



EMPLOYMENT TRIBUNALS

Claimants: Mr Barry Jones
Mrs Sharon Fogg

Respondent: Gwynedd Council

Heard at: Wrexham **On:** 17 January 2020

Before: Employment Judge R Powell (sitting alone)

Representation:
Claimants: In person
Respondent: Mr. Edwards, solicitor

JUDGMENT

1. The Claimants' claims are out of time and are therefore dismissed.

REASONS

1. This is an open Preliminary Hearing to determine an issue identified by the Tribunal on 4 November 2019, as set out in the agreed bundle at page 48; whether or not the claims of unfair dismissal brought by both Claimants fell within the primary time limit under Section 111(2)(a) of the Employment Rights Act 1996 and if not whether the claim was presented in such further reasonable period; subsection (b) of the same.
2. To determine this case today I have had the benefit of hearing evidence in accordance with the witness statements of Mr. Jones and from Mrs. Fogg Those statements were read by the Tribunal, confirmed on oath and then subject to cross-examination by the Respondent.

3. I have also had a bundle of documents which includes the Early Conciliation Certificate in this case which commenced on 16 April and concluded on 17 April 2019. I have also seen a text message which is pertinent to the date on which both the Claimants say they first became aware of the facts which were the catalyst to the commencement of these proceedings.
4. I will first set out an element of the background of this case, both Claimants are two of four former employees employed by the Respondent to operate its closed-circuit television system. The roles of all four became redundant within the meaning of Section 135 of the Employment Rights Act following the Respondent's decision to automate the CCTV service. There was consultation and consideration of some suitable alternative employment and one of the four was successful in doing so. The remaining three employees, on the evidence before me and the parties' submissions, had their employment terminated on 7 January 2019.
5. Some months later It became apparent to the Claimants that the third of the redundant employees, Mr. Thomas, had obtained employment post the redundancy dismissal. He had taken on work in Aberystwyth on a swing bridge, that entailed employment with the Respondent.
6. The following are key dates:
7. On 5 April 2019 the claimant's made the discovery Mr. Thomas' new employment; what I will call the key facts to which I have just referred.
8. On 6 April 2019 the primary period for presentation of claim to the Employment Tribunal expired.
9. On 10 April 2019 both Claimants were attending the offices of Slater and Gordon Solicitors to be advised by a barrister in relation to an employment dispute with the respondent, but not related to their dismissal. They raised concerns over Mr. Thomas' employment and their belief that they should have been offered that work. the barrister advised them to contact ACAS.
10. Both witnesses describe in one manner or another doing some investigation or research into their rights and early conciliation.
11. On 16 April 2019 ACAS conciliation commenced and it was terminated on 17 April 2019. The Early Conciliation certificate is at pages 67 and 68 of the bundle in that respect.
12. On 31 May 2019 both claims were presented to the Tribunal.
13. It is not in dispute between the parties that the claims were presented outside the primary time period. The dispute between the parties lies firstly

as to whether it was reasonably practicable to present the claims on or before 6 April 2019 and, if it was not so, whether the claim was presented within a further reasonable period.

