



EMPLOYMENT TRIBUNALS

Claimant

Mr D Pilarski

Respondent

v Orton Lifts and Escalators Limited

OPEN PRELIMINARY HEARING

Heard at: Watford

On: 1 June 2018

Before: Employment Judge Alliott

Appearances:

For the Claimant: In Person

For the Respondents: Mr M Hornsby (Solicitor)

JUDGMENT

1. The judgment of the tribunal is that:
 - 1.1 The claim was brought outside the three month time limit;
 - 1.2 It was reasonably practicable for the claim to be presented before the end of the three month time limit;
 - 1.3 The claim is dismissed.

REASONS

1. The claimant was dismissed from his employment on the 14 June 2017. The reason advanced by the respondent is redundancy. This is disputed by the claimant. He brings claims of unfair dismissal, redundancy pay, notice pay, holiday pay, arrears of pay and other payments.

2. In its response form the respondent asserts that the tribunal does not have jurisdiction to hear the claim because the claim is time barred. In a letter dated the 19 February 2018 the claimant made an application for an extension of time for the submission of his claim. In a letter dated the 12 March 2018 Employment Judge Lewis directed that the Full Merits Hearing should be postponed and the hearing converted to a preliminary hearing to determine the following issue:-

“To decide if the claims may proceed, as they appear to have been brought outside the time limit.”

3. Consequent upon the claimant’s application for an extension of time, Employment Judge Manley directed that the application would be considered at the preliminary hearing today.

The law

4. Where relevant, s.111 of the Employment Rights Act 1996 provides as follows:-

“111(2) An Employment Tribunal shall not consider a complaint under this section unless it is presented to the tribunal –

- (a) before the end of the period of three months beginning with 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.”

5. By reference to the IDS Employment Law Handbook Employment Tribunal Practice and Procedure at paragraph 5.41 the following is recorded:-

“When a claimant tries to excuse late presentation of his or her ET1 Claim Form on the ground that it was not reasonably practicable to present the claim within the time limit, three general rules apply:

- S.111(2)(b) ERA should be given a “liberal construction in favour of the employee” - Dedman v British Building and Engineering Appliances Limited [1974] ICR 53, CA
- What is reasonably practicable is a question of fact and thus a matter for the tribunal to decide. An appeal will not be successful unless the tribunal has misdirected itself in law or has reached a conclusion that no reasonable tribunal could have reached. As Lord Justice Shaw put it in Walls Meat Co Ltd v Khan [1979] ICR 52, CA: “The test is empirical and involves no legal concept. Practical common sense is the keynote and legalistic footnotes may have no better result than to introduce a lawyer’s complications into what should be a layman’s pristine province. These considerations prompt me to express the emphatic view that the proper forum to decide such questions is the Employment Tribunal, and that their decision should prevail unless it is as plainly perverse or oppressive.”
- The onus of proving that presentation in time was not reasonably practicable rests on the claimant. “That imposes a duty upon him to show precisely why it was that

he did not present his complaint” - Porter V Bandridge Limited [1978] ICR 943, CA

Even if a claimant satisfies a tribunal that presentation in time was not reasonably practicable, that does not automatically decide the issue in his or her favour. The tribunal must then go on to decide whether the claim was presented “within such further period as the tribunal considers reasonable”.

6. At paragraph 5.69 the issue of Trade Union Representation is dealt with. It states:-

“Trade Union Representatives also count as “advisors” in this context and, if they are helping a claimant with his or her case, they are generally assumed to know the time limits and to appreciate the necessity of presenting claims in time.”

7. At paragraph 5.74 the issue of a claimant’s illness is dealt with. It states:-

“A debilitating illness may prevent a claimant from submitting a claim in time. However, this will usually only constitute a valid reason for extending the time limit if it is supported by medical evidence, particularly if the claimant in question has taken legal advice and was aware of the time limit.”

It later goes on to state:-

“Mere stress – as opposed to illness or incapacity – is unlikely to be sufficient.”

8. Mr Hornsby on behalf of the respondent has placed before me the case of Fishley v Working Men’s College UK EAT/0485. He presents this case in support of the proposition, that in the event that presentation of an originating application is left to the very last moment, then a temporary impediment such as the breakdown of a piece office equipment or something of that kind is one of the risks of life which has to be taken.

The evidence

9. The application for an extension of time is a short document that contains a certain amount of information. The claimant has not put in a witness statement for this hearing. However, the claimant gave evidence on oath and was cross-examined.

The facts

10. There was a redundancy process which led up to the dismissal of the claimant on the 14 June 2017. The claimant was assisted by a Trade Union Representative. During the course of that process the claimant told me that his Trade Union Representative had expressed the opinion that the redundancy process was unfair and that he had a case for constructive unfair dismissal. At that stage the claimant told me that he was confused about the three month time limit.
11. Following the termination of his employment the claimant endeavoured to find alternative employment. Having been dismissed on the 14 June 2017 the three month time limit was scheduled to expire on the 13 September 2017. The claimant gave evidence that his Trade Union Representatives told him a few

days before the expiry of the three month limit that he should immediately telephone ACAS and notify them of a claim. The claimant told me that it was at that point that he became aware of the three month time limit. I note that the claimant was able to contact ACAS at that stage and filled in the online information form.

