EMPLOYMENT TRIBUNALS

Claimant: Mr R Gurr

Respondent: Home Office

Heard at: London South Employment Tribunal (by CVP)

On: 30 May 2022

Before: Employment Judge Braganza QC

Representation:

Claimant: Represented himself
Respondent: Mr B Gray, Counsel

JUDGMENT

The judgment of the Tribunal is that:-

1. The Claimant's claim of unfair dismissal was presented outside the statutory time limit and the Tribunal does not have jurisdiction to hear it.

2. The claim is dismissed.

REASONS

Introduction

1. The Claimant presented a claim of unfair dismissal and unpaid holiday pay on 21 June 2021. He was summarily dismissed on 26 February 2021 for gross misconduct. The Respondent asserted that the claim was brought out of time and that there were no grounds for extending the time limit. It further argued that the

claim had no reasonable prospect of success and should be struck out. Alternatively, a deposit order should be made against the Claimant.

Issues

2. On 17 February 2021 EJ Martin directed that an Open Preliminary Hearing be listed to consider the following:
   2.1 whether the claim was presented out of time;
   2.2 whether it should be struck out as it had no reasonable prospect of success;
   2.3 whether a deposit order be made.

Hearing and documents

3. This was a remote hearing by Cloud Video Platform (CVP) which was not objected to by the parties. A face to face hearing was not held because it was not practicable. The relevant matters could be determined in a remote hearing. There were initial difficulties with the Claimant connecting at the outset of the hearing. There were no further difficulties after that.

4. The Tribunal was provided with a bundle of 101 pages, a skeleton argument and list of issues from the Respondent and the cases of *Boys and Girls Welfare Society v McDonald* [1996] IR LR129 and *Savage v Sainsbury limited* [1980] IRLR 109. The Claimant provided a bundle of 48 pages containing the Claimant's correspondence to the Respondent and the Tribunal. He included within that bundle certain emails that the Respondent asserted were covered by without prejudice privilege and therefore inadmissible. The Respondent did not object to the Tribunal considering them for the purpose of determining whether they were privileged but this was not to be taken as a waiver of privilege and if found to be privileged, they should then be disregarded. Given the issues I had to decide, there was no need for me to consider the without prejudice correspondence and I have not considered it. The Claimant did not rely on any particular parts of that correspondence. The page references below are to the bundle provided by the Respondent. The Claimant gave evidence. Both the Claimant and Mr Gray for the Respondent made submissions. At the time of the hearing the Claimant no longer pursued the claim for holiday pay.

Findings of fact

5. The Claimant was employed as an Administrative Assistant from 10 February 2004 until 26 February 2021 in the Respondent's Criminal Casework Directorate. At the time of the Claimant's dismissal the Respondent's Disciplinary Policy [70-71] set out that a 'serious criminal conviction' is an act of gross misconduct and that the 'failure to report an arrest or conviction' is an act of serious misconduct [64,70,76-77]. The Respondent's policies also set out that the effective date of dismissal is when the sanction is communicated to the employee [73,78]. The employee retained a right to appeal and, if successful on appeal, would be reinstated.

6. On 9 November 2017 the Claimant was arrested for a serious criminal offence. On 14 July 2020 he was charged. On 2 October 2020, the Claimant pleaded

guilty to various offences. His sentence included two suspended terms of imprisonment.

7. The Claimant did not inform the Respondent of his arrest or conviction until 27 October 2020. A disciplinary hearing took place on 12 February 2021. The Claimant admitted the offences and put forward mitigation. By a letter of 19 February 2021 the Respondent informed the Claimant that he was dismissed for gross misconduct without notice from 26 February 2021 [47]. There is a second dismissal letter which gives the date of 24 February 2021 but the parties were agreed that the correct date was 26 February 2021. The dismissal was for committing a serious criminal offence and failing to inform the Respondent of his arrest. On 12 April 2021 the Claimant's appeal was dismissed [50, 56-58]. On 30 May 2021 the Claimant emailed the appeal officer referring to 'my dismissal date 26th February' and said 'I am now forced to taken [sic] legal proceedings' [60-61]. The Claimant started Early Conciliation on 22 June 2021 and received his ACAS Certificate on 20 July 2021 [1]. He presented his claim form on 3 August 2021 [2].

8. In his oral evidence the Claimant explained that he was not aware of time running from the date of the dismissal on 26 February 2021. He said that he thought that the time taken to conclude an appeal was allowed for in the time that he had to present a claim. He said he had not seen any information to that effect and when he spoke to his lawyer on 22 June 2021 that was the first time that it was explained to him. He said had contacted ACAS, who had contacted the Respondent and that he outlined this in his ET1. He had brought his claim two months and 24 days after his appeal. He said that he had not used the websites which provide information on the time limits to present a claim before the Tribunal. He said that he calculated the relevant time limit from the date that his dismissal was confirmed by his appeal. He said that the whole case was created by the Respondent in the first place. Had the Respondent complied with its duty of care, he would not have been off work on special leave for a limitless period and he would not have committed the offences that he was convicted of.

Law

9. Section 111 of the Employment Rights Act 1996 (ERA) provides:

> (1) A complaint may be presented to an employment tribunal against an employer by any person that he was unfairly dismissed by the employer.
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> (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—
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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 that period of three months.

10. Time begins to run from the effective date of termination. An unsuccessful appeal does not extend the time limit, *Savage v J Sainsbury Ltd* [1980] IRLR 109 and *Bodha v Hampshire Area Health Authority* 1982 ICR 200, approved in *Palmer and anor v Southend-on-Sea Borough Council* 1984 ICR 372.

11. The words 'reasonably practicable' do not mean reasonable, which would be too favourable to employees, and do not mean physically possible, which would be too favourable to employers, but something like 'reasonably feasible' *Palmer and anor v Southend-on-Sea Borough Council* 1984 ICR 372. In *Asda Stores Ltd v Kauser* EAT 0165/07 Lady Smith stated 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'.

12. In deciding whether it was not reasonably practicable for the claimant to present the claim within the time limit, three general rules apply:

    12.1 s111(2)(b) should be given a 'liberal construction in favour of the employee', *Dedman v British Building and Engineering Appliances Ltd* 1974 ICR 53, CA, *Marks & Spencer v Williams-Ryan* [2005] IRLR 562.

    12.2 what is reasonably practicable is a question of fact and a matter for the tribunal to decide. An appeal will not be successful unless the tribunal has misdirected itself in law or has reached a conclusion that no reasonable tribunal could have reached. *Wall's Meat Co Ltd v Khan* 1979 ICR 52 set out:

> 'The test is empirical and involves no legal concept. Practical common sense is the keynote and legalistic footnotes may have no better result than to introduce a lawyer's complications into what should be a layman's pristine province. These considerations prompt me to express the emphatic view that the proper forum to decide such questions is the [employment] tribunal, and that their decision should prevail unless it is plainly perverse or oppressive'

    12.3 the 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 *"…*ought the plaintiff to have known and, if he did not know, has the applicant given a satisfactory explanation of why he did not know" If the claimant fails to argue that it was not reasonably practicable to present the claim in time, the tribunal will find that it was reasonably practicable *Sterling v United Learning Trust* EAT 0439/14.

13. If the claimant satisfies a Tribunal that presentation in time was not reasonably practicable, the Tribunal must then go on to decide whether the claim was presented 'within such further period as the tribunal considers reasonable'. If the claimant delays further, a Tribunal is likely to find the additional delay unreasonable and decide that it has no jurisdiction to hear the claim.

14. As to the relevant law on an application to strike out a claim, rule 37(1)(a) of Schedule 1 of the Employment Tribunal (Constitution and Rules of Procedure)

Regulations 2013 provides that a claim may be struck out if it has no reasonable prospect of success.

15. The central question is whether the claim has a realistic as opposed to a fanciful prospect of success *Eszias v North Glamorgan NHS Trust [2007]*. A case that otherwise has no reasonable prospect of success cannot be saved from being struck out on the basis that "something may turn up" *Patel v Lloyds Pharmacy Ltd* [2013] UKEAT/0418/12.

