



EMPLOYMENT TRIBUNALS

Claimant
Mrs A Borsan

v

Respondent
Simply Serve Limited

PRELIMINARY HEARING

Heard at: Bristol **On: 18 September 2018**

Before: Employment Judge O'Rourke

Appearances

For the Claimant: In person
For the Respondent: Mr R Cumming - counsel

JUDGMENT

The Claimant's claim is struck out, for want of jurisdiction, as being out of time.

REASONS

Background and Issues

1. The Claimant was employed by the Respondent as a catering assistant, for approximately two/three years (not relevant to my considerations, but disputed by the Parties), until her dismissal on grounds of capability (sickness absence), with effect 20 February 2018. Consequently, she brings a claim of unfair dismissal.
2. It is uncontested by the Parties that the Claimant presented her claim on 26 June 2018, that is, three days outside the statutory time limit (23 June). The Claimant had initially attempted to present her claim on 23 June, but it was rejected by the Tribunal, as she had not provided, contrary to Rule 10(1)(c) of the Employment Tribunal's Rules of Procedure 2013, a valid Early Conciliation ('EC') number.
3. It is again not in dispute that having been notified of this rejection on 26 June, she wrote the same day, apologising for her error in inserting an incorrect number and provided a copy of her Early Conciliation Certificate, issued to her on 23 May, showing the correct number.
4. Employment Judge Harper reconsidered the rejection of her claim on 2 July, revoking that decision and treating the claim, therefore, as having been

presented on 26 June. However, he pointed out that nonetheless the claim, as now presented, appeared to be out of time and ordered this Preliminary Hearing.

5. While Mr Cumming initially sought to contend that Judge Harper was in error in accepting the claim as presented on 26 June and there was accordingly some discussion as to the jurisdiction, or otherwise, of this Tribunal to reconsider that reconsideration decision of Judge Harper, he, after a short adjournment, restricted his submissions to the question of whether or not it was 'reasonably practicable' for the Claimant to have presented her claim in time.

The Law

6. Section 111(2) of the Employment Rights Act 1996 states:

'(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 the period of three months.*

7. The case of **Porter v Bandridge Ltd [1978] ICR943 EWCA** indicates that the onus of proving that presentation in time was not reasonably practicable rests on the Claimant.
8. The case of **Asda Stores Ltd v Kauser [2007] 0165/07 UKEAT** states that 'reasonably practicable' does not mean 'reasonable', or 'physically possible', but something like 'reasonably feasible'. As stated by Lady Smith in that case, *'the relevant test is not simply a matter of looking at what was possible but to ask whether, on the facts of the case as found, it was reasonable to expect that which was possible to be done'*.
9. **Dedman v British Building and Engineering Appliances Ltd [1974] ICR 53 EWCA** and other subsequent cases listed factors that might indicate when it was not reasonably practicable for a claimant to present his or her claim within time, such as ignorance of their rights/the time limit/relevant facts, or advisers being at fault, illness or postal delays.
10. Mr Cumming also referred to several cases as the omission of a valid EC number not being a merely 'technical' failure, but a substantive one (**Tesco Stores Limited v Kayani [2016] 0128/16/DM UKEAT**).
11. In respect of the 'last minute' nature of presentation, he also referred to the case of **Adams v British Telecommunications plc [2017] ICR 382 UKEAT** in which Simler J stated:

'21. Equally, it seems to me, although Mr Sankey (the claimant's representative) argued the contrary, the employment judge was entitled to have regard to the fact that the claimant left it very late to present the ... claim and, had she sought to present it earlier, any error or defect in it might have been capable of being

rectified within the primary limitation period ... I accept that it is a three-month limitation period and a complainant is entitled to have the whole of that three-month limitation period so that any claim lodged at the end of the period is just as valid as a claim lodged much earlier. That is so, but leaving the claim to be lodged at the end of the period risks potentially serious consequences. Those are factors that a tribunal is entitled to have regard to in determining what was reasonably practicable in any particular case ...'.

The Facts

12. The Claimant stated that she had had legal advice via her union throughout this matter and was neither in ignorance of her rights, nor the time limit. Nor were there any further facts which she awaited, before being able to present her claim. She accepted that her claim is a relatively straightforward one – she does not consider that the Respondent should have dismissed her on grounds of incapability, as some of the periods of sick leave upon which they relied should not have been taken into account.
13. She embarked on the ACAS EC process on 23 April and was issued the EC certificate on 23 May [3]. She said that at that point she made further enquiries of her union and that they responded on 7 June. She accepted, therefore that at that point, or very shortly thereafter, her claim was ready for presentation to the Tribunal, but that she did not attempt to do so until the final day of the time limitation period, 23 June. When asked why she had delayed for this approximately two-week period, she said that she had been looking for work.

Submissions

14. Mr Cumming relied on his skeleton argument, stressing that the failure to provide a valid EC number was not a mere 'technicality' but a strict requirement, obliging the Tribunal to reject presentation of a claim. While refusal to extend the time limit under s.111(2) may seem harsh to a lay claimant, the requirement is a strict one and the Claimant has not met it.
15. The Claimant said that 'everybody made mistakes' and her mistake in this case should be overlooked.

Conclusion

16. I find that it was reasonably practicable for the Claimant to have presented her claim within the statutory time limit and that therefore, not having done so, it be struck out, for the following reasons:
 - 16.1. It is self-evident that it was reasonably practicable for her to have presented a valid claim on 23 June, by correctly completing the EC number. She provided no explanation, beyond her mistake, for failing to do so. Applying **Asda Stores**, it was 'reasonably feasible' for her to do so. Failure to provide a valid number is not a 'technical' failure, but a substantive one (**Tesco Stores Ltd**).
 - 16.2. She was aware of the time limit.

- 16.3. She had legal advice for much of the time.
- 16.4. She provided no other possible exceptional circumstance that might render the timely presentation not reasonably practicable (**Dedman** et alia – paragraph 9 above).
- 16.5. Applying **Adams**, I think it significant that despite having two clear weeks to do so, she left off presentation of her claim until the ‘eleventh hour’, thus hugely limiting her opportunities to rectify any errors.

Employment Judge O’Rourke

Date: 17th October 2018