



# EMPLOYMENT TRIBUNALS

**Claimant**  
Mr. P. Grabowski

**Respondent**  
Lidl Limited

v

**Heard at:** Watford

**On:** 4 January 2018

**Before:** Employment Judge Heal

## **Appearances**

**For the Claimant:** Ms J. Hargrove, FRU

**For the Respondent:** Mr A. Mellis, counsel

## **RESERVED JUDGMENT**

The complaints of unfair dismissal and breach of contract were presented out of time and are dismissed.

## **REASONS**

1. By a claim form presented on 10 May 2017 the claimant made complaints of unfair dismissal and breach of contract. He first contacted ACAS for early conciliation on 30 March 2017 (day A) and an early conciliation certificate was issued on 26 April 2017 (day B).

### ***Issues***

2. The claimant's employment with the respondent started on 20 or 22 January 2006. There is a dispute before me about the day on which his employment ended. The claimant says that it ended on 30 January 2017 when he says he found out that he had been dismissed. The respondent says that it ended on 22 October 2016 or on some later date. If the claimant is correct, then the claim was presented in time. If the employment contract terminated after 31 December 2017 then the claim was presented in time. If before that date, then it was out of time.

3. If the claim was presented out of time, was it not reasonably practicable to present it in time? If not, was it presented within such time as I consider reasonable?

***Evidence***

4. I have had the benefit of an agreed bundle running to 64 pages. The documents in the bundle are out of order chronologically. No other documents have been added during the hearing.
5. I have heard oral evidence from Mr Pawel Grabowski, the claimant. He gave evidence in chief by means of a prepared typed witness statement which I read before he was called. He was then cross examined and re-examined in the usual way. English is not the claimant's first language but he and Ms Hargrove confirmed that he did not need an interpreter.

***Facts***

6. I have made findings of fact on the balance of probability.
7. The claimant worked for the respondent as an Assistant Team Manager.
8. On 31 August 2016, the claimant was on remand in HMP Pentonville after allegations were made against him.
9. The claimant did not tell the respondent that he had been arrested and was in prison. He contacted Mr Christopher Foster requesting time off work to deal with a family bereavement. This was granted and the claimant was due to return to work on 3 September. All the respondent knew was that the claimant did not attend for work on 3 September 2016. It knew of no reason not to communicate with him at his home address which it had on its records.
10. The respondent wrote to the claimant by letter dated 7 September 2016, recording attempts made to contact him without success, asking him to make contact and explain why he had not attended work or notified anyone of his absence.
11. In accordance with its 'AWOL' procedure and not having heard anything further from the claimant the respondent again wrote to him by letter dated 10 September 2016, terminating his employment without notice. A P45 was sent to the claimant.
12. However, the respondent then took the view that because it did know that the claimant had a 'family issue' it had been inappropriate to use its AWOL procedure and it revoked the dismissal. He was re-instated on 5 October 2016. Nothing turns on this dismissal, although it seems that the claimant did receive this P45 in September.

13. The claimant wrote a letter to the respondent on 15 September. He put his home address at the top. This letter apologised for his absence, 'as a result of my family situation.' He asked for further time off work to sort out a difficult circumstance. This letter was delivered to the respondent by hand on 22 September.
14. By letter dated 29 September 2016, Mr Couture, the respondent's Head of Logistics, wrote to the claimant confirming receipt of his letter of 15 September and declining his request for further time off work. He told the claimant that the respondent viewed his absence as unauthorised from 3 September. Therefore, Mr Couture invited the claimant to a disciplinary hearing on 4 October 2016.
15. The claimant tells me that he had a friend who was coming to visit him in prison. He was not allowed visits from his wife.
16. The claimant's wife attended the hearing on 4 October. The claimant thinks that his friend asked his wife to attend. He says that he did not ask her to go.
17. At the hearing, the claimant's wife told Mr Couture that the claimant was in jail. She said that they were separated because of violence between them. She said, 'He wanted me to give you this.' She said that she did not know if it made sense because she was not allowed contact with the claimant.
18. 'This' was a typed undated letter from the claimant which the claimant says was written on his behalf. It has no address at the top. The claimant said that he would be unable to attend the disciplinary hearing because of his personal circumstances, of which he believed Mr Couture was aware. The claimant said that he had not received an answer or acknowledgment to his letter of 14 September, 'so that's why I've pass second letter to You by picker.' (The respondent did not receive a letter from the claimant dated 14 September.) The claimant said in his letter that he had received the letter inviting him to a disciplinary meeting. He said that his problems would be resolved in a couple of weeks.
19. By letter dated 7 October 2016, Mr Couture rescheduled the disciplinary meeting to 17 October. The letter was addressed to the claimant's home address.
20. The claimant did not attend that meeting and no-one attended on his behalf.
21. By letter dated 20 October 2016, Mr Couture told the claimant that he had terminated his contract of employment with effect from 17 October 2016.
22. The claimant told me that he did not receive any communication, via any source, of his dismissal while he was in prison. He said that his friend did not tell him.

23. The claimant said that HMP Pentonville was in a state of 'lockdown' when no-one was allowed out of his cell for 4 weeks. In evidence, the claimant was vague about the dates of the lockdown but said that it was before Christmas. There was time he said to return routine for about a week before Christmas, but the claimant was unable to commit to whether the lockdown was in November.
24. During all this time, he said no-one told him that he had been dismissed. He knew that there was a disciplinary hearing being held, but he says he did not know the outcome. He says he asked about it, but no-one knew. He says he tried to contact the respondent by telephone. At first he said that he did not know why he did not write. He said that he did not try to find out about his employment because he did not receive any information about the disciplinary hearing. He later said that the stress of prison especially 'later when guys were killing themselves,' stopped him writing. Still later he said that he knew that the disciplinary hearing had happened, but he did not know the result and could not find out. He says that he had only three visits from the same friend while he was in prison.
25. At a committal hearing on 30 January 2017 the prosecution withdrew its case against the claimant. Accordingly, he was released.
26. The claimant says that he first knew of his dismissal when he emerged from prison and discovered a P45, on 30 January 2017. He says that he did not receive the actual letter of dismissal. He now lives again at his same home address with his wife.
27. The claimant says that he tried to contact the respondent unsuccessfully on 1 February. He telephoned again after two days.
28. He says that he had a lot to deal with after having been in prison since September. He went to the Citizens' Advice Bureau ('CAB') on 8 February and was advised to follow the internal appeal procedure before issuing a claim in the tribunal. He says that the CAB did not advise him to submit an application to extend time when he submitted his claim.
29. The claimant appealed his dismissal by letter dated 27 February 2017. In this letter, he gives precise details of 5 contacts or attempts at contact between his wife and Mr Foster of the respondent during the first two weeks of September 2016.
30. The appeal hearing took place on 27 March 2017, chaired by Joe Kourea.
31. The claimant said to Mr Kourea that he had not received the letter of 7 October, but his friends told him about the situation. Mr Kourea pressed the claimant three times to explain why he had not contacted the respondent for three and a half months from October 4<sup>th</sup> to February 2017. He asked if the claimant could phone or write. The claimant said that he was in prison and he called a few times and tried to speak to Chris Foster: he said nothing about a lockdown or not being able to write because of the

stress of being in prison. He said that it was not easy to contact the respondent because he was in prison.

32. The claimant contacted ACAS on 30 March.

33. Mr Kourea did not overturn the dismissal. He told the claimant of his decision by letter dated 31 March 2017.

***Concise statement of the law.***

34. A claim for unfair dismissal must be presented to the tribunal before the end of the period of three months beginning with the effective date of termination, or within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the claimant to have presented it before the end of the three month period (section 111 of the Employment Rights Act 1996). The practical effect of section 207B of the 1996 Act is that the claimant must now contact ACAS to start early conciliation within that initial three month period. Equivalent provisions apply to a breach of contract claim (Articles 7 and 8B of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994).

35. To make the necessary calculations and resolve the issues raised by those two provisions, the first matter I have to determine is the effective date of termination of the contract of employment.

36. I have been referred to the following:

Gisda Cyf v Barrett [2010] UKSC 41

Northamptonshire County Council v Entwhistle [2010] IRLR 740

37. Time runs against an employee in relation to a complaint of unfair dismissal from the point at which the employee knew or at least had a reasonable chance to find out that he had been dismissed.

38. In general, where a skilled adviser makes a mistake and that causes a claim to the tribunal to be presented out of time, then it was reasonably practicable for the claim to be presented in time and a claim for negligence might lie against the skilled adviser. This is not an absolute rule however and I have to look at the circumstances in which the skilled adviser has failed to give appropriate advice. Where for example something done by the respondent has itself misled the adviser then that might be a matter to take into account. There may be other examples.

***Analysis***

39. I do not accept that although it was possible for the claimant to communicate with the respondent as he did through his friend and his wife during September 2016, it suddenly became completely impossible to do so after the first week of October. In saying this, I do not wish to

understate the difficulty of communicating when a person is in prison. However, the claimant knew that he was facing disciplinary action and that his job was at risk. He knew that a disciplinary hearing was being held.

40. I have found the claimant's evidence about the relevant period of time changeable and at times extremely vague. I do not accept that he was incapable of finding out the result of the hearing and incapable of communicating with the respondent at all until his release on 30 January. I note that the explanations of the lockdown and stress were not put forward at the appeal hearing and do not appear in the claimant's witness statement as reasons for his total inability to communicate during this period.
41. When did the claimant have a reasonable chance to find out that he had been dismissed? The claimant knew that there had been a disciplinary hearing on 4 October. He knew that there was to be a subsequent disciplinary hearing and that it had happened. Mr Couture's letter was sent dated 20 October 2016. All the respondent's letters had been sent to the claimant's home address so the claimant would have expected a dismissal letter to go to the same place. He had given the respondent no alternative address.
42. Making full allowance for the difficulties of communicating from prison I find that the claimant had a reasonable chance to find out that he had been dismissed one calendar month from 20 October 2016. I would expect him to have started making enquiries before 20 October because he knew that there had been a further hearing. Given that the letter was sent on 20 October, those enquiries should reasonably have produced an answer within a calendar month of the answer being sent. Therefore, I find that time ran from 20 November 2016.
43. Therefore, the claim was presented out of time. The initial 3 month period would have expired on 19 February 2017.
44. It would not have been reasonably practicable for the claimant to notify ACAS or present his claim to the tribunal before his release on 30 January 2017. To start a claim would have involved more than communication. He would have had to carry out some research or take advice about his rights, and to have found access to means to discover how to contact ACAS and then to make contact.
45. As he says, having been in prison since September he had many things to deal with on his release. He did however manage to visit the CAB on 8 February 2017.
46. It appears from what he says that he was mis-advised by the CAB. In the circumstances, he should have been told to contact ACAS as soon as possible and should not have been told to wait until the conclusion of the appeal process.

47. I have formed the view on the facts that the claimant has not been entirely frank with me about his ability to communicate from prison and to receive communications in prison from early October onwards. I have heard nothing from the CAB about the advice they gave, or the reasons for it. If the CAB gave unsound advice there is no suggestion that that was because of any mistake or misleading information from the respondent. The CAB will have been wholly reliant on the information given to it by the claimant. I cannot in the circumstances tell whether the cause of the unsound advice was the claimant's information to the CAB or some mistake by the CAB.
48. In any event I find that if the claimant had been wholly frank with his advisers as he should have been and if his advisers had given him correct advice, then it was reasonably practicable for the claim to be presented in time.
49. For those reasons, I consider that the claim was presented out of time and I do not extend time.

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Employment Judge Heal

Date: .....26/1/18.....

Sent to the parties on: .....

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For the Tribunal Office