



EMPLOYMENT TRIBUNALS

Claimant: Mr S. Sammon

Respondent: Valuation Office Agency People Group

Heard at: East London Hearing Centre

On: 19 March 2020

Before: Employment Judge Massarella

Representation
Claimant: Did not appear and was not represented
Respondent: Mr T. Kirk (Counsel)

JUDGMENT

The judgment of the Tribunal is that: -

1. the Claimant's claim of unfair dismissal is struck out, having been presented outside the time limit and in circumstances where he has not shown that it was not reasonably practicable for him to present it in time.

REASONS

1. This was a preliminary hearing to determine the Respondent's application that the Claimant's claim of unfair dismissal should be struck out as it was presented outside the relevant time limit.

The Hearing

2. This hearing was originally listed as a final hearing in person. By an email sent to the parties on 15 January 2020, it was converted to an open preliminary

hearing in person to decide whether the Claimant's claim was in time and, if not, whether time should be extended.

3. On 18 March 2020, the hearing was converted to a telephone hearing because of the restrictions placed on Employment Tribunals as a result of the Covid-19 virus. The Claimant was notified by email to the address he had provided on his ET1.
4. The hearing took place in a hearing room, to which the public had access, and was conducted over a speakerphone so that anyone attending could follow proceedings. The Respondent was represented by Mr Kirk of Counsel. Ms Tessa Branscombe of the Respondent and Mr Adam Smith-Roberts (Mr Kirk's pupil) dialled into the hearing and so observed it remotely. There were no other observers present in the hearing room. The Claimant did not dial into the hearing, nor was he represented.
5. I had before me the Tribunal file, which contained copies of correspondence which the Respondent had submitted in advance of today's hearing.

Background to the hearing

6. I asked Mr Kirk to explain to me what recent contact, if any, his clients or their representatives had had with the Claimant, which might explain his failure to attend today's hearing.
7. Mr Kirk explained that the Claimant was originally represented by Paytons solicitors. On 2 January 2020 Paytons wrote to the Respondent, notifying them that they would no longer be acting for the Claimant and asking the Respondent to contact the Claimant directly. The Respondent did so on the same day at the email address which the Claimant had provided on the ET1; they asked him if he had instructed a different solicitor and whether he intended to pursue the claim; they informed him that they had spoken to the Tribunal and had been informed that the hearing would be converted to a preliminary hearing.
8. On 10 January 2020 the Claimant replied saying that he was seeking further legal advice and would advise them in due course as to who they should contact; in the meantime he asked to be contacted directly. That was the last the Respondent heard from him. I note that the postal address on the email was an Australian address. Mr Kirk's instructions were that the Claimant had been living in Australia for some time; that is consistent with the Claimant's case that he had taken an extended career break to live there with his partner.
9. On the same day the Respondent replied to the Claimant's email, saying that they would be in touch in due course, once the Claimant had had an opportunity to seek legal advice.
10. On 15 January 2020, the Tribunal wrote to the Claimant's former solicitors, who had not formally come off the record, to inform them that the hearing had been converted to an open preliminary hearing and attaching a notice stating that the time limit issue would be dealt with. Quite properly, the Respondent forwarded this to the Claimant at his email address on 16 January 2020, asking him to confirm his intentions regarding the claim.

11. On 30 and 31 January 2020 the Respondent wrote again to the Claimant on a without prejudice basis. I was not told the content of that correspondence. The Claimant did not reply.
12. On 28 February 2020 the Respondent chased the Claimant by email for information as to what his intentions were: they pointed out that the date for the PH was approaching; they sought to discuss preparation for the hearing; they asked if he proposed to submit a written statement; and whether he had instructed a solicitor or barrister to represent him. He did not reply.
13. On 10 March 2020 the Respondent emailed the Claimant again, asking him whether he would be attending the hearing and saying that, if he did not, they would be asking the Tribunal to proceed in his absence. They received no reply.

The decision to proceed with the hearing

14. Rule 47 provides:

If a party fails to attend or to be represented at the hearing, the Tribunal may dismiss the claim or proceed with the hearing in the absence of that party. Before doing so, it shall consider any information which is available to it, after any enquiries that may be practicable, about the reasons for the party's absence.

15. I had regard to the Court of Appeal case of *Roberts v Skelmersdale College* [2004] IRLR 69. Although it was decided under the old rules, there is sufficient similarity between the two rules that it remains good law. The following principles emerge (so far as they apply to new rule 47):
 - 15.1. the rule confers a very wide discretion;
 - 15.2. the rule does not impose on an Employment Tribunal a duty of its own motion to investigate the case before it, nor to satisfy itself that on the merits the Respondent has established a good defence to the claim of the absent employee;
 - 15.3. the Tribunal has a discretion to require the employer to give evidence, but no duty to do so;
 - 15.4. before making a decision the Tribunal shall have regard to the information required under the rule.
16. The Claimant had not provided a telephone number on his ET1 form. I considered the information which was available to me and I was satisfied that the Claimant was aware of the fact that today's hearing was taking place. There had been no application by him to postpone the hearing. If it is right that the Claimant is in Australia, there was nothing to prevent him from instructing solicitors based in the UK to represent him at the hearing. Alternatively, he could have lodged written evidence or submissions himself with the Tribunal in advance of the hearing and asking it to take that material into account. He did not do so.
17. The fact that the hearing took place by telephone made it easier for the Claimant to attend than if it had gone ahead in person. No explanation was received by the Tribunal as to why the Claimant failed to attend today's

hearing or to make contact with the Tribunal or the Respondent to explain his absence.

