



EMPLOYMENT TRIBUNALS

Claimant: Mr B Philcox
Respondent: Railscape Ltd
Heard at: East London Hearing Centre
On: 25 October 2018
Before: Employment Judge Goodrich (sitting alone)

Representation

Claimant: Ms K James (Partner of Claimant)
Respondent: Mr M Hayes (Managing Director of Respondent)

JUDGMENT

The judgment of the Employment Tribunal is that the Claimant's complaints were presented out of time. It was not reasonably practicable for them to have been presented within the time limit and it was presented within a reasonable period thereafter.

REASONS

The claim and the issues

1. The background to this preliminary hearing is as follows.
2. The Claimant first submitted his Employment Tribunal claim on 9 May 2018. Before doing so he had obtained ACAS Early Conciliation covering the period from 28 February to 13 March 2018.
3. The name of the Claimant's representative given on the claim form was Ms Kimberley James. She is the partner of the Claimant.

4. The Claimant's claim is for unfair dismissal, holiday pay and notice pay. Details of the claim were given in the claim form.
5. There was a problem with the Claimant's claim form. The name of the Claimant's employer was given as being Michael Hayes in the ET1 claim form. The name of the person contacted under ACAS Early Conciliation was given as Railscape Ltd.
6. As a result of the discrepancy between the name on the ACAS Conciliation Certificate and the name on the claim form, the claim was rejected by the Employment Tribunal.
7. A letter dated 15 May 2018 was sent to the Claimant notifying him of the rejection of the claim form.
8. On 4 June 2018, the Tribunal received a re-submitted claim form. The Claimant had crossed out the name of Michael Hayes and put instead Railscape Ltd so that the names on the certificate and ET1 claim form for the Respondent matched.
9. The claim was accepted.
10. The Judge considering the claim form had also calculated that the claim was out of time, as the time limit for submitting the claim, even taking into account the extension of time provisions under the ACAS Early Conciliation legislation, was 1 May 2018.
11. The claim was listed for a three hour preliminary hearing in order to consider the question of whether the claim was in time and whether time limits should be extended. A letter was sent to the parties explaining that the Claimant would need to explain why it was not reasonably practicable to submit the claim in time and if it was not reasonably practicable, whether it was reasonably practicable to submit the claim within a reasonable period thereafter.
12. The case was initially listed to be heard in August. Because of insufficient judicial resources, however, the parties were sent away and the case was re-listed for today.
13. Meanwhile, the Respondent had entered an ET3 response filed by the human resources organisation that provides employment advice to them. Various points were made in the ET3 response. One of them was that the claim was out of time. Another was that the Claimant was at no time employed by the Respondent. They also gave their account of the circumstances under which the Claimant was dismissed from working for them.
14. The issue for me today at this preliminary hearing, therefore, is to consider whether in the circumstances of this case time limits should be extended.

The relevant law

15. Under Rule 12(1)(e) of the Employment Tribunals Rules of Procedure, an Employment Tribunal claim will be rejected if the name of the Claimant on the claim form is not the same as the name of the prospective claimant on the Early Conciliation Certificate to which the early conciliation number relates. There is a saving clause which allows the Judge to allow the claim if he or she considers that the Claimant made a minor error in relation to a name or address and it would not be in the interests of justice to reject the claim; but this was not applicable in this case.

16. Rule 13(4) of the Employment Tribunal Rules provides that if the Judge decides that the original rejection was correct but that the defect has been rectified, the claim shall be treated as presented on the date that the defect was rectified.

17. The effect of Rule 13(4) is, therefore, that the date for presentation of the claim is taken as being the date that it was presented for the second time, namely 4 June 2018.

18. So far as time limits are concerned, section 111 Employment Rights Act 1996 provides that an Employment Tribunal shall not consider an unfair dismissal claim unless it is presented to the Tribunal before the end of the period of three months beginning with the effective date of termination, or 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.

19. The extension of time limits provisions under Order 7 of the Employment Tribunals (Extension of Jurisdiction) Order 1994 are the same for breach of contract claims as for unfair dismissal claim. The Working Time Regulations also contain the same time limits requirements.

20. The statutory provisions that I have referred to are not, however the only relevant provisions. There are extension of time provisions contained in the early conciliation legislation. These have the effect of what has been described as “stopping the clock” whilst early conciliation is being undergone with ACAS; or by adding one month to the date that the early conciliation concludes provided that the claim was in time at the date early conciliation is started.

21. There has also been guidance given in numerous cases as to the approach Employment Tribunals should take in considering whether to extend time under these provisions.

