



EMPLOYMENT TRIBUNALS

Claimant: Mr W Mackie

Respondent: Cheshire East Council

RECORD OF A PRELIMINARY HEARING

Heard at: Birmingham (in private; by CVP) **On:** 26 February 2021

Before: Employment Judge Choudry (sitting alone)

Appearances

For the claimant: Mr P Byrne (Solicitor)

For the respondent: Mr P Davies (Solicitor)

JUDGMENT FOLLOWING PRELIMINARY HEARING

The Tribunal does not have jurisdiction to hear the claimant's claim for unfair dismissal as it has been presented outside the time limits prescribed by statute and it was reasonably practicable for the claimant to present the claim in time.

REASONS

Background

- (1) The "Code V" in the heading indicates that this has been a remote hearing which has not been objected to by the parties. The form of remote hearing was via cloud video platform. A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing.
- (2) The matters was listed for a preliminary hearing before me to determine whether the claim had been presented out of time. Depending on the outcome of the preliminary hearing case management orders could be issued at the conclusion of the preliminary hearing.
- (3) At the start of the hearing I queried the status of a second claim which I understood that the claimant had issued in the tribunal for disability

discrimination. Mr Byrne informed me that the claim had been filed in mid-January 2021 but that he had not heard back yet from the tribunal. Mr Byrne confirmed that he would want that claim to be consolidated with this one if the tribunal determined that it was not reasonably practicable to present this claim on time. In the circumstances, I determined that I would deal with the out of time point only and if I determined that the tribunal did have jurisdiction to hear the claim on the basis that it was not reasonably practicable for the claimant to bring his claim on time then no further case management orders would be issued until the two claims had been consolidated.

Evidence

- (4) I was presented with a bundle of some 159 pages. I was told that save for the last document of the bundle (a psychological report produced for the purposes of care proceedings relating to the claimant's children and not for the purposes of the Tribunal), the bundle was agreed. I also heard evidence from the claimant and from the claimant's mother, Mrs Shirley Mackie.
- (5) After clarifying the issues (see below) I indicated that whilst reading the documentation sent to me I had noticed that the bundle contained a legally privileged letter to the claimant. As such, I had not read this letter. Mr Byrne for the claimant confirmed that the claimant was happy to waive privilege in relation to this letter.

The issues

- (6) Was the claimant's complaint presented within the three month time limit set out in section 111(2)(a) of the Employment Rights Act 1996 ("ERA 1996")? The parties dispute that the effective date of termination was 30 November 2019.
- (7) If not, was it presented 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.

The facts

- (8) The claimant commenced employment with the respondent on 6 June 2006. He was latterly employed as a Civil Enforcement Parking Officer.
- (9) On 23 November 2018 the claimant was issued with 14 management requests and instructions in relation to his conduct at work ("the First Instructions"). On 31st July 2019 the claimant was issued with further management requests and instructions ("the Second Instructions") which related to his conduct at work; his non-compliance with the First Instructions and his conduct towards a particular female colleague, a Miss Essington. In particular, the claimant was told not to contact Miss Essington other than in prescribed circumstances.
- (10) On 12 October 2019 the claimant raised a complaint under the respondent's grievance procedure indicating that he found the First and Second Instructions which had been issued to be overbearing and unwarranted. In his complaint the claimant requested a transfer to another department within the respondent.
- (11) On 4 November 2019 the claimant emailed the Parking Services Manager, Lorraine Martin, indicating that he was tendering his resignation for his role as

- civil enforcement officer. During cross examination the claimant accepted that he had intended to resign with immediate effect.
- (12) Ms Martin responded to the claimant the following day indicating “*Your resignation is accepted – thank you for letting me know*”. The claimant was informed that he had a one month notice period which would technically mean that his termination date would be 3 December 2019 but that Ms Martin could let the claimant leave on 30 November 2019. The claimant was asked to confirm that he agreed to this as soon as possible.
- (13) Subsequently, on 7 November 2019 the claimant was sent a letter from Amanda Donnelly, HR Officer, in which Ms Donnelly confirmed receipt of the claimant’s letter of resignation. In her letter Ms Donnelly indicated that she believed that the claimant had submitted his resignation in the heat of the moment as a result of the recent grievance she had submitted. Ms Donnelly gave the claimant an opportunity to “*reconsider*” his decision and to confirm his intentions by 14 November 2019. The claimant was informed that if Ms Donnelly did not hear from him by this date she would process his resignation. The claimant was also informed that, as he had requested his grievance would continue.
- (14) On 10 November 2019 the claimant emailed Ms Donnelly indicating that he:
- “would be very happy to stay within the Council, but for the sake of my health. I cannot stay in Parking Services.*
- I have a Job to go on 2nd December if you can find me something suitable before then.*
- I would very much like to stay”.*
- (15) Ms Donnelly sought clarity from the claimant on the same day as to whether he was requesting redeployment because he was experiencing ill health.
- (16) On 11 November 2019 Ms Martin provided the team with a Staffing Update in which she indicated that the claimant had tendered his resignation the previous week. Later that day the claimant emailed Ms Donnelly indicating that he was “baffled” why the email had been sent and that it contradicted Ms Donnelly email to him of 7 November 2019. Later on the same day the claimant emailed Ms Donnelly again in response to her query whether he was requesting redeployment because he was experiencing ill health. The claimant confirmed that his request was not due to ill health but due to his relationship with Ms Martin which was tense and made his “*work place unhappy and unpredictable*”.
- (17) On 13 November the claimant emailed Ms Donnelly indicating that after careful consideration he wanted to retract his resignation “*If not to [sic] late to do so*”.
- (18) On 14 November 2019 the claimant again advised Ms Donnelly of her wish to retract his resignation. Ms Donnelly responded the same day to say if he wanted a role outside of parking services then he should apply for internal vacancies. The claimant was advised that redeployment was only available to employees who were at risk of redundancy or who were at risk of losing their job due to ill health. The claimant was informed that his employment had not been retracted.
- (19) On 22 November 2019 the respondent wrote to the claimant indicating that his last day of employment would be 30 November 2019 and that he should return

- his identity card and car parking label and any keys before his last day. The claimant was also advised to print any copies of on-line payslips before he left.
- (20) The claimant responded the following day to indicate that he had not resigned, that he had asked the respondent to reconsider its decision not to retract his resignation and he was awaiting a reply to his letter.
- (21) The claimant's grievance meeting took place on 26 November 2019 which the claimant attended with his trade union representative. During the grievance hearing the claimant indicated that he wanted reinstatement with no loss of earnings and that he would continue with the role of Civil Enforcement Parking Officer. The claimant was informed that the respondent hoped to get a copy of the grievance outcome report to him by Christmas.
- (22) In the event the claimant did not attend work after 30 November 2019 nor did he receive any further pay or benefits from the respondent.
- (23) On 9 December 2019 the claimant commenced employment with another employer.
- (24) By 22 January 2020 the grievance outcome report was still not complete and the respondent informed the claimant's trade union representative that the grievance report would be complete in the next two weeks.
- (25) The claimant was informed of this on the same day by his trade union representative.
- (26) On 29 January 2020 the claimant's trade union representative wrote to him indicating that due to the timescales for lodging possible claims could he send all information relating to his case so that he could start the process for legal referral.
- (27) On 19 February 2020 the claimant was sent a letter from Union Line, solicitors for the trade union. In their letter Union Line informed the claimant that they assessed that the claimant's claim for constructive dismissal did not have reasonable prospects of success. As such, he would not be eligible for union support. However, the claimant was advised that if he did wish to bring a claim then he would need to do so before 29 February 2020 and he needed to start the ACAS early conciliation process before lodging his claim. This information was underlined in the letter to make the information prominent.
- (28) In his evidence the claimant indicated that he found the letter from Union Line to be "*confusing and long and hard to read*". He was also annoyed at the letter as it seemed to be telling him that he no case against the respondent. As the claimant could not properly understand it he showed it to his mother a day or so later on 24th or 25th February 2020 so that she could explain it to him. The claimant did not call Union Line to raise any queries that he had nor did he did speak to his union representative. The claimant indicated that he did not read the whole of the letter from Union Line – just part way through and then he lost interest in the contents of the letter.
- (29) Mrs Mackie also confirmed that she didn't contact Union Line either to seek clarification nor did she contact the claimant's trade union official. Mrs Mackie confirmed that neither she nor the claimant realised that they needed to contact ACAS and commence Early Conciliation by 28 February 2020. Instead, the claimant and Mrs Mackie decided to await the outcome of his grievance. The claimant was of the view that he needed his grievance outcome to be able to go to Tribunal. The claimant asserted that he was in fundamental ignorance of his legal rights.

