



EMPLOYMENT TRIBUNALS

Claimant: Mr C McKenzie

Respondent: Ministry of Housing Communities & Local Government

RECORD OF A PRELIMINARY HEARING

Heard at: London Central Employment Tribunal **On:** 7 January 2020

Before: Employment Judge Davidson (sitting alone)

Appearances

For the claimant: in person

For the respondent: Mr C Stone, Counsel

JUDGMENT

The claimant's complaint of unfair dismissal is dismissed as the claim was not presented within the statutory time period.

REASONS

1. The claimant accepts that his originating application was submitted outside the statutory time limit. He applies for it to be allowed in outside the time limit.
2. The claim is unfair dismissal so the test is whether it was reasonably practicable to present the claim in time and, if not, whether it was presented within a reasonable time thereafter. This is a strict test.
3. The burden of proof is on the claimant and the standard of proof is the balance of probabilities.
4. The relevant dates are, in my view, as follows:

- a. 18 October 2018 – the dismissal date
 - b. 5 December 2018 - the date by which the claimant was definitely aware of his dismissal
 - c. Late February 2019 – the date by which the claimant had been assigned a representative by his union
 - d. 7 June 2019 – the date that ACAS was contacted to commence early conciliation
 - e. 24 June 2019 - the date of the early conciliation certificate
 - f. 2 August 2019 – the date the claim was received by the tribunal.
5. The claimant states that he was suffering from anxiety and depression in October/November/December 2018 and was not able to deal with opening post as he found it too stressful. He therefore did not open the dismissal letter from the respondent and was only aware of his dismissal when he checked his November pay and saw he had received a lump sum of pay in lieu of notice. He wrote to the respondent on 5 December requesting a reconsideration of the decision. It was only in January 2019 that he found out that there would not be an appeal.
 6. On the basis of the dismissal date, the contact with ACAS should have taken place by 17 January 2019. By that date, the claimant was aware he had been dismissed.
 7. On the basis of the claimant's case that he found out about his dismissal by 5 December 2018, the contact with ACAS should have been by 4 March 2019, by which time his union, PCS, was involved and had assigned a representative to him.
 8. I do not accept the claimant's submission that he only finally knew of his dismissal in January 2019 when it became apparent that there would be no appeal. If there had been an appeal, it would not have cancelled the dismissal and so I find that the latest that the claimant can be said to have known of his dismissal was 5 December 2019 although, in all likelihood, he knew about it a few days before that.
 9. The claimant has explained his failure to start the process of submitting his tribunal claim (by contacting ACAS) as due to his medical condition. His oral evidence was that he had high blood pressure, anxiety and depression and tachycardia and was at risk of a stroke, with a family history of strokes, and that at one point he thought he was having a heart attack. He states that the advice from his doctors was that he should rest and that he was not well enough to engage in any legal process.
 10. The only medical evidence before the tribunal was a series of fit notes, the ones for the relevant time covering three month periods, recording that the claimant was unable to work due to anxiety, depression and hypertension.

There was also a referral for an ECG in January 2019. No specific evidence of the details of the conditions or evidence of relevant blood pressure or ECG readings were before the tribunal. The claimant stated that his doctors were unwilling to put anything in writing because they had previously given a letter about his health issues in June 2018 but they would be prepared to attend the employment tribunal to give oral evidence. I do not find the claimant's evidence regarding his GP's willingness to give evidence credible. It is unlikely that a doctor would prefer to take time away from his patients to attend a tribunal hearing than simply to provide a letter explaining the medical advice he has given to the claimant. This is particularly so since the medical information required relates to the period between October 2018 and June 2019 and the claimant has given evidence of new health issues which arose during that period which would not have been addressed by the June 2018 doctor's letter.

11. The claimant's evidence is that his union were involved from February 2019. Prior to that, there had been a delay in the union taking up the case because of confusion whether he was a member of the union, since his subscriptions had ceased when he was dismissed.
12. The claimant confirmed that the union had told him in January 2019 that he had a time issue regarding his claim even though he would still have been in time then. The union was therefore aware of the time issue and, if the claimant was not fit enough to start the proceedings himself, could have done so through his representatives. No explanation has been given for the union's failure to commence the claim on his behalf. A failure by a representative to act on behalf of a claimant does not mean that the act was not reasonably practicable.
13. Inexplicably, nothing happened until early June. Even if I accept the claimant's evidence that he was not well enough in January or February and that he had problems communicating with the union, he has not explained what changed to allow him to contact ACAS in June. His position is that his condition has been consistently bad and he has not explained how he was able to take action in June which he could not have taken in February, March, April or May.
14. Even if I accept that the delay until June 2019 can be explained by the claimant's medical condition, this does not explain why the claim was not lodged until 2 August 2019. The claimant's evidence is that he sent the claim by Special Delivery in July although he could not remember the exact date and he had no receipt from Royal Mail for the transaction. I do not find his evidence regarding the date of posting to be credible as the purpose of Special Delivery is to ensure next day delivery and to provide tracking of the item. I am satisfied that the claim was lodged on 1 August and received by the tribunal on 2 August 2019.
15. In any event, this constitutes a delay of several weeks after the issue of the ACAS early conciliation certificate, a delay which the claimant has failed to explain.

16. I find that, in the light of the claimant's obvious articulateness and intelligence and given that he had the support of his union who were aware of the time issue, this claim form could have been submitted earlier than 2 August 2019.
17. In conclusion, I find that the claimant has failed to show that it was not reasonably practicable for him to lodge his claim within the statutory time limit. In the alternative, if it was not reasonably practicable to comply with the primary time limit, I find that the claim was not lodged within a reasonable period thereafter.
18. The claim is therefore dismissed on the basis that the tribunal does not have jurisdiction to hear it.

Employment Judge Davidson

8 January 2020

Sent to the parties on:

13 January 2020

For the Tribunal: