



# EMPLOYMENT TRIBUNALS

**Claimant**

Mr RD Andrews

**Respondent**

Royal Mencap Society

v

**Heard at:** Bury St Edmunds Employment Tribunal      **On:** 11 March 2020

**Before:** Employment Judge King

**Appearances**

**For the Claimant:** In person.

**For the Respondent:** Mr Feeney (counsel).

## RESERVED JUDGMENT

1. The claimant's claim for unfair dismissal is dismissed as the Tribunal does not have jurisdiction to hear the complaint.

## REASONS

1. I heard evidence from the claimant. I also heard submissions from both the claimant and the respondent in connection with this matter. The parties had prepared an agreed bundle of documents which ran to 67 pages.
2. Contrary to the orders of the Tribunal the claimant did not provide a witness statement for the hearing. I considered whether to dismiss the claim as the claimant had failed to show that it was not reasonably practicable but considered in the circumstances this would not be just and equitable. I therefore permitted the claimant to give oral evidence on the issues and Mr Feeney was able to cross examine the claimant.

**The issues**

3. The matter was listed for an open preliminary hearing following the hearing on 18<sup>th</sup> December 2019 before Employment Judge Michell, the purpose of today's hearing was to determine the preliminary issue of whether or not

the claim had been brought out of time and whether the tribunal has jurisdiction to hear it.

- (i) Was the Claimant's claim presented outside the primary time limit for unfair dismissal claims?
- (ii) If so, was it not reasonably practicable for the complaint to be presented in time?
- (iii) If not, was the claim presented within such further period as the tribunal considers reasonable.

## The Law

4. S.111 of Employment Rights Act 1996 states as follows:-

### **“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.
- (2A) Section 207A(3) (extension because of mediation in certain European cross-border disputes) and section 207B (extension of time limits to facilitate conciliation before institution of proceedings) apply for the purposes of subsection (2)(a).
- (3) Where a dismissal is with notice, an employment tribunal shall consider a complaint under this section if it is presented after the notice is given but before the effective date of termination.
- (4) In relation to a complaint which is presented as mentioned in subsection (3), the provisions of this Act, so far as they relate to unfair dismissal, have effect as if—
  - (a) references to a complaint by a person that he was unfairly dismissed by his employer included references to a complaint by a person that his employer has given him notice in such circumstances that he will be unfairly dismissed when the notice expires,

- (b) references to reinstatement included references to the withdrawal of the notice by the employer,
  - (c) references to the effective date of termination included references to the date which would be the effective date of termination on the expiry of the notice, and
  - (d) references to an employee ceasing to be employed included references to an employee having been given notice of dismissal.
- (5) Where the dismissal is alleged to be unfair by virtue of section 104F (blacklists),
- (a) subsection (2)(b) does not apply, and
  - (b) an employment tribunal may consider a complaint that is otherwise out of time if, in all the circumstances of the case, it considers that it is just and equitable to do so.”

5. S207B of the Employment Rights Act 1996 states:

**“Extension of time limits to facilitate conciliation before institution of proceedings**

- (1) This section applies where this Act provides for it to apply for the purposes of a provision of this Act (a “relevant provision”).

But it does not apply to a dispute that is (or so much of a dispute as is) a relevant dispute for the purposes of section 207A.

- (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.
6. The following authorities were raised by the judge or the parties in the hearing and considered:-
- 13.1 Walls Meat Co Ltd v Khan 1979 ICR 52
  - 13.2 Porter v Bandridge Ltd 1978 ICR 943
  - 13.3 Palmer v Southend-on-sea Borough Council
  - 13.4 Asda Stores Ltd v Kauser EAT0165/07.
  - 13.5 Bodha v Hampshire Area Health Authority 1982 ICR 200.
  - 13.6 John Lewis Partnership v Charman EAT 0079/11

