



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mr D Williams

v

George Gawith (Taxis) Ltd

FINAL MERITS HEARING

Heard at: **Birmingham** On: **12 December 2017**

Before: **Employment Judge Perry** (sitting alone)

Appearances

For the Claimant: **(in person)**

For the Respondent: **Mr J Halson (solicitor)**

JUDGMENT

- 1 This claim was not presented in time. It was reasonably practicable to have presented the claim in time. Nor in the alternative was the claim presented within a further reasonable period. The tribunal does not have jurisdiction to hear the claim and it is dismissed.

REASONS

- 1 This is a claim that was originally date stamped as received by the Tribunal on 9 October 2017. It was rejected the same day by a letter generated by the tribunal service on the basis that the ACAS number provided had not been recognised, the ACAS number might have expired or all the digits might not have been included. I considered the early conciliation certificate number (and for that matter the name of the respondent) given in both the certificate and the claim form and concluded both the certificate number and respondent's name were the same as that given in the claim form. I canvassed that with the respondent representative Mr Howson. He agreed. I find that the rejection of the Claim Form presented on 9 October 2017 was wrong and the claim was presented on 9 October 2017. That is not a rectification issue for the purpose of rule 13.
- 2 The respondent is a hackney carriage operator that also provides motor vehicle - related services. Its head (now only) office is in Liverpool. The claimant was the branch manager and a van delivery driver at its Coventry site. It is not in dispute that the claimant was an employee, his employment commenced in September 2000 and thus he had qualifying service to bring a claim [ET3/2]. I can say that the claimant had qualifying service to bring the claim because it was confirmed before me that he was dismissed without notice at a hearing on 31 May 2016 and whilst he subsequently appealed that decision the date that he was told of his dismissal is the effective date of termination.
- 3 Thus, the limitation period for bringing a claim would have ordinarily expired on 31 August 2016 but because the claimant conciliated via ACAS that period was extended to 30 September 2016 (by virtue of the corresponding date rule). As I state above the claim was not actually presented until 9 October 2017 (over a year later).



- 4 On presentation, the claim was referred to an Employment Judge who determined the claim should be listed for an open preliminary hearing to determine if it was reasonably practicable for the claim to have been presented in time. That is the hearing that comes before me today.
- 5 Whilst the claim includes complaints of holiday pay and unfair dismissal, save for a difference in the start date for the holiday pay claim running, the principal provisions s.111 Employment Rights Act 1996 (ERA) and reg. 30 Working Time Regulations 1998 are substantially in the same form. That difference as to start date for time running of little import here give the actual issues at play. I therefore merely relay below s.111 below.
- 6 An issue does arise concerns res judicata/issue estoppel. That was not raised as part of the issues and the parties had not come today prepared to address the same. Given my findings I do not need to consider the same.
- 7 I was referred to two cases by Mr Halson, [R. \(on the application of Unison\) v Lord Chancellor](#) [2017] UKSC 51 of 26 July 2017 and [Nolan v Balfour Beatty Engineering Services](#) [2011] UKEAT/0109/11.
- 8 Section 111(2) ERA provides that an Employment Tribunal shall not consider a complaint of unfair dismissal unless it is presented to the tribunal (a) before the end of the period of three months beginning with the date of the effective date of termination, or (b) 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 three months. That provision is subject to a number of exceptions, one of which (2A) provides that time is extended pursuant to s. 207B ERA to facilitate Early Conciliation. I set out the effect of that above (3).
- 9 There are two questions tribunals are required to address:-
- (1) *Is it satisfied that it was not "reasonably practicable" for the complaint to be presented before the end of the period of three months? If the Tribunal is satisfied on that point, it must then ask itself the second question;*
- (2) *Was the complaint presented to the Tribunal within such further period as the Tribunal considers reasonable?"¹*
- 10 As to the first question I read out to the claimant the test that Lord Brandon relayed in [Wall's Meat Co Ltd v Khan](#) [1979] ICR 52²:-
- "[60F-61A]... the presentation of a complaint, is not reasonably practicable if there is some impediment which reasonably prevents, or interferes with, or inhibits, such performance. The impediment may be physical, for instance the illness of the complainant or a postal strike; or the impediment may be mental, namely, the state of mind of the complainant in the form of ignorance of, or mistaken belief with regard to, essential matters. Such states of mind can, however, only be regarded as impediments making it not reasonably practicable to present a complaint within the period of three months, if the ignorance on the one hand, or the mistaken belief on the other, is itself reasonable. Either state of mind will, further, not be reasonable if it arises*

¹ per Mummery P, as he then was, in [Marley v Anderson](#) [1994] ICR 295 EAT at [299C] endorsed by the CA ([1996] ICR at 733H). It should be noted that claim involved s.67(2) Employment Protection (Consolidation) Act 1978, where the statutory time limit for presenting a claim had already been extended to 3 months and the test of 'practicability' amended by a requirement of reasonableness.