- (30) On 22nd April 2020 the respondent informed the claimant of the outcome of his grievance, namely that his grievance had not been upheld. On 1 May 2020 the claimant lodged an appeal against the grievance outcome.
- (31) The claimant commenced Early Conciliation on 4 May 2020 and an EC Certificate was issued in this matter on 5 May 2020.
- (32) On 6 May 2020 the claimant issued a claim for constructive unfair dismissal following concerns raised by the respondent in relation to the claimant's conduct at work and the claimant subsequently raising a grievance on 12 October 2019 in relation to his line manager.
- (33) In his claim form the date provided by the claimant as his termination date was 30 November 2019 (box 5.1 of the claim form refers).
- (34) In her evidence Mrs Mackie also indicated that she felt that the claimant suffered from low perceptual reasoning and mental impairments which he has suffered from all his life and which made it very hard for him to understand and grasp what was happening and his legal rights, certainly much harder than it would have been for the average person. In support of this assertion I was presented with a Cognitive and capacity assessment which was undertaken of the claimant on 26 November 2018 in relation to childcare proceedings following the claimant's separation with his wife. The claimant's overall functioning was deemed to be in the borderline range and there was no diagnosis of any learning disability. In this report the claimant was deemed to have the capacity to litigate and to instruct.
- (35) I was not provided with any other evidence to support any assertion that the claimant had a learning disability

The law

- (36) Section 111(1) of ERA 1996 provides:

"A complaint may be presented to an [employment tribunal] against an employer by any person that he was unfairly dismissed by the employer.

- (37) Section 111(2) of ERA1996 provides:

"[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."*

- (38) The Court of Appeal in **Marks & Spencer plc v Williams-Ryan [2005] EWCA Civ 470** sets out a number of legal principles to consider in relation to time limits as follows:

- Section 111(2) of ERA 1996 should be given a liberal interpretation in favour of the employee;
- Regard should be had to what, if anything, the employee knew about the right to complain to a tribunal and of the time limit for doing so.

- Regard should also be had to what knowledge the employee should have had, had they acted reasonably in the circumstances. Knowledge of the right to make a claim does not, as a matter of law, mean that ignorance of the time limits will never be reasonable. It merely makes it more difficult for the employee to prove that their ignorance was reasonable.
 - Where a claimant retains a solicitor and fails to meet the time limit because of the solicitor's negligence, the claimant cannot argue that it was not reasonably practicable to submit the claim in time.
- (39) The fact that an employee is pursuing an internal appeal does not, of itself, mean that it is not reasonably practicable for the employee to submit a claim within the applicable time limit, even if this means submitting the claim before the appeal has been concluded (***Bodhu v Hampshire Area Health Authority [1982] ICR 200***). This view was expressly approved by the **Court of Appeal in *Palmer and another v Southend on Sea Borough Council [1984] IRLR 119***.

