JB1

EMPLOYMENT TRIBUNALS

Claimants: Mr C Edo

Respondent: Bannatyne Fitness Limited

Heard at: London Central **On:** 20 June 2017

Before: Employment Judge Goodman

Representation

Claimant: Mr N Gibson, non-practising solicitor
Respondent: Mr J Thornhill, solicitor

JUDGMENT having been sent to the parties on 21 June 2017 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

1. This is an open preliminary hearing to consider whether the Tribunal has jurisdiction to hear a claim for unfair dismissal based on protected disclosures. The claim form was presented out of time.

2. Today I have read witness statements from the Claimant and from his solicitor, Mr Gibson, and I have been addressed by Mr Gibson on behalf of the Claimant, and by Mr Thornhill, solicitor for the Respondent.

3. The Claimant was dismissed on 21 August 2016. For some time he had been concerned that towels were being delivered to fitness centres ostensibly clean, but in fact still dirty and not laundered. He complained of

this to his employer without success. The facts of the Claimant's case after this are unclear because the narrative in the Claim Form stops short at the point in April 2016 when he was signed off through stress. Reading the employer's response, they say the reason why he was dismissed in August 2016 is that subsequently he complained about the dirty linen in public, in particular taking his story to the Evening Standard and the Mail on Sunday, thereby attracting adverse publicity for the Respondent's business. That is the background to the unfair dismissal claim for making protected disclosures under section 103A of the Employment Rights Act 1996. The Claimant lacks the 2 years qualifying service needed to bring an unfair dismissal claim under section 98.

4. The Employment Rights Act 1996 provides a time limit for the bringing of claims for unfair dismissal of 3 months from the date of the effective date of termination of employment, in this case 21 August 2016.

5. That time has been extended to allow time for the early conciliation procedures introduced by section 18A of the Employment Tribunals Act 1996. By section 207B of the Employment Rights Act the clock stops when during the three months a Claimant contacts ACAS for early conciliation (day A) and restarts when ACAS issue an early conciliation certificate (day B). If the three month time limit would have expired between day A and day B, one month is added after day B.

6. In this case Day A was 14 November 2016, still within the three months, and Day B, the issue of the certificate was 14 December 2016. The three month period expired on 20 November, so section 207B(4) is engaged. Adding one month to day B, the time limit expired on 14 January 2017.

7. Form ET1 was posted by the Claimant to the Tribunal on 18 January. It is marked by the Tribunal as received on 19 January, so that is the date the claim was "presented" to the Tribunal.

8. Section 111 of the Employment Rights Act, which provides that claims must be presented before the end of three months beginning with the effective date of termination, also states that if the Tribunal "is satisfied that it was

not reasonably practicable" to present a claim in time, it must be presented within a reasonable time thereafter.

9. It is not in dispute that it was not presented in time.

10. Mr Gibson gave evidence is about the cause of delay. He had been involved with the Claimant's case from time to time from April 2016, when the Claimant ran into difficulty with his employer about this issue. In June 2016 the Claimant sent Mr Gibson a 21 page statement about what was happening. Mr Gibson was consulted again at or after the time of dismissal and there was some discussions at the time of the approach to ACAS.

11. Mr Gibson says that it was not practicable or reasonable to start work on the ET1 until 14 December when the early conciliation certificate was issued, because until then the claim might have been settled and the work unnecessary.

12. In doing the work thereafter, he points out that he faces considerable practical difficulties: his name is on the roll of solicitors, but he does not take out a practising certificate. As for the basis on which he acted for the Claimant, he confirmed he is not registered as claims manager under the Compensation Act 2006 and Compensation (Exemptions) Order 2007, although employment claims are a regulated service under the Compensation (Regulated Claims Management services) Order 2006 and he agreed that he did not act pro bono. The Tribunal did not enquire as to his compliance with the SRA Practice Framework Rules 2011. He practises in a small way: he has no support staff and works unaided. He has access to email, but has not mastered the skill of adding an attachment. He must therefore file and serve documents by post or personal attendance, and if a document has to be checked by a remote client, he relies on the post.

13. It is also difficult that in 2014 he was diagnosed as suffering from cancer for which he still receives monthly chemotherapy. The treatment makes him tired and lethargic

14. The second difficulty he faced was Christmas, when effectively many services shut down. This reduced the time available.

