



# THE EMPLOYMENT TRIBUNALS

**Claimant**

**Respondent**

**Mr S O'Neil**

**v**

**Lyndale Marketing Solutions Ltd**

**Heard at:** London Central

**On:** 21 June 2017

**Employment Judge:** A Stewart (Sitting Alone)

**Representation:**

**Claimant:** In Person

**Respondent:** Mr S Wyeth of Counsel

## JUDGMENT

**1 The Tribunal has no jurisdiction to consider the Claimant's complaint of unfair dismissal because it was presented outside the time limit provided for in section 111 (2) (a) of the Employment Rights Act 1996 and he has failed to satisfy the Tribunal that it was not reasonably practicable for him to have presented his complaint within that time limit, within the meaning of section 111 (2) (b) of the Act.**

**2 Accordingly, the Full Merits Hearing listed for 5 to 7 September 2017 shall be vacated.**

## REASONS

1. This Preliminary Hearing was convened for the purpose of determining the following issues: It being agreed that his claim for unfair dismissal was presented to the Tribunal more than 3 months after the effective date of termination of the Claimant's employment/work contract, was it not reasonably practicable for him to present his claim within time and, if so, did he present the claim within such further time as was reasonable.

2. The Tribunal heard evidence from the Claimant and from Mrs Angela Bailey for the Respondent.
3. The facts found by the Tribunal, on the evidence before it, were as follows: The Claimant worked for the Respondent from 16 September 2014 to 19 October 2016, when his contract was summarily terminated.
4. On 21 October the Claimant did some tentative online research on making a claim to the Employment Tribunals, but looked only at the gov.uk website, which was the first website he came to, and found that those who are considered to be self employed cannot make claims to the Tribunal. He accepted this without further research. He was suffering anguish about his treatment at the time, but also suffering abdominal pain and was feeling unwell.
5. On 23 October, the Claimant was admitted to hospital for the removal of his appendix. On 25 October, he was released from hospital and was at home recuperating over this period, subject to what he described as a very stressful situation and in the following days he had dealings with the Respondent over the handover of business data and equipment and discussions about money and so on.
6. The Claimant stated that from 7 November to 11 November he spent a week at home assessing his financial and employment situation and preparing to apply for benefits because he was in financially straitened circumstances. He needed to earn money and he researched all options for getting paid work.
7. On 12 November, he received notice that Mrs Bailey/the Respondent had started a civil claim against him, which considerably distressed him in addition to his other difficult circumstances at the time, and he devoted his time to researching a defence to his claim and also pursuing his job search.
8. On 1 December, he submitted a detailed response and counter claim to that civil action, which consisted of 7 detailed pages drafted by himself, plus a 46 page pack of supporting materials.
9. During the remainder of December 2016, the Claimant attended further medical appointments for various medical conditions and began a series of training days with Vitamix, in batches of four or five days at a time, including 5 days in Cardiff up to 8 January, 3 days in Wembley up to 15 January and he was engaged to do his first paid work for Vitamix on 16 and 17 January 2017.
10. Thereafter, he was very busy researching, planning and preparing for KitchenAid work, cumulating in a very successful event in Coventry on 25 January. He continued with work engagements and also researching and conducting his defence and civil counter claim.

11. On 10 February at 4 o'clock in the afternoon, the Claimant heard a news item on the radio about the *Pimlico Plumbers* case and experienced what he described as a 'light bulb' moment when he heard the phrase "the Tribunal examined the actuality of the employment relationship". This awakened in the Claimant for the first time the possibility that his status of self employment may be open to challenge. He at once began online research, continued the next day, reading cases and consulting the Citizens Advice and ACAS websites.
12. He decided after careful consideration on 12 February to present a Tribunal claim and registered for the early conciliation process with ACAS. He knew that his claim was out of time, but only slightly as he thought, since he believed that time would stop running during the early conciliation process. He told the Tribunal that the ACAS Officers said nothing to him about time still running and did not seem to indicate any particular urgency. His researches also revealed that in one case an Employment Tribunal claim was allowed to proceed despite being 6 years out of time.
13. On 24 February 2017, ACAS informed the Claimant that Mrs Bailey was going on holiday, but would be thinking about early conciliation. He heard nothing after that and on 3 March finally asked the ACAS for an early conciliation certificate so that he could present his Tribunal claim, which he eventually did on 6 March 2017.
14. Since the Claimant had not registered with ACAS *prior to* the expiry of the primary limitation period on 18 January 2017, time did not in fact stop running during the early conciliation process and therefore his claim, presented on 6 March, was in fact 6 weeks and 5 days out of time and not 3 weeks and 2 days, as the Claimant believed. The Respondent challenges therefore the Tribunal's jurisdiction to hear his complaint.
15. The law which the Tribunal has to apply is as follows. **Section 111 (2)(b) of the Employment Rights Act 1996** provides that "an Employment Tribunal shall not consider a complaint of unfair dismissal unless it is presented to the Tribunal before the end of the period of 3 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 complaint to be presented before the end of that period of 3 months."
16. The burden of showing that it was 'not reasonably practicable' rests on the Claimant, on a balance of probabilities, so he has got to persuade the Tribunal by 51% or more that it was 'not reasonably practicable' for him to have presented his claim in time. If he does so, the Tribunal must then consider whether he has shown that he presented it within such further time as it considers reasonable, in all the circumstances.
17. The case law has established that it is not just a matter of looking at what was possible but asking whether or not, on the facts of the case, it was reasonable to expect that which was possible to have been done. Ignorance

of the law may make it not reasonably practicable but only if the ignorance itself was reasonable. This is a matter of fact for the Tribunal to assess in each individual case and the Tribunal also had cited before it the case of ***Avon County Council v Hayward Hicks [1978] ICR Page 646.***

