EMPLOYMENT TRIBUNALS

Claimant: Sarah Perryman

Respondent: RSL Awards Ltd

Heard at: London South (by cvp) **On:** 10 November 2020

Before: Employment Judge Housego

Representation

Claimant: In person

Respondent: Nigel Henry

JUDGMENT

1. It was not reasonably practicable for the Claimant to present her claim for unfair dismissal within the time limit and it was presented within a further period which was reasonable, and it is not struck out.

2. It is just and equitable to permit the Claimant's discrimination claim to proceed, and it is not struck out.

REASONS

Law

1. A claim for unfair dismissal must be presented within 3 months of the effective date of termination[1], extended in a variety of ways by the requirement to obtain an Early Conciliation Certificate from ACAS before filing a claim. What the extension is depends on when the notification is

[1] Employment Rights Act 1996 S 111 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.

given by the Claimant and when the certificate is issued[2]. If not so filed, time may be extended for such further time as is reasonable, but only if it was not reasonably practicable for the claim to have been filed in time.

2. General guidance for the parties about the approach of the Tribunal in such cases (not all will be applicable) is:

   The test for extending time has two limbs to it, both of which must be satisfied before the Tribunal will extend time:

   • first the Claimant must satisfy the Tribunal that it was not reasonably practicable for the complaint to be presented before the end of the three month primary time limit

   • if the Claimant clears that first hurdle, she must also show that the time which elapsed after the expiry of the three month time limit before the claim was in fact presented was itself a 'reasonable' period.

3. Hence, even if the Tribunal is satisfied that it was not reasonably practicable for the complaint to be presented within the three month time limit, if the period of time which elapsed after the expiry of the time limit was longer than was 'reasonable' in the circumstances of the case, no extension of time will be granted.

4. As regards the first limb of the test, it is quite difficult to persuade a Tribunal that it was 'not reasonably practicable' to bring a claim in time. A Tribunal will tend to focus on the 'practical' hurdles faced by the Claimant, rather than any subjective difficulties such as a lack of knowledge of the law, an ongoing relationship with the employer or the fact that criminal proceedings are still pending. The principles which tend to apply are:

   • section 111(2)(b) ERA should be given a liberal construction in favour of the employee

   • it is not reasonably practicable for an employee to present a claim within the primary time limit if he was, reasonably, in ignorance of that time limit

   • however, a Claimant will not be able to successfully argue that it was not reasonably practicable to make a timely complaint to an Employment Tribunal, if he has consulted a skilled adviser, even if that adviser was negligent and failed to advise him correctly

   • there may be exceptional circumstances where that principle may not apply, namely where the adviser's failure to give the correct advice about time limits is itself reasonable, for example, where both the Claimant and the adviser have been misled by the employer as to some material factual matter such as the date of dismissal

   • where a claimant has consulted skilled advisers, such as solicitors, the question of reasonable practicability is to be judged by what he could have done if he had been given such advice as they should reasonably in all the circumstances have given him

[2] S207B of the Employment Rights Act 1996.

• the question of reasonable practicability is one of fact for the Tribunal, and should be decided by close attention to the particular circumstances of the particular case

• a Claimant can rely on failure to act in reliance on advice from, for example, Tribunal employees or government officials. In *Fazackerley* the EAT held that the Employment Tribunal did not err in finding that it was not reasonably practicable for the claimant to have brought proceedings in time when he relied on incomplete advice from Acas that he should exhaust an internal appeal process first before considering starting a Tribunal claim

• it is not reasonably practicable to bring a claim if a Claimant is unaware of the facts giving rise to the claim. However, once they have discovered them, a Tribunal will expect them to present the claim as soon as reasonably practicable, rather than allowing three months to run from the date of discovery

• if a Claimant knows of the facts giving rise to the claim and ought reasonably to know that they had the right to bring a claim, a Tribunal is likely not to extend time. If the Claimant has some idea that they could bring a claim but does not take legal advice, a Tribunal is even less likely to extend time

• if a letter is posted by first class post, it is reasonable to assume that it will be delivered two days later (excluding Sundays and Bank Holidays). If it is not, a Tribunal is likely to extend time. However, the onus is on the Claimant to ensure that it does arrive in time: he must take all reasonable steps to check. Claimants' representatives should therefore always make a note of when they would expect to receive a response from the Tribunal (or Acas) and to chase if it has not been received