² approved by Lord Phillips in [Marks & Spencer Plc v Williams-Ryan](#) [2005] IRLR 562 at [27]



from the fault of the complainant in not making such inquiries as he should reasonably in all the circumstances have made, or from the fault of his solicitors or other professional advisers in not giving him such information as they should reasonably in all the circumstances have given him."

- 11 I should as to the last sentence whether or not the solicitor has made an error that can be characterised as negligence is now a relevant consideration for assessment as reasonable (or unreasonable).³
- 12 As to the second question *Marley* made clear what is a **reasonable** period depends on the circumstances of the case. The Tribunal must make a fact-sensitive decision relating to the particular employee and the exercise entails an investigation of what the employee knew and what knowledge the employee should have had if he or she had acted reasonably in all the circumstances. There is thus no rule that a particular period is reasonable (or unreasonable) as the case may be.
- 13 The claimant told me that the reason why he did not present the claim within the statutory time limit was because he had to pay a fee of £1,200, that he could not justify that because he had become a pensioner before he ceased to be employed by the respondent. He told me initially his date of birth was 10 July 1949, he corrected that to 10 October 1949. I do not seek to doubt that the latter is his date of birth (that is the date he gives that within his ET1 claim form), but I checked my notes and the date he gave me was 10 July. That is of no matter other than it explains why Mr Halson sought to check the claimant's answer to his age when he was dismissed. There was also an issue over whether the claimant believed he had to pay both the presentation (£250) and hearing (£950) fees at the outset or over time. It appeared to me the claimant was unclear when each was payable. The claimant's point was it mattered not when but that it had to be paid at all. Mr Halson's as to the extent of the claimant's knowledge and whether that was reasonable.
- 14 The claimant also told me that his wife worked part-time and he received not only the state pension but also an occupational pension. The claimant provided no further detail before me today as to what his means were other than he has not found another job and was not in receipt of state benefits. He did not tell me what level of savings he had or provide evidence of his means. He explicitly stated there was no need to go into that detail.
- 15 I explained at some length to the claimant that given the claim was said to have been brought out of time it is for him to show that it was in time. Further, that he must show that the fees were essentially an impediment (to use the phrase from *Walls Meat*) such that it was not reasonably practicable for him to do so.
- 16 When asked why he had not brought the claim in the tribunal in time the claimant said he could not justify paying the fee. That infers in my judgment an assessment on his part if he wished to spend money not whether he could actually do it; i.e. if the money was available. Irrespective of whether that was so (and it is not for me to form a view if he felt he could justify that or not) in my judgment the claimant has not shown that it was not reasonably practicable for him to pay the fees. He has simply provided no evidence of his (lack of) means other than a mere assertion. In the absence of such evidence the claimant has not in my judgment shown it was not reasonably practicable for him to present the claim in time.

³ See Hand J in [Balfour Beatty Engineering Services v Allen](#) [2011] UKEAT/0236/11 at [76-77]



- 17 Irrespective of that determination I have gone on to consider the second limb of the statutory test. The claimant told me orally he had discovered the decision of the Supreme Court in Unison (dated 26 July 2017) sometime in July 2017, that he spoke to his adviser about that in early August. That was at odds with what he stated in the claim form (§15) I should say at this point that the claimant brought a County Court claim against the respondent on 18 October 2016 having decided he could not justify paying the Tribunal fee. That claim came before the County Court on 8 September 2017. It was adjourned part heard. It may have been that the claimant was preparing for that hearing with his representative in early August. Irrespective of the reason for that discussion the claimant accepted that he had spoken to his representative following the Unison sometime in early August 2017.
- 18 That being so the claimant did not explain to me in any detail why he did not bring a ET claim before 9 October 2017 other than to say he was on holiday for about a week in early September, returning on 16 September 2017 (although that does not explain why having discovered the Unison decision he did not bring a complaint in the month before the County Court hearing at the start of September or indeed in the three or four weeks immediately following his return from holiday) and that he also needed to check with ACAS whether the early conciliation certificate was valid. He could not tell me precisely when that was so but it appears that was after his return from holiday. The claimant was simply unable to tell me in any detail when he took advice or the nature of the advice.
- 19 As to the reasonable steps the claimant took, he accepted before me that he was aware the previous year (2016) of the time limit for bringing claims having discovered what that was when he spoke to ACAS when he conciliated. He also demonstrated he was able to find out how to present a claim, he appears to have completed the form that was presented to the tribunal as no representative was stated. He also told me that he looked up other matters on the internet and liaised with ACAS.
- 20 I should add as final point the claimant indicated to me that he wished to take up with his representative why the representative had not lodged the claim for him earlier. Again, the claimant gave no detail what he says the advice that he was given was (or lack of it) that allows me to consider whether the representative's advice (if any) was reasonable (or not), or what it was about the representative's advice that meant the claimant did bring a claim in a (further) reasonable period.
- 21 It is again for the claimant to show that he took reasonable steps to bring the claim within the further reasonable period and in the absence of any detailed explanation why he did not bring the ET claim earlier than he did, in my judgment, he has failed to discharge that burden.

Employment Judge Perry

12.12.17