



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Ms J Rich

v

Sussex Partnership Foundation Trust

RESERVED JUDGMENT AT PRELIMINARY HEARING

Heard at: Southampton

On: 1/8/2019

Before: Employment Judge Wright

Appearances

For the Claimant: Mr A Philpott of Counsel

For the Respondent: Miss K Geddes of Counsel

1. This case was listed on 13/8/2018 for a preliminary hearing to address the following matters:
 - a Jurisdiction (time)
 - b Issues
 - c Case Management
2. The hearing was listed for two hours and after hearing submissions from both parties, judgment was reserved. The claimant claims unfair dismissal and wrongful dismissal.
3. The issue in respect of time is that it appears the claim was presented outside of the primary time limit (although the claimant contends that the claim form presented on 3/4/2018 was presented in time). The effective date of termination ('EDT') could not be identified and the parties were asked to reach agreement on this point; failing that, to set out their respective positions on the EDT. Irrespective of that, the parties agreed the primary time limit for presentation of the claim was 5/4/2018.

4. The ET1 contends for an EDT of 17/11/2017 (box 5.1 ET1). The respondent has not completed box 4.1 on the ET3, but in the skeleton agreement contends for an EDT of 24/11/2017. When this was queried, Miss Geddes took instructions and said the summary dismissal was communicated to the claimant in person on 7/11/2017. Acas Early Conciliation ('Acas EC') commenced on 5/2/2018 and the certificate was issued on 5/3/2018.

Law and applicable Rules

5. The parties referred to the following Rule of Schedule 1 of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013 ('the Rules').

Rule 8 Presenting the claim

- (1) A claim shall be started by presenting a completed claim form (using a prescribed form) in accordance with any practice direction made under regulation 11 which supplements this rule.
- (2) A claim may be presented in England and Wales if—
 - (a) the respondent, or one of the respondents, resides or carries on business in England and Wales;
 - (b) one or more of the acts or omissions complained of took place in England and Wales;
 - (c) the claim relates to a contract under which the work is or has been performed partly in England and Wales; or
 - (d) the Tribunal has jurisdiction to determine the claim by virtue of a connection with Great Britain and the connection in question is at least partly a connection with England and Wales.

(3) ...

6. Rule 10 Rejection: form not used or failure to supply minimum information

- (1) The Tribunal shall reject a claim if—
 - (a) it is not made on a prescribed form;
 - (b) it does not contain all of the following information—
 - (i) each claimant's name;
 - (ii) each claimant's address;
 - (iii) each respondent's name;

- (iv) each respondent's address; or
- (c) it does not contain all of the following information—
 - (i) an early conciliation number;
 - (ii) confirmation that the claim does not institute any relevant proceedings; or
 - (iii) confirmation that one of the early conciliation exemptions applies.

(2) The form shall be returned to the claimant with a notice of rejection explaining why it has been rejected. The notice shall contain information about how to apply for a reconsideration of the rejection.

7. Rule 12 Rejection: substantive defects

(1) The staff of the tribunal office shall refer a claim form to an Employment Judge if they consider that the claim, or part of it, may be—

- (a) one which the Tribunal has no jurisdiction to consider; or
- (b) in a form which cannot sensibly be responded to or is otherwise an abuse of the process.

(2) The claim, or part of it, shall be rejected if the Judge considers that the claim, or part of it, is of a kind described in sub-paragraphs (a) or (b) of paragraph (1).

(3) If the claim is rejected, the form shall be returned to the claimant together with a notice of rejection giving the Judge's reasons for rejecting the claim, or part of it. The notice shall contain information about how to apply for a reconsideration of the rejection.

8. Rule 13 Reconsideration of rejection

(1) A claimant whose claim has been rejected (in whole or in part) under rule 10 or 12 may apply for a reconsideration on the basis that either—

- (a) the decision to reject was wrong; or
- (b) the notified defect can be rectified.

(2) The application shall be in writing and presented to the Tribunal within 14 days of the date that the notice of rejection was sent. It shall explain why

the decision is said to have been wrong or rectify the defect and if the claimant wishes to request a hearing this shall be requested in the application.