14. Turning to the first issue, both Mr. Jones and Mrs. Fogg gave evidence that it was the discovery of their colleague still working for the Council on Friday 5 April 2019 that was the catalyst to their claim and that prior to that they had no cause to be concerned. It is their case that 6 April 2019 fell during the weekend and so it was absolutely impossible for them to comply with the time limit and in any event, it was proper for them to take a little time thereafter to address various matters.
15. The Respondent has not challenged the evidence of the Claimants on this issue. Whilst the Claimants bear the burden of proof both of them have corroborated each other's account and they have produced a text message to date and corroborate their first knowledge of Mr. Thomas' new employment.
16. Quite properly the Respondent has alerted the Tribunal and the Claimants to the case of ***Walls Meat Company -v- Khan 1978***, which essentially for our purposes is uncontentious in that it is one of the cases along with another such as ***Marley -v- Atkinson*** which indicate that if a Claimant is unaware of a material or essential fact it can make it reasonably impractical for them to present the claim if they do not have the knowledge then how can it be otherwise.
17. I finally note that on paragraph 30 of the Respondents written submission, page 8 and 9, whilst acknowledging the burden of proof lies upon the Claimant the Respondent; "*does not take an adversarial stance on the NRP issue, it accepts that there may be an arguable case that this is not reasonably practicable for the complaint to be presented in time.*"
18. Taking all those matters into account I am satisfied that it was not reasonably practicable for the Claimants to have presented the claim on or before 6 April 2019.
19. The core battleground in this case has been the issue of such further reasonable period. In addressing this I am reminded of the following points which I am going to take into account:
20. The first is that the time must be assessed with due regard to the circumstances of the delay and I am not given carte blanche to entertain a claim however late it is presented ***Westwood Circuits Limited -v- Reed 1973 All England Law Reports 1013***. The expectation is therefore that Claimants make their application as quickly as reasonably possible once the obstacle which prevented them doing so has been removed and our

case that is the knowledge of their former co-worker's renewed employment with the Respondent.

21. I have been taken by the Claimants to ***Walls Meat Company -v- Khan***, I acknowledge that and the principles within that I fully accept apply. ***Khan*** and other cases to which I am going to refer are relied upon in part to reflect a reasonable period, so in ***Khan*** the employee became aware of a material fact; his confusion prior to that that the local insurance tribunal would hear his unfair dismissal claim and he then presented his claim within 4 weeks. This was held to be a reasonable period reflecting as it did the fact that the Claimant had experienced difficulty in finding a solicitor and then that period straddled the two-week Christmas break.
22. In ***James W Cooke and others -v- Tipper 1990 Industrial Relations Law Reports*** 8 employees were dismissed for redundancy, who had been told by their management they would be re-employed when work picked up and later found out that the shipyard had been closed down and realised there had never been any intention ever to re-employ them. This was a material fact which was unknown to them and was the catalyst for the commencement of proceedings. Some of the Claimants managed to bring their claims within a few days, others took a month. The Tribunal granted all of them extensions. The Court of Appeal however, distinguished that time frame and held that two weeks from the closure was a reasonable time and therefore dismissed those claims which were present a month later. These are only examples, every case must turn on its own facts. I note the dicta in ***Marley -v- Anderson*** that a Tribunal will err in law if it concentrates on the length of delay to the exclusion of a proper consideration of all the relevant circumstances.
23. Turning then to the points I must consider, (1) is the actual knowledge of the Claimants of their rights and what knowledge they should have had in all the circumstances, that is ***Northumberland County Council -v- Thompson [2007] All England Law Reports***.
24. In this case, before turning to my findings of fact, I note the following: In respect of "knowledge" this is not a purely subjective test, it is a test which requires me to assess what a Claimant, in the circumstances of these Claimants, should reasonably have known.
25. Neither of the Claimants have any background or experience in employment law, but they did have access on 10 April to a firm of solicitors who specialise in employment law amongst other things and they both indicated that they did some research to understand how to contact ACAS and they both demonstrated, at least through Mr. Jones's actions, that they were capable of contacting ACAS and commencing the Early Conciliation period.

