



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr V Shivachev

**Respondent:** Wartsila UK Ltd

**Heard at:** Bristol Employment Tribunal via the Video Hearings service

**On:** 13 January 2022

**Before:** Employment Judge Cuthbert

**Representation:**

Claimant: In person

Respondent: L Piesley (Solicitor)

Interpreter: R Pangarova

## PRELIMINARY HEARING RESERVED JUDGMENT

The claimant's claims for unfair dismissal and breach of contract are out of time and are dismissed.

## REASONS

### Introduction

1. This was a preliminary hearing convened to determine whether or not the claimant's claims for unfair dismissal and breach of contract were brought within the applicable time limit. The parties were notified by the tribunal on 14 September 2021 that a preliminary hearing would be held to determine this issue.
2. The parties confirmed at the outset of the hearing that they were content to proceed with a video hearing, having previously been made aware that the hearing would proceed on this basis.

3. A Bulgarian interpreter was present throughout the hearing. The interpreter had been requested by the claimant to translate for the claimant's wife when she gave witness evidence on behalf of the claimant. The interpreter translated during that evidence and remained present throughout the hearing.
4. English was not the claimant's first language either, but it was evident that he was relatively fluent in written and spoken English. I told the claimant that he could ask the interpreter to translate for him if he did not understand any part of the proceedings, but he did not ask her to do so at any time. I was satisfied that he understood the proceedings and was able to participate fully in them.
5. I was provided with a 17-page bundle of documents by the claimant, which included witness statements from both the claimant and his wife, Daniela Shivacheva. The respondent supplied a 36-page bundle, mainly consisting of the pleadings, and separately adduced a witness statement from Laura Powell, the respondent's Head of Human Resources. I had read the witness statements before the witnesses gave oral evidence.
6. I noted from the tribunal file that, in August 2021, draft directions had been prepared by an employment judge concerning the present hearing. The draft directions, amongst other things, specifically indicated that the claimant's witness statement should explain why he had presented his claim at the point in time when he did so. That particular aspect of the draft directions was unfortunately omitted from the correspondence which was then sent out by the tribunal, on 14 September 2021, to the parties about the present hearing.
7. The witness statements of the claimant and his wife did include some detail about why the claim was presented when it was, but the content appeared to be more focused upon the substantive claims and the perceived unfairness of the claimant's treatment by the respondent. I therefore explained to the parties that, due to the omission in the earlier directions, I proposed to ask some additional questions of the claimant and his wife at the start of their oral evidence, to ensure that the claimant's reasons as to why the claim was presented when it was were sufficiently brought to light. I explained that the respondent's representative could deal with any matters arising from the answers to my questions during her own cross examination. The parties did not object to this course.
8. During the two hours allocated to the hearing, I was able to hear from all of the witnesses and hear closing submissions but there was insufficient time remaining for me to deliberate and give judgment. I therefore explained that I would need to reserve my judgment.

### **The relevant law**

9. Section 111 Employment Rights Act 1996 sets out the relevant time limit for presenting an unfair dismissal claim:

*Complaints to employment tribunal.*

*(1) A complaint may be presented to an employment tribunal against an employer by any person that he was unfairly dismissed by the employer.*

(2) 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—

(a) before the end of the period of three months beginning with the effective date of termination, 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.

....

10. The time limit for presenting a breach of contract claim is the same as above (see Article 7 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994).
11. The question of whether or not it was reasonably practicable for the claimant to have presented his claim in time is to be considered having regard to the following authorities.
12. In *Wall's Meat Co v Khan* [1978] IRLR 499, Lord Denning, (quoting himself in *Dedman v British Building and Engineering Appliances* [1974] 1 All ER 520) stated '*it is simply to ask this question: has the man just cause or excuse for not presenting his complaint within the prescribed time?*'
13. The burden or onus of proving that presentation in time was not reasonably practicable rests on the claimant. '*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. In addition, the tribunal must have regard to the entire period of the time limit (*Wolverhampton University v Elbeltaji* [2007] All E R (D) 303 EAT).
14. In *Palmer and anor v Southend-on-Sea Borough Council* [1984] ICR 372, CA, the Court of Appeal held that '*reasonably practicable*' did not mean reasonable, which would be too favourable to employees, and did not mean physically possible, which would be too favourable to employers, but meant something like '*reasonably feasible*'. The following factors were identified in *Palmer* as being relevant: (1) the substantial cause of the claimant's failure to comply with the time limit; (2) whether there was any physical impediment preventing compliance, such as illness, or a postal strike; (3) whether, and if so when, the claimant knew of his rights; (4) whether the employer had misrepresented any relevant matter to the employee; and (5) whether the claimant had been advised by anyone, and the nature of any advice given; and whether there was any substantial fault on the part of the claimant or his adviser which led to the failure to present the complaint in time.
15. Lady Smith in *Asda Stores Ltd v Kauser* EAT 0165/07 held that '*the relevant test is not simply a matter of looking at what was possible but to ask whether, on the facts of the case as found, it was reasonable to expect that which was possible to have been done*'.

16. Debilitating health issues may make it not reasonably practicable for a claimant to submit a claim within time. Medical evidence would normally be expected in such cases although it is also not absolutely essential. It is a question of fact which will depend upon all of the circumstances of the case.
17. In *Norbert Dentressangle Logistics Ltd v Hutton* EATS 0011/13, the claimant submitted his claim six weeks late and the employment judge accepted his witness evidence (without supporting medical evidence) that, after the dismissal of his internal appeal, he '*could not face doing anything as he was not functioning at all at these times*'. She found that it was not reasonably practicable for the claimant to have presented the claim in time because he remained unwell and was having considerably difficulty functioning. The employment judge implicitly accepted the claimant's evidence as to his inability to leave the house except to buy food and about his refusal to answer telephone calls or deal with the post. Langstaff P (as he then was) heard and dismissed the respondent's appeal. He indicated, however, that he would not necessarily have come to the same conclusions as the employment judge had reached, that there were some troubling aspects to the decision below and he expressed a number of reservations about it. For the purposes of the appeal, however, the decision of the tribunal did not cross the threshold into perversity and so there was no error of law by the employment judge.
18. By way of contrast to *Norbert*, in *Kauser* (above) the EAT overturned an employment tribunal decision that it was not reasonably practicable for a claimant to have presented her claim in time. Whilst the tribunal had found that the claimant was '*very stressed*' and '*in some turmoil*', something more than mere stress was needed to elide the statutory time limit.
19. Only if a claimant satisfies a tribunal that presentation in time was not reasonably practicable, must the tribunal then go on to decide whether the claim was presented '*within such further period as the tribunal considers reasonable*'.
20. Underhill P as he then was considered the period after the expiry of the primary time limit in *Cullinane v Balfour Beattie Engineering Services Ltd* UKEAT/0537/10 (in the context of the time limit under section 139 of the Trade Union & Labour Relations (Consolidation) Act 1992, which is the same test as in section 111 of the Act) at paragraph 16: '*The question at "stage 2" is what period - that is, between the expiry of the primary time limit and the eventual presentation of the claim - is reasonable. That 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. 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, certainly, to the strong public interest in claims in this field being brought promptly, and against a background where the primary time limit is three months*'.

## The issues

21. I identified and confirmed the issues to be determined at the start of the hearing.

22. The claimant brought claims for unfair dismissal and breach of contract. In either case the time limit provisions for presentation of the claims were the same.
23. It was not in dispute that the claimant's claims were not commenced by 12 April 2021, which was the primary three-month time limit which applied to his claims. The issues to be determined were therefore:
- a. Was it reasonably practicable for the claimant to have submitted his claim by 12 April 2021?
  - b. If it was not, was the claim, lodged on 19 May 2021, submitted within a reasonable period afterwards?
24. I explained to the claimant that the burden of proving these matters was his to discharge.

