



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mr S Adeyemo

v

The London Borough of Islington

Heard at: Watford Employment Tribunal
On: 18 and 19 April 2024
Before: Employment Judge French (sitting alone)

Appearances

For the Claimant: Mr L Ogilvi, Consultant

For the Respondent: Mr M Akram, Counsel

JUDGMENT

1. The claim was not presented within the applicable time limit. It was not reasonably practicable to do so but the claim was not presented within a further reasonable period. The claim is therefore dismissed.
2. Reasons having been given orally at the hearing, the claimant requested written reasons pursuant to rule 62(3) of the Employment Tribunals Rules of Procedure 2013 and these are provided below.

REASONS

Introduction

1. The claimant was employed by the respondent as a service desk analyst between 10.10.29 to 22.2.23. By claim form dated 22.9.23 he brings a claim for unfair dismissal and a claim for notice pay. The claimant had also ticked holiday pay and arrears of pay on his ET1 however at the outset of the hearing his representative confirmed that those were not stand alone claims and relevant to quantum only.
2. The claimant states that he was unaware of dismissal until release from prison on 11.8.23 and says his employment ended on that date. The respondent states that the Tribunal has no jurisdiction and that the very latest the claimant was aware of his dismissal was 24.3.23 when his cousin Mr Shoye received the dismissal letter.

Evidence

3. I had a bundle consisting of 270 pages and a supplementary bundle consisting of 18 pages. I heard evidence from the claimant himself and from Mr Kenny Shoye on the claimant's behalf. For the respondent I heard evidence from Mr Frank Purcell and Mr John Cummings.

The issues

4. The issues were agreed with the parties at the outset of the hearing. In the first instance the effective date of termination would need to be determined which was relevant to whether the Tribunal had jurisdiction to determine the claim.

Fact finding

Background

5. The claimant started working with the respondent on 10 October 2019 as a service desk analyst. In January 2021 he was arrested at the respondent's offices for an allegation of an assault on his son. The respondent was aware of the arrest and circumstances around it. On 12 October 2022 the claimant was convicted of this offence and sentenced to an electronic curfew as well as a financial penalty.
6. At some point the prosecution appealed this sentence and on 16th of December 2022 the sentence was substituted with a term of imprisonment. I have not made any findings in relation to the claimant's knowledge of the appeal and the amended sentence because it is not necessary to my findings at this time.
7. The claimant says however that he was unaware of the appeal and that on the date that the appeal was determined, he received news of a bereavement of a family member which required him to travel to Nigeria. It is understood that due to the claimant not being at the appeal hearing a warrant of arrest was issued and on his return from Nigeria he was arrested and subsequently transferred to Pentonville prison to serve his sentence.
8. The respondent states that the claimant only had authorised leave until 13 January 2023 and that when the claimant did not return enquiries were made as to the reason why. The only correspondence that the respondent had received was an email on 13 January understood to be the date the claimant returned to the United Kingdom and was arrested, in which he is requesting the processing of his early retirement and states that his family issues continue.
9. The claimant's account is that this email address was created for him whilst he was in police custody for him to be able to communicate with his employer and this was not an email address to which he had continued access. This contradicts an email in the bundle at page hundred and 116 which comes from the same email account, and which is accepted to have been sent during the claimant's detention in prison namely on 21 January 2023. I have not made any findings in relation to this email account because it is not necessarily within my

findings at this stage. The respondent did however accept this as having come from the claimant and further correspondence was sent to him to try and establish his return to work.

10. This continued with further letters being sent to the claimant to establish his whereabouts. On 1 February 2023 page 136 of the bundle Mr Shoye sent the respondent an email which explained the claimant's detention in prison. The respondent then made a decision to proceed with a disciplinary investigation due to concerns about Mr Shoye's identity and the lack of any communication from the claimant.
11. This resulted in a disciplinary hearing having been conducted on 22 February 2023. This was chaired by Mr John Cumming who took the decision to dismiss the claimant. On 24 February 2023 a dismissal letter was sent to the claimant's home address being the last known address that the respondent held for the claimant.

