Case Number 2501177/17

THE EMPLOYMENT TRIBUNALS

Claimant Mr D Vardy

Respondent Healthcare Environmental Group Ltd

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

At a Public Preliminary Hearing

HELD AT NORTH SHIELDS ON 12th January 2017
EMPLOYMENT JUDGE GARNON (sitting alone)
For Claimant: in person
For Respondent: Mr C Edward of Counsel

JUDGMENT

The Judgment of the Tribunal is that the claim, presented on 2nd October 2017, of unfair dismissal and/or subjection to detriment on the ground of having made a protected disclosure and raising concerns about health and safety , can be considered because it was not reasonably practicable for it to be presented before that date and it was presented within a reasonable time thereafter.

REASONS (bold print being my emphasis)

1 . The Issue and Statutory Provisions

1.1. The preliminary issue is whether a Tribunal is prevented from considering the claim because it was presented outside the time limit for doing so, or whether the limited exception to that prohibition applies. The law applicable is contained in sections 48 and 111 of the Employment Rights Act 1996 (the ERA) . The start date for time limit in the former is the date of the act of detriment, or the last in a series of such acts. This is likely to have been very shortly before the dismissal without notice, but even if it were a few weeks earlier it would make no difference to my decision. As the principles are identical, I cite only section 111 which includes

(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

(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

1.2. The parties agree the effective date of termination (EDT) was on or shortly after 17th October 2016. If this was the only relevant provision, the claim needed to be

presented by 16th January 2017. Section 207B of the ERA provides for extension of time limits to facilitate Early Conciliation (EC) through ACAS. The claimant did not contact ACAS until 29th September 2017, so the section does not help him. On any analysis, the claim is about 9 months out of time**.**

2 Findings of Fact

2.1. The claimant says in his claim form he was '*unable to issue tribunal proceedings at that time by virtue of the requirements to pay fees to lodge a claim'*. He has provided a witness statement for today and given oral evidence.

2.2. He was pursuing a grievance with the respondent when he contacted the Citizens Advice Bureau (CAB) in Morpeth and had an appointment with Ms Aileen Cunningham on 5th September 2016 . She said he may be able to resign and claim constructive dismissal but this would be complex and he may require legal help which he could not afford .The CAB told him where to find the forms for starting a tribunal claim himself and the time limit to present a claim.

2.3. On 13th September 2016 he received a email from the respondent's solicitor warning him he may be subject to legal action resulting from his alleged protected disclosure. Following this, he was dismissed.

2.4. He sought advice from a friend and colleague Barry Davies who said he should start a tribunal claim. He looked on the internet but stopped due to the fees. Most of Mr Edwards cross examination focused on the effect of possible remission on the fees the claimant would have had to pay. He is married with two children . His wife works. He had been off sick and received Housing Benefit, Child Tax Credit and Working Tax Credit. When he obtained new work in November 2016, the Housing Benefit stopped and the Working Tax Credit diminished. He was not disqualified from remission by disposable capital but the family monthly income was , at material times when he could have issued after EC, about £2000 per month at a time when , for full remission, it could not exceed £ 1735. For every £10 of income over that figure he would have to pay £5 in fees. As Mr Edward worked out he may have been able to pay only £150 on issue. The question I put to him was whether he could have paid that and he answered emphatically he could not .

2.5. Despite valid criticism from Mr Edward of the detail produced by way of bank statements to prove the claimant's means, the documents I have seen show enough to convince me that even the reduced issue fee would have been beyond his means without it placing intolerable pressure on his family budget. He always knew a hearing fee would also be payable later and, even with partial remission, that would have been well outside his means.

2.6. He contacted Sintons solicitors on 26th October to seek advice, hoping they would take on the case on a "no win no fee" basis. They telephoned roughly a week later and informed him of the costs he would incur as disbursements being Tribunal fees, in whole or part, and perhaps a medical report. He could not afford either.

2.7. He could then, as he does now, have acted in person. He says he did not feel confident representing himself but has since been a witness for two colleagues at a tribunal against the respondent in which the colleagues were successful. Watching how the tribunal process worked made him wish he had been able to afford to go ahead with a claim.

2.8. On or about 1st September 2017 Mr Davies told him tribunal fees had been abolished. He immediately contacted the CAB to verify this who told him he may still be able to make a claim. He telephoned ACAS who told him he would need to do so as fast as possible. He had by now mislaid some paperwork which helped his case so had to obtain further copies from the Health and Safety Executive. He did so and contacted ACAS to commence EC on 29th September 2017. ACAS sent the EC Certificate on 2nd October 2017and the claim was issued that same day.

2.9. The claimant had five years continuous employment and was paid £316 gross £234 net per week. Within five weeks he found another job paying about £45 per week less.If his unfair dismissal case succeeded compensation on a full liability basis would be unlikely to exceed £10000. He would have to win the detriment claim too to be compensated for injury to feelings. I agree with my colleague Employment Judge Buchanan who reviewed the file on receipt of the response that both the claim and the response are arguable. The respondent probably could pay any award and re-imburse the fees if the claimant won, but may have resisted doing so .

3 The Relevant Case Law

3.1. There is ample case law to the effect "reasonably practicable" means reasonably feasible or "do-able". The burden of proving it was not reasonably do-able rests on the claimant. Schultz –v-Esso Petroleum 1999 IRLR 488 says the main focus should be on the closing stages of the limitation period, in this case December 2016-January 2017. Mr Edward cited three authorities Trevelyans-v-Norton 1991 ICR 488, Cullinane-v-Balfour Beatty UK EAT /0537/10 and Tesco Stores-v-Kayani UKEAT/0128/16. None of them help him on the facts of this case

3.2. In Palmer v Southend on Sea Borough Council 1984 IRLR 119 the Court of Appeal held to limit the meaning of "reasonably practicable" to that which is reasonably capable physically of being done would be too restrictive a construction. The best approach is to ask "Was it reasonably feasible to present the complaint within three months?" The question is one of fact for the Tribunal taking all the circumstances into account. It will consider **the substantial cause** of the failure to comply with the time limit. It may be relevant to investigate whether and when, the claimant **knew** he had the right to complain. It will frequently be necessary to know whether he was being advised at any material time and, if so, by whom. It will be relevant in most cases to ask whether there was any substantial fault on the part of the claimant or advisor which led to the failure to comply with the time limit.

3.3. The requirement for fees was introduced on 29th July 2013. A Supreme Court decision, R (on the application of Unison) v Lord Chancellor [2017] UKSC 51, held such fees were unlawful and struck down the legislation. It held the fees put people off making or continuing claims, even those likely to succeed. Lord Reed said:

93. Secondly, as explained earlier, the Review Report itself estimated that around 10% of the claimants … said that they did not bring proceedings because they could not afford the fees . The Review Report suggests that they may merely meant that affording the fees meant reducing "other" areas of non-essential spending in order to save money. It is not obvious why the explanation given by the claimant should not be accepted. But even if the suggestion in the Review Report is correct, it is not

a complete answer. The question whether fees effectively prevent access to justice must be decided according to the likely impact of the fees on behaviour in the real world. Fees must therefore be affordable not in a theoretical sense but in the sense that they can ***reasonably*** *be afforded. Where households on low to middle incomes can only afford fees by sacrificing the ordinary and reasonable expenditure required to maintain what would generally be regarded as an acceptable standard of living, the fees cannot be regarded as affordable"*

3.4. Lord Reed placed emphasis on low value claims thus: *96. Furthermore, it is not only where fees are unaffordable that they can prevent access to justice. They can equally have that effect if they render it* ***futile or irrational*** *to bring a claim. ….. If, for example, fees of £390 have to be paid in order to pursue a claim worth £500 ..* ***no sensible person*** *will pursue the claim unless he can be virtually certain that he will succeed in his claim, that the award will include the reimbursement of the fees, and that the award will be satisfied in full****. If those conditions are not met, the fee will in reality prevent the claim from being pursued, whether or not it can be afforded.*** *In practice, however, success can rarely be guaranteed. In addition, on the evidence before the court, only half of the claimants who succeed in obtaining an award receive payment in full, and around a third of them receive nothing at all.*

3.5. From the time the Unison decision was given, it was anticipated by lawyers Tribunals would be asked to permit claims issued out of time to be heard based on the argument the unlawful fees made it not reasonably practicable to issue. For the fee regime to be a relevant consideration, it must have had at least **some** effect on the particular claimant's decision not to issue. Also it must be reasonable for the claimant to believe it to be a sufficient factor to dissuade him from issuing in time.

3.6. There is a different test for Equality Act 2010 (EqA) claims which is whether it is " just and equitable " to hear a claim issued more than three months after the act of which complaint is made . Although the legislation at the time was more restrictively worded, the guidance to which I and many others still look as a starting point is British Coal Corporation -v-Keeble 1997 IRLR 336 The EAT said the tribunal would be assisted by the factors mentioned in s.33 of the Limitation Act 1980, which deals with the exercise of discretion by courts in personal injury cases. It requires consideration of the prejudice each party would suffer as the result of the decision and regard to **all the circumstances of the case** including (a) the length of **and reasons for** the delay (b) the extent to which the cogency of the evidence is likely to be affected by the delay (c) the extent to which the party sued had cooperated with any requests for information (d) the promptness with which the plaintiff acted once he knew of the facts giving rise to the cause of action and (e) the steps taken to obtain professional advice once he knew of the possibility of taking action.