16. In *Twist DX Ltd v Armes* (UKEAT/0030/20/JOJ) at [43] Linden J summarised the principles as follows:-

> a. A decision to strike out is a draconian measure, given that it deprives a party of the opportunity to have their claim or defence heard. It should, therefore, only be exercised in rare circumstances: see, for example, *Tayside Public Transport Company Ltd v Reilly* [2012] IRLR 755 para 30.
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> b. The power to strike out on the no reasonable prospect ground is designed to weed out claims and defences, or parts thereof, which are bound to fail. The issue, therefore, is whether the claim or contention "has a realistic as opposed to a fanciful prospect of success" *Ezsias v North Glamorgan NHS Trust* [2007] 4 Wll ER 940, CA.
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> c. The court or tribunal should not conduct a mini-trial of the facts and therefore would only exceptionally strike out where the claim or contention has a legal basis, if the central or material facts are in dispute and oral evidence is therefore required in order to resolve the disputed facts. There may, however, be cases in which factual allegations are demonstrably false in the light of incontrovertible evidence, and particularly documentary evidence, in which case the court or tribunal may be able to come to a clear view: see, for example, paragraph 29 of *Ezsias*.
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> d. Subject to this point, the court or tribunal must take the case of the respondent to the application to strike out at its highest in terms of its factual basis and ask whether, even on that basis, it cannot succeed in law.
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> e. The court or tribunal generally should not seek to resolve novel issues of law which may not arise on the facts, particularly in the context of a developing area of the law: *Campbell v Frisbee* [2003] ICR 141 CA.
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> f. The fact that a given ground for striking out is established gives the ET a discretion to do so – it means that it "may" do so. The concern of the ET in exercising this discretion is to do justice between parties in accordance with the overriding objective and an ET, therefore, would not normally strike out a claim or response which has a reasonable prospect of success simply on the basis of the quality of the pleading.
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> g. Obviously, particular caution should be exercised where a party is not legally represented and/or is not fully proficient in written English (*Hassan*

v Tesco Stores Limited UKEAT/0098/16 and *Mbuisa v Cygnet Healthcare Limited* UKEAT/0109/18), but these principles are applicable where, as here, the parties are legally represented, albeit less latitude may be given by the court or tribunal.

17. Rule 39 deals with deposit orders. It sets out, as relevant:

> (1) Where at a preliminary hearing (under rule 53) the Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success, it may make an order requiring a party ("the paying party") to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument.
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> (2) The Tribunal shall make reasonable enquiries into the paying party's ability to pay the deposit and have regard to any such information when deciding the amount of the deposit
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> (3) The Tribunal's reasons for making the deposit order shall be provided with the order and the paying party must be notified about the potential consequences of the order.

18. In considering whether to make a deposit order, the Tribunal is entitled to have regard to the likelihood of a party being able to establish facts essential to their case and, in doing so, to reach a provisional view as to the credibility of the assertions being put forward. In *Van Rensburg v The Royal Borough of Kingston Upon Thames* [2007] UKEAT/0096/07, Elias P held:

> "…the test of little prospect of success…is plainly not as rigorous as the test that the claim has no reasonable prospect of success… It follows that a tribunal has a greater leeway when considering whether or not to order a deposit. Needless to say, it must have a proper basis for doubting the likelihood of the party being able to establish the facts essential to the claim or response"*;*

19. In *Hemdan v Ishmail* [2017] IRLR 228, Mrs Justice Simler, as she then was, described the purpose of a deposit order as being: *"…*to identify at an early stage claims with little prospect of success and to discourage the pursuit of those claims by requiring a sum to be paid and by creating a risk of costs ultimately if the claim fails*."*

Conclusions

20. The three month deadline for the Claimant to present his claim started on 26 February 2021, the date the Claimant's dismissal took effect. The deadline ended on 25 May 2021, 3 months less one day after that. Early conciliation was not started until 22 June 2021. The ET1 claim form was presented on 3 August 2021, 10 weeks after time had expired.

