



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr M Lukosius

**Respondent:** Gallowglass Security Limited

**Heard at:** Croydon (by video) **On:** 15 January 2021

**Before:** Employment Judge Fowell

**Representation:**

**Claimant** In person

**Respondent** Ms B Omotosho, Solicitor

## JUDGMENT ON A PRELIMINARY ISSUE

The claim was presented out of time.

## REASONS

### Introduction

1. This preliminary hearing is to decide whether or not the claim was brought on time. It is accepted that the claim form was sent to the Tribunal outside the normal three-month time limit, but there are circumstances where a claim can be presented late, and Mr Lukosius seeks to rely on them.
2. The basic facts are not in dispute. The contract which Mr Lukosius had with the respondent (Gallowglass) ended on 5 January 2019, or at least that is the last day on which he worked for them, and the claim was not submitted until 5 August 2019, exactly 7 months later. There is now an obligation to contact ACAS first, to engage in what is known as early conciliation, before the three month point. That was done. Mr Lukosius contacted them on 3 April 2019, just in time. ACAS then attempt to

resolve matters. They are normally involved for about a month but the process can be shortened where the claimant does not want to attempt further mediation, as here. ACAS then issue a certificate to say that their efforts are at an end, and the claimant then has, as a minimum, a further month to submit the claim. That certificate was issued on 11 April 2019 and so the claim should have been sent in by 11 May. (All dates are in 2019)

3. Mr Lukosius' main point is that he was not told by ACAS about this one month rule. He says that when they issued the certificate they told him he could submit a claim "at any time" after that.
4. That account was explored in evidence this morning, and I heard from Mr Lukosius and his partner Ms Murnikova. They had provided witness statements, and there was also a bundle of documents, mainly tribunal papers. An interpreter was requested and translated the whole of the hearing. Partly for that reason it was not possible to complete the hearing in the 3 hour allocation and so this judgment has had to be reserved.
5. The main document in evidence is a letter from ACAS, sent in the course of these proceedings, stating that when they sent the certificate to Mr Lukosius there was also a covering letter which said  

"ACAS cannot advise you about when a Tribunal claim should be submitted. It is your responsibility to ensure that any tribunal claim is submitted on time."
6. We do not have that original covering letter or email but those words of caution are not disputed. Having considered that evidence, oral and in writing, and heard submissions from each side, I make the following findings of fact.

### **Findings**

7. Mr Lukosius and Ms Murnikova are Lithuanian, so English is not their first language. However, Mr Lukosius has been working in the UK since at least 2008, when he started to work for Gallowglass, providing security services via his own limited company. He has therefore run his own business for at least 10 years. Ms Murnikova describes herself as having good English, better than his, and she works for a firm of management accountants. They are therefore used to dealing with business matters.
8. Mr Lukosius carried on supplying his services through a limited company throughout, so his employment status is disputed, but for the purposes of this decision I will use the language of "employment" and "dismissal". In 2018, the year before his dismissal, he sued the company for unpaid invoices, using solicitors to draft a formal letter of claim for him, and then resolving things through a consent order. One of his complaints is that his dismissal was in reprisal for this legal action.
9. His employment then came to a sudden end on 5 January. After that he had limited funds. He and his partner could not afford a solicitor again, so they did some online

research. They googled “free legal advice”, which led them to the CAB. It took a few weeks to get an appointment and he went to see them, armed with all his documents. That was at the end of March or the beginning of April. They then referred him to ACAS.

10. He contacted ACAS by telephone on 3 April. That was the first he heard about a 3 month time limit, but he was in time, so there was no problem. He spoke to an advisor who passed him on to someone in early conciliation, and so the first step was taken that day.
11. As already noted, the certificate was issued on 11 April and he says he was told over the phone that he could then file a claim at any time. He took that to mean that that there was no further time limit. Later, he contacted ACAS again to try to get the recording of that conversation but was told that they had upgraded their system since then and the old recordings were no longer available.
12. Here is the nub of the matter. It seems to me most unlikely that an ACAS advisor would say that he could submit the claim “at any time”. They would know that there is a minimum period of one month from the date of the certificate. In some circumstances it is longer. Everyone has a minimum of three months to bring a claim, so if someone contacts ACAS a few days after a dismissal, and the certificate is issued a few days later, there may be the best part of 3 months still to go before the claim has to be submitted. (In those circumstances, the time spent in early conciliation is added to the 3 month period.) But there is always at least a month, and that is a very basic rule.
13. It seems to me more likely that there has been a misunderstanding. The adviser may well have said words to the effect, “Here is your certificate. You can go ahead and file your claim now, any time you like.” That is to say, there is nothing now to prevent you from bringing your claim. The scope for misunderstanding is all the more obvious since Mr Lukosius is not a native English speaker and that is what I conclude has occurred here.
14. For completeness, I accept the explanation given by ACAS about the tapes no longer being available and do not accept that there is anything sinister about that.
15. At the same time, Mr Lukosius did receive the letter from ACAS with the words of caution set out above, which I note do make specific mention to the need to submit the claim in time. It would be very strange to give that warning if in fact there were no time limits.
16. Over the summer Mr Lukosius and his family moved house. He was busy doing the new house up and it was a difficult time. He says that he was stressed and depressed. There is no medical evidence to support that but I accept that he was lacking in motivation. At the same time he was making applications for jobs, including submitting his CV online to at least one recruitment agency.