3.7. Mrs Justice Smith (as she then was) said "*the claim appeared unanswerable apart from the limitation point. Mr Napier, who has appeared today on behalf of the appellants, has conceded that is so".* In Keeble, the strength of the case was a factor, so in other cases, I believe. could the weakness of a case in EqA cases. By analogy with another area in which relative prejudice has to be considered, granting

leave to amend, in Woodhouse-v-Hampshire Hospitals HH Judge McMullen said *It is true in the assessment of the balance of hardship and balance of prejudice there may in all the circumstances include an examination of the merits – in other words, there is no point in allowing an amendment to add an utterly hopeless case. …*

3.8. When fees were introduced one stated intention of Government was to deter unmeritorious claims. As the Supreme Court pointed out, the regime deterred meritorious claims in equal measure, which is why the legislation introducing them was struck down. Now Tribunals have to grapple with questions of extending time under both the tests in the ERA and the EqA, In my view, under the ERA, the strength of the case sought to be brought out of time is only relevant to the question of **why** the claimant did not issue in time. In Conney-v -Tees Esk and Wear Valley NHS Foundation Trust Case number 2501096/17 I had to consider both tests. I could see for myself the major difficulties the claimant would have to overcome to succeed in her claims. Two specialist employment law advisors, each fully appraised of all the facts, formed the view at the time her case was so weak it was not even worth risking the issue fee. The unlawful fees were not the main, let alone the only reason (per Smith J in Keeble), for her not issuing in time. The fees were not a **substantial** cause of her failure, only an "added disincentive".

4 Conclusions

4.1. In my view, there are three parts to the ERA time limit issue: (a) what were the **substantial causes** of the claimant not issuing in time? (b) did fees, or any other factor, render it "not **reasonably** practicable" to issue in time? (c) if so, was the claim presented within such further period as the Tribunal considers reasonable?

4.2. Having taken, in late 2016, steps necessary before considering issuing the claimant says the **most** important factor was the requirement for fees. His lack of confidence in representing himself was a minor factor. I accept that.

4.3 None of the other factors mentioned in Palmer seem relevant. The claimant knew he had an arguable case, he knew about time limits and the advice he was given by the CAB and Sintons was basically correct. Mr Edward submitted it was deficient on the question of remission. The most I can say is that it may not have been complete, but, if it had been, the claimant could not have afforded even a reduced fee.

4.4. An employee who has been unfairly dismissed after short continuous employment may find another job equally paid very quickly. His compensation would be a basic award and compensation for loss of statutory rights which may well not even equal the fees payable. In this case, the facts are not so stark, but the limited value of the claim compared to the fees was a reasonable deterrent to issuing. Although if the claimant obtained a judgment, the respondent would be likely to pay the amount ordered, it may not have. Borrowing Lord Reed's terminology, a reasonable claimant could easily have concluded it would have been" *futile or irrational*" to bring a claim at the time and no *sensible person* "would not have risked issuing even if he had a good argument and some means of finding the fees.

The claimant did not argue his case on this basis so I say no more about it .His case is simply that, with or without partial remission , he could not afford the fees without depriving his family of essentials. I accept that.

4.5. I view point (c) as requiring consideration of two time "gaps". The first is between the date of the Supreme Court judgment on 26th July 2017 and the date of issue. Some claimants who have advice from lawyers or unions could reasonably be expected to have known of the judgment almost as soon as it was published. Others may reasonably not have found out about it for several weeks. I accept the claimant did not find out until 1st September , and reasonably so. I would not expect an unrepresented claimant to take less than a few weeks to work out how then to proceed. The claim was presented within 10 weeks of the Supreme Court judgment, which I find reasonable.

4.6. The second time gap is between the date of the events to which the claim relates and the date of issue. Again, each case will depend on its own facts. Some cases involve evidence which is mainly the recollection of witnesses as to what they did and why. Other cases depend largely on documentary evidence. If witnesses cannot be expected to remember events, or if documents have been discarded in the normal course of business, due to the passage of time, it may not be reasonable to consider a claim despite the fact the claimant is not to blame for the delay. Much of the relevant evidence in this case will be of events dating back only to mid 2016. As they were the subject matter of grievances there should be records to help refresh the memory of witnesses. In many cases, claimants paid the issue fee but later could not pay the hearing fee. If they were struck out administratively for that reason, they are now having their claims re-instated automatically months or years after the event. This time gap is also reasonable.

Employment Judge Garnon

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON 12th JANUARY 18