22. In the case of *Palmer and Saunders v Southend on Sea Borough Council* [1984] IRLR 119 CA, it was explained that:

“The meaning of the words “reasonably practicable” in section 111(2) lies somewhere between reasonable on the one hand and reasonably physically capable of being done on the other. The best approach is to read “practicable” as the equivalent of “feasible” and to ask “was it reasonably feasible to present the complaint to the Employment Tribunal within the relevant three months?”

23. In the *Palmer and Saunders* case the Court of Appeal went on to give further guidance on the sorts of factors a Tribunal should consider. They gave guidance that it is pre-eminently an issue of fact for the Employment Tribunal taking all the circumstances of the given case into account. The kinds of factors they suggest were such as:

23.1 What was the substantial cause of the employee’s failure to comply with the statutory time limit? Was he or she physically prevented, for instance by illness or a post strike or something similar?

23.2 Did the Claimant at the time of dismissal, and if not when thereafter, know that he had the right to complain of unfair dismissal?

- 23.3 Was there any misrepresentation about any relevant matter by the employer to the employee? Was the employee being advised at any material time and if so, by whom? What was the extent of the advisor's knowledge of the facts of the employee's case and the nature of any advice they may have given him?
- 23.4 Was there any substantial failure on the part of the employee or his advisor which led to the failure to comply with the time limit?
- 23.5 What was the manner and reason for which the employee was dismissed, including the extent to which, if at all, the employer's conciliatory appeals machinery had been used? The mere fact, however, that an employee was pursuing an appeal does not mean that it was not reasonably practicable for the application to be made in time.

24. Ignorance or a mistaken belief in respect of essential matters can be regarded as grounds for an Employment Tribunal to hold that a claim in time was not reasonably practicable if it can be shown that the ignorance or mistaken belief was itself reasonable. It will not be regarded as reasonable if it arises from the fault of the complainant in not making such enquiries as they reasonably should have made in all the circumstances.

25. In the case of *Marks & Spences plc v Williams-Ryan* [2005] IRLR 562 CA, it was stated that section 111(2) should be given a liberal interpretation in favour of the employee.

The evidence

26. On behalf of the Claimant I heard evidence from Ms Kimberley James, the Claimant's partner; and from the Claimant himself.

27. I heard from Mr Michael Hayes, Managing Director of the Respondent, although he did not give evidence in the witness box. At various stages, particularly when giving his closing submissions, Mr Hayes gave evidence and I have borne in mind what he said.

Findings of fact

28. The Claimant's partner's explanation and that of the Claimant himself for submitting his claim late are as follows.

29. I have accepted the evidence given by all three individuals I have heard from as being truthful to the best of the witnesses' recollections, although of course Mr Hayes was not the person who was submitting his case late, so would be less aware of the circumstances.

30. The Claimant lives with his partner Ms Kimberley James.

31. The Claimant has dyslexia.

32. Because of his dyslexia they decided that Ms James would represent him and she has taken all the relevant steps since the date of his dismissal. The steps to which I refer below were carried out by Ms James. She was the main witness today.

33. The Claimant's dyslexia were described both by himself and his partner as being relatively mild for reading and relatively severe for writing.

34. It was because of the Claimant's lack of skills and confidence in reading and writing that he and Ms James arranged for her to act for him.

35. Mr Hayes challenged, at least to some extent, whether the Claimant's dyslexia were as severe as was being claimed. He pointed, for example, to the need for the Claimant to have passed many job requirements in order to work for the Respondent; and to attend courses which, he said, required a greater ability to manage written materials than was being claimed.

36. The Claimant's response was that he did receive help for aspects of his work requiring the skills. He stated that when going on courses (apart from one where he received no help and was unable to participate properly) tutors gave him help and that his supervisors and some colleagues were aware of his dyslexia.

37. I find the Claimant and his partner's assessment of the extent of his dyslexia to be fair. My observation was that unless the Claimant was faking the extent of his limitations when reading out the affirmation card I gave to him (he read the first line of it before I took over by reading out in order for him to repeat my words), was that he struggled to read the first line fluently, although with time and haltingly he could do so. It may of course have been that he was reading less well than usual if nervous. Nonetheless, I do not believe he was deliberately overplaying his reading difficulties.

38. The Claimant's partner, Ms James, has multiple sclerosis and restricted mobility. She has a wheelchair.

39. Ms James's multiple sclerosis is generally fairly stable. From time to time she has periods of time which may last for several weeks or even months when she is more or less unable to move and is highly restricted. Stress, she believes, can be a factor in triggering such relapses. I do not have the medical expertise to say if this is the case, although it appears plausible.

