



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4104478/2018

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Held in Glasgow on 28 August 2018

Employment Judge: L Doherty

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Mr M Wallace

Claimant

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Association Of Chartered Certified Accountants

Respondent
Represented by:
Ms Skeoch
Solicitor

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that it does not have jurisdiction to consider the claimant's complaint of unfair dismissal.

REASONS

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1. The claimant presented a complaint of unfair dismissal on 2 May 2018. It is not in dispute that his employment came to an end on 30 September 2017, and that a Preliminary Hearing ("PH") was fixed to determine whether the Tribunal had jurisdiction to consider the claim for unfair dismissal on the basis that it had been lodged outwith the statutory time limit.

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2. It is not an issue in this case that the claim was presented outwith the applicable time limit.

3. What is an issue is whether the Tribunal should extend time in terms of section 111 (2) of the Employment Rights Act 1996 (ERA) in order to consider the claim.

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E.T. Z4 (WR)

4. The Tribunal will consider whether it is reasonable practicable for the claimant to present his claim within the applicable time limit, and if not, to consider if the claimant presented his claim within a reasonable period after the expiry of that time limit. The claimant gave evidence on his own behalf, and both sides
- 5 lodged documentary productions.

Findings of fact

5. For the information and evidence before the Tribunal made the following finds of fact. For the claimant, his date of birth was 24 April 1981, was employed by the respondents until 30 September 2017 as a senior product manager.
- 10 The claimant was served with three months' notice of termination of his employment by the respondents on 30 June 2017, and his employment with the respondents came to an end on 30 September 2017. Prior to his employment with the respondents coming to an end, the claimant had researched the position in relation to bringing a claim of unfair dismissal. The
- 15 claimant was aware by September 2017 of the right to bring a complaint of unfair dismissal, and was aware of the statutory time limit which applied to presenting such a claim.
6. Throughout all of July and August 2017, the claimant was looking for
- 20 alternative work and he was offered and accepted a job in Copenhagen. The claimant spent time travelling in September 2017, on a pre-planned and paid for holiday. During September and October 2017, the claimant had to coordinate moving out of his flat, cancelling bills and subscriptions, changing address, redirection and other administrative matters associated with leaving
- 25 his flat, and moving abroad. The claimant started his new employment on 11 October 2017, and focused on learning his new job, and finding a permanent apartment. The claimant stayed in AirB&B accommodation until the end of November. During November, the claimant spent time in looking for apartments, and carrying out necessary administrative tasks in order to
- 30 register as a resident in Denmark.
7. The claimant also however contacted Acas on 24 October 2017, which is the date of receipt by Acas of the Early Conciliation Notification.

8. The claimant was aware from his discussions with Acas of the time limit for presenting a complaint of unfair dismissal. The Acas certificate was issued on 24 November 2017. In November 2017, the claimant continued to take up time to deal with administrative issues in Denmark. The claimant was also engaged in November 2017 with a dispute with his landlord in Glasgow and he raised an appeal which was successful. The claimant understood there was a four week time limit in which to deal with the landlord dispute, and he was able to comply with that. In November 2017, the claimant moved to a more permanent address in Denmark, however by 28 November, he was made redundant from his job in Denmark.
9. This was a difficult event for the claimant to deal with. The claimant had to work six weeks notice prior to his employment coming to an end. The claimant looked for new work in December 2017 and January-February 2018. He attended a total of twenty one interviews, and completed various job applications, and attended various aptitude tests. He registered with three recruitment agencies. The claimant was forced to use his savings in order to continue living in Denmark. He had no other source of income. As a result of this, he had to cut back on non-essentials, and he cancelled his internet subscription, only having usage of the inclusive data on his phone during January and February. He had access to the internet via his employer in November and December, but did not wish to use this to research raising a claim against an employer in Scotland.
10. The claimant was offered a job on 19 February 2018, which was to start in early March. This job was based in Sweden, and the claimant worked remotely. The claimant did not receive his first salary from the employment until April. Because he was being paid in a Swedish salary, he had to go through a similar process of registration in setting up a bank account in Sweden. It was continuously in the back of the claimant's mind to submit the Tribunal claim, but he understood that he would need to attend the court in Scotland, after losing his job in Denmark, he did not know how much of a commitment this would take, and how much money he would have spare to

do this. After starting his new job, and receiving a salary at the end of April, knowing he was going to receive an income, the claimant finally considered he was in a position to submit the Tribunal claim, which he did on 2 May 2018.

Submissions

5 **Claimant's submissions**

11. The claimant referred to the evidence he had given in his submissions. He admitted this was a priority choice he had made, and that he lodged a claim at a point when he was able to give it the time and attention which it required. He finally found himself in a position to present the claim after he secured new
10 employment however his time, attention and resources had been taken up and had been pressing other significant matters which he had spoken to in evidence.

The respondent's submissions

12. Miss Skeoch presented outlined submissions, which is supplemented with
15 oral submissions.

13. Given that it is accepted the claim was lodged outwith the statutory time limit, Miss Skeoch's submissions focused on the reasonable practicability of presenting the claim in time.

20 14. Miss Skeoch submitted that it was up to the claimant to establish that it was not reasonably practicable to present the claim within the time limit (Porter v Bandridge Ltd 1978 ICR 943, CA).

25 15. Miss Skeoch referred to part of the ET1, in which the claimant made reference to not wanting to risk colleagues who remained in the respondent's employment facing repercussion. Miss Skeoch submitted it was not accepted by the respondents that there was any impact or risk of impact on other employees. The fact that the claimant had contacted Acas was inconsistent
30 with the suggestion this was a significant factor. Furthermore, the claimant

accepted in his evidence that it was simply guesswork on his part, and he had no evidence to support the assertion made.

5 16. Miss Skeoch referred to the case of Birmingham Optical Group plc v Johnson
1995 ICR 459, and submitted that even it was not conveyed or commercially
sensible to raise proceedings, this is not a reason not to do so. The claimant
was clearly aware of the fact that he could present the claim, and of time limit
involved. Miss Skeoch considered whether it was feasible for him to have
raised the claim. She submitted effectively that none of the matters which
10 the claimant relied upon were sufficient to support the position that it was not
feasible to raise the claim in time. The claimant was able to deal with a host
of administrative matters, including a legal dispute with his landlord. This
was most certainly on par with raising an Employment Tribunal claim. The
claimant accepted in his evidence that his medical condition do not prevent
15 him from dealing with these matters, and therefore could not be argued that
he was prevented by his medical condition from lodging a Tribunal claim. The
difficulties which the claimant faced in terms of finding new employment, and
financial difficulties which he faced were no different to difficulties
encountered by other claimants but this was not a reason to extend the
20 statutory time limit. The claimant spoke in evidence about his concerns about
raising a claim, was ultimately facing an application for expenses in the event
he was unsuccessful, but this again was no different to other claimant. Even
if the Tribunal were to be satisfied that it was not reasonably practicable to
raise the claim within three months, there had been an unreasonable delay in
25 presenting the claim which was presented 93 days after expiration of the
applicable time limit as extended by the Acas certificate. In these
circumstances, Miss Skeoch submitted the claim should be dismissed.

Consideration

30 17. Section 111 (2) of the ERA provides as follows: 'subject to the following
provisions of this section, 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.'

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18. Section 207 B (3) of the ERA provides for an extension of that time limit to take account of the requirement to undertake early conciliation. The practical effect of Section 207(B), is that the statutory time limit is extended by the length of time between the date of presentation of the EC notification, and the issue of the EC certificate. The claimant was dismissed on 30 September 2017. EC notification was presented on 24 October, and the EC certificate was issued on 24 November. The effect of this is that the time limit for the claimant to submit his claim was extended by thirty days (25 October – 24 November) under Section 207 B (3) of the ERA, therefore time limit for the presentation of this claim was extended to 29 January 2018.

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19. The claim was submitted on 2 May 2018, and has therefore entered 93 days after the expiry of the applicable time limit and the ERA as extended by Section 207 B of the ERA.

