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# EMPLOYMENT TRIBUNALS

**Claimant:** Miss M Rotimi

**Respondent:** Imperial College Healthcare NHS Trust

**Heard at:** London Central

**On:** 30 August 2017

**Before:** Employment Judge Goodman

## Representation

**Claimant:** Ms Y. Adedeji, counsel

**Respondent:** Mrs S Ramadan, solicitor

**JUDGMENT** having been sent to the parties on 30 August 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 open Preliminary Hearing was listed to decide the Respondent's contentions
  1. the claimant lacked qualifying service to bring an unfair dismissal claim; and
  2. that the claim was not presented in time.
  
2. The first issue was not heard today, at the Respondent's request and with the consent of the Claimant, because preliminary disclosure means the issue is factually unclear. The hearing today concerned only whether the claim was presented in time.

3. The unfair dismissal time limit is set out in Section 111 of the Employment Rights Act 1996. It must be 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”.
4. In this case, the effective date of termination was 22 December 2016. The claim form was eventually presented on 20 April 2017.
5. The time limit is complicated by the introduction of the early conciliation provisions; in this case the Claimant having been dismissed on 22 December 2016 so that primary limitation of 3 months expired on 21 March 2017. On 17 February 2017, she approached ACAS for the purposes of early conciliation. ACAS issued a certificate on 17 March 2017; it is agreed that the effect of the rules is that the claim should then have been presented to the Tribunal by 18 April 2017.
6. Following dismissal the Claimant instructed solicitors in Thornton Heath in Surrey who on 5 April 2017 wrote a letter before action to the Respondent setting out the circumstances and inviting settlement by 11 April 2017 or they would issue in the Employment Tribunal. Although the claim letter mentions not just unfair dismissal but also race discrimination and harassment, no such claim is mentioned in the ET1, either in a text, or by ticking the relevant boxes. Neither side has pursued that point today, accordingly the rules and law relevant to unfair dismissal claims only are applicable.
7. Not having had proposals by 11 April, the Claimant’s solicitors on 12 April 2017 arranged for her to complete and sign an application for remission of fees, which they posted to the Central Office of Employment Tribunals in Leicester, while the ET1 claim form itself was posted to the Employment Tribunals office in Croydon.

8. The Claimant's solicitor, Mr Etim Ikpedighe, gave evidence. He said that he checked online and seen there was a list of designated offices. He chose Croydon as the one nearest to his office.
9. On Tuesday 18 April, six days later, time expired.
10. On Wednesday 19 April, say the Claimant's solicitors, they received a letter from London South Courts and Tribunals Service at Croydon. It is in fact dated 12 April. The standard letter states that from from 29 July 2013 there are only three prescribed methods of presenting an Employment Tribunal claim which are detailed below. It then lists the three as given in the Presidential Practice Direction, and says "the attached claim form has not been presented using one of the prescribed methods, it therefore cannot be accepted and is returned to you accordingly".
11. Mr Ikpedighe pointed out that the 12 April is unlikely to be an accurate date because his own letter to the Croydon Office was posted on 12 April. Be that as it may, he says it was received on 19 April. He confirmed in answers to questions that in accordance with the usual practice in solicitors' offices, the practice at his office was for post to be opened by his principal, Mr Ross, and was then date stamped for receipt by Mr Ross or by the solicitor with conduct of the matter (himself), but unusually this letter was not date stamped for receipt. So there is doubt both on when this letter was posted and on when it was received. Appreciating that time was now short, on 19 April he telephoned London South in Croydon, and the Central Office of Tribunals in Leicester. Then he posted the ET1 claim form to Leicester. It must have been received by Leicester on 20 April because it was then passed to London Central, the appropriate region for the Respondent's address, and it was date stamped by London Central as presented on 20 April. The practical result is that the claim appears to have been presented two days late.

#### Relevant Law

12. The relevant law on time limit is Section 111 of the Employment Rights Act 1996, already cited. The Employment Tribunals Act 1996 gave power to

Parliament from time to time to set out procedure by statutory instrument. The relevant statutory instrument is the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013. This provides in Regulation 11, that the President, (meaning the President of Employment Tribunals) “may make, vary or revoke practice directions about the procedure of the Tribunals in the area for which the President is responsible, including (a) practice directions about the exercise by Tribunals of powers under this regulations (including the Schedules)”. By regulation 11(2), practice directions “may make different provision for different cases, different areas or different types of proceedings”.

13. The Employment Tribunal Rules are set out in schedule 1 to the 2013 Regulations.

14. Rule 1 of the Tribunal Rules is entitled Interpretation, and says “‘present’, means deliver by any means permitted under Rule 85 to a Tribunal Office.

15. Rule 85 says: “Subject to paragraph 2, documents may be delivered to the Tribunal by post, by direct delivery or by electronic communication”, and Rule 85(2) says: “A claim form may only be delivered in accordance with the practice direction made under regulation 11 which supplements rule 8.”

