EMPLOYMENT TRIBUNALS

Claimant: Mr Isaac Andrew

Respondent: London Borough of Lewisham

OPEN PRELIMINARY HEARING

Heard at: London South - Croydon (by video) **On:** 22 February 2022

Before: Employment Judge C H O'Rourke

Representation
Claimant: In person
Respondent: Mr J Wiggins – solicitor

JUDGMENT

1. The Claimant's claim of unfair dismissal is dismissed, for want of jurisdiction.

2. The Claimant's claim of race discrimination is dismissed, on withdrawal.

REASONS

Background and Issues

1. The Claimant was employed by the Respondent as a refuse truck driver, for approximately twelve years, until his dismissal, with immediate effect, on 7 November 2019. There is no dispute that the primary limitation period for presenting his claims expired on 6 February 2020. The Claimant entered into early conciliation with ACAS on 19 December 2019 and the certificate was issued the same day [3]. The claims were presented on 21 July 2020, so approximately five months out of time.

2. This hearing was therefore listed to determine, as a preliminary issue, whether or not the Tribunal had jurisdiction to consider these claims.

3. Race Discrimination Claim. During the Claimant's evidence, when being questioned about the merits of his claim of direct race discrimination, he was referred to various documents in the bundle related to his nominated comparator, a Mr Urbaniak [58 to 78]. The Claimant had been dismissed

for allegedly receiving cash payments for the unauthorised collection of commercial waste. Mr Urbaniak had been the Claimant's co-driver at the time and was also accused by the Respondent of the same offence. However, in Mr Urbaniak's case, he had returned to his home country of Poland and when invited to disciplinary proceedings, presented sick notes and attended interviews with Occupational Health, which the Respondent accepted, for a time, meant that they were unable to proceed with a disciplinary hearing. Restrictions on travel, due to the outbreak of the COVID pandemic in March 2020 were also a factor. Eventually, however, in May 2020, the Respondent indicated that they would either proceed with a video hearing, or decide the case in Mr Urbaniak's absence, at which point he resigned.

4. The Claimant asserted that he had been less favourably treated than Mr Urbaniak, due to him being able to continue in employment for several months, during which time he received some form of sick pay and having resigned, instead of being dismissed, was therefore without '*a blemish on his work record'* [12].

5. When it was suggested, therefore, to the Claimant that Mr Urbaniak's personal circumstances were different to his, in that Mr Urbaniak was, at the time, no longer in UK, was presenting as too ill to attend or travel and then chose to resign (as was his right and also, if he had chosen to, that of the Claimant) and that therefore Mr Urbaniak was not a true comparator, as there were '*material differences'* between their circumstances [38], he said '*I can see that, but I didn't know this at the time. I can now see the situation, in the correspondence.'* When it was suggested to him, therefore that he was not less favourably treated because of his race, he said that he '*had been thinking of other past matters*' (but which he had not raised in any detail in his claim). He said that he '*saw it differently now'* and when asked by the Tribunal if he therefore nonetheless maintained this claim, he said that he didn't and withdrew it, upon which it was dismissed.

The Law

6. The statutory test, in respect of the remaining claim of unfair dismissal, is set out in s.111(2) of the Employment Rights Act 1996, namely:

   (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.

7. I referred myself to the guidance in the cases of **Wall's Meat Co Ltd v Khan [1979] ICR 52, EWCA***, as to the Tribunal's discretion in such matters and also that as stated in* **Porter v Bandridge Ltd [1978] ICR 943, EWCA**, the burden of proof is upon the Claimant and that in respect

of ignorance of rights, the correct test is not whether the claimant knew of his or her rights but whether he or she *ought to have known of them*.

The Facts

8. I heard evidence from the Claimant and both he and Mr Wiggins made submissions. Mr Wiggins had also provided written outline submissions, but which the Claimant said that he had not yet seen. A short adjournment was therefore ordered, of approximately twenty-five minutes, for Mr Wiggins to re-send those submissions to the Claimant and for him to read them, which, by the time the Hearing re-commenced, he confirmed he had,.

