Appeal No. UKEAT/0163/20/OO

EMPLOYMENT APPEAL TRIBUNAL

ROLLS BUILDING, 7 ROLLS BUILDINGS, FETTER LANE, LONDON, EC4A 1NL

At the Tribunal
On 17 December 2020

Before

HIS HONOUR JUDGE SHANKS

(SITTING ALONE)

STRATFORD ON AVON DISTRICT COUNCIL — APPELLANT

MR OLIVER HUGHES — RESPONDENT

Transcript of Proceedings

JUDGMENT

FULL HEARING

APPEARANCES

For the Appellant	**MR D MAXWELL** (Of Counsel) Instructed by: Warwickshire Legal Services V34 4RL Market Place Warwickshire C
For the Respondent	**MR HUGHES** (The Respondent in Person)

SUMMARY

JURIDICTIONAL /TIME POINTS

The Claimant was dismissed on 29 March 2019. He maintained that the dismissal was unfair and contacted ACAS on 25 June 2019. ACAS informed him on 2 August 2019 that his employer did not wish to continue with the conciliation process and a certificate was emailed to him that day. The email was not received for some reason but the primary limitation period (as extended by section 207B(4) of the Employment Rights Act 1996) expired on 2 September 2019. On 3 September 2019 the Claimant contacted ACAS, obtained a copy of the certificate and presented a claim on 5 September 2019, three days out of time. The EJ extended time under section 111(2)(b) on the basis that it was not reasonably practicable for the Claimant to have presented the claim by 2 September 2019.

The EAT found that based on his reasoning it was apparent that the EJ had not properly addressed the question whether it would have been "reasonably practicable" for the Claimant to have presented the claim in time and the issue was accordingly remitted to be considered again by the ET.

HIS HONOUR JUDGE SHANKS

Introduction

1. This is an appeal by Stratford-on-Avon District Council, the Respondent below, against a decision of Employment Judge Meichen in the Birmingham Employment Tribunal, sent out on 20 February 2020, whereby he found that the Claimant's claim for unfair dismissal was presented out of time under section 111(2)(a) of the Employment Rights Act, but that it was not reasonably practicable to have presented it earlier and that the claim could therefore proceed.

Facts

2. The Claimant was employed as a solicitor, though not as an employment lawyer, with the Respondent from 22 September 2008 until 29 March 2019. He maintained that he had been unfairly dismissed and he contacted ACAS to start the conciliation process on 25 June 2019, which was therefore day A for the purposes of section 207B of the Employment Rights Act 1996, which deals with the extension to the normal three month period to accommodate ACAS conciliation procedures.

3. On 2 August 2019 ACAS contacted the Claimant by phone and told him that the Respondent did not wish to continue with the conciliation process and that ACAS would be sending him a certificate to that effect. The Employment Tribunal found that ACAS did in fact email a certificate to the claimant on 2 August 2019 at 18.49 in the evening, and that that was sufficient to make 2 August 2019 day B for the purposes of section 207B, but nevertheless that for some reason, possibly a mistake by ACAS, the email with the certificate never made it to the Claimant's inbox.

4. By this stage the Claimant's researches had told him that he had one month from the date the certificate was sent to him in which to present his claim to the Employment Tribunal. At this stage he was going through a difficult time, which is described by the Employment Judge at paragraphs 35 to 37 of the judgment, and he therefore waited to receive the certificate before taking the next step.

5. On 3 September 2019 he turned his mind back to his claim and telephoned and later emailed ACAS chasing for a certificate to be sent to him. On 4 September 2019, ACAS sent the certificate to him, telling him that it had already been sent out on 2 August 2019. He then prepared his claim on the evening of 4 September 2019 and submitted it to the Employment Tribunal on 5 September 2019. That was three days after time had expired, which was itself one month after day B, ie, on 2 September 2019.

Tribunal decision

6. Having found that it was on the face of it out of time, the Employment Judge went on to find, as I have said, that in all the circumstances, it was not reasonably practicable for the Claimant to have presented his claim before 2 September 2019. That finding is in effect made at paragraph 44 of the judgment.

Legal position

7. Before proceeding to the appeal, let me briefly remind myself of the legal position. The time limits in relation to a claim for unfair dismissal are in section 111 of the Employment Rights Act. Subsection (2) provides:

> **"… an employment tribunal shall not consider a complaint … 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."**

That provision is to be read subject to section 207B of the **Employment Rights Act,** which in effect extends the time limit to accommodate the conciliation procedures. The relevant provision in this case was section 207B(4) which says:

> **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 [ie the period ending one month after day B].**

It is clear that the three months referred to in both sections 111(2)(a) and (2)(b) are to be read subject to section 207B, such that the time expires as provided in 207B(4) and that practicability and extension issues have to be assessed as at that extended date.