### **Findings of Fact**

7. The claimant commenced employment with the respondent on 1<sup>st</sup> August 2016 and resigned with immediate effect on 18<sup>th</sup> November 2018. The claimant walked off shift and did not return. 18<sup>th</sup> November 2018 was the effect date of termination.
8. The claimant commenced ACAS early conciliation on 14<sup>th</sup> February 2019 and the certificate was issued on 14<sup>th</sup> March 2019.
9. The claimant presented his claims to the Employment Tribunal and these arrived at the Tribunal on 16<sup>th</sup> April 2019. The claims have been clarified at the last preliminary hearing to be constructive unfair dismissal.
10. On 14<sup>th</sup> November 2018, the claimant was given a first written warning in respect of five allegations at a disciplinary hearing. The written outcome of that meeting confirming the oral decision was sent to the claimant by letter dated 19<sup>th</sup> November 2018. When the claimant resigned, he knew the outcome but had not received that letter.
11. The outcome letter of 19<sup>th</sup> November 2018 gave the claimant 14 days to appeal the decision so by 3<sup>rd</sup> December 2018. The claimant did not appeal within that timescale.
12. In January 2019 the claimant raised some concerns with his employer over his alleged treatment during employment which were investigated

and some feedback was given to the claimant by letter dated 28<sup>th</sup> February 2019.

13. Whilst the ACAS EC process was ongoing the claimant appealed against the final written warning by letter dated 1<sup>st</sup> March 2019. The claimant confirmed in evidence that this appeal was to clear his name and that he did not want his old role back.
14. The substance of this letter is critical as to the claimant's knowledge at the time. The letter confirms the following:

*“ACAS have been updated as how progress is going. My union will also be given a copy of this letter.*

*I must also stress the early conciliation process ends on the 13 March 2019 at acas. There will be a further month after that before I will apply t the tribunal for constructive dismissal. Acas will be happy to mediate during this process.”*
15. Notwithstanding the time elapsed the respondent agreed to hear the appeal and the claimant attended an appeal hearing on 3<sup>rd</sup> April 2019. The respondent upheld the original decision by letter dated 4<sup>th</sup> April 2019 which was sent to the claimant but postmarked 9<sup>th</sup> April 2019 so there was a delay in this letter reaching the claimant.
16. A number of facts arose from the claimant's oral evidence at the preliminary hearing. At the relevant time the claimant was a member of a trade union. He took advice from them and understood the time limit to present the claim was 90 days bar one. He knew he had to appeal and that he had to ring and speak to ACAS.
17. The claimant knew he had 30 days from receiving the certificate to put in his claim. This was his oral evidence as is confirmed by the appeal letter referencing the time period. The claimant knew he wanted to bring a constructive dismissal claim after speaking to the union following his resignation. The claimant used google to find out about constructive dismissal and the ACAS early conciliation process. The claimant did not go back to the union for advice after their initial advice as he did not consider them to be a lot of help.
18. The claimant told the Tribunal (but we saw no medical evidence) that he suffered from mental health issues and his mind was all over the place. He had ups and downs and differed on how he felt about proceeding with a claim against the respondent.
19. The claimant thought he should conclude the internal process and said he was waiting for the appeal to conclude as he was hoping that would get the right result for him. He was not sure about proceeding with a claim but changed his mind when he received the appeal outcome. He has the outcome orally but explained he was frustrated and wanted to wait to see what the outcome letter said as he was angry.

20. The claimant got the outcome letter on the Thursday 11<sup>th</sup> April or the Friday 12<sup>th</sup> April he could not recall and the deadline was 14<sup>th</sup> April 2019 which was a Sunday.
21. The claimant lived with his older daughter who was more computer literate. He did not ask her for help as she had other issues preparing for her exams. The claimant did not have a printer at home but had internet and IT facilities.
22. Notwithstanding the proximity of the deadline, the claimant went to the library and printed off the form, hand wrote it and posted it to the Tribunal. He cannot be precise as to from where or whether this was on Saturday or not. The claimant felt he could not ask his daughter to help him as she had her own issues. He was able to use a computer and had done so to date and it is not entirely clear why he would ask a lady at the library to help him print off the document when he could have equally asked her to help him submit the form on line or indeed get his daughter to assist.

