONS

Introduction

1. By an ET1 presented on 20 November 2020 the claimant brought claims of constructive unfair dismissal, unlawful deduction from wages, unpaid holiday pay and breach of contract (unpaid notice pay). The respondent resists the claims, and in its Grounds of Resistance asserts that the tribunal does not have jurisdiction to hear this claim as it is presented out of time.
2. The hearing had been listed as a telephone hearing, but the joining instructions invited the parties to a CVP hearing in error. Ms Walmsley attended the hearing by way of the CVP platform, and the claimant was dialled in by telephone. Because of this issue, the hearing did not start until 10:30 AM. Neither party objected to conducting the hearing in this fashion.

The issues

3. At a previous Preliminary Hearing held on 31 March 2021 Employment Judge Deol listed this Preliminary Hearing to consider time-limits, and set out the issues to be considered at this hearing as follows: -
 - a. Was it reasonably practicable for the Claimant to present her claim within the requisite time limit?
 - b. If not, was the claim nevertheless presented within such further period as the Tribunal considers reasonable?
 - c. When considering the reasons for the delay, was the delay caused (in full or part) by the Claimant's skilled advisor and if so, should the Tribunal treat this as an unreasonably delay by the Claimant?

The facts

4. I heard evidence from the claimant, who adopted a document headed "timeline of events" as her witness statement and expanded orally on this statement. She was cross-examined by Ms Walmsley. I also considered the evidence in a 106-page agreed bundle prepared by the respondent. I considered both parties closing submissions and Ms Walmsley's Skeleton Argument.
5. The claimant was employed by the respondent since 13 December 2013 as a sales consultant until her employment ended on 23 April 2020.
6. Towards the end of 2019 the claimant was subject to a disciplinary investigation, the circumstances of which she claims amounted to a repudiatory breach of her contract of employment. She sought legal advice from a solicitor, Mr Kenealy.
7. The claimant initially sought Mr Kenealy's help on how to negotiate an exit package from the respondent. The respondent did not engage with this process, and so the claimant chose to resign. Mr Kenealy helped her with making amendments to a resignation letter she wrote herself.
8. Stepping out of the chronology, subsequently the claimant was to make a complaint about the service she received from Mr Kenealy's firm, and a determination of her complaint by that firm, by a letter of 30 April 2021, appears in the bundle at page 79. This letter states: "*I note you instructed Spencers Solicitors to negotiate your exit from David Lloyd Leisure in February 2020, for which you paid the sum of £450 plus VAT. Following attempts to enter negotiations with your employer regarding your exit which they refused to engage with, you resigned your position something Liam helped you with under the terms and scope of the client care letter dated 13th February 2020*".
9. The claimant resigned by letter dated 23 March 2020 giving notice of six weeks. This would have given a date of 7 May 2020, but for reasons which

are not entirely clear (and which do not make any difference to my reasoning), both parties appear to accept that the effective date of termination was 23 April 2020.

10. Indeed, on 18 June 2020 the claimant emailed Mr Kenealy, subject line “important change of date”, to “*emphasise with my leaving date was processed as 23/04/20 by the company NOT 11/05/20 as we thought it should be*”. She continued “*I also wanted to let you know – I would hopefully be going abroad (for about 20 days) on June 2nd, so let’s please catch up before then.*” The claimant meant July rather than June.
11. Mr Kenealy replied on 21 June 2020 that he would check his phone the following day but that he was not aware that it had a voicemail facility. He said that he was busy but would try to give a call the following afternoon to discuss matters.
12. There is a conflict between what the claimant says happened, and what is set out in Spencers’ complaint determination letter of 30th of April 2021. That letter says “*we attempted to call you on 23rd June without success*”. The claimant says that she had a phone call with Mr Kenealy in late June or early July in which they discussed possible steps to take the matter forward. In her statement she says that Mr Kenealy explained that she had to apply to the tribunal by 22 July 2020 and then “the clock would stop ticking”, that there were massive delays because of Covid and that he would send documents in the post by September or October and she would not hear from him for a few months. The claimant said that she asked her solicitor to keep her informed “step-by-step”. The claimant disclosed telephone records for September and October 2020, but not for June or July 2020.
13. It has not been easy to resolve this conflict, but I do not accept that a competent solicitor would have simply said, effectively, that the claimant should simply leave everything with him and that she would not hear from him for several months; not least when an important deadline was approaching. I do not find that Mr Kenealy said this to her. The claimant has not produced the client care letter referred to in the determination of her complaint against Spencers, and I find on the balance of probabilities that the client care letter defined the scope of Mr Kenealy’s work for the claimant as being in relation to negotiating an exit and helping with the resignation letter.
14. The claimant needed to travel to Sofia as her mother was very unwell. She flew to Sofia on 16 July 2020 and stayed there until her return to the UK on 27 August 2020. She did not contact her solicitor while she was overseas, but it is understandable that her focus was on her mother.
15. 27 August 2020 was a Thursday, and the claimant did not contact her solicitor on that day or the following day. Monday 31 August 2020 was a bank holiday. The claimant emailed Mr Kenealy on Wednesday 2 September 2020 say “*I’ve been back in UK for a couple of weeks now and I wanted to check if you had sent any documents by post for me as the*

Postal Service is quite unreliable these days... Please let we know what next... I have another little travel end of this month 22nd to 29th of September but apart from that I should be here". The claimant meant days when she said weeks.

16. Claimant telephoned Spencers on 8 September 2020 and emailed again on 9 September 2020, telephoned again on 15 September 2020. As set out earlier, the claimant was away from 22 September to 29 September 2020. She emailed Mr Kenealy again on 30 September 2020 referring to her earlier emails and asking for a response. However there appears to be no real sense of urgency from the claimant at this point. She telephoned Spencers again on 1 October 2020.
17. In respect of the above phone calls the claimant's evidence was she never got through to Mr Kenealy, and was told by staff at Spencers that they would leave a message for Mr Kenealy, and that the case was "open". Mr Kenealy did not respond to her emails.
18. On 12 October 2020 the claimant again emailed Mr Kenealy saying "*we last spoke on the phone early July when you last said you could then start working on my claim properly as I had left work on 23 of April 2020 and it had to be within three months of that date. The next step you explained was for you to register my case with ACAS. I appreciate the delay on everything with the dreadful Covid in our lives but you also said that I was going to get a bunch of documents by you in the post in the next few months to come (it's been nearly 4) at the start of this process and I never did. This and the fact that I had no response to my three emails over the last six weeks and a couple of phone calls to the office makes me naturally worried are you all right? Has this process started? Please respond*".
19. A friend of the claimant's told her about ACAS, and on 22nd of October 2020 the claimant contacted them. ACAS received the EC notification on 23 October 2020, and issued the EC certificate the same day by email.
20. It was not until 19 of November 2020 that the claimant posted her ET1 special delivery to the tribunal. The claimant gave evidence that she does not have Internet access or a printer and is reliant on her neighbour for Internet, and on a friend-of-a-friend for a printer.

The law

21. The time limit for bringing an unfair dismissal complaint is set out in section 111 of the Employment Rights Act ("ERA"), the relevant provisions of which are as follows:
 - (1) Section 111(2)(a) provides that a tribunal shall not consider such a complaint unless it is presented before the end of three months beginning with the effective date of termination.
 - (2) This is subject to section 111(2)(b) which provides that a tribunal may consider a complaint if it is satisfied that it was not reasonably practicable for it to have been presented before the end of the

relevant period of three months and if the complaint is presented within such further period as the tribunal considers reasonable.

22. The test of practicability means what could have been done not what would have been reasonable. Reasonably practicable does not mean “reasonable” or “physically possible” but is analagous to “reasonably feasible” (see **Palmer and Or v Southend-on-Sea BC 1984 ICR 372, CA**).
23. Where a claimant's skilled advisors fail to submit a claim in time, the tribunal will usually consider that it was reasonably practicable for the claim to have been presented in time (**Dedman v British Building and Engineering Appliances Ltd [1973] IRLR 379**).

Conclusions

24. The claimant’s case is that she had instructed a solicitor to act on her behalf in respect of bringing tribunal proceedings. If this were the case then she would be bound by any failure of his under the **Dedman** principle. On balance, however, I consider it more likely that the claimant had not properly instructed solicitors in this regard, and that there was some sort of misunderstanding on her part as to the scope of the work the solicitors would carry out.
25. That being the case, it is necessary for me to examine what was the impediment to the claimant getting her claim in on time. I consider that this impediment was her mistaken belief that her solicitors were instructed to present her ET1. It is necessary for me to examine the reasonableness of this belief in considering whether in all circumstances it was reasonably practicable for her to have presented her claim in time.
26. The claimant knew when she sent her email of 18 June 2020 to Mr Kenealy that her deadline for presenting a claim to the tribunal would be around 22 July 2020. At this point it was clear to her that she was highly likely to be overseas when that deadline arose.
27. The claimant would have had almost a month from her email of 18 June 2022 ensure that her solicitor was properly instructed, with no room for any doubt, to present her ET1 on her behalf. As I have indicated earlier, I do not accept the claimant’s evidence that her solicitor, in rather vague terms, suggested that she leave things with him and would hear from him in several months time. Any belief of the claimant that this state of affairs was the case would not have been reasonable.
28. The deadline of 22 July 2020 passed when the claimant was in Sofia, and I accept her explanation that she was entirely focused on her sick mother at this point. But the fact is, she should have ensured before she left for Sofia that her solicitor had been properly instructed to present the claim, or if he were not to act for her, for her to present it herself.
29. If I am wrong on this question, I will also consider the subsidiary question of whether the claimant presented her claim within a reasonable time after the deadline.

30. When the claimant returned home from Sofia on 27 August 2020 she left it four working days before emailing the solicitor. When she heard nothing, she left it six days before she telephoned, emailing again the following day, then telephoning some four days later. It was another week before she was again overseas from the 22 to the 29 September 2020, and she emailed again on 30 September 2020, and telephoned again on 1 October 2020. She left it another 12 days before emailing again and another 10 days before contacting ACAS, and almost a month before she presented her claim to the tribunal.

31. While I accept that this was a difficult time in terms of the pandemic, and the claimant had limited access to Internet and printing facilities, overall, this represents an entirely unreasonable delay following the passing of the deadline. When it became clear that the solicitors were not going to respond positively to her, the reasonable thing to do would have been to adopt a Plan B. When it became clear, from her contact with ACAS, that no claim had been registered, the reasonable thing to do would have been to have acted with the utmost speed to present a claim to the tribunal more or less immediately. I cannot accept that the claimant's difficulties with Internet and printing presented such an obstacle that she could only present her claim after around a month. In the circumstances were I to find that it had been not reasonably practicable for her to have presented her claim on time, I would have found that she had not presented her claim a reasonable time thereafter.

32. In all the circumstances the tribunal cannot accept jurisdiction for this claim.

Note: This has been a remote hearing. The parties did not object to the case being heard remotely. The form of remote hearing was [V – video, conducted using Cloud Video Platform (CVP)]. It was not practicable to hold a face to face hearing because of the COVID-19 pandemic.

Employment Judge **Heath**

Date 21 May 2021

JUDGMENT SENT TO THE PARTIES ON

24th May 2021..

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FOR THE TRIBUNAL OFFICE

Note

Written reasons will not be provided unless a written request is presented by either party within 14 days of the sending of this written record of the decision.

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