18. I considered that the Claimant had had a reasonable opportunity to participate in today's hearing. I concluded that it was just in the circumstances for me to proceed to deal with the Respondent's application in his absence.

Time limits in unfair dismissal cases: the law

19. S.111 Employment Rights Act 1996 ('ERA') provides (as relevant):

Complaints to employment tribunal.

(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.

20. I considered the relevant authorities as to the construction of the words 'reasonably practicable'. To construe it as the equivalent of 'reasonable' would be to take a view too favourable to the employee; but to limit it to that which is reasonably capable physically of being done would be too restrictive a construction. 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 Industrial Tribunal within the relevant three months?' (*Palmer v Southend-on-Sea Borough Council* [1984] ICR 372 per May LJ at para 34).
21. If an employee has retained a solicitor to act for him and fails to meet the time limit because of the solicitor's negligence, the adviser's fault will defeat any attempt to argue that it was not reasonably practicable to make a timely complaint to an employment Tribunal (*Marks & Spencer Ltd v Williams-Ryan* [2005] IRLR 562 per Phillips LJ at para 31).

The Respondent's submissions

22. This is a claim of unfair dismissal only. The only relevant time limit issue is in relation to the effective date of termination of the Claimant's employment. It was not disputed between the parties that that date was 2 July 2019. That is clear from Box 5.1 of the ET1, paragraph 1 of the Claimant's Particulars of Claim, as well as from paragraph 7 of the Respondent's ET3.
23. On 29 July the Respondent received correspondence from the Claimant solicitors Paytons. It was without prejudice and Mr Kirk quite properly did not make any reference to its content. However, he submitted that the fact the correspondence exists plainly shows that the Claimant was able to seek advice from skilled advisors on limitation before time expired.

24. Mr Kirk took into account in his submissions any extension of time from which the Claimant benefitted by reason of participation in ACAS early conciliation.
25. The Claimant contacted ACAS on 30 August 2019; that is 'Day A' for the purposes of s.207B ERA. The ACAS certificate was issued on 2 September 2019; that is 'Day B'. Applying the provisions of s.207B(3) ERA the number of days to be discounted is three.
26. The ordinary time limit expired on 1 October 2019. The new extended time limit (adding the three days) was 4 October 2019. The claim was presented on 10 October 2019.
27. I asked Mr Kirk to address the question of whether there might be any further extension of time by reason of s.207B(4) ERA. He submitted that where the expiry of the new limitation period (4 October 2019) comes after the period ending one month after day B (2 October 2019), no further extension is available. I accept that submission.
28. Consequently, the claim was presented six days outside the applicable time limit.
29. The burden is on the Claimant to show that it was not reasonably practicable for him to present the claim in time. If he can do so, he must then show that it was presented within a reasonable period after the point at which it became reasonably practicable to present the claim.
30. Mr Kirk submitted that it was not for the Respondent to second-guess what the Claimant's case might have been as to why it was not reasonably practicable for him to issue the Claimant time. About that he is undoubtedly right. However, he observed that, in the one email that the Respondent did receive from the Claimant on 10 January 2020, he wrote: 'as the solicitor who was acting for me has advised that he cannot properly act for me any further in this matter I am seeking further legal advice'. Mr Kirk submitted that, had the Claimant argued that he was given wrong or misleading legal advice by his solicitors, that would not provide good grounds for extending time because of the principles set out above in the *Williams-Ryan* case referred to above. I accept that submission.

Conclusion

31. The claim was presented six days out of time. The Claimant has had ample time and opportunity to make representations, in writing or in person, as to why time should be extended. Absent any explanation from him as to why he submitted his claim late, and why it was not reasonably feasible for him to present it in time, I conclude that the Claimant has not discharged the burden on him to show that time should be extended. The Tribunal does not have jurisdiction to hear his claim of unfair dismissal and it is struck out.

Costs

32. After hearing from Mr Kirk, I adjourned to deliberate and then resumed the telephone hearing and gave the judgment and reasons set out above.

33. Mr Kirk then indicated that the Respondent seeks its costs. In light of that, I decided of my own motion to provide written reasons for my decision. The Claimant will require these in order to be able to deal with that application.
34. I have given separate orders as to how that application will be progressed. Given the current lockdown, I'm sure the parties will appreciate that it may take some time for this Judgment and Reasons and those orders to be sent out.

Employment Judge Massarella
Date: 7 April 2020