21. The Tribunal needs to decide whether it is satisfied that it was not reasonably practicable for the Claimant to present his claim within three months of his dismissal, by 25 May 2021, and if it was not, whether the claim was presented

within a further reasonable period of time. The Claimant repeatedly said that what he set out in his ET1 is everything that had happened and that he could not expand on that. He explained that he was not aware of the timeline. He accepted that he could have looked into it earlier but said that he sent an extremely long email to the appeal manager and he never received a response.

22. For the reasons set out, the Tribunal concludes that it was reasonably practicable for the Claimant to have presented his claim in time: First, he had access to the internet and could have looked up the process for making an employment tribunal claim. There are numerous websites, including that of ACAS, the Citizens Advice Bureau, the employment tribunal claims website and gov.uk. The Claimant accepted that he could have looked this up earlier than he did. Second, the dismissal letter and the Respondent's policies made clear that the effective date of termination was the date of the dismissal on 26 February 2021, not that of the appeal. Third, the Claimant could have contacted the Tribunal or ACAS directly to ask how to submit an ET1 form earlier. He was able to email the appeal officer on 30 May 2021 when he referred to 'my dismissal date 26th February' and said 'I am now forced to taken [sic] legal proceedings against the Home Office' [60-61]. That indicates that he was considering litigation at this time. Yet he did not contact a lawyer until 22 June 2021, approximately 4 months after the dismissal and 2 months after the appeal outcome. There is no explanation as to why he did not contact a lawyer earlier. Fourth, even at the time of the letter dated 12 April 2021 informing him that his appeal had been dismissed, the Claimant had a further 6 weeks to present the claim in time. That gave him ample time from the date of the appeal outcome to make enquiries as to the time limit. I accept that this would have been a stressful period for him but I do not accept that this was such as to make it not reasonably practicable for him to present his claim in time.

23. As it would have been reasonably practicable for the Claimant to present his claim in time, there is no basis for an extension of time. The Tribunal therefore has no jurisdiction to hear the claim and the claim is dismissed.

24. The hearing was also listed to consider whether the claim should be struck out or a deposit order should be made. Had I concluded that the claim was brought in time or warranted an extension of time being granted, I would have gone on to strike out the claim on the basis that it does not disclose any reasonable prospect of success.

25. The Claimant was convicted of serious criminal offences, the nature of which are referred to in the Respondent's ET3, the dismissal and appeal letters, and the Respondent's skeleton argument. The Respondent's policy made clear that serious convictions would amount to gross misconduct and the failure to report an arrest, charge or conviction to the employer would constitute serious misconduct. The Respondent followed an investigation, disciplinary and appeal process. The test for the Tribunal in conduct cases is set out in *BHS v Burchell* [1980] ICR 303. That is whether the Respondent had a genuine belief, based on reasonable grounds and following a reasonable investigation, that the Claimant had committed the misconduct in question. The Tribunal considers whether the sanction of dismissal was within the range of reasonable responses

by an employer in all the circumstances, having regard to the size and administrative resources of the Respondent.

26. The Claimant admitted the offences in court and to his employer. As the misconduct was admitted, that limited the level of investigation required. There were no significant factual issues for the employer to determine. The basis on which the Claimant alleged that the dismissal was unfair in his ET1 and at the preliminary hearing was that he complained that the dismissal was disproportionate and that he had committed the offences because of a situation created by the Respondent: had he not been on special leave, he says he would not have committed these offences. That does not make the dismissal unfair. The Respondent's policies clearly state that the commission of a 'serious criminal offence' is an act of gross misconduct.

27. It is not for the Tribunal to step into the shoes of the Respondent but to decide under section 98(4) of the ERA whether the Respondent acted within the range of reasonable responses. Taking the Claimant's case at its highest, it does not have a reasonable prospect of success and so, had I been required to decide this, I would have granted the Respondent's application to strike out this claim. The hearing that is currently listed for 7 September 2022 will be vacated.

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Employment Judge Braganza QC
Date: 5 August 2022