• if an employee makes a mistake on a claim form which means that it is rejected by an Employment Tribunal (such as incorrectly stating the early conciliation certificate number) and thereafter the time limit for the claim expires while he is labouring under the misunderstanding that he has not made a mistake, that misunderstanding—provided it is reasonable in the circumstances—may justify an extension to the time limit on the basis that it was not reasonably practicable for him to have brought the claim in time

• where an error on the part of solicitors leads to an initial employment tribunal claim being rejected and a corrected resubmitted second claim being presented out of time, in deciding whether it was 'not reasonably practical' for the resubmitted claim to be presented in time, the employment tribunal must assess the reasonableness of the solicitors' original error. This involves taking into account all the circumstances (eg in *Zhou* the claimant had completed her own ET1 form to save costs and her solicitors did not spot her error in respect of the early conciliation certificate number) and a recognition that not every omission, however technical, is unreasonable. In accordance with the *Dedman* principle:

◦ if the error which led to the first claim being rejected was reasonable, and the claimant and her solicitors thereby believed a valid claim had been

presented in time, the tribunal may find that it was not reasonably practicable to present the second claim in time, however

◦ if the error on the part of the solicitors was not reasonable, then the claimant is bound by their error, and it would have been reasonably practicable for the claim to have been presented in time

5. If the first limb of the test is satisfied, the Claimant must then satisfy the second as well: even if a Tribunal concludes that it was not reasonably practicable for a Claimant to present the claim within the three month time limit (or extended period where the requirement for early conciliation applies) no extension of time will be granted unless the claim was presented within a 'reasonable' time (judged according to the circumstances of the case) thereafter.

6. If a Tribunal concludes that the extent of the delay between expiry of the primary three month limitation period (or extended period where the requirement for early conciliation applies) and the date the claim was presented was objectively unreasonable, the fact that the delay was caused by the Claimant's advisers rather than by the Claimant makes no difference, and hence a time extension will be refused.

7. The test for discrimination claims (which have the same time limit) is whether it is just and equitable to extend time to permit the claim to proceed[3]. There is a similar extension of time for the ACAS early conciliation procedure.

8. I have considered the case law summarised and explained in Robinson v Bowskill & Ors (p/a Fairhill Medical Practice) (Jurisdictional Points : Claim in time and effective date of termination) [2013] UKEAT 0313_12_2011 and the factors in section 33 of the Limitation Act 1980 which is referred to in the BCC v Keeble [1997] IRLR 336, cited in *Robinson*.

9. I have also taken note of the judgment of Auld LJ in Robertson v Bexley Community Centre [2003] IRLR 434 (again cited in *Robinson*):

> *"It is also important to note that time limits are exercised strictly in employment and industrial cases. When tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse, a tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time so the exercise of discretion is the exception rather than the rule"*.

Chronology

10. In this case:

10.1 Ms Perryman's maternity leave started on 19 March 2019.

[3] S123 Equality Act 2010 Time limits
(1) Subject to sections 140A and 140B proceedings on a complaint within section 120 may not be brought after the end of—
(a) the period of 3 months starting with the date of the act to which the complaint relates, or
(b) such other period as the employment tribunal thinks just and equitable.

10.2 On 21 March 2019 her baby was born.

10.3 Ms Perryman resigned on 31 July 2019, giving notice to 22 September 2019.

10.4 On 15 August 2019 Ms Perryman moved to Cardiff.

10.5 The effective date of termination was 22 September 2019, when her notice expired.

10.6 The Early Conciliation notification was 29 November 2019. That is before the end of the 3 month period, and so in time.

10.7 The Early Conciliation Certificate was dated 29 December 2019, and so the limitation date was one month later, 29 January 2020.

10.8 The claim was lodged on 30 January 2020, and so was 1 day out of time.

11. As the delay was less than 24 hours, in the case of the unfair dismissal claim the issue is whether it was reasonably practicable to file the claim in time, for a further period of less than one day must be reasonable. However consideration needs to be given to the fact that it was possible to file it the day after the limitation period expired, which may impact on whether it was reasonably practicable to do so one day before.

12. Mr Henry sought to make submissions and to question Ms Perryman about what happened before she left the Respondent, and before the Early Conciliation notification was made. I find that this is not relevant to the issues of reasonable practicability or to whether it is just and equitable to extend time. Ms Perryman went through an internal grievance procedure (lodged 17 September 2019), and was in contact with Acas before the EC notification. She was doing so in an effort to resolve her dispute by agreement. That is what claimants should do. For that reason there is no point to be made about running up close to the deadline before the issue of the EC certificate on 29 December 2019.

13. Therefore, the period to be examined carefully is 29 December 2019 until 29 January 2020.

Late filing of the claim – unfair dismissal

14. Ms Perryman's discrimination claim relates to pregnancy and maternity. Her baby was 9 months old at the start of 2020. Ms Perryman's father died in 2019. She suffered from anxiety and depression to the extent that at the time she was on Sertraline 50mg daily and was having counselling.

15. Ms Perryman relocated back to Cardiff and started a new job in there late in 2019. This is a responsible job with another qualifications body, at higher pay than she was earning at the Respondent.

16. Ms Perryman was assisted by the Richmond Fellowship (a charity) before she moved to Cardiff. They are able to help, but not represent. They were

much less able to help (by reason of distance) after Ms Perryman moved to Cardiff.

17. They suggested contacting Acas, which Ms Perryman did, and Acas was also helpful, but they have boundaries which they do not cross, so that while her contact with them informed her, again they did not represent her.

18. Ms Perryman found Christmas / New Year 2019/2020 very hard by reason of the death of her father. That this remains a very great sadness to Ms Perryman was apparent during the hearing, and she was patently genuine in this.

19. Ms Perryman did not say that she suffered from post-natal depression, rather that the combination of factors affecting her at the time were considerable. I accept that evidence. Ms Perryman was plainly a witness of truth.

20. Ms Perryman was clear that she knew that there was a time limit. She had a mental deadline of the end of January, because the EC certificate was the end of December and she had a month from then. Accordingly she filed it at the end of January. She was very taken aback when the point came up at the last hearing on 07 September 2020, as she had not appreciated that it was a day late.

21. It would be easy to conclude that Ms Perryman was holding down a responsible job, knew of the time limit and simply failed properly to diarise it, and that was her error, that she had a month from the date of the EC certificate, left it to the very end and it is entirely her fault that she missed the date: it was reasonably practicable to file the claim in that month.

22. Having heard the evidence of Ms Perryman, I conclude that this would be a simplistic (rather than a simple) analysis. The guidance (above) is more nuanced, and the decision has to be fact specific. For one thing, the calculation of the time limit is now much less simple than it was. Three months is easy – take the date of dismissal, count on three months and pick the date in the month that is the one before the date in the month dismissal happened. With Early Conciliation it is far more complex, and varies with the stage at which Acas is notified. Ms Perryman was not unaware of the 3 month time limit. She made a mistake about when it expired. She was right that it was the end of January, but wrong that it was not the last day in January. It was technically possible for her to have diarised it, and there was, in that sense, no difference in her filing it on 31st January instead of 30th. My focus is on the word *"reasonably*". In all her circumstances (and it should be borne in mind that I heard and saw her give evidence) it was not reasonably practicable for her to do so. She was careful to make a mental note that there was a deadline to file the claim. She was unaware that she had made an error. That she made that error – on 29 December 2019 – was entirely understandable, in her circumstances. There was nothing to make her reassess her belief that the time limit was 31st January, and she made sure she met what she thought was the time limit. The factors (above) affecting her mind and thought processes are sufficient in my judgment that I am satisfied that it was not reasonably practicable for Ms Perryman to file her claim in time.

23. As set out above, the further period was reasonable – it cannot be otherwise.

24. In coming to this decision I have focussed only on the Claimant: there is no just and equitable consideration and no balance of prejudice to consider.

Late filing of the discrimination claim

25. The considerations relevant to the unfair dismissal claim apply, with a balance of prejudice consideration as well. There is insignificant prejudice to the Respondent in a 1 day delay. They have to fight a claim that could be struck out, but the task in doing so is no more difficult by reason of the delay of less than 24 hours in filing the claim. They are not bound to lose, but Ms Perryman would lose entirely if struck out.

Consequential directions

26. Full directions were given at the last Case Management hearing. Those directions remain effective, save one, but need redating. All are repeated with dates one month later, save that witness statements are to be exchanged no later than 28 days before the hearing, which is listed for 27 September 2020 - 01 October 2021.

Employment Judge Housego

Date 13 November 2020