### **Evidence and findings of fact**

25. I heard oral evidence from the claimant, from his wife and from Ms Powell on behalf of the respondent.
26. The claimant was dismissed after a disciplinary hearing on 13 January 2021 for gross misconduct, specifically for alleged fraudulent and inappropriate use of his company credit card. The claimant did not seemingly dispute that he had used the card as alleged but argued that, as he had offered to pay back the outstanding balance, he should not have been dismissed.
27. I explained to the claimant that I would not be making any findings about the fairness or otherwise of his dismissal or whether it was in breach of contract, as he alleged.
28. The claimant was dismissed with immediate effect on 13 January and paid in lieu of notice. There was a dispute about whether (1) the respondent sent and (2) the claimant received a letter of dismissal from the respondent dated 15 January 2021. Ms Powell's evidence related solely to this issue. I did not find it necessary to reach a view on this dispute in order to decide the issues before me, given that the claimant in any event plainly understood that he had been dismissed on 13 January. He submitted his claim for unfair dismissal expressly on the basis of his employment having terminated on 13 January.
29. Following the claimant's dismissal, later during January 2021, he sent several emails to the respondent. One of these emails is set out within the claimant's witness statement and is dated 20 January 2021. The claimant stated: *'Since our Teams conversation last week, I haven't heard anything about references and report since from your last decision. Would you be kindly let me know about references, how this be dealt with, as I'm relying on them 100% to find job as quickly as I can'*.
30. The claimant should have started his claim by Monday 12 April 2021 at the latest. Having made contact with Acas on 12 or 13 May, the claimant then started Acas Early Conciliation on 18 May 2021, just over five weeks after the time limit expired. The Early Conciliation certificate was issued on 19 May 2021.

31. The claimant presented his claim for unfair dismissal on 19 May 2021.
32. In the ET1, the claimant stated the claim was '*slightly*' late. I asked the claimant about when and how he had become aware of the relevant time limits for bringing a claim. He said that he had been made aware by Acas before he was dismissed, during conversations in December 2020 or early January 2021, and Acas had suggested that he should await the outcome of the disciplinary hearing before taking any further action.
33. The claimant gave reasons for the claim being late within the ET1 itself. The reasons given were that he was waiting to hear from the respondent with a '*dismissal report*' and an outcome to an outstanding grievance about his former manager. The ET1 was accompanied by a five-page typed document about the claimant's claims. No other explanation was offered by the claimant within those documents about why the claim was presented late, and in particular I note that the claimant did **not** mention any health or psychological issues as having affected the date of submission of his claim.
34. In his witness statement prepared for the present hearing, paragraph 9 stated that the claimant's '*heart was broken into pieces*' following his dismissal; paragraph 10 indicated that, after the disciplinary hearing, the claimant was '*feeling broken into pieces*'; he was '*not having any emotions as a human*'. He said that he was not able to fulfil '*family duties*' for '*weeks in a row*'. He said that he was waking up in the middle of the night, not able to sleep and only sleeping for three to four hours a night. Paragraph 12 stated that he was '*emotionally and physically broken...for this period*'. He said that he was not able to do anything and that he could not fill in the tribunal claim online until 19 May 2021.
35. I asked the claimant to explain what he meant by being unable to fulfil his family duties. He said he stopped paying attention to his son and his wife and would watch them without a reaction. He said that he could not do shopping and stopped going out to meet people. He said that he would not go online and check emails. He said that he shared his email address with his wife who completed an online CV for him.
36. The claimant had not produced any medical evidence about his health for the purposes of the present hearing. He was asked in oral evidence about whether he had sought any medical assistance for the effects he had described and said that he had not. He said he had hoped that the effects would pass and that he was not a person who sought or trusted medical assistance with such issues. His oral evidence was that these effects lasted from around the end of January 2021 until mid-May 2021. It was put to the claimant in cross examination that the effects of his dismissal upon him could not have been as serious as he described given that he did not seek any medical advice about them. The claimant said that he was relying on the effects to pass and he needed to wait for that.
37. I asked the claimant why he had not mentioned any of these same matters relating to his health within the ET1 or the five-page accompanying document, where he had given an explanation about why the claim was late, as noted above, as being for other reasons. He said that he did not know but that he had prepared the form in a hurry.