Effective date of termination

12. In the first instance I have considered whether or not the tribunal has jurisdiction to hear this claim there being a question over the effective date of termination (EDT). The claimant's position being that the EDT was the date of his release from prison, 11 August 2023, when he first had sight of the dismissal letter and the claimant relies on authority Gisda Cyf v Barrett [2010] UKSC 41 in that regard.
13. The respondent's position is that the very latest date of the EDT was 24 March 2023 and that is when Mr Shoye, the claimant's cousin was aware of the dismissal.
14. Acas early conciliation started on 7 September 2023 and the certificate was issued on 8 September 2023. The claim was presented on 22 September 2023. On the claimant's case that would therefore be in time, and on the respondent's it would not.
15. The claimant's evidence originally through these proceedings was that he was not aware of his dismissal at all until his release from prison on 11 August 2023. That was supported by the evidence of Mr Shoye who, in his witness statement, details that he did not tell the claimant because of his mental state and not wanting to cause him concern (paragraph 20).
16. I specifically asked the claimant whether or not he was informed at any time whilst he was in prison of the dismissal and he said no. That was not correct because when asked in cross examination he conceded that he was in fact aware that he had been dismissed, however he stated that he had not seen the letter of dismissal. Whilst I would accept that the claimant may not have had sight of the letter of dismissal because of his imprisonment and difficulties in forwarding this on, I do find that he had knowledge of it through Mr Shoye expressly discussing this with him.

17. Mr Shoye at paragraph 19 of his witness statement confirms that he attended the claimant's home address on 24 March 2023 and discovered the summary dismissal letter. I also note that Mr Shoye at paragraph 19 states that the reason he attended the claimant's address was to check his letters 'due to his cousin's eagerness to know what his employer's decision would be.' It is clear that the claimant was therefore eager to know what was occurring in relation to his employment.
18. I do find that the effective date of termination was 24 March 2023. I find that is the date that the claimant was made aware of the dismissal letter. That is supported by the claimant's eventual concession that he was aware that he had been dismissed whilst he was in custody. It is also supported by the email at page 232, that being an email from Mr Shoye to the respondent, which refers to "Sam's worries" and "according to him" with reference to the claimant which, in my judgment, evidence that he was acting on instructions. It follows that those instructions follow from his awareness of the dismissal.
19. I reject Mr Shoye's evidence that he worded the email in that way because he was aware of what Sam would say as opposed to acting on express instructions. I have read the email very carefully and he draws a distinction between what he is saying or thinks, and what the claimant's instructions are.
20. I will note at this point in terms of the respondent sending the dismissal letter to the claimant's home address, I consider that that was quite proper based on the information that they had available to them at that time. They had concerns about Mr Shoye's identity and the sharing of potential confidential information with him and requested a signed authority from the claimant to act. The first authority was provided on 8th March (dated 27.1.23 at page 211). This was rejected as being too general. A second was then dated 10th March and sent 14 March 2024 (page 223). Although both signed authorities were eventually rejected by the respondent, at the time the dismissal letter was sent, the respondent had neither. At the time the dismissal letter was sent they had not received any communication from the claimant in relation to his whereabouts and considered Mr Shoye's information to be unverified. This was a confidential letter regarding his dismissal and, I think it quite proper to have used the last known address in those circumstances.

The Law

Time Limits in Unfair dismissal cases

21. The time for presenting a complaint of unfair dismissal is determined by s.111(2) of the Employment Rights Act 1996 which provides:-

"(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.

(2A) Section 207(B) (extension of time limits to facilitate conciliation before institution of proceedings) applies for the purposes of subsection (2)(a).

Breach of contract – notice pay

22. An employee's claim for breach of contract must be presented to a tribunal within 3 months beginning with the effective date of termination of the contract giving rise to the claim. 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 (Article 7 Employment Tribunals Extension of Jurisdiction Order 1994.)

Not reasonably practicable

23. The onus of proving that presentation in time was not reasonably practicable rests on the claimant. This "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. "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 - Lady Smith in Asda Stores Ltd v Kausar EAT 0165/07.
24. What is reasonably practicable is a question of fact and so a matter for the tribunal to decide- Wall's Meat Co Ltd v Khan 1979 ICR 52, CA: 'The test is empirical and involves no legal concept. Practical common sense is the keynote'- Lord Justice Shaw.
25. As Lord Scarman commented in Dedman v British Building and Engineering Appliances Ltd 1974 ICR 53, CA, where a claimant pleads ignorance as to his or her rights, the tribunal must ask further questions: 'What were his opportunities for finding out that he had rights? Did he take them? If not, why not? Was he misled or deceived?'

Such further reasonable period

26. Even if a claimant satisfies a tribunal that presentation in time was not reasonably practicable, that does not automatically decide the issue in his or her favour. The tribunal must then go on to decide whether the claim was presented 'within such further period as the tribunal considers reasonable'.
27. In University Hospitals Bristol NHS Foundation Trust v Williams EAT 0291/12 the EAT emphasised that this limb of S.111(2)(b) does not require the tribunal to be satisfied that the claimant presented the claim as soon as reasonably practicable after the expiry of the time limit in order to allow the claim to proceed. Rather, it requires it to apply the less stringent test of asking whether the claim was presented within a reasonable time after the time limit expired.

28. In Cullinane v Balfour Beatty Engineering Services Ltd and anor EAT 0537/10 Mr Justice Underhill, then President of the EAT, commented that the question of whether the period between expiry of the time limit and the eventual presentation of a claim is reasonable requires an objective consideration of the factors causing the delay and of what period should reasonably be allowed in those circumstances for proceedings to be instituted. Crucially, this assessment must always be made against the general background of the primary time limit and the strong public interest in claims being brought promptly.
29. In Nolan v Balfour Beatty Engineering Services EAT 0109/11 the EAT reiterated this last point, stating that tribunals, when considering whether to extend time under S.111(2)(b), should always bear in mind the general principle that litigation should be progressed efficiently and without delay. The EAT went on to hold that, when deciding what would have been a reasonable time within which to present a late claim, tribunals should have regard to all the circumstances of a case, including what the claimant did; what he or she knew, or reasonably ought to have known, about time limits; and why it was that the further delay occurred.

Effective date of termination

- 30.. So far as is relevant, section 97 (1) of the 1996 Act provides: -
“(1) ... in this Part ‘the effective date of termination’—
(a) in relation to an employee whose contract of employment is terminated by notice, whether given by his employer or by the employee, means the date on which the notice expires,
(b) in relation to an employee whose contract of employment is terminated without notice, means the date on which the termination takes effect ...”
31. The claimant draws my attention to Gisda Cyf v Barratt [2010] UKSC 41 and I note the paragraphs that he has highlighted within his closing submissions which I do not repeat here.

32. Paragraphs 41 and 42 of that Judgment read as follows:

‘41. The essential underpinning of the appellant’s case, that conventional principles of contract law should come into play in the interpretation of section 97, must therefore be rejected. The construction and application of that provision must be guided principally by the underlying purpose of the statute viz the protection of the employee’s rights. Viewed through that particular prism, it is not difficult to conclude that the well established rule that an employee is entitled either to be informed or at least to have the reasonable chance of finding out that he has been dismissed before time begins to run against him is firmly anchored to the overall objective of the legislation.

42. The fact that this rule has survived, indeed has been tacitly approved by, successive enactments merely reinforces the conclusion that it is consonant

with the purpose of the various provisions relating to time limits. As Mummery LJ so pithily and appositely put it, the legislation is designed to allow an employee three months – not three months less a day or two – to make a complaint of unfair dismissal. When one considers that the decision to lodge such a complaint is one not to be taken lightly, it is entirely to be expected that the period should run from the time that the need to make such a decision is known to the employee.'

33. The respondent has taken me to the case of Newcastle upon Tyne Hospitals v Haywood [2018] UKSC 22 by the respondent. This case concerns when a notice period would take effect and concludes that in absence express provision within the contract this would be the date when it had actually been received by the employee and the employee had either read or had a reasonable opportunity of reading it. It goes on to examine the principles of agency and the respondent in submissions takes me to paragraphs, 11, 18, 64 and 73 in particular which are noted and not repeated here.

Conclusions

34. In terms of the Gisda Cyf case, I accept what the claimant says; that is clear authority that the date of effective termination is a date that the claimant sees the letter which would lead to that being when he is released from prison in August. As I have said, the claimant invites me to accept therefore as a right that the claim is in time. The Gisda Cyf case however, on my reading, is not without exceptions. My reading is that it is not simply the date on which the claimant reads the letter but the date of knowledge of the dismissal. This is my reading of paragraph 41 and 42 referenced above.
35. I have been taken to the case of Newcastle upon Tyne Hospitals v Haywood [2018] UKSC 22 by the respondent. The principles of agency are addressed within it which I will cover later but even taking away any agency principles that arise from that case, my reading of Gisda Cyf is that it is not limited to when the claimant opens the letter. My reading of the case is that the crucial element is when the claimant becomes aware of the termination. I draw the distinction between that case in which it was suggested that the claimant could have become aware or reasonably could have been expected to become aware of her dismissal sooner than when she did, to this case where the claimant states that he was actually aware.
36. Here, the evidence of Mr Shoye at paragraph 19 of his witness statement, is very clear that the claimant was very concerned in relation to his employment and that he constantly asked him to go to his apartment to check letters, which he did on 24 March 2023, and that is when Mr Shoye discovered the letter of dismissal. That is supported by paragraph 1 of his email to the respondent on 24 March at page 232. It is clear that he had arranged to collect the post. That is what he did, and he discovers the letter. At the point that he discovers the dismissal letter he has two signed authorities from the claimant, the first one being, I would say, a general one that related more to his imprisonment and potential avenues of release. The second one dated 10 March 2023 at

page 223, which gave express provision for Mr Shoye to deal with his employment matters.

37. The claimant conceded in cross examination when taken to the document at page 232, that he was aware of the dismissal and it was in the circumstances that I have outlined, that being Mr Shoye had been given express instructions to attend and open post and had authority to act in his employment matters. In that context I conclude the claimant had knowledge of the dismissal letter.
38. Mr Shoye's evidence was that he did not tell the claimant about the dismissal letter but again, I reject that evidence because the claimant eventually, conceded that he had been told. The EDT therefore, in my judgment, was 24 March 2023 when the claimant became aware through Mr Shoye of the dismissal. He therefore would have had until 23 June 2023 to contact Acas and start any early conciliation process in terms of the applicable time limits.
39. The claimant's knowledge of the dismissal letter is confirmed at page 232, that being an email from Mr Shoye to the respondent, which refers to "Sam's worries" and "according to him" with reference to the claimant which, in my judgment, evidence that he was acting on instructions. It follows that those instructions follow from his awareness of the dismissal.
40. I do recognise that the claimant appears to have recognised the potential difficulties he faced with time limits and has tried to conceal his knowledge of the dismissal. That is because it is only in cross examination that he eventually accepts that he was aware. He also stated in his evidence that the letter of dismissal was sealed when he opened it. We know that cannot be correct on Mr Shoye's evidence that he had opened it and which of course led to his letter to the respondent at page 232, which refers to the dismissal letter. Mr Shoye seeks to explain that away by saying that he had resealed the envelope but that is not mentioned in his witness statement, and I do consider that to be significant. He has addressed the issue of not telling the claimant and I consider that, had he taken that action of resealing the envelope, he would have mentioned the same.
41. I do accept the claimant's submissions that the case of Haywood does not say that Gisda Cyf is not good law. I accept it repeats the principles that were established, and I have made my decision based on the case that the claimant relies upon.
42. If I am wrong in my interpretation of that case, I do accept what the respondent says in applying Haywood and the agency issue, that being that the claimant authorised Mr Shoye to act as his agent regarding his employment matter and that once there is service upon his agent there is service upon him. Again, I draw distinction in that case where the claimant's father acted on his initiative to collect a recorded delivery letter for the claimant, to this one where the claimant gave express authority for Mr Shoye to act on his behalf.

43. Even if the respondent did not accept the written authorities provided by the claimant (being dated 27 January at page 211 and 10th March 2023 at page 223, that, in my mind, does not mean that Mr Shoye was not acting as an agent. The claimant was very clear in his evidence that was his intention when providing the authorities and that is what he wanted him to do.
44. At the point of any dismissal the respondent did not have either authority because the receipt of the same postdate it. They have sent communication to the last known address and prior to the claimant or Mr Shoye becoming aware of the dismissal, there are express authorities giving Mr Shoye authority to act on his behalf; he may well be as a family member, but the authority says for all employment issues.
45. This is not a case where the respondent has tried to deliver it to Mr Shoye as an agent. They have sought to deliver it to the claimant; the claimant has authorised, Mr Shoye to accept his post and to act on his behalf regarding employment issues and I consider that he has appointed him to act as an agent. That is supported by the authority itself, by Mr Shoye's witness statement and by the claimant's own evidence that he says that was his wish, but it was rejected by the respondent. I do agree with the respondent's reading of paragraph 63 of the judgment in that regard that being that, once its served on an agent, it is served on you, and that being 24 March when Mr Shoye accepts the same.
46. Based on my finding that the EDT was 24 March 2023, the claim presented on 22 September 2023 was not presented within 3 months of the EDT. I therefore need to look at whether it was reasonably practicable for the claimant to present his claim within 3 months and if not, whether it was presented within a reasonable further period.
47. I am persuaded that it would not have been reasonably practicable for the claimant to have presented his claim in time, namely by 23 June 2023. As of that date he remained in prison and had been since 13 January 2023. I acknowledge that that makes communication more difficult, and that the claimant would have limited means of communicating. The claimant was also unlikely to be able to access an ET1 to complete whilst in prison and although I do consider that it may have been possible for this to completed on his behalf by Mr Shoye in the circumstances outlined above, on balance I accept that it was not reasonably practicable for it to have been submitted.
48. I therefore go on to consider whether it was presented in a reasonable period thereafter.
49. The release was 11 August 2023, by that point the claimant, on my findings, had been aware that he had been dismissed since 24 March of that year. Whilst in prison the claimant would have been unlikely to have had any resources available to him to assist him in any employment claim, it was however clear that Mr Shoye had been assisting him with communications to the respondent.

50. I accept that when he was released from prison, he would have required a period of adjustment back into the community. However, I do consider that giving his attention to this issue should have been a priority. In that regard the claimant was released on 11 August, there is not any contact with Acas until 7 September. They issue a certificate very promptly, namely 8 September, and the ET1 is not presented until 22 September. I asked the claimant the reason for the delay, and he indicated that he had to speak to people to help him and also that he did not know the procedures.
51. It is well established that being a litigant in person is no exemption from knowing the rules and whilst I accept, he would not have had access to these whilst in prison he could have accessed them on his release. Again, this is in the context of him having known about his dismissal for some time.
52. With that I have the background that Mr Shoye had previously helped the claimant. Although I accept Mr Shoye's evidence that he was away until September immediately following the claimant's release, I consider that there would have been an opportunity for the claimant to have had discussion with him about an employment tribunal claim prior to his release and therefore prior to his being on holiday. He has previously helped the claimant; he has corresponded with the respondent and I note that he says that he had previous paralegal experience. He was not a current paralegal and I do note that he said that his practice was not in employment law. However, as someone who had knowledge of the law, he would have no doubt been aware that there are time limits in all claims that are presented, employment or otherwise. It is inconceivable, in my judgment, that there had not been discussions or input by Mr Shoye in those particular circumstances prior to the claimant's release.
53. I consider therefore that he would have been able to acquire some knowledge and input and support whilst in prison to have allowed him to have very promptly presented his claim upon his release. I therefore do not accept his explanation that the reason for the delay between his release and its submission was because he was awaiting support and guidance.
54. I am therefore not satisfied that the claim was presented within a reasonable further period and, as such, I dismiss the claim, the tribunal having no jurisdiction to hear the same.

Employment Judge French

Date: 9 May 2024

Sent to the parties on: 22 May 2024.....

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For the Tribunal Office

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