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20. As indicated above, there was no dispute in this case that the claim was lodged out of time, and the Tribunal firstly considered whether it was not reasonably practicable for the claim to be lodged within the statutory time limit. What is reasonably practicable is the question of fact for the Tribunal, the onus of proving that the presentation on time was not reasonably practicable rests with the claimant. Reasonably practicable 'does not mean reasonable, but nor does it mean physically possible' but it has been said to mean something like 'reasonably feasible'. The Tribunal had no difficulty in accepting that a great deal of the claimant's time had been taken up trying to find a new job, thereafter moving to Denmark, dealing with all the administrative matters

which went with that, which included moving out of his house in Glasgow, and finding accommodation in Denmark, and arranging administratively both in Scotland, and in Denmark, in order to accommodate this. Also, there was no difficulty in accepting that the claimant found it difficult, in having moved to Denmark, he lost his job there, and again was out of work, by the end of November. The Tribunal accepted that losing his job in the UK, and then in Denmark, having moved to Denmark, would have had an effect on the claimant financially, and that, as said in his evidence, he would have been going back on his savings. These were not matters however which would have prevented the claimant from presenting a complaint to the Employment Tribunal.

21. The claimant was aware, and had been since September 2017, of the right to present a claim of unfair dismissal, and of the time limit for doing so. As he candidly accepted in evidence, he prioritised dealing with other pressing matters before deciding to raise a claim. His choice however to prioritise in this way is not a matter which applies the test of reasonable practicability, or feasibility, or a matter which rendered it not practicable to present the claim within the statutory time limit. The Tribunal accepted that the claimant would have found experience of losing his employment, and jobsearch, stressful and this would have had a toll on him mentally and emotionally, however it was not suggested by the claimant that the stress which he was under as a result of this was such that he was prevented from lodging a claim. Indeed the fact that the claimant was able to engage in other activity associated with living in another country and finding another job, but also to engage in litigation in Scotland which was subject to a time limit which he was able to comply with, does not support the conclusion that this prevented him as a result of the stress he was under from presenting a claim. However, the Tribunal accepted the claimant may have had limited access to the internet for a period however he had access to internet via his employment in December, and he had access via the data on his phone during January and February.

22. Furthermore, the claimant was aware of being able to raise a claim, and the time limit for doing so, and therefore limited access to internet, did not raise a barrier to him presenting a claim. The claimant had also alluded to in his evidence as to the reasons he did not submit a claim, to concern about the impact on other colleagues who remained in the respondent's employment. Again, the Tribunal accepted in cross examination that he had no evidence in support of this suggestion, and it was simply guesswork on his part, the Tribunal was not satisfied that any concern that the claimant may have had would reasonably prevent him raising a claim. It appeared that such a concern had no substantial basis.
23. Lastly, the Tribunal considered the claimant's position to the effect that he was concerned about the financial implications of presenting a claim and losing and that potentially incurring liability of expenses, at a point where he had no income, and then the time in preparation which were required to lodge the claim.
24. It was not satisfied that either of these factors were matters which meant that it was not reasonably feasible for the claimant to present his claim. All litigants are potentially at risk of an award of expenses, and it is not uncommon for a claimant at an Employment Tribunal to be out of work. Such agreements are still subject to the statutory time limit. In connection with the time estimated to prepare for lodging an ET1, the Tribunal was satisfied that it was likely on balance and this was again a matter which the claimant chose to prioritise in choosing to devote his time and attention to other matters, such as job search, or issues associated with relocation. The Tribunal was satisfied that this was again a matter which the claimant chose to prioritise, and the facts found in this case, the Tribunal was satisfied that the claimant was aware of the right to lodge a claim, and the time limit for doing so. He had the ability to deal with a number of complex administrative matters, which included raising court proceedings in another forum in Scotland, on the basis of these facts, the Tribunal was satisfied it was reasonable to expect the claimant could have raised the claim within the statutory time limit.

25. Having reached this conclusion, it is unnecessary for the Tribunal to go on to consider the second branch of the test in Section 111 (2).

26. The Tribunal's conclusion that it is not satisfied that time should be extended
5 to consider the claim, and therefore it does not have jurisdiction to consider
 the claim of unfair dismissal.

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Employment Judge: L Doherty
Date of Judgment: 03 September 2018
15 Entered in register: 06 September 2018
 and copied to parties