9. 'Not Reasonably Practicable'. I summarise the Claimant's evidence on this point as follows:

    a. He had not seen the dismissal letter until his return from a pre-planned holiday, on 9 December 2019. He said this for the first time in cross-examination, but did refer, in his statement (5), to being granted an extension of time in which to bring his appeal, due to this holiday.

    b. He lodged an appeal on 10 December 2019 [51].

    c. He said that at the same time, he looked on the internet and '*found that ACAS could sort it out for me'*. He contacted them on 19 December 2019 and he was provided with an Early Conciliation certificate the same day. He said, however that they advised him to '*exhaust all of the employment and appeal process',* but '*if that didn't work then I would have to fill in an ET1 form. I had a vague idea about time limits but now realise that I hadn't fully understood.'* '*I thought that ACAS would be taking my case after* (the appeal process)'.(6). As to his knowledge of Employment Tribunals, he said the following in cross-examination:

        i. He had no previous experience of them and none of his former colleagues had ever gone to one. He was '*vaguely aware'* of their existence.
        ii. He was not a union member and therefore could not seek advice from that source.
        iii. He did not use the internet regularly, but did have help to do so from his partner who, since the first lockdown, has worked from home and therefore uses that facility more than she did before. With her assistance, he did look on the internet '*about unfair dismissal'*.
        iv. When he was referred to his evidence as to having a 'vague' idea about time limits, he agreed that ACAS had told him, over the phone, of the three-month time limit to bring a claim, running from the date of dismissal. However, he said that he thought that the issue of the EC certificate '*covered as regards the time limit'*. When asked if he'd ever again spoken to ACAS, he said, for the first time that in fact he had and that's when they told him about the time limit. When challenged as

to why he had not said this before and when this may have taken place, he said that they told him to go on-line and fill in the ET1. He denied that ACAS would have told him about the time limit when he first contacted them in December 2019, but when pressed said that he '*couldn't recall'* and that '*it was quite possible'* they did.

v. He was asked why, if he was able to get assistance from two lawyers, following the case management hearing, to assist with drafting his statement, he was unable to do so earlier and he said that he had relied on ACAS. He also said (again, for the first time) that he'd not immediately seen the EC certificate, as it had been emailed to him, rather than posted.

vi. He tried to get advice from the CAB, but they referred him back to ACAS.

vii. He agreed that nonetheless he had help with the subsequent drafting of his detailed appeal letter [51] and his letter of complaint to the Chief Executive [56], on the basis that they were well laid out, well-written and used legal terminology such as 'the sanction being too severe', 'hearsay evidence' etc. and he said that it was with the help of one of his daughters, who works for an educational establishment as an HR assistant. When challenged, therefore that in that role she will be familiar with Tribunals, he said that she was only an assistant and '*learning her trade'*. He said he had also written to the Mayor and a councillor.

viii. He agreed that despite his stated problems he '*had been able to fight his corner'*.

d. The appeal hearing proceeded on 10 March 2020 (all dates hereafter 2020, unless otherwise stated) and he was notified of the decision on 14 March [54], which was to reject his appeal and to uphold the dismissal decision.

e. The first COVID lockdown occurred shortly afterwards. His mother's health declined and the family were upset about being unable to visit her in her care home. She died at the beginning of April. He said also that at around the same time his mother's sister-in-law and a cousin of his also died and that '*it felt like everything was falling apart. I was not in a good way.'* (7).

f. He wrote a detailed letter to the Respondent's Chief Executive on 12 May, as '*a last attempt to get my old job back'* [56]. In it, he referred to taking legal action to the Employment Tribunal and writing to his MP. He said he waited for a response, but when he didn't get one, he presented his ET1 to the Tribunal on 21 July [4]. He said in cross-examination that he'd '*waited a week or two'* for this response. He said that he '*had no idea that I should have …'* (presented his claim by 6 February) and only realised the problem at the case management hearing on 8 September [33]. He said, for the first time in cross-examination that he had sent the claim form to the wrong address, initially.

10. Submissions. I heard submissions from both parties, summarised as follows:

    a. Respondent. Mr Wiggins referred to his written submissions and stated that it was reasonably practicable for the Claimant to submit his claim by 6 February. He made the following submissions:

        i. The claim is five months late and a year after the incidents that lead to the dismissal.

        ii. The Claimant is now attempting to provide contradictory new evidence, despite having had legal advice in preparing his statement.

        iii. He did contact ACAS on 19 December and it is implausible that they would not have told him of the three-month time limit and even on his own evidence, he admitted to having a 'vague idea' of such matters. However, his account now differs, suggesting a second call to ACAS, close to his presentation of his claim, which is not plausible.

        iv. He was clearly capable of taking legal advice, as he did with his statement and could, therefore, have done so much earlier.

        v. At the point he submitted his appeal in December, he had access to his daughter's help and her HR experience and how plausible is it, therefore, that she would have been unaware of the time limit?

        vi. While now attempting to rely on awaiting the outcome of the appeal, before submitting his claim, he nonetheless delayed a further four months thereafter.

        vii. The Claimant has referred to his family issues and lockdown, but those events did not prevent him from sending detailed letters out, threatening to take legal proceedings and it is not clear, therefore, why they would have prevented him from presenting his claim.

        viii. Even after having written to the Chief Executive, he still only filed the claim two months later.

        ix. He had assistance throughout, contact with ACAS, access to advice and to the internet and therefore it was practicable for him to present his claim in time.

    b. Claimant. Mr Andrew made the following submissions, as to why it was not reasonably practicable for him to bring his claim in time, or in such further period as was reasonable:

i. He quite understood the Respondent's position in this case and the legal position.

ii. At the time, he did not fully comprehend the severity of the time issue, with his main point of concentration being on the reasons for his dismissal.

iii. He thought everything would be in order with ACAS.

iv. He had been 95% sure, before the appeal that he would be reinstated. However, the Respondent had dragged out the appeal process, resulting in delay in him realising that his hopes would not be met.

v. The situation with his mother and lockdown had spiraled out of control.

11. Finding. I find that it was reasonably practicable for the Claimant to present his claim by 6 February 2020, for the following reasons:

a. Applying **Bandridge**, the Claimant ought to have known of the three-month time limit, for the following reasons:

i. On his own admission, he was 'vaguely' aware of the existence of time limits. He therefore should have checked his position. He had access to the internet, with, if necessary, the assistance of his partner and therefore a simple Google search of 'what is the time limit for bringing an employment tribunal claim?' would have provided the top answer, from ACAS, of 'within three months', with further links to additional information.

ii. I did not believe his evidence as to having not been told by ACAS, when he contacted them in December of the time limit. He accepted, when challenged that he 'couldn't recall', but that it 'was quite possible' he had been told and I consider that the true account is that they did tell him, but he took no action. His contradictory evidence today, as to subsequent contact with ACAS and his belated references to not having seen the dismissal letter until his return from holiday (when his statement says, in reference to his holiday, '*While I was away, thought more about unfair this all was …'*, indicating that he did know that he'd been dismissed) and his belated reference to having sent the ET1 to the wrong address, initially, all indicate a willingness to alter events to suit his account.

iii. His daughter works in HR and it is deeply implausible that she will have been unware of the time limit, when she advised him in December.

iv. He was capable of getting professional advice following the case management hearing, so could have done so earlier.

b. While he states that he was awaiting the outcome of the appeal, because he was confident it would be found in his favour, he nonetheless, when it was not, did nothing to advance his claim, for a further four months. The appeal outcome cannot therefore have been a factor in rendering it not reasonably practicable for him to have met the time limit, as, if it was, he would have submitted his claim immediately thereafter. In any event, awaiting the outcome of internal appeal proceedings is not, of itself alone, a factor than can justify a failure to meet the time limit.

c. I don't accept, either that he thought that ACAS were going to somehow progress his claim, without further input from him. Bearing in mind my views already expressed as to his credibility generally, I don't consider it remotely plausible that ACAS will have given him that impression and (as I have found) he made no further enquiries of them. He himself stated, from when he contacted ACAS that he knew that '*I would have to fill in an ET1 form*.' I expect also that his daughter will have advised him otherwise.

d. Up to the point of the time limit expiring, the Claimant had no stated family problems and it was pre-COVID.

12. Within such further period as was reasonable. As I have found that it was reasonably practicable for the Claimant to meet the primary time limit, I do not, strictly speaking, need to consider the issue of the claim being presented within such further period as was reasonable, but nonetheless find that even if I were incorrect to consider that it was reasonably practicable to meet the time limit, the Claimant clearly did not present his claim within such further period as was reasonable. I conclude this for the following reasons:

a. He delayed a further five months.

b. While, clearly, he went through a difficult time in March and April that does not explain the continued delay until July, during which time he was able to submit detailed correspondence to the Chief Executive and others.

c. He has not explained why COVID restrictions would have prevented him from presenting his claim within a further reasonable period.

d. It is clearly not reasonable to argue that he was entitled to wait a further two months, for a response from the Chief Executive, when the claim was already so far out of time.

e. There is a strong public interest in claims being brought promptly, against a background where the primary time limit is three months (**Cullinane v Balfour Beatty Engineering Services Ltd UKEAT/0537/10**).

Conclusion

13. For these reasons, therefore, the Claimant's claim of unfair dismissal is dismissed, for want of jurisdiction.

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Employment Judge O'Rourke

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Date: 22 February 2022