40. Although in the past Ms James has done shop work, because of her multiple sclerosis she is not in work at present.

41. After the Claimant was dismissed from working with the Respondent they were short of money and could not afford legal advice.

42. As indicated above, the Claimant was dismissed on 19 January 2018.

43. Ms James sought to get advice through telephoning a Citizen's Advice Bureau. She made some telephone calls to them for advice during the next two to three weeks. In one of those telephone calls, they advised her of the right to bring an Employment Tribunal claim. They also advised her to write a letter asking for the reasons for her dismissal.

44. In early February, as advised, Ms James wrote to the Respondent asking for the reasons for the Claimant's dismissal. The Citizen's Advice Bureau advisor had advised her to give 14 days for a response and she did so.

45. Ms James, however, got no response from the Respondent to her letter.
46. Mr Hayes explained that he did not reply because the Claimant had not been an employee of the Respondent and did not want to prejudice the Respondent's case. This advice was unsatisfactory in that the Respondent has access to advice from an advisor giving human resources advice who has been representing the Respondent in these proceedings (although I understand that the representative, who would otherwise have attended today, is ill so Mr Hayes was put in the position of needing to represent the company).
47. Ms James telephoned the Citizen's Advice Bureau after the 14 days had elapsed and she had not got a response.
48. Ms James was advised to undertake ACAS early conciliation.
49. Ms James did as advised and on 28 February, as indicated earlier, started ACAS early conciliation.
50. The early conciliation was unsuccessful. ACAS issued an early conciliation certificate on 13 March 2018.
51. After receipt of the early conciliation certificate Ms James was unwell, having a relapse in her multiple sclerosis. She could not remember the exact amount of time that she was unable to take the matter forward.
52. After she had recovered sufficiently from her multiple sclerosis relapse she telephoned the Citizen's Advice Bureau again. They advised her to submit an Employment Tribunal claim. She did so within a few days of her telephone conversation, taking a few days to draft the claim form.
53. Although Ms James asked the Citizen's Advice Bureau for advice about the time limits, they did not advise her one way or the other. Ms James stated that she was told that if they got their advice wrong they could be in trouble.
54. Ms James believed, mistakenly as it turns out, that her claim was in time at the date it was presented on 9 May.
55. After the Claimant had received the letter of rejection to which I have referred above, she telephoned the Employment Tribunal and was told that the names on the certificate or claim form for the Respondent were different. As referred to above she crossed out the name of the Respondent and re-submitted the claim form.
56. In box 15 of the claim form Ms James provided some additional information explaining that she had changed the name because it did not match and that she was working for Railscape Ltd for whom the boss is Michael Hayes. She stated that she has sent this back as soon as she could but it was a Bank Holiday weekend and hoped it was okay. She signed section 15 as being 25 May 2018.
57. The re-submitted claim form was received on 4 June 2018 and accepted.
58. Bearing in mind the guidance to which I have referred in my summary of the law, was it reasonably practicable for the Claimant to have presented his claim in time? I have in mind particular the following factors: -

- 58.1 The reason in part for the delay in submitting the claim form in time was Ms James's illness, her multiple sclerosis relapse.
- 58.2 The Claimant knew of his right to bring an Employment Tribunal claim form although not the correct time limit.
- 58.3 I have considered whether her mistaken belief was reasonable. In the circumstances of this case, I consider that it was. There is no legal aid available for bringing Employment Tribunal proceedings. Both the Claimant and his partner were out of work. They could not afford to pay for legal advice. The Citizen's Advice Bureau did not give them advice about the time limits. The issues of time limits are complicated, particularly with the effects of the early conciliation changes to the time limits.
- 58.4 Mr Hayes was also responsible for part of the delay himself by ignoring the letter sent to him rather than responding to it promptly.
- 58.5 Considering the extent to which the Claimant was at fault, I consider that they were doing their best in difficult circumstances.
- 58.6 On balance therefore, I find that it was not reasonably practicable to present the claim in time.

59. I have considered whether the claim was presented within a reasonable period thereafter. I find that it was. So far as what took place in the first place, it was an understandable mistake to have put the name of the managing director as being the name of the employer in the ET1 claim form and for it to have differed from that in the ACAS Early Conciliation Certificate. Ms James went to a Citizen's Advice Bureau to obtain advice, contacted them throughout the period in question and followed their advice. In the difficult circumstances they were in she submitted the claim within a reasonable period after the time limit.

60. After I had given my decision, recorded above, I discussed with the parties the preparations needed for the full hearing of the case and made the following case management orders.

Employment Judge Goodrich

Date 16 November 2018