8. So far as the law on the meaning of "not reasonably practicable" is concerned, the most important case is called **Palmer v Southend Council** [1984] ICR 372, a decision of the Court of Appeal. May LJ makes clear at page 385 that the issue is pre-eminently one of fact for the employment tribunal and that whether something is "reasonably practicable" is a concept which comes somewhere between whether it is reasonable and whether it is physically capable of being done. At the middle paragraph on page 385, May LJ outlines various matters that may be relevant for an employment tribunal to consider. Among these, which may be thought relevant in this case, are the question of what the substantial cause of the failure to present the claim within time was and also whether there was any "substantial fault" on the part of the claimant.

Tribunal reasoning

9. The Employment Judge's reasoning for his conclusion at paragraph 44 is at paragraphs 31 to 43 in the judgment. It is notable, as Mr Maxwell pointed out, that he does not,

anywhere in the judgment, expressly refer to the law in relation to the reasonable practicability issue, even in very general terms as I have just done.

10. At paragraphs 31 and 33, he makes findings which seem to me are relevant this appeal. First, having decided that the time limit expired on 2 September 2019 and that the claim was therefore brought out of time, he goes on paragraph 31 to say this:

> **"… I must go on to consider whether it was reasonably practicable for the claim to have been brought in time. In my judgment, my answer to that question must be no. The reason why I so find, is because I have found as a matter of fact that the Claimant did not have the early conciliation certificate until 4 September 2019. The Claimant needed the early conciliation certificate in order to lodge his claim; this claim not being one to which one of the early conciliation exemptions applies. The Claimant would not have been able to bring his claim within the time limit as if he had attempted to do so without having an early conciliation certificate it would have been rejected."**

Then there is a puzzling paragraph at 32 which I will pass over, and at paragraph 33 he returns to the theme by saying:

> **"I also think it would be illogical and unjust if I was required to find that it was reasonably practicable for the Claimant to bring his claim in time when I have found as a matter of fact that he did not at the relevant time have the early conciliation certificate which was a necessary prerequisite to him bringing a claim."**

11. It seems from those paragraphs that the Employment Judge may have been finding that it was not practicable at all for the claim to be brought before 2 September without a certificate and, if that was what he was finding, that would have been a total answer to whether it was reasonably practicable. But that was clearly not the right question. The question was whether it would have been reasonably practicable for the claimant to have got hold of the certificate before 2 September 2019 in order to start the proceedings as required by the rules. So the way it is put at paragraphs 31 and 33 is clearly not sufficient for a finding on reasonable practicability.

12. Then at paragraphs 34 through to 38, the Employment Judge recites the difficulties that the claimant was under at that stage, in the months of August and September, and how he had approached matters. Then at paragraphs 39 through to paragraph 41, the Employment Judge found in effect that the Claimant behaved reasonably in waiting from 2 August 2019 through to 3 September 2019 before chasing ACAS for the certificate. Nowhere in those paragraphs does he ask himself whether it would in all the circumstances have been reasonably practicable for the claimant to have obtained the certificate earlier than he did.

13. Whether the Employment Judge was confused by the terms of section 111(2)(b) which may explain the puzzling paragraph 32 and has dealt with what was a reasonable period when he should have been dealing with what was reasonably practicable, or whether he just asked himself the wrong question in relation to the period between 2 August and 3 September, I am not sure, but the fact is, I think, he did ask himself the wrong question in those paragraphs to which I have just referred. As I say, the question was whether in all the circumstances it would have been reasonably practicable for the Claimant to have obtained the certificate earlier, not whether he behaved reasonably in waiting until 3 September to contact ACAS.

Conclusion and disposal

14. Having reached that conclusion, it seems to me that I have to allow the appeal on the basis put forward by Mr Maxwell that the Employment Judge asked himself the wrong question.

15. However, having said that, I do not accept that the conclusion reached about whether it was reasonable was necessarily perverse and nor can I say that it was necessarily wrong or would necessarily have been wrong to decide that it was not reasonably practicable for the Claimant

given his personal circumstances at the time, given his understanding of matters, to have started proceedings earlier. It seems to me that it may be open to an Employment Tribunal properly directing itself to reach that conclusion, bearing in mind that the concept of reasonable practicability involves a heavier onus than just behaving reasonably, but is not to be equated with what is physically possible. It seems to me that the right way to proceed is therefore to allow the appeal but to remit the case to the employment tribunal to consider it asking itself the right question in the light of the facts as found by Employment Judge Meichen back in February 2020.

16. I will hear the parties as to whether the matter should go to a different judge and whether the tribunal should receive any further evidence or how matters should proceed.