



EMPLOYMENT TRIBUNALS

Claimant
Mr D Cahill

Respondent
Department for Work and Pensions

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

**HELD AT NORTH SHIELDS
EMPLOYMENT JUDGE GARNON (SITTING ALONE)**

ON 14 JANUARY 2019

Appearances

For Claimant: in person
For Respondent: Mr A Tinnion of Counsel

JUDGMENT DISMISSING A CLAIM AT A PRELIMINARY HEARING

The claim was presented outside the time limit for doing so, in circumstances where it was reasonably practicable for it to be presented within time. The Tribunal cannot therefore consider the claim which is hereby dismissed.

REASONS

1. This is a claim of unfair dismissal and, arguably, wrongful dismissal but the time limits in both are the same. The issues to be decided at this hearing are

(a) whether the claim was presented before the end of the relevant time limit ?

(b) if not, was it reasonably practicable for it to have been?

(c) if not, was it presented within a reasonable time thereafter?

Rule 53 of the Employment Tribunal Rules of Procedure 2013 (the Rules) empowers me to issue a final judgment even at a preliminary hearing if the issue I decide is determinative of a case.

2. Section 97 of the Employment Rights Act 1996 (the Act) defines the "Effective Date of Termination" (EDT) as

(a) in relation to an employee whose contract of employment is terminated by notice, whether given by his employer or by the employee, means the date on which the notice expires,

(b) in relation to an employee whose contract of employment is terminated without notice, means the date on which the termination takes effect.

The claimant's employment was terminated by the respondent, without notice, on 17 May 2018. The claim was presented on 4 October 2018.

3. Section 111 says the Tribunal **shall not consider** a complaint under that 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 it was not reasonably practicable for the complaint to be presented before the end of that period of three months.

4. If this was the only relevant provision, the claim needed to be presented before midnight on 16 August 2018. However, s 207B provides for extension of time limits to facilitate Early Conciliation (EC) before institution of proceedings, thus:

(2) In this section—

(a) Day A is the day on which the complainant or applicant concerned complies with the requirement in subsection (1) of section 18A of the Employment Tribunals Act 1996 (requirement to contact ACAS before instituting proceedings) in relation to the matter in respect of which the proceedings are brought, and

(b) Day B is the day on which the complainant or applicant concerned receives or, if earlier, is treated as receiving (by virtue of regulations made under subsection (11) of that section) the certificate issued under subsection (4) of that section.

(3) In working out when a time limit set by a relevant provision expires the period beginning with the day after Day A and ending with Day B is not to be counted.

(4) If a time limit set by a relevant provision would (if not extended by this subsection) expire during the period beginning with Day A and ending one month after Day B, the time limit expires instead at the end of that period.

(5) Where an employment tribunal has power under this Act to extend a time limit set by a relevant provision, the power is exercisable in relation to the time limit as extended by this section."

5. The claimant contacted ACAS on 5 July (Day A). ACAS sent the EC Certificate by e-mail transmitted on 26 July. If I apply ss.3 there would be 21 days of the limitation period to be discounted so it would expire on 6 September. If I apply ss. 4, 16 August does fall between Day A and one month after Day B but that is less favourable because one calendar month after Day B is 26 August. The more favourable date of 6 September is the correct limitation date. The claim is four weeks out of time. There is ample case law eg. Dedman v British Building and Engineering Appliances Ltd 1974 ICR 53, to the effect time limits are just that—limits not loose targets. Reasonably practicable means reasonably "do-able". The burden of proving it was not reasonably do-able rests on the claimant, see Porter-v- Bandridge 1978 ICR 943.

6 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, whether he was being advised at any material time and, if so, by whom, and 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. Palmer held that using internal processes does not of itself render it not reasonably practicable to present within time. Illness may excuse late presentation but Schultz –v-Esso Petroleum 1999 IRLR 488 says the main focus should then be on the closing stages of the three month period.

7. Wall’s Meat Company v Khan , Riley –v-Tesco Stores and Dedman it may be enough to mean it was not reasonably practicable where the claimant was **reasonably** ignorant of the correct time limit. However, time limits are widely publicised. Since the introduction of EC, ACAS, when issuing an EC certificate, often remind prospective claimants about them and the information they give online does so too.

8. The claimant gave evidence today, having recently sought legal advice and prepared a witness statement. He is 54 years of age and his job as an Executive Officer for the DWP would mean he is used to dealing with forms and using them online. He says in his statement I have a “*discretion to extend the time period on the basis that it was either not reasonably practicable to present the claim in time or that it is “just and equitable” to do so* “. The second part of that sentence is wrong. The “just and equitable” test applies to claims under the Equality Act 2010 which this is not. He says he was ill with depression and not thinking straight at the time of the disciplinary hearing in May and produces a GP letter to that effect. I must decide whether he was still so incapacitated in July–September as to render it not reasonably do-able for him to issue.

9. I accept he was still on medication for depression though there is no medical evidence to support that. However, it is self evident he was not so incapacitated as to be unable to pursue his claim because what he did by contacting ACAS was done correctly. Of itself, his illness did not render it not reasonably do-able for him to issue.

10. The claimant appealed against his dismissal on 5 June. On 20 June it was heard and the result given on 26 June. Had dismissal not been effective until 26 June, the initial time limit would have expired on 25 September and been extended for EC to 16 October. That would mean the claim was in time. His statement says he was **either** told by the ACAS conciliator the time limit ran from the disposal of the appeal **or** he misunderstood what she told him. In oral evidence he accepted it was the latter. If he thought 26 June to be the start of the limitation period, it would be an error of law. He accepts that, having been told so by the solicitor he has seen recently.

11. I cannot accept it was reasonable for him not to know the correct time limit. I take into account his mental state at the time but he is a literate, and IT literate, man who , had he taken steps to inform himself of the correct position could, and would, easily have found in the month after Day B his time for issuing was running out .

12. I cannot find it was not reasonable practicable for this claim to have been presented in time. I have no further discretion to exercise. These complaints must be dismissed.

EMPLOYMENT JUDGE GARNON

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON 14 JANUARY 2019