EMPLOYMENT TRIBUNALS

Claimant	*Respondent*
Mr P Minchell	Supply Technologies (UKGP) Limited

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT NORTH SHIELDS ON 27th July 2018
EMPLOYMENT JUDGE GARNON (SITTING ALONE)

Appearances
For Claimant: Mr J Whitworth Lay Representative
For Respondent: Mr B Frew of Counsel

JUDGMENT DISMISSING A CLAIM AT A PUBLIC PRELIMINARY HEARING

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

REASONS

1. This is a claim of unfair dismissal and it is agreed it was presented after the end the relevant time limit. The issues to be decided at this hearing are
(a) was it reasonably practicable for it to have been?
(b) if not, was it presented within a reasonable time after?
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 the whole case.

2. Section 97 of the Employment Rights Act 1996 (the Act) defines the "Effective Date of Termination". It is agreed to be 10th November 2017. Section 111 says the Tribunal **shall not consider** a complaint 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.

3. If this was the only relevant provision, the claim needed to be presented before midnight on 9th February 2018. With effect from 6th April 2014 s. 207B provides for extension of time limits to facilitate Early Conciliation (EC), 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."

4. At all material times the claimant was being assisted by Mr Alan Cummings of the Durham Miners Association (DMA). I accept neither he nor they are experts in employment law but they do have some knowledge. There was a time when they did represent members before Employment Tribunals mainly prior to the introduction of EC. it was also at a time when claim forms would simply be posted either to the Central Office or to a Regional Office. Mr Cummings assisted the claimant through his disciplinary and appeal process. The appeal was rejected on 21 December 2017. Mr Cummings knew enough to contact ACAS and did so on 18th January 2018 (Day A). ACAS sent the EC Certificate by email on 2nd February. If ACAS are told communicate by email that is the method they adopt. The time for presentation would at best now be 2nd March . The claim arrived at the Tribunal office on 1st May 2018 . At least that is when it arrived by the proper route.

5. Rule 85 says documents may be sent to the tribunal by post, personal delivery, including a courier, or email but that is subject to paragraph 2 which refers to Rule 8 and says claim forms must be presented in accordance with a Practice Direction (PD) issued by the President under regulation 11. That PD commencing on 26 July 2017 says a claim form may be submitted online, by post to the Central Office of the Employment Tribunal in Leicester or by personal delivery, which presumably includes a courier, to a Regional Office. This means a document posted to a Regional Office is rejected by the administrative staff without referral to a Judge. This PD replaced an earlier PD issued when there were tribunal fees and it is no accident this current version was published on the day fees were declared unlawful. When they existed, a reason for channelling claim forms to Leicester included they had the facility to process the fees

whereas Regional Offices did not. I fully accept Mr Cummings did not and cannot reasonably have been expected to know about this PD.

6. If this were the only reason the claim was late, I would have little difficulty in extending time. What was unclear is when he first posted the form. With the consent of both parties I stood the case down whilst I made enquiries of the administrative staff. Fortunately they had kept a copy of the manuscript claim form. Whenever claims are received, they are always processed quickly because of time limits. Emails which have been retained show the form was probably received from DMA by this office on Monday 19 March. The best case scenario for the claimant would be it arrived on 16 March and took one working day to process.

7. At 12:54 on 19 March the tribunal emailed DMA a standard letter headed "RETURNED CLAIM FORM NOTICE". It explained why the form was being returned and how it should be presented properly. At 14:09 Mr Cummings replied "*I have sent the form recorded delivery*". I accept it was sent by that method to this office but that is still by post . A similar exchange took place between a different tribunal clerk and Mr Cummings on 21 March. Mr Cummings must have known, by that date at the latest, presentation of the claim to this office was ineffective.

8.The next question is why it was not until two weeks after expiry of the time limit as extended for EC that even the incorrect method of presentation was adopted. On that point what is said in paragraphs 9 and 10 of some very helpful written submissions is that Mr Cummings has no recollection of receiving the email from ACAS which attached the EC certificate. He does not deny it was received and it must have been, because the manuscript claim form bears the correct EC number. I repeat the EC certificate was emailed on 2 February. Mr Cummings must have realised EC had failed and, to put it colloquially, the clock was running. He says he was waiting for a telephone call from ACAS who had led him to believe they would continue to explore settlement. It did come but he does not say when. At that point he knew EC had ended and says he i*mmediately* submitted the claim by post.

9. The other notable feature is that it is now clear beyond doubt by 21 March Mr Cummings must have known the original manuscript form which had been presented had been rejected. It was a full six weeks later, the claim was validly presented .

10. 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. 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 targets so even a day late is still out of time . The burden of proving it was not reasonably practicable rests on the claimant.

11. Fault on the part of a claimant's adviser may be a relevant factor but in most cases, an adviser's fault will bind the claimant. Much will depend on the type of adviser involved. As Lord Denning put it in Dedman '*If a man engages skilled advisers to act for him - and they mistake the time limit and present [the claim] too late - he is out. His remedy is against them.'* Wall's Meat Co Ltd v Khan 1979 ICR 52, explained lack of knowledge or a mistaken belief will not be reasonable if it arises either from the fault of the claimant or of advisers. In Northamptonshire County Council v Entwhistle 2010 IRLR 740, the EAT, said where the adviser's failure was itself reasonable, for example, where the employee or advisor had both been misled by the employer on some factual matter it may be not reasonably practicable to present in time. There have been cases where being misled or wrongly advised by an employment adviser at a Jobcentre Dixon Stores Group v Arnold EAT 772/93, or tribunal employees Rybak v Jean Sorelle Ltd 1991 ICR 127, , and London International College Ltd v Sen 1993 IRLR 333, ,or ACAS Drewery v Carphone Warehouse Ltd ET Case No.3203057/06, made it not reasonably practicable to present within the time limit. There is nothing like that in this case.

12. Mr Cummings accepts he did know the time limits and EC **.** His main argument is that he received the email from ACAS but did not appreciate its significance. I cannot accept that was a reasonable error so I cannot find it was not reasonable practicable for this claim to have been presented in time. I have no further discretion to exercise.

13. However if I had been persuaded it was a reasonable error , there is no doubt on 21 March at the latest , he must have known the manuscript form had been rejected , but it took another six weeks to issue the form in the proper way. That is not within a further reasonable period. This complaint must be dismissed.

14. Mr Frew applied for costs or wasted costs. Rule 76 (1) provides (bold is my emphasis)
A Tribunal ***may*** *make a costs order .., and* ***shall consider*** *whether to do so, where it considers that—*
(a) a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or ***the way that the proceedings (or part) have been conducted;*** *or*
(b) any claim or response had no reasonable prospect of success.

15. The Court of Appeal and EAT have said costs orders in Employment Tribunals:

(a) are rare and exceptional.
(b) whether the Tribunal has the right to make a costs order is separate and distinct from whether it should exercise its discretion to do so .

(c) in determining whether to make a costs order, the paying party's conduct as a whole needs to be considered. Per Mummery LJ in Barnsley MBC v. Yerrakalva [2011] EWCA 1255 at para. 41:
"*The vital point in exercising the discretion to order costs is to look at the whole picture of what happened in the case and to ask whether there has been unreasonable conduct by the claimant in bringing and conducting the case and, in doing so, to identify the conduct, what was unreasonable about it and what effects it had*."
(d) there is no rule/presumption that a costs order is appropriate because the paying party lied or failed to prove a central allegation of their case, see HCA International Ltd. v. May-Bheemul 10/5/2011, EAT.
(e) even if there has been unreasonable conduct making it appropriate to make a costs order, it does not follow that the paying party should pay the receiving party's entire cost of the proceedings. Yerrakalva at para. 53.

16. I cannot accept the claimant has acted unreasonably but his representative may have. However in all the circumstances I would not exercise my discretion to order the claimant himself to pay costs. Mr Frew accepted it would be harsh but maintained his application for wasted costs against DMA on the basis that the argument time should be extended never stood any reasonable prospect of success. I always have some sympathy for lay representatives who are doing their best. But more importantly the terms of rule 80 preclude a wasted costs order against a representative who is not acting for profit. The DMA are in that category, so I make neither order.

EMPLOYMENT JUDGE GARNON

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON 27th JULY 2018