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EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4109290/2021 (V)

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Public Final Hearing held in Glasgow by Cloud Based Video Platform
(CVP) on 15 July 2021

Employment Judge Mr. A. Tinnion

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Mr. Peter Ryan

Claimant
In person

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British Telecommunications plc

Respondent
Represented by
Ms Osman, Solicitor

RESERVED JUDGMENT

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For the reasons given below, the Tribunal's judgment is that:

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1. The Claimant did not present his claim in time.
2. It was reasonably practicable for the Claimant's claim to have been presented in time.
3. The Tribunal lacks jurisdiction over the Claimant's claim.
4. The Claimant's claim is dismissed for lack of jurisdiction.

REASONS

Claim

1. The Tribunal clarified with Mr. Ryan (Claimant) at the outset of the hearing the claim he presented to the Tribunal. Mr. Ryan confirmed that he asserted only one claim against the Respondent: a claim that the Respondent failed to pay him his full enhanced redundancy pay entitlement on 30 November 2020 following his dismissal on grounds of redundancy on 8 November 2020, which he put in two ways: first, as a claim for unlawful deduction from wages, contrary to s.13(1) of the Employment Rights Act 1996 (**ERA 1996**); and second, as a claim for breach of contract against his former employer, the jurisdiction for which arises under the Industrial Tribunals Extension of Jurisdiction (Scotland) Order 1994 (**EOJ 1994**).
2. Mr. Ryan confirmed that he did not present complaints against the Respondent for (i) unfair dismissal under s.98 of ERA 1996 (ii) failure to pay a statutory redundancy payment under ss.162-163 of ERA 1996 (iii) a breach of contract claim for failure to make a PILON (pay in lieu of notice) payment on dismissal (iv) failure to pay a “CLARPS” payment in full (v) any other matter.

Preliminary Issue

3. A preliminary issue arose for determination, which the Tribunal had previously notified Mr. Ryan of by letter dated 6 May 2021: whether the Tribunal had jurisdiction over the claim, which turned on whether Mr. Ryan’s ET1 had been presented in time in order for the Tribunal to have jurisdiction over the claim made in that document, and if not, whether it had been reasonably practicable for him to have done so.

Law

4. Under s.23(2)(a) of ERA 1996, subject to s.23(4) of ERA 1996 a Tribunal shall not consider an employee’s complaint that their employer has made a deduction from their wages in contravention of s.13 of ERA 1996 unless it is presented before the end of the period of 3 months beginning with the date of payment of the wages from which the deduction was made.

5. Under s.23(4) of ERA 1996, where a Tribunal is satisfied that it was not reasonably practicable for the complaint under s.13 of ERA 1996 to be presented before the end of the relevant period of 3 months, the Tribunal may consider the complaint if it was presented within such further period as the Tribunal considers reasonable.
6. Para. 7 of EOJ 1994 provides (in relevant part) that a Tribunal shall not entertain a complaint in respect of an employee's contract claim unless it is presented (a) within the period of 3 months beginning with the effective date of termination of the contract giving rise to the claim, or (c) where the Tribunal is satisfied that it was not reasonably practicable for the complaint to be presented within that period, within such further period as the Tribunal considers reasonable.
7. It is a question of fact in each case whether it was reasonably practicable to present a claim in time. Reasonable practicability does not mean simply physically possible. Existing cases do not set down hard and fast rules. The Tribunal should ask whether it was 'reasonably feasible' to present the complaint in time. Palmer v Southend-on-Sea BC [1984] 1 All ER 945. A claimant is unlikely to be able to show that it was not reasonably practicable to present a complaint because of ignorance of the right to make the claim. If the claimant ought reasonably to have known of his right to claim, then it will probably be held that it was reasonably practicable to present a complaint within the time limit whether they knew of the right or not. Porter v Bandridge Ltd. [1978] 1 WLR 1145. Even if it only becomes practicable to present the claim within the last few days of the 3 month period, it may have been reasonably practicable to do so; claimants are expected to move quickly if they are aware that the time limit is nearly upon them. Kauser v Asda Stores Ltd. [2007] All ER (D) 195, EAT.
8. Where the employee is prevented by serious illness from claiming in time, it will normally be held not to have been reasonably practicable to present the claim in time. Schultz v Esso Petroleum Ltd. [1999] 3 All ER 338.

9. If it is not reasonably practicable to present a complaint in time, the Tribunal may allow an extension of time of such further period as it considers reasonable. There is no fixed limit, each case must be considered on its facts in light of the employee's explanation for the delay. Marley (UK) Ltd. v Anderson [1996] IRLR 163, CA. The Tribunal has an unfettered discretion as to how long an extension of time to allow in the light of all the circumstances, albeit the discretion must be exercised judicially. Howlett Marine Services Ltd. v. Bowlam [2001] IRLR 201.