18. The Respondent contends that the Claimant could have, and should reasonably have, done more research than just looking at the gov.uk website in October 2016 and that any basic Google search would have thrown up various lively contemporary discussions on the controversy about the status of self employed as opposed to worker as opposed to employee status any time in October 2016 or thereafter. The Respondent further contends that the Claimant did not then submit his claim within a reasonable time of finding out that he had a possible claim, i.e. the gap between the 10 February 'light bulb' moment and the actual presentation of the claim on 6 March 2017.
19. The Claimant contends that it was not reasonably practicable for him to submit his claim in time because he was dealing with several difficult health issues including an appendectomy; that he was dealing with the distress and upset and outrage caused by what he saw as the unfair treatment he had suffered by the Respondent, including termination of his contract and interference with his future and alternative work career prospects. Also, with what he saw as an entirely spurious civil claim against him, which alleged fraud, and also dealing with an acute financial crisis with no income, no friends supporting him in this country and an urgent job hunt and then subsequently undertaking training and paid work as it became available.
20. In particular, the Claimant states that between the 21<sup>st</sup> October 2016 and 10<sup>th</sup> February 2017, he did not believe that he had any claim available to him at an Employment Tribunal because he was self employed as per the gov.uk website, until he heard about the *Pimlico Plumbers* case on the radio.

## Conclusions

21. The crux question before this Tribunal was whether or not it was reasonable to expect the Claimant to have gone beyond his first website view of gov.uk in his initial tentative research on the 21<sup>st</sup> October, or, in any event within the initial 3 month time limit, so as to discover his right at least to challenge his apparent self employed status.
22. He stated before the Tribunal that he had known from about 7 months into his contract with the Respondent, in other words from about April 2015, that there were other employees at the Respondent who were on PAYE employment contracts but who were doing exactly the same work as himself. He also told the Tribunal that he is a former IT Manager and Microsoft Office Master, clearly experienced and confident in computer research. The Claimant has shown himself throughout the facts which he has attested to, to be adept at handling his response to the civil claim against him and his counter claim within time limits and doing any necessary research to that end and eventually, after his 'light bulb' moment very effectively researching his

ET claim and procedure. The Claimant has shown himself to be an intelligent, motivated and articulate person throughout all his vicissitudes.

23. Although the Claimant was ill, stressed and distressed dealing with a period of health problems, being profoundly shocked by the turn around in his relationship with the Respondent, he was able to search for work, make benefit claims, train with a new company and take up all the work that subsequently was offered to him. Although not UK born, as he told us he is American, the Claimant has lived in the UK for 21 years and clearly knows his way about the system and the culture in this country.
24. He has failed to satisfy the Tribunal, having regard to all of the above factors, that it was not reasonable practicable for him to present his complaint to the Tribunal within the 3 month time limit. That is, to have registered with ACAS by 18 January 2017 in order to take advantage of the clock stopping provisions of the early conciliation process. Despite his distress and health difficulties, he was able to be active in all other areas and demands of his life at that time and the Tribunal concluded that in fact it was not the lack of time which prevented him from presenting his ET claim, nor incapacity, nor inability to do the necessary research or make the appropriate enquiries. It was his conclusion on 21 October that as a self employed person he was precluded from making an ET claim. This he gleaned from gov.uk website and he remained of this thinking until the radio news item he heard about *Pimlico Plumbers* on 10 February 2017.
25. Until 10 February 2017, he had failed to look beyond that single and first website which he consulted on 21 October 2016, despite the fact that he should reasonably have been put on enquiry by his existing long standing knowledge that people doing exactly his job were being treated as employees on PAYE. He could and should reasonably have pursued more research at that earlier stage. The Tribunal was satisfied that a basic Google search in October/November would have thrown up sufficient initial material which would reasonably have led to further exploration.
26. The Tribunal concluded, on all the evidence before it, that the Claimant's ignorance of the online material about contemporary challenges and controversy around self employed v workers status, potentially applicable to his own situation, was not reasonable. The *Uber* case was widely reported in late October and even if the Claimant was resting at home after his appendectomy at that time, and not necessarily listening to news reports, this was a live issue over the entire period which any very basic Google research would have revealed, even prior to the *Pimlico Plumbers* judgment. There is also some force in the Respondent's contention that in the internet age, it is more reasonable to expect a person with ready access and capacity for looking at the internet, to make fuller use of its resources, all other things being equal, and despite the Claimant's difficulties and health problems, he did have that opportunity and could reasonably have done so. He showed his capacity to do so in respect of all of the other areas of his life at the time.

27. Accordingly, the Tribunal concluded that the Claimant has failed to satisfy it that it was not reasonably practicable in all the circumstances to have discovered that he had the right to challenge his Respondent assigned status of self employment by way of a Tribunal claim, given particularly the high level of outrage that he felt about his treatment and his knowledge that some of his colleagues, doing the same work, were indeed being treated as employees.
28. The Tribunal therefore has no jurisdiction to consider his complaint of unfair dismissal and the Full Merits Hearing listed to be heard from 5 to 7 September 2017 inclusive shall be vacated.

Employment Judge A Stewart  
17 July 2017