(3) If the claimant does not request a hearing, or an Employment Judge decides, on considering the application, that the claim shall be accepted in full, the Judge shall determine the application without a hearing. Otherwise the application shall be considered at a hearing attended only by the claimant.

(4) 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.

9. Rule 8 refers to a claim being started by presenting a completed claim form (using a prescribed form) in accordance with any practice direction made under regulation 11. Regulation 11 therefore provides:

(1) The President may make, vary or revoke practice directions about the procedure of the Tribunals in the area for which the President is responsible, including—

(a) practice directions about the exercise by Tribunals of powers under these Regulations (including the Schedules); and

(b) practice directions about the provision by Employment Judges of mediation, in relation to disputed matters in a case that is the subject of proceedings, and may permit an Employment Judge to act as mediator in a case even though they have been selected to decide matters in that case.

(2) Practice directions may make different provision for different cases, different areas, or different types of proceedings.

(3) Any practice direction made, varied or revoked shall be published by the President in an appropriate manner to bring it to the attention of the persons to whom it is addressed.

10. The relevant practice direction ('PD') was issued by the President (England and Wales) on 2/11/2017. It provides:

Presidential Practice Direction – Presentation of Claims

1. This Presidential Practice Direction, which sets out the methods by which a completed form may be presented, is made in accordance with the provisions of Regulation 11 of the Employment Tribunals (Constitution & Rules Procedure) Regulations 2013. The Practice Direction has effect on and from 26 July 2017.

2. Rule 8 (1) of Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 (“the Rules”) is in the following terms:

“Presenting the claim

8.—(1) A claim shall be started by presenting a completed claim form (using a prescribed form) in accordance with any practice direction made under regulation 11 which supplements this rule.”

3. For the purpose of this Presidential Practice Direction “claims” are defined by Rule 1 of the Rules as any proceedings before an Employment Tribunal making a complaint. A “complaint” is also clarified as anything that is referred to as a claim, complaint, reference, application or appeal in any enactment which confers jurisdiction on the Tribunal.

4. Methods of starting a claim

A completed claim form may be presented to an Employment Tribunal in England & Wales:

Online by using the online form submission service provided by Her Majesty’s Courts and Tribunals Service, accessible at www.employmenttribunals.service.gov.uk;

PO By post to: Employment Tribunal Central Office (England & Wales),
Box 10218, Leicester, LE1 8EG.

A claim may also be presented in person to an Employment Tribunal Office listed in the Schedule to this Practice Direction (and exceptionally by email to such an Office only during the period 26 July 2017 to 31 July 2017 inclusive and not otherwise).

5. The Presidential Practice Direction dated 14 December 2016 is hereby revoked.

11. Complaints to employment tribunals. 111 ERA provides:

- (1) A complaint may be presented to an employment tribunal against an employer by any person that he was unfairly dismissed by the employer.
- (2) Subject to the following provisions of this section, 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, 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.

Chronology

12. What is not in dispute is that the claimant, via her solicitors, purported to present her claim form (referred to as the 'ET1') on 3/4/2018. This was transmitted to the London South ET email address, with the ET1 and particulars of claim attached. It was sent at 17:57 by a secretary on behalf of a partner at the claimant's solicitors.

13. Prior to that, it appears the secretary had started an online ET1 submission via the online form submission service. A 'claim number' - 170H-S962 (page 40) was sent to the partner on 3/4/2018 at 17:48. The 'no-reply' email stated:

'You've started a claim to an employment tribunal. To return to your claim you'll need your claim number (above), and memorable word'

14. There was then a link to 'complete claim'.

15. It was assumed the secretary had abandoned the attempt to submit the ET1 via the online form submission service and instead sent the email to the London South office at 17:57. Indeed on 4/3/2018 (page 37) the secretary emailed the partner and said:

'I was a little nervous about lodging the ET1 yesterday for [the claimant] and had emailed this through to them.

I have called up the Tribunal this morning and they have confirmed that this has been received by them, but this has been forwarded to the Central Office for them to put onto the system as the Tribunal email addresses do not process ET1s. I wanted to check to see if they required the online application as well in case they required the reference number that comes out from it, but the lady advised that this would essentially be doubling up/another application so said that I shouldn't do this.

Let me know if there's anything else we need to do to ensure this is processed.'

16. No further action was then taken by the claimant's solicitors. The next event was a letter dated 18/5/2018 (page 38) was sent to the solicitors from the London South ET which informed the claimant:

'There are only three prescribed methods of presenting an Employment Tribunal Claim form (ET1) which are detailed below:

- 1 Online by using the online submission service provided by HMCTS accessible at www.employmenttribunals.service.gov.uk
- 2 By post to the Employment Tribunals Central Office (England & Wales) P O Box 10218, Leicester, LE1 8EG.
- 3 By hand to a designated Employment Tribunal office within business hours (between 9am and 5pm Monday to Friday excluding public holidays - see overleaf for designated offices)

The attached claim form has not been presented using one of the prescribed methods; it therefore cannot be accepted and is returned to you accordingly.'

17. Thereafter on 22/5/2018 it appears the ET1 was presented online (page 35) and 'claim number' 170H-S962 was recorded as having been submitted on 22/5/2018 to the Bristol Tribunal office.

18. On the same date, the claimant's solicitor made an application for reconsideration (pages 32-41) under Rule 13(1) of the Rules to the London South Tribunal office. The basis of the application was the claimant's claim:

'be accepted and declared to be lodged on either the:-

3/4/2018; or

22/5/2018. If the latter date is chosen, we ask that the Tribunal declare that it was not reasonably practicable for the claimant's claim to be lodged by the 5/4/2018 and that it was only reasonably practicable to do so by 22/5/2018. We request that the claimant's time to lodge the claim is extended accordingly.'

19. The application set out the background and stated that the online process was commenced on 3/4/2018 and then 'put on hold' whilst the ET1 was emailed to the London South ET. It set out the conversation the secretary had had on 4/4/2018. It relied upon the ET's 'incorrect advice' and the fact that it had taken 6.5 weeks to be notified of the defect. The application requested that the application be accepted, with the ET1 being 'lodged' as per the above. The application concluded by saying allowing the application would be in accordance with Rule 70¹ and it would be in the interest of justice to do so.

20. On the 1/6/2018 a 'Notice of Claim' was sent advising the claim had been 'accepted'. The letter went onto say:

¹ Rule 70 provides for a reconsideration of a judgment.

'The claim form has been referred to Employment Judge Livesey who ... inform[s] the claimant that the Employment Tribunal's letter dated 22/5/2018¹ cannot be reconsidered under Rule 70 as it was not a judgment.

Furthermore, the Employment Judge has directed the respondent to provide their comment to the claimant's email dated 22/5/2018.' (pages 1-2)

21. The respondent provided comments on 22/6/2018 (pages 43-45). The respondent took the position the ET1 'correctly filed' on 22/5/2018 was out of time. The respondent agreed the time for presenting the ET1 was on or before 5/4/2018. The respondent referred to Rule 10, stating that the ET1 should be rejected if it was not presented in the correct format. It also referred to Rule 13(4) stating that the claim was out of time. The respondent took issue that it was reasonably practicable to present the form before 22/5/2018 and referenced the claimant's attempt to do so on 3/4/2018. The respondent agreed with Employment Judge Livesey regarding the application of Rule 70 and said the correct Rule was 13.

Submissions

22. Both representatives spoke to their written submission.
23. For the claimant, Mr Philpott submitted Rule 85(2)² provides that a claim form may only be delivered in accordance with the PD made under Regulation 11.
24. He said the Employment Judge had not given reasons for rejecting the ET1 and Rule 12 provides that it can only be rejected: if the Tribunal has no jurisdiction; it is in a form which cannot sensibly be responded to; or is an abuse of process (Rule 12 (1)(a) and (b)). The letter of 18/5/2018 to the claimant does not state the ground for rejection and that it 'merely states that the [ET1] has not been presented by using one of the three prescribed methods'. He contends that the ET1 has not been properly rejected under Rule 12.
25. Mr Philpott went onto say that the mere fact a claim is brought out of time does not necessarily mean that it is an abuse of process because of the power to extend time. An order under Rule 12 is a drastic order and should only be made in plain and obvious cases and not in a borderline case - which it is inferred this is.
26. Issue was taken that the notice accompanying the returned claim form did not contain the reason for rejection as per Rule 12(3) and that the Tribunal has not complied with the Rules and as a result, the ET1 has not been rejected correctly.

¹ This must be incorrect and must have meant to refer to the claimant's letter/application of the 22/5/2018.

² 'A claim form may only be delivered in accordance with the practice direction made under regulation 11 which supplements rule 8.'

27. It was submitted the absence of information as to how to apply for a reconsideration of the rejection influenced the claimant's solicitors to make the application under Rule 13(1) and to cite Rule 70.
28. Mr Philpott referred to the respondent's reliance upon Rule 10 and said that it did not apply as the claim has been made on the prescribed form. He says there is confusion due to: which Rule applied; under which Rule the ET1 had been Rejected; and the view of Employment Judge Livesey that Rule 70 did not apply.
29. Even if, the ET1 had been rejected under Rule 10, Rule 10(3) had not been complied with as there was no explanation for the rejection.
30. Mr Philpott went onto say that the claimant's application of 22/5/2018 had not been determined by the Tribunal, as the letter of 1/6/2018 requested the respondent's comments.
31. Finally, Mr Philpott referred to the ultra vires of Rule 13(4) as per the obiter comments in Secretary of State for Business v Parry [2018] EWCA Civ 672.
32. Turning to a reasonably practicable extension of time under s.111 ERA Mr Philpott submitted it was not reasonably practicable to present the ET1 on 3/4/2018 and that time should be extended to 22/5/2018. The authorities of Wall's Meat Co Ltd v Khan [1979] ICR 52 and Adams v British Telecommunications Plc [2017] ICR 382 were cited.
33. The claimant relies upon the legal secretary's email and the application of 22/5/2018 as to reasons why time should be extended.
34. The claimant also submitted that in relying upon Rule 13(3) as the claimant did not request a hearing and requested that the application be dealt with on the papers; that the respondent should not be able to participate in the hearing and its objections should not be considered.
35. To conclude, the claimant submits that it was not reasonably practicable to 'submit' the ET1 in time for those reasons and contends the claimant presented it within a further reasonable period of time and it should be accepted under s.111 ERA.
36. For the respondent, Miss Geddes submitted the ET1 had been brought out of time and therefore should be rejected by the Tribunal. She relies upon Rule 10 and says the ET1 has not been brought in the correct format, and therefore 'should be rejected and not deemed served as submitted by the claimant'.
37. Miss Geddes notes the claimant was legally represented at the relevant time. She highlights that the claimant's representatives had commenced the online

ET1 on 3/4/2018, then abandoned that process and therefore cannot argue that it was not reasonably practicable to present the ET1 in the prescribed format by the deadline.

38. It was submitted the authority of Sterling v United Learning Trust UKEAT/0493/14 was analogous in that the ET1 was rejected pursuant to Rule 10 in that case.
39. In accordance with the overriding objective therefore, the ET1 should not be accepted.

Findings and conclusions

40. Having heard the parties and in accordance with the overriding objective the issue to be determined is: was the ET1 of 3/4/2018 presented correctly in accordance with the Rules? Or in the alternative, whether it was reasonably practicable to extend time in respect of the ET1 of 22/5/2017? The findings and conclusions are as follows.
41. The ET1 which was purportedly presented in accordance with Rule 8 was not presented in accordance with the PD (to which Rule 8 refers and which has been issued in accordance with Regulation 11). It was neither submitted via the online form submission service, posted to Leicester nor delivered in person by the claimant's solicitors. There is no evidence that the London South Tribunal office did in fact send the ET1 onto the Leicester Central Office; and indeed the return of claim form notice dated 18/5/2018 (page 38) was sent from London South.
42. The secretary had started to submit the ET1 via the online service, but abandoned that and emailed it directly to the London South Tribunal. She noted, in her email of 4/4/2018 to a partner at the claimant's solicitors, her 'nerves' regarding the situation. She highlighted the Tribunal email addresses 'do not process ET1s'. As Miss Geddes submitted, the responsibility lies with the claimant's experienced and legally qualified representatives and not with the secretary. Once the secretary highlighted her concerns, it was incumbent upon the partner supervising the claim, to ensure the ET1 had been correctly and validity presented. It was not. The ET1 had not been submitted/presented in accordance with the PD.
43. The PD does not provide that an ET1 may be sent to a Tribunal office in the hope that the Tribunal office will forward the ET1 onto the Central Office in Leicester. In any event, it transpired that London South was not the correct region for this claim; it was the South-West region.
44. As a result of the fact the ET1 had not been validly presented, it was rejected by London South, in accordance with the 'returned claim form notice' of 18/5/2018 (page 38).

45. The arguments that Rules 10 or 13 apply and have not been complied with are rejected. The decision that the ET1 had not been presented in accordance with the PD was not a judicial decision, it was an administrative one and one that did not engage the Rules the parties referred to. The ET1 was rejected as it had not been presented in accordance with the PD. It was not 'rejected' under the Rules as it had never been validly presented.
46. The arguments in respect of rejection under Rules 10 or 12 are otiose. Rule 10 did not apply as the claim form was on the prescribed form and contained all of the relevant information. Rule 12 does not apply as there are no substantive defects. As such, Rule 13 does not apply. The complaint that no reason for the rejection of the ET1 is dismissed. The Tribunal's letter of 18/5/2018 gives a clear reason for the rejection of the ET1. It was not presented by one of the three methods set out by the PD.
47. The ET1 of 3/4/2017 was never validly presented in accordance with the PD and so it is void. All the ET1 of 3/4/2017 can be relied upon, is in respect of then considering whether the ET1 of 22/5/2017 was presented within such further period as considered practicable where the Tribunal is satisfied that it was not reasonably practicable to present the claim in time. The Tribunal's finding is that it was reasonably practicable to present the claim by 5/4/2017. The claimant's solicitor's secretary was attempting to do so. Whatever reason caused her to abandon submitted it for presentation via the online service and instead to email it to the London South office, she highlighted this to the solicitor/partner the following day. It would appear the ET1 was ready to submit via the online service as the secretary emailed it to London South 9 minutes later. The secretary then drew the solicitor's attention to this the following day at 9:48. She pointed out that her concern had caused her to call the Tribunal office. She expressly said that the ET email addresses did not 'process ET1s'.
48. The claimant's solicitors had two days within which to rectify the situation (they clearly did so on 22/5/2017), but did not do so. The Tribunal agrees with Miss Geddes that it was incumbent upon the claimant's legal advisers to consider whether the ET1 had been correctly presented; not to rely upon a conversation the secretary had had with a member of Tribunal staff.
49. The Tribunal finds therefore, that it was reasonably practicable to present the ET1 within the primary time limit. The ET1 presented on 22/5/2017 was presented outside of the primary time limit and so was out of time. For those reasons the Tribunal declines to extend the time limit under s.111(2)(b) ERA. The ET1 was out of time and the application of 22/5/2018 is refused (It is noted that it does not appear the claimant's solicitors had complied with Rule 92 and had not copied the respondent into its application of 22/5/2018). Accordingly, claim is therefore dismissed.

Further preliminary hearing – now vacated

50. At the conclusion of the hearing, the case was listed for a further preliminary hearing in private to: determine the claimant's applications in respect of privacy/anonymity; to determine the EDT; to identify the issues; and to list the matter for a final hearing on Friday 6/12/2019 in Southampton to start at 10am for 3 hours. In view of the above findings, that hearing is vacated.

Employment Judge Wright
19 August 2019