Submissions

- (40) In his submissions Mr Davies referred to the following authorities : ***Dedman -v- British Building and Engineering Appliance [1974] 1 WLR 971***, ***Palmer and Southend on Sea Borough Council [1984] 1 WLR 1129*** and ***Horwood v Lincoln County Council [2012] UKEAT 0462/11/0304***. Mr Davies asserted that given the claimant's evidence that he intended his resignation to be immediate his case fell within the principles set out by the Employment Appeal Tribunal in Horwood.
- (41) Mr Davies asserted that it was reasonably practicable for the claimant to bring his claim on time. The claimant had had the benefit of advice from his trade union throughout his grievance process and had received a letter from Union Line setting out the time limits and the process he needed to follow but the claimant did not follow this up.
- (42) Mr Byrne referred to the following authorities: ***Marks and Spencer plc v Williams-Ryan 2005 ICR 1293, CA***; ***John Lewis Partnership v Charman EAT 0079/11***; ***Webb v Carphone Warehouse ET Case No. 1402557/11***; ***Chandler v Thanet District Council ET Case No.2301782/14***; ***Maddison v B and M Retail Ltd ET Case No.2501529/15***.
- (43) Mr Byrne, on behalf of the claimant indicated that there was confusion on the part of the claimant – he submitted his resignation and then potentially retracted it and he was also awaiting the outcome of his protracted grievance. At no point did the claimant have comprehensive legal advice and he was reliant on others for this. The letter from Union Line was long and in legal language and both the claimant and his mother had found it difficult to understand with his disability. The claimant had acted quickly once he had the outcome of the grievance. Mr Byrne referred to the claimant in the John Lewis claim referred to above where the claimant was a young individual dependent on his parents. The claimant similarly was dependent on his mother. Mr Byrne asserted that there was a

deliberate delay to the grievance process to ensure that the claim was presented out of time.

- (44) Mr Byrne also asserted that the claimant's disability underpinned his confusing resignation.

Conclusions

- (45) In making my conclusions I have considered all the evidence before me and the oral submissions made on behalf of both parties. I have also considered the legal authorities I have been referred to.
- (46) I am satisfied on the evidence before me that the claimant's effective date of termination was indeed 30 November 2019. This was the date that the respondent confirmed would be the claimant's last date of employment, it was the last date that the claimant undertook any work for the respondent and the last day for which he received any payment. As such, his claim should have been presented to the Tribunal by 29 February 2020. As the claim was not issued until 6 May 2020 I am satisfied that the claim has been presented outside the time limits prescribed by statute.
- (47) The question for me to consider then is was it reasonably practicable for the claimant to present his claim in time. The claimant had the benefit of assistance from his trade union throughout the whole of his grievance process. He also had the benefit of legal advice from Union Line who informed the claimant that he needed to commence early conciliation before bringing a Tribunal claim and that his claim needed to be presented by 29 February 2020. This date was underlined. In his evidence the claimant indicated that he had difficulties in understanding the letter from Union Line but he was aware that he was being advised that his claim was unlikely to succeed. I am not satisfied on the evidence before me that the claimant has a learning disability which made it difficult for him to understand the advice from Union Line. The claimant did not give any evidence in relation to his learning disability and the only evidence before me was the medical report which had been prepared for the purposes of the family report. This report made no finding of a learning disability on the part of the claimant and indeed noted that the claimant had capacity to take part in legal proceedings and to give instructions.
- (48) Furthermore, whilst the claimant did not read the whole of the letter it was incumbent upon him to make further queries. He took the letter to his mother and the claimant and his mother both made a decision to wait until the outcome of his appeal. This was a conscious decision on their part and not a reasonable one given the advice from Union Line. Had the claimant acted reasonably he would have paid regard to the advice from Union Line. In the circumstances, I am satisfied that it was reasonably practicable for the claimant to present his claim in time.
- (49) Even if I am wrong and it was not reasonably practicable for the claimant to bring his claim on time I note that it took the claimant two weeks after he

received the outcome of the grievance to commence his claim which is not a reasonable period of time in the circumstances.

- (50) As such, the tribunal does not have jurisdiction to hear the claimant's claim and the claim is dismissed.

Employment Judge Choudry

Date 01/04/2021