



EMPLOYMENT TRIBUNALS

Claimant
Mr M Roye

v

Respondent
Education My Life Matters

OPEN PRELIMINARY HEARING

Heard at: London South

On: 15 December 2020

Before: Employment Judge Truscott QC

Appearances:

For the Claimant: No appearance or representation

For the Respondent: Mr G Mcketty legal manager

JUDGMENT on PRELIMINARY HEARING

The claimant's claim for unfair dismissal is struck out as the Tribunal has no jurisdiction to hear the claim because it was presented outside the primary time limit contained in section 111(2) of the Employment Rights Act 1996 and it was reasonably practicable for the claim to be presented within the primary time limit.

REASONS

Preliminary

1. This has been a remote hearing because of emergency arrangements made following Presidential Direction because of the Covid 19 pandemic. The form of remote hearing was fully video. A face to face hearing was not held because it was not practicable and specific issues could be determined in a remote hearing.

2. This Preliminary Hearing is to determine the following issues, as set out by Employment Judge Sage at the Preliminary Hearing on 29 April 2019:

“whether the claim was presented out of time and if so whether it was reasonably practicable to present it in time, if not within what further time period was it reasonable for him to present his claim and whether the claims should be struck out on the grounds that it has no reasonable prospect of success or if it has little reasonable prospect of success and a deposit order should be made.”

3. The claimant did not attend the hearing. The respondent was represented by its legal and HR manager Mr G Mcketty.

Background

4. The claimant was employed by the respondent, latterly as a senior mentor, from 8 March 2016 until dismissal with effect on 2 July 2018.

5. The claimant brought complaints of unfair dismissal and was dismissed on the 2 July 2018. The claim is essentially about the unfairness of the dismissal process and of the decision to dismiss. In summary, the respondent's defence is that a fair process was followed, and the claimant blatantly failed to follow the correct procedures and failed to recognise the seriousness of his actions it was concluded that dismissal was the only fair sanction.

6. A claim form presented on 11 October 2018 was rejected due to the failure to have an ACAS certificate. The claimant produced an ACAS certificate dated the 8 November 2018, following a period of early conciliation from 8 November 2018 to 8 November 2018, so his claim was accepted on the 29 November 2018. Given the date the claim form was presented and the dates of early conciliation, the complaint form should have been presented by the 1 October 2018.

7. At a preliminary hearing dated 29 April 2019, EJ Sage ordered the claimant to provide a statement narrating why the claim was lodged late. The claimant did so on 11 May 2019 [8-9].

8. In an email dated 15 December 2020, the claimant wrote:
My name is Maurice Roye. I am sending you this message in regards to the hearing tomorrow afternoon at 14.00hrs. Roye V EMLM. My computer has crashed so I am unable to send an electronic copy to the Tribunal. I have not the resources to send a copy. I will however be able to log on for the Tribunal tomorrow.

The claimant did not attend the hearing.

Time Limits

9. Section 111(2) of the Employment Rights Act 1996 (ERA 1996) provides:
"an Employment Tribunal shall not consider a complaint...unless it is presented to the Tribunal before the end of the period of three months beginning with the effective date of termination."

10. The primary time limit is extended by section 207B ERA 1996 to account for the mandatory period of ACAS Early Conciliation.

11. A Tribunal may only extend time for presenting a claim where it is satisfied of the following:

"It was "not reasonably practicable" for the complaint to be presented in time
The claim was nevertheless presented "within such further period as the Tribunal considers reasonable" (Section 111(2)(b), ERA 1996.)

12. There are two limbs to this formula. First, the employee must show that it was not reasonably practicable to present the claim in time. The burden of proving this rests on the claimant (**Porter v. Bannister Ltd** [1978] ICR 943 CA). Second, if she succeeds in doing so, the Tribunal must be satisfied that the time within which the claim was in fact presented was reasonable.

13. In **Dedman v. British Building Engineering Appliances Ltd.** [1974] ICR 53 Lord Denning held that ignorance of legal rights, or ignorance of the time limit, is not just cause or excuse unless it appears that the employee or his advisers could not reasonably be expected to have been aware of them. If he or his advisers could reasonably have been so expected, it was his or their fault, and he must take the consequences. Scarman LJ indicated that practicability is not necessarily to be equated with knowledge, nor impracticability with lack of knowledge. If the applicant is saying that he did not know of his rights, relevant questions would be:

'What were his opportunities for finding out that he had rights? Did he take them? If not, why not? Was he misled or deceived? Should there prove to be an acceptable explanation of his continuing in ignorance of the existence of his rights, it would be inappropriate to disregard it, relying on the maxim "ignorance of the law is no excuse".

The word "practicable" is there to moderate the severity of the maxim and to require an examination of the circumstances of his ignorance'

14. This approach was endorsed in **Walls Meat Co. Ltd. v. Khan** [1979] ICR 52. Brandon LJ dealt with the matter as follows:

'The performance of an act, in this case the presentation of a complaint, is not reasonably practicable if there is some impediment which reasonably prevents, or interferes with, or inhibits, such performance. The impediment may be physical, for instance the illness of the complainant or a postal strike; or the impediment may be mental, namely, the state of mind of the complainant in the form of ignorance of, or mistaken belief with regard to, essential matters. Such states of mind can, however, only be regarded as impediments making it not reasonably practicable to present a complaint within the period of three months, if the ignorance on the one hand, or the mistaken belief on the other, is itself reasonable. Either state of mind will, further, not be reasonable if it arises from the fault of the complainant in not making such inquiries as he should reasonably in all the circumstances have made, or from the fault of his solicitors or other professional advisers in not giving him such information as they should reasonably in all the circumstances have given him'.

15. **Palmer & Saunders v. Southend-on-Sea Borough Council** [1984] ICR 372 CA followed this line and talked in terms of reasonable possibility at page 384-385.

Discussion and decision

16. The Tribunal decided that the hearing should go ahead in the claimant's absence for the following reasons:

- a. The decision as to whether to go ahead in the claimant's absence is discretionary, and to be exercised in accordance with the Overriding Objective in Rule 2 of the Employment Tribunal Procedure Rules:
“...to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable—
 - (a) ensuring that the parties are on an equal footing;
 - (b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;
 - (c) avoiding unnecessary formality and seeking flexibility in the proceedings;
 - (d) avoiding delay, so far as compatible with proper consideration of the issues; and
 - (e) saving expense.”
- b. The claimant was aware of the hearing and provided no reason for his failure to attend.
- c. A postponement would not do justice to the respondent. This is a long outstanding matter and the Overriding Objective requires that justice be done to both parties. Adjourning this hearing, and further delaying determination of the issues which are outstanding, would not do justice to the respondent.

17. For those reasons, the Tribunal exercised its case management discretion to not adjourn the hearing and determine the issues listed at paragraph 2 above in the absence of the claimant.

Matters to be determined

Is the claimant's claim out of time?

18. The primary limitation period for the claimant's claims expired on 1 October 2018. ACAS Early Conciliation was applied for and granted on 8 November 2018 so it does not affect the primary time limit.,

19. The claimant has offered no substantial explanation as to why his claim was brought out of time. The Tribunal examined the contents of the statement of 11 May 2019 and noted the following:

- a. The claimant must provide some adequate explanation as to why his claim is out of time.
- b. The claim which the claimant presented contained a chronology which ends with the legal advice he received from a number of solicitors that his claim was out of time.

20. The claim is struck out as it was presented out of time and it was reasonably practicable to present the claim within time. The Tribunal did not consider it necessary to address whether the claim had any prospects of success.

Employment Judge Truscott QC
Date: 15 December 2020