26. I take judicial note based on my experience of dealing with these cases that if one “googles” the words Employment Tribunal the first website which is offered is You Gov’s “Make a claim to the Employment Tribunal – gov.uk” and if one googles unfair dismissal the first website the person will be offered is “Dismissal: Your rights: Unfair dismissal and constructive dismissal – gov” and if one opens that website you will be taken to a page “dismissal your rights” which contains a link to “Make a claim to the Employment Tribunal”.
27. The same is similar on the ACAS website for early conciliation where it expressly tells litigants or potential litigants that ACAS is not part of the Tribunal service.
28. In my Judgment any person who undertakes a modicum of research online these days can quickly access sufficient information to identify the time limits for presentation of a claim to the Employment Tribunal and the process for bringing a claim.
29. The second element which I must address is the cause of the delay throughout the period. So, I then turn to my findings of fact on these points.
30. I do not have any difficulty in accepting that the Claimants did not have actual knowledge of the time limits, in fact it appears to have been Mrs. Fogg’s perception that the time limit of 3 months “and 1 day”, as she understood it, commenced on 6 April rather than expired on that date. I also accept that as a matter of fact the Claimants had not investigated the time limits and therefore were not knowledgeable on that subject. As to whether that was reasonable, I then apply the law which I have referred above. In my Judgment is that it is not reasonable for a person with access to a solicitor, access to the internet and with access to ACAS to not be aware of the relevant time limits.
31. The second point, which was not raised in evidence but in submissions, was that Mr. Jones thought by contacting ACAS “that got the ball rolling” i.e. that was in some way the presentation of an Employment Tribunal case or was the commencement of the process towards presentation. I have difficulty with this submission because, as pointed out by Mr. Edwards in cross-examination, the Early Conciliation Certificate indicates that the employee who intends to bring a claim must contact the Employment Tribunal. There is nothing on the ACAS website or any other source which would give a reasonable person an indication that contacting ACAS was commencing a claim.
32. The third element that has been put forward is the circumstances of Mr. Jones and I emphasise that because it is agreed between the Claimants that it was Mr. Jones who took on the task of submitting the claims. Before

going to the rationale put forward by Mr. Jones in cross-examination I need to note the following: The claim form which was as I understand filled in online, then printed off and then sent by post, sets out the detail of the claim in six short paragraphs which I will quote in part

“Myself and Sharon Fogg finished work on our last shift on Thursday, 3 January 19 and our colleague was due to finish his last shift on the following Monday – 7 January 19.

We have now been made aware (on Friday 5 April 19) directly by our ex-colleague (who got the job) that he was approached during his very last shift by a line manager Steven Edwards offering him the job within the very same department that we had been made redundant from.

Both of us (myself and Sharon Fogg) feel discriminated against as we feel we should have been invited to apply for the vacancy as a team during the consultation period. No mention of this vacancy was ever made to us and we were disappointed when we heard word of mouth what had happened following our very last shift on 3 January.”

I set out the above text because there are some claims that come before the Tribunal of great complexity or a great volume of factual allegations and I take into account the greater the complexity the more difficult it is to formulate the content and settle on the wording, but in this case the claimants accepted, that the facts set out in the ET1 were fully understood by both Claimants as of 5 April.

33. Two reasons that were given by Mr. Jones were (1) the Easter holidays and (2) the preparations for impending marriage of his daughter in June of 2019.
34. In my Judgment a further period of time which reasonably would be at least in part reflected by prioritising the urgency of commencing Employment Tribunal proceedings as promptly as possible. The case law indicates that in the exercise of my discretion under this second part of Section 111 I must look at it in the context of (a) the time limit being generally strictly enforced.
35. so would it have been reasonably practicable for the Claimants to have prioritised completing the form over taking a break over the Easter, would it have been reasonable for the Claimants to have prioritised completing the form over aspects of the preparation for a wedding. Yes, it would.
36. In my Judgment a lay person without legal assistance whose claim was discreet and straightforward as that set out in the claim form, could reasonably have accessed the internet and the online site within 14 days of

the Early Conciliation. Somebody acting promptly would probably have been able to do that within 7 days, but I will allow what I consider to be a period which is at the maximum and I also take note that of the number of cases I have come across of persons in similar circumstances to the Claimants, i.e. without legal support and without prior knowledge of the Tribunal and how promptly claims can be presented and I take that into account because this is an objective test. Even laying that point aside I have come to the conclusion that the reasonable period for presenting this claim would have expired on 1 May 2019 and therefore the claims are not within the jurisdiction of the Tribunal and must be dismissed.

Employment Judge R Powell
Dated: 3rd February 2020

JUDGMENT SENT TO THE PARTIES ON 12 March 2020

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FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS