



EMPLOYMENT TRIBUNALS

Claimant
Mr R Smith

Respondent
ASDA Stores Limited

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT NORTH SHIELDS
EMPLOYMENT JUDGE GARNON (SITTING ALONE)

ON 15 November 2019

Appearances

For Claimant: in person
For Respondent: Mr R Bradley Scottish Advocate

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 generally and for making a protected disclosure. The issues to be decided at this hearing are

- (a) whether the claim was presented before the end 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 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 111 of the Employment Rights Act 1996 (the Act) says the 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 it was not reasonably practicable for the complaint to be presented before the end of that period of three months.

3 The effective date of termination was 28 January 2019. Section 207B provides for extension of time limits to facilitate conciliation 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.”

3. The claimant contacted ACAS on 11 April (Day A). ACAS sent the Early Conciliation Certificate (ECC) on 8 May (Day B). The time for presentation would at best now be extended to 8 June. A claim arrived at the Tribunal office on 11 June, 3 days late. This claim is out of time, and there is ample case law to the effect time limits are just that—limits . I cannot say three days is not long and turn a blind eye.

4. Reasonably practicable means reasonably “do-able”. The burden of proving it was not reasonably do-able rests on the claimant. Palmer v Southend on Sea Borough Council 1984 ICR 372 listed a number of factors which may properly be argued including a claimant was prevented from presenting in time due to illness That case also held I should look at the substantial cause of the failure to issue in time.

5. Dedman-v-British Building , held that where either the claimant or his advisers were at fault in allowing the time limit to pass without presenting, it cannot have been impracticable for the complaint to have been presented in time .Even if the claimant’s advisors let him down, I will not be able to find it was not reasonably practicable to present in time. His remedy, if any, will be against the advisors

6. Schultz-v-Esso Petroleum held where ill-health is a factor I should concentrate on the closing period rather than the early stages of the limitation period so if a disabling illness is relied upon similar weight should not be given to it regardless of the part of the limitation period in which it falls .The proper approach is to focus not on the early weeks but the far more critical period leading up to the expiry of the limitation period.

7. The claimant gave evidence today and had produced a good bundle of documents which satisfied me completely he had a depressive illness in the early part of 2019 and

before. He was prescribed the antidepressant citalopram. He went on a waiting list for Talking Therapy and in the early months of 2019 the dosage of medication varied. He started Talking Therapy sessions. His wife has provided a statement saying he was really quite unwell and his concentration and memory were affected adversely. However by May he started to come off the antidepressants and was improving. His wife's statement says in May he "felt a lot better in himself and began to come off his medication with some problems".

8. He had contacted his union who appear to have given him advice his claim did not stand a better than even chance of success. Nevertheless he commenced early conciliation within the three months of the effective date of termination and was doing everything correctly. Page 34-35 of the bundle are very informative. During May the claimant was trying to get to speak to somebody at the union and finally got to do so on about 27 May. It is clear the claimant knew full well the extension of time given to him by his early conciliation certificate was coming to an end. In fact he says on page 35 he knew it was going to run out on 8 June. On 28 May he left the country with his wife to go and visit her sister in Greece and returned on 4 June. Again he tried to get to speak to somebody at the union and had a text communication with Mr Worcup. On about Friday 7 June he took some paperwork to the union office which was sent back to his house.

9. It is to me clear from the claimant's own evidence he was functioning well despite his depression. The operative reason for him missing the time-limit was not his ill-health but poor communication between himself and the union, upon which he was placing more reliance than he should. The union thought he had a weak case and therefore would not back it. He appears to have known that before he went to Greece. The claim form he presented appears to have been drafted by him and it is perfectly acceptable. There is no reason he could not have drafted and presented it within time. I have no pleasure in coming to this decision but 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 15 NOVEMBER 2019