



EMPLOYMENT TRIBUNALS

Claimant:
Mrs L Hilsdon

v

Respondent:
Dorchester Living Ltd

PRELIMINARY HEARING

Heard at: Reading **On:** 7 January 2019

Before: Employment Judge Hawksworth (sitting alone)

Appearances

For the Claimant: No attendance or representation

For the Respondent: Ms P Hall (Consultant)

JUDGMENT having been sent to the parties on **23 January 2019** and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

REASONS

1. The Respondent made an application for strike out the Claimant's claim on the basis that it was out of time. The application for strike out of the Claimant's claim was heard on 7 January 2019. In my judgment of 23 January 2019 I determined that the Claimant's claim was out of time and therefore the tribunal does not have jurisdiction to hear the claim.
2. The Claimant had been given notice of the Respondent's application and the hearing date. She did not attend the hearing and was not represented.
3. The Claimant had applied for postponement of a previous preliminary hearing to hear the strike out application listed for 22 August 2018 and was invited to submit any evidence for the tribunal to consider evidence in her absence if she wished. After that hearing was postponed she wrote to the tribunal and the Respondent on 22 October 2018 providing written evidence to be taken into account at the hearing on 7 January 2019. For these reasons I decided that I could fairly proceed with the hearing in the Claimant's absence.

Facts

4. The Claimant gave notice of the termination of her employment as a construction secretary with the Respondent on 27 February 2017, claiming constructive dismissal. Her last day of employment was 28 February 2017. She notified ACAS for early conciliation on 8 May 2017 and an early conciliation certificate was issued on 8 June 2017.
5. The Claimant did not at this stage present a claim to the Employment Tribunal. She says this was because she could not afford the fee. There is no evidence that the Claimant made any application for remission of the fee. The Claimant did not provide any evidence of ill health during the period from June to December 2017 which would have prevented her from presenting a claim to the employment tribunal.
6. The Claimant became aware on 11 December 2017 that Employment Tribunal fees no longer applied. Prior to 11 December 2017 she was unaware of the Supreme Court ruling in the Unison case and the withdrawal of fees.
7. The Claimant's claim was presented on 18 December 2017.
8. The Claimant's claim form indicated that she wished to complain of unfair dismissal (including constructive dismissal) and she also ticked the box to indicate that she was making another type of claim which the Employment Tribunal could deal with. She mentioned "stress at work". She did not tick the box marked 'discrimination' or refer to any discrimination or other tribunal complaints elsewhere on the ET1 form.
9. A preliminary hearing was listed to consider the question of jurisdiction, ie to consider whether the Claimant's claim had been presented in time.
10. The preliminary hearing was originally listed for 22 August 2018. The Claimant requested a postponement of that hearing. She had started a new job in July 2018 and was unable to take any leave during her three month probation period. The postponement request was refused by Employment Judge Vowles. He directed that if the Claimant wished the Tribunal to consider any evidence in her absence, she should send hard copies of such evidence to the Tribunal and the Respondent. On 21 August 2018, the preliminary hearing had to be postponed in any event, as it was unlikely that the case would have been able to be heard on 22 August 2018. It was relisted for 7 January 2019.
11. On 22 October 2018, the Claimant sent the Tribunal and the Respondent copies of her evidence and reasons for bringing the claim after the prescribed time limits. These comprised bank statements and copies of emails between the Claimant and solicitors' firms and legal advice centres during the period 4 to 15 June 2017, evidencing that the Claimant made attempts to find affordable legal assistance, but was unable to do so. She was advised of the unfair dismissal time limit by some of the solicitors she approached. She was also advised of avenues to explore for free legal advice including the CAB.

12. The evidence provided by the Claimant (including in her ET1) is that she has a daughter and that her gross monthly income at the relevant time was less than £2,333.00.
13. The Claimant did not attend the relisted hearing on 7 January 2019.