12. The ACAS notification is dated the 12 September 2017. During the course of ACAS involvement the claimant had Trade Union assistance. The ACAS Certificate is dated the 12 October 2017. The claimant told me that when the certificate was sent to him by his union representative "they said I have one month after receiving the certificate to start the tribunal case". Time began to run again on the 13 October 2017. One month thereafter expired on the 12 November 2017. The claimant's ET1 was issued on the 13 December 2017. The claim was therefore presented one month and one day after the expiry of the time limit. Consequently, I find that the claim was brought outside the three month time limit.
13. In the circumstances, I have to consider whether it was reasonably practicable for the claimant to bring the claim within that time limit and, if not, whether the claim was presented within such further period as the tribunal considers reasonable.
14. It is clear from the facts as I find them that the claimant was aware not only that he had a potential claim for constructive unfair dismissal and other payments but also that he had one month to bring his claim from the date of the ACAS Certificate. I have to consider why the claimant says he did not present his claim form until the 13 December 2017. In short, the reasons advanced by the claimant are that he was ill, that he was sick, that he was depressed, that his world was about to end and that he was worried about money. He states that he was trying to save his job, he was underperforming due to his health condition and he was struggling financially.
15. Between the date of the ACAS Certificate, namely the 12 October 2017 and the expiry of the three month time limit, namely the 13 November 2017, the claimant was working until he lost his job on the 10 November 2017. The claimant told me that he was working 8 until 5, five days a week in a demanding job testing lifts. He had three hours travel to work each way. He was earning approximately £3,000 net per month.
16. The claimant is clearly computer literate. The claimant told me that he studied computer engineering and programming in Poland. I find that the claimant had the technical ability to fill in the online application form and, despite working long hours during the working week, clearly he had the weekends to complete the form should he have wanted to do so.
17. The claimant's evidence was that he began filling in the form on the 11 November 2017. The automated response indicates that he had created the document prior to 13.59 hours on the 11 November 2017. I have to consider why

it was that the claimant began filling in the form only at the eleventh hour. In that context I found an answer of his to be revealing. The claimant said:-

“If I could of saved my job maybe I wouldn’t have started this claim”.

18. In my judgment the reason the claimant began his claim only on the 11 November was that he had lost his job on the 10 November. I find that he could have completed the form had he wanted to prior to that date.
19. I consider whether health issues impacted on his ability to fill in the claim form prior to the 11 November. In terms of evidence I have a very brief letter from the claimant’s general practitioner which reads as follows:-

“This is to state above named patient is a patient in our surgery. He first consulted surgery in April 2017 due to feeling low and anxious due to work related stress. He was diagnosed with depression and treated with antidepressant medication. Work related issues were possible contributing factors with background of depression. He received follow-up from surgery regarding his condition.”

20. I observe that the claimant’s depression was diagnosed in April prior to him being dismissed from his employment. I have no evidence to suggest that it did not continue throughout the material time up to and including when he finally did submit his claim form on the 13 December 2017. Whilst I have every sympathy with the claimant for what was clearly a stressful time of his life, the fact is that his depression was being treated and that he was able to work for the respondent and at least one other employer doing a demanding job during this time. I do not have any medical evidence to the effect that his mental state would have prevented him from being able to formulate or fill in the claim between the date of the ACAS Certificate and the expiry of the three month time period. The fact that he was working in a demanding job suggests to me that he would have been able to do so. I find that the reason he did not begin prior to the 11 November is that he was not contemplating bringing a claim whilst in employment at that stage. That was his decision.
21. Up until the time that he lost his job the claimant had an internet connection and so had the technical ability to submit the claim. The claimant began filling in the form on the 11 November but for reasons best known to himself did not complete the exercise despite knowing that the form had to be submitted within a month of the ACAS Certificate. The claimant said that at midnight on the 11/12 November his internet connection was discontinued due to him not paying the bill. That is as maybe but the fact of the matter is that the claimant was leaving it to the very last moment to submit his claim. It is common knowledge that access to the internet can be gained for example in libraries or internet cafes. The fact that the claimant’s internet connection was terminated does not, in my judgment, mean that he could not have submitted his claim in time.
22. The claimant eventually did submit his claim in December whilst still suffering from the same sickness issues. In response to questioning the claimant indicated that he had good days and bad days. I quite understand that he may have good and bad days but that would have enabled him to present his claim

during the period between the ACAS Certificate and him losing his job on the 10 November 2017.

23. Consequently, in my judgment it was reasonably practicable for the claimant to present his claim within the three month time limit. As such this claim must be dismissed.
24. Having dismissed the claim Mr Hornsby on behalf of the respondent has made an application for costs pursuant to Rule 76 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.
25. Rule 76 provides as follows:-
 - (1) A tribunal may make a costs order ... and shall consider whether to do so where it considers that –
 - ...
 - (b) any claim or response had no reasonable prospect of success;
26. Issues relating to costs are within my discretion subject to that rule. My discretion is to be exercised justly and fairly.
27. I take as my starting point that in the ordinary course of events the expectation is that the losing party will not have to pay the costs of the successful party.
28. I need to consider whether the claimant's claim did not have reasonable prospects of success. I do not address the merits of his claim in any way, shape or form other than to observe that the claims he presented were claims known in law and he set out a factual basis on which to advance those claims.
29. The application for costs is based on the fact that the claim was presented out of time. It is quite correct it was presented out of time and manifestly was so. However, in my judgment that does not mean that the claim lacked reasonable prospects of success. It is always open to a claimant to present a claim out of time and to seek to have time extended if that individual can demonstrate that it was not reasonably practicable to bring his claim within time. In this case the claimant has advanced reasons that could potentially have excused the failure to present his claim in time. The mere fact that he has lost does not in my judgment mean that he was doomed to failure and had no reasonable prospect of success. Consequently I decline to make a costs order.

Employment Judge Alliott

6 / 6 / 2018

Sent to the parties on:

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For the Tribunal:

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