



EMPLOYMENT TRIBUNALS

Claimant: Mr. K. Chavdarov

Respondent: ISS Facility Services Limited

Heard at: London Central (by CVP) **On:** 8 April 2022

Before: Employment Judge J Galbraith-Marten

Appearances

For the claimant: Mr. Chavdarov, in person
For the respondent: Mr. O. Tahzib, of Counsel

RESERVED JUDGMENT

The Judgment of the Tribunal is that it has no jurisdiction to consider the Claimant's complaints as they were presented out of time. The claim is dismissed.

REASONS

1. The Claimant brings claims of unfair dismissal, wrongful dismissal, holiday pay, arrears of pay and other payments. The case was listed for an open Preliminary Hearing.
2. The issue for the Preliminary Hearing was "*The Claimant's claim was presented one day out of time. Has the Claimant shown that it was not reasonably practicable for him to present the claim in time? If so, did he present it within such further period as the Tribunal considers reasonable?*".

3. The parties prepared a joint 292-page bundle for the hearing. The Claimant provided a witness statement, and the Respondent produced a skeleton argument with supporting authorities.

Findings of fact

4. The Claimant commenced employment with the Respondent on 6 January 2018 as a Quality Assurance & Project Manager in its Security Division. His gross salary was £3,750.00 per month and his employment was terminated without notice on 17 January 2020. The Respondent states the reason for dismissal was gross misconduct.
5. The Claimant submitted his claim to the Employment Tribunal on 16 June 2020. He relies on an early conciliation certificate numbered R139020/20/20 in his Claim Form.
6. The Respondent maintains the claim is out of time. Its position is the claim should have been submitted either on 26 May 2020 or by 15 June 2020. The claim is either 20 days late or 1 day late and as such the Tribunal does not have jurisdiction to consider it and it should be struck out.
7. The early conciliation certificate referred to in the Claim Form is dated 15 May 2020 and was included in the bundle at page 21. In total, six early conciliation certificates were obtained by the Claimant. All were dated 15 May 2020 save for the certificate numbered R139232/20/17 dated 26 April 2020 and included in the bundle at page 17.
8. The Claimant's evidence was that ACAS issued more than one certificate due to the Covid-19 pandemic and ACAS informed him the first certificate he received on 26 April 2020 was invalid. The Claimant did not produce any evidence corroborating that point.
9. As the Claimant does not seek to rely on the earlier certificate and relies on the certificate referenced in his claim form and dated 15 May 2020, the Tribunal finds the limitation period, as extended by s.207B Employment Rights Act 1996, ended on or before 15 June 2020 and the claim therefore was presented 1 day out of time.
10. The Claimant quickly obtained new employment following his dismissal on 17 February 2020. He is employed by a Security Agency and is based at London South Bank University. This employment continues and the Claimant earns £3,583.00 gross per month. In his role the Claimant lines manages approximately 50 staff.
11. The Claimant maintains it was not reasonably practicable for him to present his claim within the statutory time limit for three reasons; (a) he was struggling with his mental health as a result of the Respondent's disciplinary process and his dismissal, (b) he had financial difficulties as he was only in receipt of Statutory Sick Pay in the three months preceding his dismissal which resulted in financial hardship and, (c) he was dealing with the stressful consequences of the Covid-19

pandemic in his new job which required him to secure the health & safety of those he managed and the students who remained on campus.

12. In respect of his health, and during the limitation period, being the date of dismissal 17 January 2020 until 15 June 2020 when the claim should have been presented, the Claimant's evidence was that he was experiencing mental health difficulties and suffering from stress as set out in the fit notes included in the bundle at pages 181 & 187. The fit notes relate to the period 22 November 2019 to 20 December 2019. The Claimant submitted no other medical evidence in respect of the limitation period.
13. The Claimant informed the Tribunal he had requested a copy of his medical records by way of a subject access request but that had not been processed by his GP Practice. The Claimant also stated he had been prescribed medication to treat stress and anxiety during the relevant period, but he could not recall the name of the medication nor supply any letter from his GP confirming the same. The Claimant further provided that he used medication prescribed to a relative to treat his symptoms but again could not recall what that medication was called nor the time frame.
14. Notwithstanding his mental health difficulties, the Claimant was able to apply for 50 plus jobs following his dismissal on 17 January 2020. He also submitted an appeal against his dismissal on 24 January 2020 (bundle pages 52-55), he attended his appeal hearing on 5 February 2020, he obtained new employment on 17 February 2020, and he submitted a lengthy email to the Respondent regarding his grievance outcome on 30 March 2020 (bundle pages 80-86).
15. In relation to his new employment, the Claimant supplied a variety of documentation. The documents established that during the limitation period the Claimant was "*working tirelessly*" in an email of 14 April 2020 (bundle page 94), he was in receipt of and was required to process complex security information from the police and counter terrorism agencies (bundle page 100), he was devising multiple training sessions for his staff on 25 May 2020 (bundle page 105) and on 8 June 2020 he supplied his Line Manager with a set of comprehensive material that comprised; a monthly report, a Service Level Agreement, Action Plan, Activity Report, Minutes, Training Matrix and two excel spreadsheets (bundle page 136).
16. In evidence when asked whether his health required to him to take any time off during the limitation period, the Claimant confirmed he did not have any time off. He also confirmed that he was not under the continuing care of his GP. However, the Claimant referenced three documents in which he had not meet deadlines to demonstrate that he was not functioning as well as he normally would during that period.
17. He referred to page 33 that confirmed he submitted his appeal against dismissal out of time. Page 128 & 129 when he was granted an extension by his current employer to submit documents with a deadline on 8 June 2020 and page 233 in relation to a deadline set by the Respondent in respect of his grievance on 13 January 2020. Save for the extension on 8 June 2020, which the Claimant met,

the other events took place just before and around his dismissal at the beginning of the limitation period, and not at the end when the claim required to be submitted.

18. The Claimant also asserted that his new employer had cause to extend his probation period due to performance issues which he says were caused by his ill health. However, there was no documentary evidence to support that assertion. The only reference to his probation period was included in the bundle at page 145 and that document confirmed the Claimant passed his probation.
19. Turning to the Claimant's financial pressures, the Claimant stated he had taken on a significant loan commitment prior to the commencement of the Respondent's disciplinary process and when his salary dropped when he commenced sick leave, the impact of the loss of his full salary was significant. He struggled to pay his bills, and he was using credit cards and his overdraft facility to support his family. The Claimant did not present any financial documentation to support these claims. However, the Tribunal accepted his evidence that his financial worries contributed to his ill health prior to and following his dismissal and until he secured new employment on 17 February 2020.
20. In relation to the pressures of his new job and the stress of dealing with the Covid-19 pandemic, as set out above, the Claimant was, and he accepted in cross examination, attending to the requirements of his role. Furthermore, there was no documentary evidence to substantiate the Claimant's contention that he was struggling with his new role. He raised no concerns with his employer to that effect, he had no time off sick, and no performance management concerns were raised by his employer. The Claimant successfully passed his probation and remains employed to date.

The Law

21. **Section 111 Employment Rights Act 1996** provides: -
 - (2) *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 the period of three months.*
22. **Section 23 Employment Rights Act 1996** provides: -
 - (2) *An [Employment Tribunal] shall not consider a complaint under this section unless it is presented before the end of the period of three months beginning with-*
 - (a) *in the case of a complaint relating to a deduction by the employer, the date of payment of the wages from which the deduction was made,*
 - (4) *Where the [Employment Tribunal] is satisfied that it was not reasonably practicable for a complaint under this section to be presented before the end*

of the period of three months, the Tribunal may consider the complaint if it is presented within such further period as the Tribunal considers reasonable.

23. **Section 7 [Employment Tribunals] Extension of Jurisdiction (England & Wales) Order 1994** provides: -

[An Employment Tribunal] shall not entertain a complaint in respect of an employee's contract claim unless it is presented-

- (a) Within the period of three 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 whichever of those periods is applicable, within such further period as the Tribunal considers reasonable.

24. **Regulation 30 Working Time Regulations 1998** provides: -

(2) [An Employment Tribunal] shall not consider a complaint under this regulation unless it is presented-

(a) before the end of the period of three months beginning with the date on which it is alleged that the exercise of the right should have been permitted or as the case may be, the payment should have been made:

(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...

25. The burden of proof for establishing that it was not reasonably practicable to present the claim in time is on the Claimant and it is for him to set out precisely why he did not present his complaint in time as set out in *Porter v Bandridge Limited 1978 ICR 943, CA*. What is reasonably practicable is a question of fact for the Tribunal to determine in accordance with *Wall's Meat Co Ltd v Khan 1979 ICR 52, CA*. Furthermore, reasonably practicable does not mean reasonable or physically possible as the Court of Appeal concluded in *Palmer and anor v Southend-on-Sea Borough Council 1984 ICR 372, CA*.
26. In *Schultz v Esso Petroleum Co Ltd 1999 ICR 1202, CA* the Court of Appeal accepted that illness may justify the late presentation of claims and the Tribunal must consider what could have been done during the whole of the limitation period, but attention should be focused on the closing stages.
27. In *Pittuck v DST Output (London) Ltd [2015] 12 WLUK 656* the Tribunal had regard to what the Claimant had done well during the limitation period and in *Chouafi v London United Busways Ltd 2006 EWCA Civ 689, CA* the Claimant's actions during the relevant period are also to be considered.
28. The Employment Appeal Tribunal in *Asda Stores Ltd v Kauser EAT 0165/07* held that more than stress is needed to elide the statutory time limit.

Submissions

29. The Respondent's position was the Claimant failed to establish that it was not reasonably practicable for him to present his claim in time. The Claimant had not presented any evidence of his medication or the deterioration in his mental health. As such, there is no evidence before the Tribunal that the Claimant's ill health prevented him from submitting his claim in time.
30. In terms of the Claimant's new job, the Respondent submitted he was working as normal in his new job in the period leading up to the expiry of the time limit. Also, contrary to the Claimant's assertion it was a reason that prevented him from submitting the claim, the Respondent stated it demonstrated that he was capable of doing so given the level of responsibility he had at work, the complex information he was required to absorb and the documentation he was able to produce. Furthermore, there was no evidence before the Tribunal that he was poorly rated by his new employer nor that he was struggling.
31. In respect of the Claimant's financial difficulties, the Respondent submitted he was paid Statutory Sick Pay and that could not have placed the Claimant in the financial difficulties he described. Also, the Claimant submitted no evidence of any financial hardship and from February 2020 onwards, both the Claimant and his partner were working, and he was earning a comparable salary to his role with the Respondent.
32. The Claimant's position was that his ill health was severely affected as set out at paragraph 11 of his witness statement and although he was able to work, he did not do it very well. He submitted the probation period in his new job was extended and he relied on the late production of documents to show how his mental health problems had manifested and affected him during the relevant period.
33. The Claimant maintained his capacity to submit his claim on time was compromised. The requirements of his duty of care to his staff and students in his new role was of profound importance and had to be prioritised.
34. He stated his finances affected him from the date of his suspension by the Respondent and the drop in salary from full pay to Statutory Sick Pay. Although he accepts, he presented no financial evidence, he suggested that was offset by his provision of emails to the Respondent regarding payments owed. The Claimant also relied on the information he provided to the Respondent during a welfare visit on 17 December 2019 (bundle pages 198 & 199).
35. The Claimant asserted his financial hardship and mental health issues were compounded by the extension of his new employment probation period which for the reasons given above, was not substantiated.
36. Finally, the Claimant stated his actions must be considered within the context of the Covid-19 pandemic. He stated ACAS could not complete their normal functions in a timely fashion and that is why additional certificates were issued. The Claimant does not have any experience of using an Employment Tribunal previously. His GP was unable to provide the support he required as the practice

was dealing with the pandemic and taking all these issues into consideration, he believed it would be reasonable for the Tribunal to extend the deadline.

Conclusions

37. The Tribunal finds that it was reasonably practicable for the Claimant to submit his claim in time.
38. Although the Claimant relied on three broad headings, there was no specific reason he identified that meant it was not reasonably practicable for him to present his claim in time taking into consideration his actions during the relevant period.
39. The Claimant failed to provide any contemporary medical evidence to support his position and his actions did not support his contention regarding his health during any part of the limitation period save for the period at the very beginning.
40. Although the Tribunal accepts the Claimant would have experienced stress and anxiety during the disciplinary process, because of his dismissal and the financial consequences of it, the Claimant was able to find new employment quickly and function at a high level in a safety critical position at the outset of the pandemic. Additionally, the Claimant was able to engage in lengthy correspondence and produce documentation in respect of the Respondent's internal appeal process and for his new employer. Therefore, it was reasonably practicable for the Claimant to have submitted his claim in time, but he did not do so.
41. Accordingly, the Tribunal has no jurisdiction to consider the Claimant's claim and it is struck out on the grounds it has no reasonable prospects of success in accordance with Rule 37(1)(a) of the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013. The Claimant's request for an extension of time is declined.
42. In the circumstances, the claim is dismissed.

Employment Judge J Galbraith-Marten

11/04/2022

REASONS SENT TO THE PARTIES ON

11/04/2022

.FOR THE TRIBUNAL OFFICE