The Law

Time limit in unfair dismissal complaints

14. Under section 111(2) of the Employment Rights Act 1996, a complaint of unfair dismissal (including in cases of constructive unfair dismissal) must be presented:

*“(a) before the end of the period of three months beginning with the effective date of termination of employment; 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.”*
15. When considering whether a complaint should be allowed under section 111(2)(b), there is a two stage test. A tribunal must consider i) whether it was reasonably practicable for the complaint to be presented before the end of the three month period and if it was not, then ii) whether it was presented within such further period as the tribunal considers reasonable. The onus of proving that presentation in time was not reasonably practicable is on the Claimant.
16. Reasonably practicable means something close to reasonably feasible. In Asda Stores Ltd v Kauser EAT 0165/07 Lady Smith explained that: ‘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 have been done.’
17. Ignorance of rights is a factor that the tribunal may take into account when considering whether or not it was reasonably practicable to present a claim in time, but ignorance of rights is not a ‘universal excuse’ (Avon CC v Haywood-Hicks 1978 ICR 646 EAT).

Effect of Acas early conciliation

18. Under section 207B(3) of the Employment Rights Act, in working out when an unfair dismissal time limit expires, the period during which the claimant was engaged in Acas early conciliation is not counted. The period of early conciliation begins with the day after Day A (the date on which Acas is notified for early conciliation) and ends with Day B (the date of the Acas early conciliation certificate).
19. However, under section 207B(4), if after section 207B(3) has been applied to calculate an extended time limit, that extended time limit expires less than one month after Day B, then the time limit expires instead one month after Day B. ‘One month after Day B’ is calculated using the

'corresponding date rule' (Tanveer v East London Bus and Coach Company Limited, UKEAT/0022/16/RN).

Employment tribunal fees

20. The Employment Appeal Tribunal Fees Order 2013 came into force on 29 July 2013, requiring an issue fee of £250 to be paid when a complaint of unfair dismissal was presented to an employment tribunal, and a hearing fee of £950 to be paid prior to the hearing.
21. There was a scheme allowing remission of fees on a means tested basis. There was a sliding scale for partial remission. By way of example, to qualify for full remission of the fee, a Claimant with one child had to have a gross monthly income of below £1,330.00. To qualify for partial remission of the fee, a Claimant with one child had to have a gross monthly income of below £5,330.00.
22. On 26 July 2017, following the handing down of the decision of the Supreme Court in R (ota Unison) v Lord Chancellor [2017] UKSC 51 which declared the fees unlawful, the requirement to pay an issue or hearing fee was withdrawn.

Conclusions

The complaints brought by the Claimant

23. I first considered what complaints had been brought by the Claimant.
24. In section 8 of the ET1 form where a Claimant is asked to indicate the type of claim being made, the Claimant ticked two boxes. The first was the box indicating that she wished to pursue a complaint of unfair dismissal (including constructive dismissal).
25. The Claimant also ticked a box marked 'I am making another type of claim', but it was not clear from the form what other type of claim she was making. There was no reference to any other employment tribunal claim elsewhere in the ET1 form. The Claimant referred to 'stress at work', but this is not a claim the Employment Tribunal has jurisdiction to consider.
26. The Claimant said in an email to the tribunal on 28 January 2019 that her claim included complaints of discrimination. However, the Claimant did not tick the box in section 8 of the ET1 marked 'discrimination' or refer to discrimination anywhere else on the form. She did not make any application to amend her claim to include complaints of discrimination.
27. I have concluded that the Claimant has not brought any complaint of discrimination and has not made any application to amend her claim to include one. The only complaint which has been brought which the tribunal may potentially consider, subject to the time point, is the Claimant's complaint of constructive unfair dismissal.