15. In the period following the issue of the certificate he was in London over Christmas until 28 December, but was unable to see his client (who lives in London) because of the Claimant's own family commitments. He had to return home (Wiltshire) for treatment on 29 December. He says he then worked on drafting ET1 from 3 January. He lost some more time with a Tribunal hearing in London on 5 January and a half day oncology appointment on 11 January. He completed the ET1 and sent it to the Claimant for approval on 16 January - which is of course 2 days after the time for presentation expired - and it was sent by the Claimant by special delivery to the Leicester fees office on 18 January.

16. Mr Gibson, as well as arguing that it was not *reasonable* to work on ET1 before 14 December, because of the possibility of settlement, also argues that the rules allow an extra calendar month for good reason, and if that month is interrupted by what is effectively a Christmas shut down, that it is reasonable to extend time, and is always impracticable to expect work to be completed within that calendar month because of the loss of working days.

17. The Respondent opposes this argument on the basis that the meaning of what is "reasonably practicable" to submit a claim has been indentified from as early as *Palmer and Saunders v Southend on Sea Borough Council (1984) IRLR 119*, and *Marks & Spencer v Williams-Ryan (2005) IRLR 562*. In "reasonably practicable" the emphasis is on practicable, meaning what in practice prevented the Claimant from presenting the claim, acknowledging that that might be something physical, or it might something to do with his mental state (for example not being aware of particular facts or of the law) making it not practicable to present a claim,.

18. In this case the practicability simply comes down to Christmas, the postal delays over that period, and the other demands on Mr Gibson's time. The Respondent argues that Mr Gibson knew the time limit well, that he had taken on the work, and although there were restrictions on the post there was still 16 working days, and the option of special delivery meant that an item posted as late as 22 December would still arrive before Christmas. He

also points to the fact that Mr Gibson is a skilled adviser, so that any fault on his part is attributed to the Claimant, as in *Dedman v British Building and Engineering Appliances Limited [1973] IRLR 379*.

19. I have to consider the facts of the matter in the light of the law. Parliament imposed a strict time limit, and has extended it so as to encourage people to try to resolve disputes without recourse to litigation. That means that there is more time available to the Claimants than there was before.

20. With regard to Mr Gibson's point that it was not possible or practicable to draft, at any rate the ET1, before 14 December, as he had to wait until the ACAS Certificate was issued, it is not unreasonable to have at any rate prepared the statement of case for ET1, given that Mr Edo had already provided a full statement. It had perhaps to be edited, but the facts will have been available. The document attached to the otherwise handwritten ET1 is only a page and a half long, and stops in April without moving on to the circumstances of the dismissal. It was not a substantial piece of work. It should have been possible to prepare it before Christmas and in time to post it to the Claimant before Christmas, and even after Christmas, still leaving time for timely presentation. Further , if Parliament intended that the extra month allowed should be clear of holiday periods, it could have provided (for example) that bank holidays should be excluded from the count. It is well settled in numerous cases about time limits in the courts as well as Tribunals that one month means all days, not just working days. It is to be noted that some months are shorter than others: no days are added in these cases.

21. It is relevant that Mr Gibson took on this work not as a favour to the Claimant, but in the course of business, albeit on a small scale, and he did so knowing that Christmas was coming up, knowing the restrictions on the post during that period, knowing his own timetable for treatment, and knowing his own limitations in not having support staff, and his state of own health. It was his responsibility to prepare the claim form in time knowing these limitations. He had been involved in the case for some time, so work did not have to be done at the last minute, and he did not need a meeting with his client, as it could be approved by post. Nothing unexpected

occurred. Mr Gibson was always able to predict the interruptions to the time available and plan when to do the work required to fill in ET1. I add that it is surprising that in 2016 a professional person should not know how to attach a document to an email or be able to find someone to show him; sending it to the claimant by email would have saved significant time and avoided any delay because of Christmas post if work had to begin late. So while there must be considerable sympathy for Mr Gibson's health difficulties, and his lack of assistance, it cannot be held that these made it not reasonably practicable to have presented the claim by 14 January. There were sufficient working days to be able to get the work done if necessary, before or after Christmas; and it would not have been unreasonable to start work on it before 14 December if, looking ahead, there was a lot in the diary.

22. It should be added that as Mr Gibson did not post the form to his client until after the time had expired, the Claimant's actions (for example saving time by presenting the claim in person at the Tribunal office) are not relevant.

23. On these facts it cannot be said that it was not reasonably practicable to present the claim in time. The Tribunal does not have jurisdiction to hear the unfair dismissal claim because it was presented out of time.

Employment Judge Goodman
2 August 2017