Case Number: 3202608/2019

RM

EMPLOYMENT TRIBUNALS

Claimant: **Mr M Sherman**

Respondent: **East of England Ambulance Service NHS Trust**

Heard at: **East London Hearing Centre**

On: **10 March 2020**

Before: **Employment Judge Gardiner**

Representation

Claimant: In person
Respondent: Mr T Perry, counsel

JUDGMENT

The judgment of the Tribunal is that:-

1. **The Respondent's application for an extension of time to present its Response, made under Rule 20, Employment Tribunal Rules 2013 is granted.**

2. **The Tribunal does not have jurisdiction to determine the Claimant's unfair dismissal complaint on its merits, because the Claimant's claim was issued after the statutory time limit prescribed by Section 111 Employment Rights Act 1996 had expired. Accordingly, the Claimant's claim is dismissed.**

REASONS

Application for extension of time to present Response

1. This is an application by the Respondent made under Rule 20 of the Employment Tribunal Rules. The application is to extend the time permitted for presenting its Response. That document ought to have been lodged with the Tribunal by 18 December 2019. The deadline was not met. Instead a draft Response was lodged with the Tribunal on 20 January 2020, together with an application for an extension of time. The required extension is therefore just over a month. The application is opposed by the Claimant. This Preliminary Hearing was listed to resolve this dispute. It was later extended to include a decision on whether the Claimant's claim is out of time.

2. On the application in relation to the Response, I have heard submissions from Mr Perry of counsel on behalf of the Respondent, and from the Claimant in person. I have also had regard to certain documents provided by each party.

3. The test for the Tribunal to apply is that set out in *Kwik Save v Swain* [1997] ICR 49. There the Employment Appeal Tribunal said 'the process of exercising a discretion involves taking into account all relevant factors, weighing and balancing them one against the other and reaching a conclusion which is objectively justified on the grounds of reason and justice'.

4. The EAT said that the following factors should be considered:

(1) The employer's explanation as to why an extension of time is required. The more serious the delay the more important it is that the employer provides a satisfactory and honest explanation.

(2) The balance of prejudice – would the employer if its request for an extension of time were to be refused, suffer greater prejudice than the complainant would suffer if the extension of time were to be granted?

(3) The merits of the defence. If the employer's defence is shown to have some merit in it, justice will often favour granting the extension of time – otherwise the employer might be held liable for a wrong which it had not committed.

5. In the present case, the employer's explanation for the delay is that set out within the application to extend time. As Mr Perry accepts, it was not a particularly compelling or complete explanation. In short, there was a breakdown in communication within the Respondent over who was responsible for drafting and filing the Response within the Respondent's HR team. Michelle Donoghue, Locality HR Manager, for the Essex Locality, thought that this was the responsibility of the Head of HR, Karen Carter. However, it appears that Ms Carter did not realise or did not remember to do so. At the time there was a significant amount of change at senior levels within the HR team; it is said that there had been three deaths of members of staff though as Mr Sherman says this is not something that HR would ordinarily be directly involved with; and an independent investigation was being commissioned into allegations of bullying at the Respondent. In addition, Ms Carter was absent initially on annual leave and subsequently on sick leave. The sick leave started around the time of the deadline for submitting the Response. The failure to lodge a Response was only appreciated around 16 January 2020 and a draft Response was lodged within two working days, on 20 January 2020.

6. As to the balance of prejudice, the Respondent would obviously be prejudiced if it is unable to defend the claim on its merits because it cannot rely on any Response. However, the objection made from the Claimant, both by email dated 27 January 2020 and today, does not identify any particular prejudice that he will suffer if an extension is granted apart from the risk that the Final Hearing date will need to be postponed. The Claimant says that his mental health has been impacted by the whole process and this may impact on the Final Hearing date. The date of the Final Hearing was timetabled for 17 April 2020. The Respondent says that it may not be ready by 17 April 2020, given that this date is only just over 5 weeks away; and a one-day hearing may be insufficient on the basis that they are calling 2-3 witnesses.

7. Subject to the second issue, namely whether the Tribunal has jurisdiction to consider the Claimant's claim, I consider that the Final Hearing should not be postponed to suit the Respondent's convenience. The Respondent can be expected to dedicate its HR resources to ensuring that it is fully prepared to be heard on 17 April 2020. It is standard practice in this Region for an unfair dismissal case to be concluded within one day of Tribunal hearing time. There is no reason to depart from that standard practice here. If the Final Hearing date of 17 April 2020 is kept, there should be no additional prejudice to the Claimant as a result of the Respondent's initial delay in presenting a Response

8. So far as the merits of the defence are concerned, the Response submitted by the Respondent has potential merit. The essential issue is whether it was reasonably open to the Respondent to conclude that the Claimant was guilty of the behaviour alleged, given the extent of the evidence; whether the conduct of the investigator, Tabitha Saunders, makes the investigation process unfair; and whether the sanction was within the range of reason responses. There are real issues to be decided here, which fairness and justice dictates should be decided on their merits rather than as a result of some procedural slip up.

9. For these reasons the Respondent's application is granted.

Whether the Tribunal lacks jurisdiction to consider the unfair dismissal claim

10. The Tribunal needs to decide whether it has jurisdiction to consider the claim on its merits at a Final Hearing given the date of dismissal, the date of Early Conciliation and the date when these proceedings were issued.

11. The Claimant was summarily dismissed on 13 June 2019. Under Section 111(2) Employment Rights Act 1996, there is a three-month primary time limit for bringing a complaint of unfair dismissal. The three-month period is paused whilst Early Conciliation takes place. Given the three-month time limit, Early Conciliation ought to have been initiated by 12 September 2019. However, it was only started on 24 October 2019, about six weeks out of time.

12. The Tribunal only has jurisdiction to decide a claim issued outside the three-month time limit on its merits if it was not reasonably practicable to issue the claim within three months and then only if the claim is issued within such further period of time as the Tribunal considers reasonable. Caselaw has interpreted the phrase "reasonably practicable" as "reasonably feasible".

13. Each party has attended today with a bundle of potentially relevant documents, although I have only been referred to a limited number of pages in each bundle. The Claimant has also given evidence on oath as to the steps he has taken since the date of his dismissal and as to his state of health. He also relies on a signed statement from his union representative Donna Thomas, which was dated 9 March 2020. Ms Thomas did not attend to give evidence.

Findings of fact

14. The Claimant was dismissed on 13 June 2019 following the conclusion of his resumed disciplinary hearing. On the same day, his grievance was also dismissed. He

appealed against his dismissal within the 7 days provided in the dismissal letter. He also appealed against the outcome of the grievance.

15. As a result of the allegations that led to his dismissal and the dismissal itself, the Claimant consulted his GP about his low mood and was prescribed citalopram. The dosage was increased and remained at a high level until about September, when it was reduced for a couple of months before increasing again. This is based on what I have been told by Mr Sherman, although there is no medical evidence in the bundle of documents.

16. There was a delay in progressing the appeal that may have been caused, in part, by the turnover in staff within the HR team. In the meantime, the Claimant was looking for other work. He was contacted about a potential warehouse role on 15 September 2019 and started work the following day. Whilst the hours were not guaranteed, he was working on a full-time basis. On 27 September 2019, at the same time as working full time, he submitted a three-page long appeal document which had been prepared with some assistance from his union representative Donna Thomas. After that point, but before the appeal hearing on 14 October 2019, the Claimant submitted a much longer document, including photographs, which he had prepared without assistance from his union representative.

17. Despite his low mood, the Claimant was apparently able to prepare for and attend the Disciplinary Appeal Hearing which took place on 14 October 2019. This started at 1.20pm and continued until 4pm. There was no apparent request for any reasonable adjustments to be made to enable the Claimant to concentrate or otherwise fully engage in the hearing. He was represented by Donna Thomas at this hearing. That morning, he had attended a grievance appeal outcome hearing.

18. Within a few days after the hearing he was informed of the outcome, namely that his appeal against dismissal was unsuccessful. His appeal against the grievance outcome was also rejected.

19. The Claimant contacted ACAS to request Early Conciliation on 24 October 2019 and a Certificate was issued on 4 November 2019. An ET1 Claim Form was prepared and issued on 7 November 2019, three days later, with assistance from Miss Thomas.

Explanation for delay

20. The Claimant's explanation for the delay is as follows. Firstly, he did not issue proceedings earlier than he did because he did not realise that there were time limits that applied to claims for unfair dismissal. He had never needed to use an Employment Tribunal in the past. Secondly, he had been told by his union that he needed to exhaust his internal remedies first, by appealing against the dismissal decision. Thirdly he was not provided with as much assistance as he could have received from his union representative, because she was unwell and off work for various periods.

Conclusion

21. My decision, considering all the evidence before me, is that it was reasonably practicable for the Claimant to have issued proceedings within the three-month time limit. I reach this conclusion for the following reasons:

(1) Notwithstanding his stress and his low mood, the Claimant was able to appeal against his dismissal and to prepare documents for use in the course of the appeal. He did so both with assistance from his trade union representative, and without her help. He was also able to prepare documents in relation to his grievance appeal. He was able to attend the lengthy appeal hearing, which although it took place on 14 October 2019 is broadly indicative of the extent of his symptoms during the initial three-month period and thereafter, in the absence of more precise medical evidence from the Claimant;

(2) The Claimant was able to seek alternative work. There is no evidence that he was signed off work by his GP or considered that he was too ill to seek work. He started an alternative role on 16 September 2019 which he carried out on a full- time basis at the same time as preparing documents in connection with his appeal. Again, although this work started just outside the three-month period for issuing proceedings, his ability to start this work when he did is broadly indicative of his level of functioning during this period in the absence of more precise medical evidence from the Claimant;

(3) Although his union representative was unwell at various times, she appears to have played a full role in assisting him with his disciplinary processes. She says in her statement that she was back at work at the start of August, albeit on alternative working duties;

(4) Finally, although Mr Sherman asserts that he was misled by his union into believing that he had to exhaust the appeal processes before he could initiate employment tribunal proceedings, this is not a sufficient excuse as a matter of law. If there is fault on the part of an advisor, this is not an excuse for failing to comply with statutory time limits.

22. For all these reasons, I consider that it was reasonably feasible for the Claimant to have issued proceedings within three months of his dismissal, and therefore the Tribunal does not have jurisdiction to consider his unfair dismissal claim on its merits. Accordingly, his claim has to be dismissed.

Employment Judge Gardiner

11 March 2020