38. The only supporting evidence before me about the effects which the claimant described above was that of his wife in her own witness statement, prepared for the hearing, and in her oral evidence at the hearing. At paragraph 9 of her witness statement she described observing the following in respect of the claimant:

- a. He 'felt very bad'
- b. He had high blood pressure
- c. He had a constant headache
- d. He slept for three to four hours a night
- e. His condition worsened every day
- f. He would not leave house (she said in oral evidence that he did not leave the house at all during the January to May period)
- g. He stopped taking care of himself
- h. He put on 15 pounds in weight
- i. He suffered panic attacks
- j. He would not see a doctor although she begged him to do so
- k. He fell into very severe depression (she said in oral evidence that she had not seen the claimant as he was in this period even when his mother had passed away)
- l. These effects lasted almost until mid-May 2021 (she said in oral evidence that the claimant was 'up and down' but also said that the effects were essentially constant during the period in question)

39. I asked the claimant's wife whether she had any medical qualifications. She said that she did not (other than being a first-aider).

40. The claimant's wife in her evidence explained that, during the same period between January and May 2021, she had applied for suitable jobs online on behalf of the claimant, using a saved copy of his CV; she said that she was trying to stimulate him. The claimant was asked why his wife could not have assisted with submitting an ET1 sooner than he did. The claimant said that his wife's English was not good enough to deal with the process and in particular for her to contact Acas on his behalf.

41. Within his evidence bundle for the hearing, the claimant had included an email to the respondent dated 1 December 2020, sent shortly before his dismissal. He stated at the outset of the email:

*Following our previous discussion and the based on an email I've sent on 7th May 2020, I have been feeling very depressed and demotivated for the reasons outlined in the email.*

42. I asked the claimant if he had taken any time off work from the respondent due to his health during 2020. He did not recall having done so. I asked the claimant how his health in the period he was describing from May to December 2020 in the email above, in which he said he was ‘*very depressed*’, compared to his health in the period from after his dismissal until just before he submitted his claim. He said that he had become ‘*much weaker*’ after the end of January 2021.

### Discussion and decision

43. I heard oral closing submissions from the respondent’s representative and from the claimant.

44. In summary, the respondent’s submissions were as follows. The claimant was clearly aware of the date of his dismissal and the relevant time limit. The reasons given in the ET1 for late presentation were that the claimant was waiting to hear from the respondent about his grievance about his line manager – this was not relevant to whether or not the claim was presented in time. The claimant had produced no evidence, aside from the witness evidence from him and his wife, about his health. He had sought no medical treatment for the issues, which did not suggest that they were sufficiently serious as to have prevented him from submitting a claim sooner than he did. There was no evidence as to why the claimant’s wife could not have assisted him with submitting an ET1, despite assisting the claimant with virtually everything else over the relevant period, on his account. The claimant sought to rely on the case of *Norbert* (see above) but that case was distinguishable, primarily because the suffering described by the claimant in *Norbert* was more severe than that described by the claimant. It was therefore reasonably practicable for the claimant to have submitted his claim within time or alternatively the further delay was unreasonable. I was invited to strike out the claims.

45. The claimant in his submissions contended that it had not been reasonably practicable for him to have submitted the claim earlier because of how he was feeling. He raised some issues in closing about the events at work prior and leading to his dismissal and about how he said his former manager had behaved towards him and so I reminded him that he needed to focus his submission on the reasons why he presented his claim when he did, not on issues of fairness. He returned his focus to the issues at and said that he had not been able to function and fulfil his duties as a husband and a father. I asked him if he wished to say anything about the *Norbert* case, of which he had submitted a copy to the tribunal and the respondent. He said that the claimant in *Norbert* had been six weeks late and the claim had been allowed to proceed; he said that he himself felt the way that the claimant in that case felt; and he said that the respondent in that case had acted in a way in which the claimant felt disregarded. He said his claims should be allowed to proceed.