17. Ultimately of course the ET1 was submitted. The form was typed up and sent in by Ms Murnikova, and I am satisfied that at that stage neither of them had any idea it might be too late.

### Conclusions

18. Time limits are a frequent cause of difficulty in Tribunal proceedings. Unlike in the civil courts, where the limits are usually 3 years or 6 years, here they are usually only 3 months. It is generally accepted that some cut-off point is needed in legal cases, since otherwise some claims are just too old and stale to pursue, and the other party has the threat of legal action hanging over them indefinitely, but it is often felt more difficult to apply that view to such a short period. But that *is* the period specified by parliament. The starting point for this hearing is that parliament has decided that in the absence of certain special circumstances, to which I will come, there is nothing unjust about refusing someone's claim if it is brought more than 3 months after the events in question. That may reflect the fact that losing a job – the usual spur to bringing a claim – is a dramatic event, something to be addressed without delay, and also perhaps because staff at work change and move on, and it may be very difficult a year or two later to recreate the events in question. Whatever the rationale, that is the legal framework to be applied, and it is certainly not enough simply to say that the situation is unfair and that the time limits are too short.
19. The special circumstances in question are the two particular legal tests for extending time. In the case of claims based on dismissal the question is whether the claimant can show that it was “not reasonably practicable” to bring the claim in time. In the case of discrimination claims, the test is broader – whether it would be “just and equitable” to extend time in the circumstances. I will take them in turn.

#### *Reasonably practicable test*

20. It is well-established that a person's complete ignorance of his or her right to claim unfair dismissal may mean that it is not reasonably practicable to present a claim in time, but equally his or her ignorance must itself be reasonable. In **Porter v Bandridge Ltd** 1978 ICR 943, CA, the Court of Appeal held that the correct test is not whether the claimant knew of his or her rights but *whether he or she ought to have known of them*. In that case the employee took 11 months to present an unfair dismissal claim. They decided that he ought to have known of his rights earlier, even if in fact he did not.
21. Here, Mr Lukosius is from Lithuania and so it will have been more difficult for him to find his way around the employment tribunal system. But he did take some steps to find out. He contacted the CAB, for example. That was the result of his google search for free legal advice. If that was the full extent of his search it seems to have been rather limited. Information about the tribunal process and, crucially, about time limits, is set out on the CAB website and the ACAS website. As might be expected, both organisations have gone to some lengths to present the information as clearly as possible. It is well known that such public organisations have websites, and that

they put lots of useful information on them, not least to avoid being deluged in queries, but neither Mr Lukosius or Ms Murnikova appear to have looked a little further into these obvious, free, sources of information.

22. It seems to me in those circumstances that Mr Lukosius ought to have known about the applicable time limits. He had access to the internet, and in this respect the world has moved on enormously since many of the cases in this area. We now live in an age where most people will turn to the internet as a first resource when presented with any unfamiliar situation or difficulty, whether it be health problems, the washing machine breaking down, or for a recipe. Whatever the query there is usually a YouTube clip or blog post which will answer the problem in a few clicks.
23. He says however that he was misled by the ACAS adviser, and I accept that he misunderstood the advice given. But that is not in my view sufficient to absolve him from any further effort in this area. As already noted, in addition to words spoken over the phone there were written words of caution to go and check, and checking is not difficult. It is an important point to get right, just like the need to look carefully into job applications. Anyone applying for a job will note down any deadline for applying, and if there is not one they may well want to make further enquiries to find out how long they have got.
24. A considerable number of legal cases have concerned advice from legal advisers. The basis position is that if someone has a solicitor or other skilled adviser who wrongly advises them, say, that there is no need to submit a claim until after an appeal, that will not be enough. The remedy is to sue the adviser for the bad advice if the claim is late. More recently there have been cases involving other people, such as CAB workers, jobcentre staff, or tribunal staff. Here the position is slightly different. In **Rybak v Jean Sorelle Ltd** 1991 ICR 127, the Employment Appeal Tribunal allowed a late claim where a tribunal employee mistakenly told the employee that because the last date fell on a Saturday, the claim could be presented the following Monday. They drew a distinction between this and cases where a claimant was wrongly advised by a solicitor, union official, Citizens Advice adviser or other third party. Arguably, a member of staff at ACAS is more similar to a tribunal worker, but ACAS is a separate body, and it is perhaps less reasonable to trust entirely to their advice, particularly where they warn not to.
25. I do not however consider that this is a case of wrong advice being given: it is a case where the advice or comment has been misunderstood and where it was unreasonable in the circumstances to rely on it absolutely, and not to make any further enquiry. The words of caution from ACAS and the situation generally should have given Mr Lukosius some pause for thought. Is it likely that there was no longer any time limit at all, so he could bring his claim that year, next year, or in ten years' time? That seems unlikely and enough to prompt further investigation.
26. Overall therefore I have to conclude that it was reasonably practicable for Mr Lukosius to present his claim in time. That leaves his complaints of discrimination, where there is a separate test, whether it would be just and equitable to extend time

– the test in section 123 Equality Act 2010.

*Just and equitable*

27. For these purposes I will assume that Mr Lukosius was employed, was dismissed on 5 January 2019 and that this was an act of discrimination.
28. The test here is broader than whether it was reasonably practicable to submit the claim on time, but it does not follow that justice is served by allowing a late claim. Indeed, the Court of Appeal made it clear in **Robertson v Bexley Community Centre t/a Leisure Link 2003** IRLR 434, CA, that when employment tribunals consider exercising their discretion under this section:

‘...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 the discretion is the exception rather than the rule.’
29. The onus is therefore on the claimant to convince the tribunal that it is just and equitable to extend the time limit. This is not an easy question to approach, and as already noted, parliament has provided a 3 month period, so it is not simply a question of arguing that this is not a very long period and the consequences for a late claimant would be hard.
30. Arguments about limitation periods also arise in the civil courts, under the Limitation Act 1980, despite the much longer periods in question. Section 33(3) has a list of factors to take into account in deciding whether it would be “equitable” to allow a late claim to proceed. Since the test is so similar the Employment Appeal Tribunal in **British Coal Corporation v Keeble** and ors 1997 IRLR 336, EAT held that this is a useful list to take into account. It includes:
  - a. the length of, and reasons for, the delay;
  - b. the extent to which the cogency of the evidence is likely to be affected by the delay;
  - c. the extent to which the party sued has cooperated with any requests for information;
  - d. the promptness with which the claimant acted once he or she knew of the facts giving rise to the cause of action;
  - e. and the steps taken by the claimant to obtain appropriate advice once he or she knew of the possibility of taking action.
31. At the same time tribunals are not supposed to apply this list slavishly. Here, the third point is of no relevance, but the rest have some. For the reasons already mentioned, the delay was nearly an additional 3 months, and the main reason was a confusion over the advice from ACAS and a failure to take reasonable steps to

check the position. The effect on the evidence is unlikely to be significant, but it cannot be said that Mr Lukosius acted very promptly when he knew he had been dismissed. Equally, the steps taken to obtain appropriate advice were rather limited, and certainly more could have been done to find information online. The position is simply that there is no very satisfactory reason for the delay.

32. In **Ahmed v Ministry of Justice** EAT 0390/14 an employment tribunal found that Mr Ahmed, a legal adviser in the magistrates' courts, had been treated less favourably because of his race. However, they did not consider that it was just and equitable to extend time to allow the claim even though its merits were strong, given that he had given no satisfactory explanation for why the claim was not presented in time. (There was also a difficulty for some witnesses in recollecting what had happened)
33. In that case, Mr Ahmed was in a better position to find out about time limits than Mr Lukosius, but the position remains that there is no very satisfactory explanation here for the delay. The extent of the delay is substantial – about twice the period normally allowed – and it has to be seen against that statutory background. It would in my view be wrong to extend time in a case such as this, in the absence of better reasons to distinguish Mr Lukosius' case from that of claimants in general. Parliament did not choose to make the period in question six months, or seven months, and so for all the above reasons I find that it is not just and equitable to extend time.
34. Accordingly the claim must be dismissed.

Employment Judge Fowell

Date 15 January 2021