16. Rule 8 says: “a claim shall be started by presenting a completed claim form (using a prescribed form) in accordance with any practice direction made under regulation 11 which supplements this rule”.

17. The Presidential Practice Direction on starting a claim was made by the then President David Latham on 29 July 2013, and says:

#### “4. Methods of starting a claim

A completed claim form may be presented to an Employment Tribunal in England & Wales:

Online by using the online form submission service provided by Her Majesty’s Courts and Tribunals Service, accessible at

[www.employmenttribunals.service.gov.uk](http://www.employmenttribunals.service.gov.uk);

By post to: **Employment Tribunal Central Office (England & Wales), PO Box 10218, Leicester, LE1 8EG**

A claim may also be presented in person to an Employment Tribunal Office listed in the schedule to this Practice Direction. If a claim is so presented, it must be so within tribunal business hours (9am to 4pm, Monday to Friday, not including public holidays or weekends).”

18. In the schedule to the Direction is this list of offices, including the address in West Croydon to which this claim was posted.

19. If the Presidential Practice Direction governs presentation, the claim form could only have been posted to Leicester or hand delivered to Croydon. Posting it to Croydon was not prescribed.

#### **Claimant's Submission**

20. The Claimant's principal argument why this claim is not out of time is that it was validly presented by post to Croydon office, and given that it was sent on 12 April, it must have been received before 18 April -even accepting that Croydon's date on their letter of 12 April is probably inaccurate, the fact that it was received by the Claimant on the 19 April means that it must have been received by them before the 18 April. The fact that it was accepted by Leicester and London Central on 20 April means that the Claimant must have presented it or posted to Leicester no later than 19 April.

21. It is argued that it was validly presented, despite not being posted to Leicester or hand delivered to Croydon, because the statutory meaning of presented means that it was *delivered*, and that the means of delivering are not limited. It is argued that “to do so is otherwise to restrict the meaning of the primary legislation.” Counsel for the Claimant draws my attention to *Hammond v Haigh Castle & Co Ltd [1973] ICR148*, in which Sir John Donaldson, as President of the National Industrial Relations Court, said:

“Although it is immaterial to the present appeal, we have been asked to express our opinion on the meaning of the word “presented”. In our Judgment a claim is presented to a Tribunal when it is received by the Tribunal, whether or not it is dealt with immediately upon receipt”,

and then explores the difference between arriving in the post on a Saturday, even if it is not processed until the Monday.

22. It is therefore argued that to restrict the meaning of the primary legislation that present means to deliver, by means of a Presidential Practice Direction under the Rules is an unreasonable fettering of access to justice. The argument is developed in arguing that the language of the Presidential Direction is permissive, that is to say, it *may* be presented by one of three methods, but it does not go on to say that it *may not* be presented by any other method. The Practice Direction should not fetter the meaning of the primary legislation, and if it is intended to do so it should be explicit that other methods are prohibited, and not just list the three that are permitted.

23. The Counsel for the Claimant directed the Tribunal to the decision of the Employment Appeal Tribunal in *Software Box Limited v Gannon [2016] ICR 148*, a decision of the then President, in which it was held that the claim was presented for the purposes of section 111 when it was received by the Tribunal, and it was then either rejected or determined or withdrawn; there is no such process as ‘acceptance’, or valid presentation. I was taken in particular to the discussion in paragraphs 14 to 17 of the effect on ‘presented’ of Rule 8 and the Presidential Direction of 2013. I note that paragraph 14 says that “presented” is not defined in the Act, but does not mention that it is defined in rule 1, though the definitions of claim and complaint in rule 1 are discussed. In *Software Box Limited v Gannon*, the difficulty was not that the claim form had been sent to the Tribunal in a way not prescribed by the Practice Direction; it was that it was not accompanied by an application for remission for fees. In that case the claim form had been returned because it was not accompanied by the relevant fee (as specified in paragraph 5 of the Practice Direction), and when the fee was paid and the matter was re-presented, it was now out of time. There was

therefore an issue whether the first claim was valid, though not accompanied by a remission application, and whether the second claim was valid, though out of time. The EAT accepted that presenting a claim should not be clouded by considering whether there was a process of 'acceptance', or 'valid presentation', as compared to invalid presentation. There was discussion of rule 13 permitting a Judge to consider rejection where a prescribed form had not been used, or a failure to provide minimum information, and to *Hammond v Haigh Castle* about presentation meaning simply when it was received by the Tribunal. In paragraph 17, discussing whether presentation was defined in the Practice Direction, the President said he did not accept a submission that presentation meant more than when it was received by the Tribunal: "it is plain to me that the Practice Direction is consistent with the meaning of presentation which has been adopted, but I do not consider that a Practice Direction can affect the interpretation of primary legislation contained in the statute." He goes on to refer to Presidential Guidance under rule 7, but this is beside the point, as this case is not about guidance, it is about a Practice Direction made under regulation11.