46. The key issue for me to decide was whether the claimant had established that it was not reasonably practicable for him to have presented his claim on or before 12 April 2021. Only if I found that it was not reasonably practicable for him to have done so, would I then need to consider the reasonableness of the subsequent delay.



47. The claimant was aware of the applicable time limit at all relevant times from 13 January until 12 April 2021.
48. The reasons which the claimant gave in May 2021 in the ET1 for the late presentation of the claim, namely that he was awaiting certain documents or responses from the respondent, did not prevent it from being reasonably practicable for the claimant to have presented his claim on or before 12 April. The claimant did not require any further documents or information from the respondent following his dismissal in order to submit his claim, and nor did he receive any documents or information prior to the eventual submission some five weeks out of time.
49. The question is therefore whether the claimant has established that his health or psychological state made it not reasonably practicable for him not to have presented his claim in time.
50. I recognise that debilitating health issues may make it not reasonably practicable for a claimant to submit a claim in time. However, in such cases, I would expect that a claimant relying upon such health issues would produce some supporting medical evidence going to matters such as diagnosis and the duration and severity of the effects of any condition. In the present case there was none.
51. I also recognise that medical evidence is not absolutely essential, as was the position on the facts of *Norbert*, as found by the employment tribunal in that case. The decision of the EAT in *Norbert* does not particularly assist in the present case, beyond emphasising that the question before me is one of fact, dependent on my assessment of the particular circumstances and evidence before me. I have also had regard to the EAT decision in *Kauser*, in which mere stress was held not to be sufficient to elide the time limit.
52. I do not doubt that in the present the claimant found his dismissal to have been stressful and that the period after the dismissal was difficult for him. I do not accept, however, that the level of stress which he experienced was such that it made it not reasonably practicable for him to have presented his claim sooner than 12 April 2021.
53. Reference was made by the claimant and his wife to the claimant being 'depressed' over the relevant period from January to May 2021, but there was no supporting evidence of any medical diagnosis or condition or any medical description of the effects or severity or likely duration of the same. I am also mindful that the claimant, in his email of 1 December 2020 to the respondent, described himself as being 'very depressed' during much of 2020 but nonetheless despite labelling himself as such, he did not recall having had any time off work and was seemingly able to function normally over that same period.
54. In the weeks following his dismissal, the claimant was able to send several emails to the respondent about his dismissal. His evidence was that his condition deteriorated after that point, but the only evidence in support of this is the witness evidence from his wife; there is no independent corroborative evidence or medical evidence to indicate a significant deterioration in his

health between January and mid-May 2021. The claimant did not seek any medical advice or support at any time.

55. The only contemporaneous document about the reason(s) why the claimant did not submit the claim on time was the ET1 form itself. That document contained no reference whatsoever to any health issues as having affected the submission of the claim and gave different reasons, as mentioned above.
56. The content of the ET1, the absence of corroborative medical evidence of any kind, and the absence of any other supporting evidence, gives me cause to treat the witness evidence of the claimant and his wife about the health of the claimant with some caution.
57. In summary, I find that the claimant was stressed and upset about his dismissal, but I do not find that the effects were to the extent described by the claimant and his wife, such that he could not function. If the claimant's health had in fact been the primary reason for the late submission, I consider it very likely that he would have indicated as such in the ET1, and not given the other reasons which he did. I consider it likely that the primary reasons for the late submission of the claim were those which the claimant did in fact put in the ET1 at the time, namely that he had wished to receive further documents or information from the respondent.
58. As such, I find that the claimant has failed to establish that it was not reasonably practicable for him to have submitted his claim on or before 12 April 2021. The claimant's claims are therefore out of time and are dismissed.

Employment Judge Cuthbert  
Date: 14 January 2022

Reserved judgment & reasons sent to parties: 20 January 2022

FOR EMPLOYMENT TRIBUNALS