### **Conclusions**

23. Given the time points and the date stamp the claimant's claim is clearly out of time. The claim was presented 2 days too late. The correct test under s111A of the ERA is to consider whether as it is an unfair dismissal claim it was reasonably practicable to present the claim on time.
24. I accept the respondent's submission that the burden is on the claimant to provide a good explanation to satisfy that test. The claimant's evidence was not saying he had wrong advice about time limits or that he was prevented from doing so. The facts of this case centre around his personal desire to resolve the matter amicably rather than present a claim.
25. Presentation will occur on the day on which it would be delivered by ordinary course of post. This is the second day after posting first class excluding Sundays. By posting the form to the tribunal on Saturday the ordinary course of post would mean it would have arrived on Tuesday 16<sup>th</sup> April 2019 which is of course what did happen in this case. There is no way that the forms posted on Saturday would ever have reached the Tribunal on the Sunday. There was no reasonable expectation that this would be so. Post is not delivered on a Sunday.
26. Had the claimant submitted the claim online on the Saturday it would have been in time. The claimant had successfully negotiated the internet to research the legal position. I therefore do not accept that it was not reasonably practicable for it to have been presented sooner than posting it the day before when the limitation date was a Sunday. The claimant could have submitted his application on-line. This was open to him knowing that he was so close to the known deadline.
27. I do not accept given that the claimant had taken advice and knew about the time limits that any illness of the claimant's meant it was not reasonably practicable for the claim to be presented on time. His evidence

suggested after he resigned, he was in a bad place. The claimant has produced no medical evidence to support his illness and the extent and effect of any illness on his ability to present the claim in time. The claimant's evidence was that he was in two minds as to whether to proceed.

28. He had considered the matter and was well enough to engage in raising concerns from January and the appeal process in March and early April. Any initial issues therefore seem to have improved to enable him to undertake these processes. Therefore any mental health issues did not prevent the claimant from engaging in this processes any more than they prevented him from engaging in the tribunal process.
29. This is not a case akin to John Lewis Partnership as in that case the claimant was both ignorant as to the time limit and the letter giving the outcome of the appeal arrived sometime after the limitation had expired. Here the claimant verbally knew his appeal was not being upheld but decided to await the outcome letter before proceeding notwithstanding the fact that he knew of the time limits certainly on 1<sup>st</sup> March when he wrote his appeal letter. As confirmed by Bodha v Hampshire Health Authority the existence of an internal appeal of itself is not sufficient to justify a finding that it was not reasonably practicable to present a complaint on time. This is particularly the case where the appeal was never going to reinstate the claimant or overturn his dismissal it was to clear his name.
30. I have considered all the surrounding circumstances including that the claimant was trying to avoid litigation by the negotiation process (the appeal was not to be given his role back so this would not have impacted on his claim) but the focus should be on the later parts of the limitation period and it is important to look at what could be done.
31. During this time the claimant was well enough to handle the appeal and to raise concerns with his employer, he was able to research the law and time limits, he engaged in the ACAS process, attended an appeal meeting and give due consideration to his options. When one considers the whole history it was not reasonable for the claimant to delay matters in the first place as he knew the law and knew the limitation period.
32. Having made the decision to await the appeal letter for no valid reason he then decided to use the postal form and post the form to the tribunal notwithstanding that this would make it late. Objectively it must be practicable for an employee to submit the claim online as this happens in the majority of cases. The claimant had computer access and knowledge albeit he did not consider himself to be particularly computer literate. He had an older daughter who could have assisted. Even accepting his evidence that he went to the library on the Saturday to get help to print the form and post it, there is no reason why it could not have been submitted on line with help that day.
33. Instead I find that understandably the claimant was motivated by his personal desire to resolve the matter amicably rather than present a claim.

This however does not lead me to conclude that it was not reasonably practicable to present the claim on time. It follows from all of the above and the circumstances of this case, it was reasonably practicable for the claimant to present his claim but he chose not to do it.

34. I therefore conclude that the Employment Tribunal does not have jurisdiction to hear this complaint as it is outside of the ordinary time limits for presenting a claim in accordance with s.111 of the Employment Rights Act 1996. The claimant's claim is therefore dismissed.

Employment Judge King

Date: .....27/05/2020.....

Sent to the parties on: ...10.06.2020

.....T Yeo.....  
For the Tribunal Office