Evidence

10. The Claimant gave evidence. The Respondent did not call any witnesses. The Respondent produced a hearing bundle of c.130 pages. The Tribunal was satisfied that the Claimant gave evidence in an honest, truthful manner and sought to assist the Tribunal with his genuine recollection of events.

Facts

11. The Tribunal makes the following findings of fact on the balance of probabilities.
12. Mr. Ryan was born in 1965. He commenced employment with the Respondent on 16 October 2006, and remained in continuous employment until his dismissal.
13. In 2020, Mr. Ryan's job title was Jeopardy Management Controller. During this period of time, Mr. Ryan's job required him to use computers and observe computer monitors. By letter dated 7 October 2020, Mr. Ryan was notified that his new salary was £40,528 per annum with effect from 1 October 2020.
14. In 2020 the Respondent engaged in a redundancy exercise, as a result of which Mr. Ryan was dismissed on grounds of redundancy with effect from 8 November 2020, his effective date of termination.
15. On 30 November 2020, Mr. Ryan received a payment in the region of approximately £37,000 from the Respondent (the precise figure is not clear,

and for the purpose of this Judgment and Reasons the precise figure is not required).

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16. That payment appears to have included (i) a PILON payment of £8,669.68 (ii) a CLARPS payment (net) which (gross) had amounted to £3,337.74 (iii) a statutory redundancy payment of £11,298 (iv) an enhanced redundancy payment (the subject of his claim, exact amount unknown), which Mr. Ryan believed at or around the time of receipt was “*short*” of what he thought it ought to have been under his employment contract. The payment the Respondent made to Mr. Ryan on 30 November 2020 was £13,000 less than it otherwise would have been because on 6 November 2020 Mr. Ryan completed a form confirming that he wanted £13,000 of the sum due to him to be paid into the BT retirement savings scheme.
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17. Mr. Ryan claims he was completely unaware of his right to bring a legal claim concerning the alleged shortfall against his former employer in either a court or an Employment Tribunal until around mid-March 2021, at which point Mr. Ryan discovered that a former work colleague (Barry Booth) was (or was shortly to be) involved in legal proceedings against the Respondent.
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18. Mr. Ryan then spent approximately 2 weeks considering what to do, before contacting ACAS on 29 March 2021. On 21 April 2021, ACAS issued an EC Certificate, and on 27 April 2021 Mr. Ryan presented his ET1 by completing it and submitting it online.
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19. When asked to explain why he contacted ACAS on 29 March 2021 and presented his ET1 on 27 April 2021 and not earlier, Mr. Ryan made reference to the following matters (for the avoidance of doubt, the Tribunal accepts that the following events and matter occurred as Mr. Ryan described them):
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- a. in 2020, Mr. Ryan’s pet dog passed away after suffering kidney failure – Mr. Ryan had been very attached to his pet, and its illness had led to a “*traumatic*” 6-7 week period;

- b. in 2020, Mr. Ryan’s mother was very ill, was discharged from hospital to pass away at home, and did pass away at home on 5 July 2020;
- c. a long-term physical impairment involving his spine, which makes sitting for long periods of time uncomfortable, which Mr. Ryan manages through regular pain relief – Mr. Ryan accepted he had had this impairment during his period of employment in 2020 (when he had been working from home during the Covid-19 pandemic), and also accepted that it had not prevented him from doing his job, its severity being intermittent, although Mr. Ryan said that his condition is affected by the cold/temperature, and is normally worse in the winter months and better over the summer;
- d. Mr. Ryan’s poor mental condition – Mr. Ryan said that until February/March 2021 he was “*in a bad place*” having lost his mother then later his job in 2020, his head “*was not in the right place*”, and it was not really until April 2021 that he started to have better motivation;
- e. when Mr. Ryan did contact ACAS, ACAS did not tell him that he had breached any time limits, or needed to present his ET1 as soon as possible, or that a claim would be a waste of time;
- f. Mr. Ryan had been a member of the CWU union, but was critical of the quality of the representation he and colleagues received from a particular union representative, who was meant to attend meetings but sometimes failed to;

Conclusions

20. The Tribunal reaches the following conclusions on the preliminary issue:
21. First, Mr. Ryan’s complaint under s.13(1) of ERA 1996 was presented out of time. To be in time, the s.13 complaint was required to be presented no later than 3 months from 30 November 2020 (the date of Mr. Ryan’s last payment of wages from which a deduction was made), ie by no later than 28 February 2021. In the event, Mr. Ryan did not present his ET1 on or before 28 February 2021, and did not contact ACAS – a precondition of presenting an ET1 - until

29 March 2021, by which time c.4 weeks had passed since the filing 'deadline'. Mr. Ryan presented his s.13 complaint on 27 April 2021.

22. Second, Mr. Ryan's breach of contract complaint was also presented out of time. To be in time, this complaint was required to be presented no later than
5 3 months from his effective date of termination or the last day he worked, which in Mr. Ryan's case was the same date – 8 November 2020. Mr. Ryan was therefore required to present his breach of contract complaint by no later than 8 February 2021. Mr. Ryan did not present his ET1 on or before 8 February 2021 – he contacted ACAS on 29 March 2021, some 7 weeks after
10 the filing 'deadline' for this complaint, and presented his breach of contact complaint on 27 April 2021.

23. Third, the Tribunal is not satisfied that Mr. Ryan has discharged his burden of proving (on the balance of probabilities) that it was not reasonably practicable – ie, reasonably feasible - for him to have presented his complaints in time.
15 The Tribunal reaches that conclusion on the following grounds:

a. after suffering two emotionally upsetting bereavements in 2020, the last of which occurred on 5 July 2020, Mr. Ryan was still able to work for the Respondent (from home) up until the date of his dismissal on 8 November 2020, and there is no evidence that his mental state after his dismissal
20 materially worsened as a consequence of those bereavements – Mr. Ryan mentioned that he did not take any medication for his mental state in the period after his dismissal;

b. while Mr. Ryan had a serious physical impairment during the period November 2020 – April 2021 (and of course before and after that period
25 as well), there is no evidence that that impairment was materially worse during that period than it had been during his last 6 months of employment by the Respondent, albeit the Tribunal accepts that there may have been some additional impact caused by the colder weather – the Tribunal does not accept (because Mr. Ryan did not claim, and there is no evidence)
30 that the winter weather caused Mr. Ryan's physical impairment to be

exceptionally poor or affect him so badly that he was unable to carry out everyday activities which he was able to perform during summer months;

- c. there is no medical evidence before the Tribunal which suggests that Mr. Ryan was not physically or mentally well enough in the period 8 November 2020 – 28 February 2021 to have made inquiries about his legal rights, or contacted ACAS, or a solicitor, or his former union, or presented an ET1;
- d. the Tribunal does not accept that Mr. Ryan’s admitted lack of knowledge about his legal rights vis-à-vis his former employer provides an adequate excuse for his failure to investigate whether he had any such rights (by, eg, conducting a basic internet search – Mr. Ryan had a computer and smartphone at home with a 30GB monthly data allowance);
- e. the Tribunal accepts that in the period 8 November 2020 – 28 February 2021 Mr. Ryan’s mental state was not good, and that he was likely suffering from anxiety if not depression at this time because of adverse personal events (bereavements, loss of employment) – however, there is no evidence which shows that Mr. Ryan’s mental state was so poor at the time that it would be unreasonable to expect him to have complied with the legal deadlines for presenting Tribunal claims;
- f. before his dismissal and probably for at least a period of time after, Mr. Ryan was a member of a major UK union, which Mr. Ryan could have approached for help, advice or guidance regarding Mr. Ryan’s employment rights advice – if his own union representative provided a less than satisfactory service, there were probably other union officials who Mr. Ryan could have contacted for advice.

24. Fourth, even if it was not reasonably practicable for Mr. Ryan to have presented his complaints in time, the Tribunal is not satisfied that he did contact ACAS And then present his ET1 in a reasonable period of time thereafter. Even on his own case, Mr. Ryan appreciated by no later than mid-March 2021 that he might be able to bring a claim against his former employer. On Mr. Ryan’s own case, he does not appear to have done much other than

“consider” matters for a period of approximately 2 weeks before finally contacting ACAS on 29 March 2021. The Tribunal’s view is that when an employee has missed a legal deadline to present a complaint, but then realises after that deadline that they may be able to bring a Tribunal claim, the employee needs to act with reasonable promptness after that discovery to expedite the bringing of a claim. The Tribunal is not satisfied that Mr. Ryan did act with reasonable promptness after he discovered in mid-March 2021 that he might be able to bring a claim – other than consider matters, he appears to have done effectively nothing in this 2 week period.

25. For the reasons stated above, the Tribunal concludes that it lacks jurisdiction over the Claimant’s claim.

EJ A Tinnion

Employment Judge

15th of July 2021

Date of Judgment / Reasons

19th of July 2021

Date sent to parties