24. On reasonable practicability, the Claimant argued that in fact it was validly presented, but otherwise that the Claimant's solicitor had acted promptly when the matter was returned by the Croydon Office.

### **Respondent's Submission**

25. The Respondent argues that presented is not defined in Section 111, and that *Software Box Limited v Gannon* should be distinguished because it is not about the basic meaning of what it is to present, as in that case it was validly presented in accordance with the practice direction, it was about whether it was not validly presented if not accompanied by the appropriate fee. The Respondent relies on rule 8, which says that presentation should be in accordance with any practice direction, the provisions are set out very clearly in the practice direction, and that the effect of the rule does not prevent access to justice.

## Discussion

26. The 2013 Rules are made by statutory instrument under the Employment Tribunals Act 1996. They have statutory force as does the statutory provision of Section 111. The Regulations provide for making Practice Directions. The Rules themselves provide in rule 85 that presentation of a claim form can only be done by the means set out in the Practice Direction.
27. The Practice Direction is plain that if a Claimant decides to post his claim form he must do so only to Leicester, the only address given. He can also hand deliver to other offices provided it is done within working hours.
28. Time limits are tough on Claimants, as has often been observed in the substantial body of case law on what is not reasonably practicable when presenting a claim. Some decided cases turn on minutes or seconds before or after midnight in electronic transmission of a claim form. I am invited to find that the practice direction is unclear, and that when restricting access to justice it must be very clear. Having read the practice direction, it seems clear enough. A qualified solicitor ought to appreciate that when it is said that a claim may be presented in one of these methods, it cannot be implied that any other method not described is also valid – why otherwise should three methods be set out so precisely of all sorts of other methods could also work. To decide that anything not ruled out is therefore ruled in is unwise for a layman, but particularly for practising law.
29. There is nothing in the Practice Direction unduly restricting access to justice. Those without access to or competence in use of the internet can use the post. Those too close to the deadline to rely on the post can hand deliver.
30. The interlocking provisions of the 1996 Tribunals Act, the 2013 statutory instrument, and the rules in its schedule defining “present”, and specifying that for a claim form this means following the Practice Direction, make clear that this claim form was not “presented” in accordance with the rules. *Gannon* can be distinguished, in part because it does not discuss the definition of “present” in rule 1, in part because it was not about the means



of presentation but whether presentation was valid when not accompanied by a fee or remission application.

31. As to practicability, there is no explanation from the Claimant's solicitor of why when on the 12 April he was posting an application for remission of fees to the Central Office in Leicester, he could not also post, perhaps in the same envelope, the Claimant's ET1 claim form, which instead he chose to deliver separately by post to Croydon, not one of the methods prescribed in the Practice Direction. It was in my finding reasonably practicable for the Claimant to have presented his claim form in time by posting it to Leicester on 12 April at the same time as the fees remission letter was posted, even in the same envelope.
32. In summary, in my finding the claim form was not presented by posting it to Croydon on 12 April. It was presented by posting to Leicester where it arrived on 19 April. By then it was out of time. It was reasonably practicable to have presented in time. If I were required to find on the residual point as to whether it was presented within a reasonable time thereafter, the Claimant's solicitor did act promptly by dispatching it to Leicester on 19 April, when it was already out of time, and I do not accept the Respondent's argument that he should by then at least have hand delivered to Croydon, to save a day, or filed it online. One day is neither here nor there.
33. In reaching this decision I have to consider the overriding objective to deal with cases justly, set out in rule 2 of the Tribunal Rules of Procedure 2013, so to ensure that the parties are on equal footing, to deal with cases in ways proportionate to complexity and importance of the issues, to avoid unnecessary formality and seek flexibility in the proceedings to avoid delay and to save expense. I was asked to consider using this flexibility to allow the claim to proceed. This is a case where both parties had legal representation at all relevant times, and so were on equal footing. I have dealt the cases proportionate to the complexity and importance of the issues, by holding a formal hearing. On avoiding formality and flexibility, that is about interpreting the rules, but it does not give Tribunals licence to be flexible about jurisdiction in the statutory right to unfair dismissal under the

Employment Rights Act 1996, which not only confers the unfair dismissal right, but restricts it to claims presented within 3 months, and is subject to statutory interpretation of what is meant by presented.

**34.** One final point, this was not only an unfair dismissal claim but also a claim for wrongful dismissal, as the Claimant was dismissed without notice. Wrongful dismissal claims are heard by the Employment Tribunal under the Extension of Jurisdiction Order 1994 which provides a similar three month time limit, talks also of “presenting” a claim, and has a similar test of whether it was not reasonably practicable. In respect of the wrongful dismissal claim therefore the reasoning is exactly the same, and that claim was not presented in time either.

**35.** The conclusion therefore is that the claims were out of time and the tribunal does not have jurisdiction to them. They fail at the preliminary hurdle. It is not necessary to have a further preliminary hearing on whether there was qualifying service for the unfair dismissal claim.

Employment Judge Goodman  
27 September 2017