The unfair dismissal time limit in the Claimant's case

28. I have next identified the time limit for the Claimant to present a complaint of unfair dismissal.
29. The effective date of termination in the Claimant's case was 28 February 2017. The original time limit for presenting a complaint of constructive unfair dismissal was 27 May 2017 (three months less one day from the effective date of termination).
30. This time limit can be extended because of Acas early conciliation. The Claimant started Acas early conciliation on 8 May 2017 (Day A). An Acas early conciliation certificate was issued on 8 June 2017 (Day B). Applying section 207B(3), the period from 9 May 2017 to 8 June 2017 is not counted for the purposes of calculating the time limit. This gives an extended time limit of 27 June 2017.
31. For the purpose of section 207B(4), one month after Day B is 8 July 2017 (using the corresponding date rule). The time limit extended under section 207B(3) of 27 June 2017 expires during the period which starts with Day A and ends one month after Day B. Section 207B(4) therefore comes into play and provides that the extended time limit in fact ends on the day which is one month after Day B, that is 8 July 2017.
32. The time limit for presentation of a complaint of unfair dismissal in the Claimant's case was therefore 8 July 2017. The claim was presented on 18 December 2017.

Reasonably practicable test

33. I next have to consider whether it was reasonably practicable for the Claimant to have presented a complaint of unfair dismissal by 8 July 2017.
34. It is clear that the Claimant knew about her right to bring an unfair dismissal claim and the time limits for doing so. She was advised of this by some of the solicitors she approached during the period 4 to 15 June 2017.
35. The Claimant says that the reason she did not present a claim before the time limit expired was because she was unable to afford the fee. She did not become aware until 11 December 2017 that the fee regime had ended. When she became aware that she no longer had to pay a fee, she presented her claim on 18 December 2017.
36. Even if she was unable to afford the fee, it would have been possible for the Claimant to have submitted an employment tribunal claim before 8 July 2017 accompanied by an application for remission of the fee. There was no evidence that the Claimant made any application for fee remission. On the basis of the information provided in her ET1 and bank statements, it appears that she may have qualified for full or partial remission.
37. I bear in mind that the burden is on the Claimant to demonstrate that it was not reasonably practicable for her to submit her claim by 8 July 2017. I find

that the Claimant has not met that burden. In particular, I conclude that it would have been reasonably practicable for her to submit her claim by 8 July 2017 had she made an application for remission of the fee. This was a step which could have been taken by the Claimant, and I have concluded that it would be reasonable to expect a Claimant who could not afford the fee, and who may have been entitled to full or partial remission, to have taken this step.

- 38. If a remission application by the Claimant had been fully successful, she would not have had to pay any fee. If her application had been partially successful she could have considered whether she was able to afford to pay the reduced fee required to proceed. As things turned out, with the withdrawal of the fees regime on 26 July 2017, which was very shortly after the time limit expired in the Claimant’s case, it is likely that if the Claimant had made an application for remission of the fee, she would have been informed of the withdrawal of the fees regime while her remission application was being considered, and her claim could have proceeded.
- 39. I have therefore concluded that it was reasonably practicable for the Claimant to have presented a complaint of unfair dismissal accompanied by an application for remission of the fee, by 8 July 2017.
- 40. For completeness, I have gone on to consider the second limb of the test. This requires me to consider whether, if it was not reasonably practicable for the Claimant to present a claim by 8 July 2017, the further period within which the claim was presented was a reasonable one.
- 41. I have concluded that the further period within which the claim was presented was not a reasonable one. The claim was presented almost 5 months after the withdrawal of the requirement to pay a fee. During that period, the Claimant took further legal advice. There was also a considerable volume of coverage in the media of the withdrawal of the fees regime at the time of the Unison claim. I have concluded that the Claimant could reasonably have been expected to have learned or been advised about the abolition of fees and presented her claim within a shorter period after 26 July 2017.
- 42. In the light of my findings that it was reasonably practicable for the Claimant to have presented a complaint of unfair dismissal by 8 July 2017 and that (even if it was not) the further period in which the complaint was presented was not a reasonable one, the claim was presented out of time and the tribunal does not have jurisdiction to hear it.

Employment Judge Hawksworth

Date: 16 April 2019

Reasons sent to the parties on

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For the Tribunal office