



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

Mrs Cathrine Wheeler

AND

Respondent

Renishaw Plc

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD REMOTELY AT Plymouth **ON**
By Cloud Video Platform

8 April 2021

EMPLOYMENT JUDGE N J Roper

Representation

For the Claimant: In person, Assisted by her Husband

For the Respondent: Mr G Graham of Counsel

JUDGMENT

The judgment of the tribunal is that the claimant's unfair dismissal claim was presented out of time and it is hereby dismissed.

RESERVED REASONS

1. This is the judgment following a Preliminary Hearing to determine whether or not the claimant's unfair dismissal claim was presented in time. When the claimant originally issued these proceedings she brought claims of unfair dismissal and disability discrimination. The disability discrimination claims were subsequently withdrawn and were then dismissed by Judgment of this tribunal which was sent to the parties on 18 March 2021. The claimant's sole remaining claim is therefore one of unfair dismissal.
2. This has been a remote hearing on the papers which has been consented to by the parties. The form of remote hearing was by Telephone Conference. A face to face hearing was not held because it was not practicable, and all issues could be determined in a remote hearing. The documents that I was referred to are in an agreed paginated bundle of documents running to 70 pages, the contents of which I have recorded. The order made is described at the end of these reasons.
3. I have heard from the claimant, who was questioned on her evidence by Mr Graham on behalf of the respondent. The claimant was also assisted by her husband Mr Wheeler, and he also gave some brief evidence. I find the following facts proven on the balance of

probabilities after considering the whole of the evidence, both oral and documentary, and after listening to any factual and legal submissions made by and on behalf of the respective parties.

4. The claimant is Mrs Cathrine Wheeler. The respondent Renishaw plc is a multinational company and the claimant was employed as a Business Travel Consultant from 20 April 2015 until her dismissal by reason of redundancy which took effect at the end of her notice period on 2 April 2020. This was part of a wholesale redundancy programme in which approximately 200 employees were also made redundant.
5. The claimant suffers from Systemic Scleroderma, which is also known as Systemic Sclerosis. I accept her evidence that this disease has caused her skin to thicken and has affected her internal organs and her fingers are very stiff and swollen. The condition is accompanied by joint and muscle pain and constant lethargy, tiredness and nausea. The claimant has also suffered ongoing depression and anxiety.
6. The claimant attended a first individual consultation meeting in connection with her prospective redundancy on 3 February 2020. She objected to the scoring process which had been adopted by the respondent. There was then a second individual consultation meeting on 19 February 2020. Following her selection for redundancy the claimant appealed, and there was an appeal meeting on 9 March 2020. The claimant's appeal was rejected, and this was confirmed in a letter dated 17 March 2020. The claimant had already requested that her one month's notice period was to be taken as Gardening Leave and the claimant's last day of work was 2 March 2020, and the effective date of termination of her employment was on 2 April 2020. Her redundancy payment and a further ex gratia payment were subsequently paid to the claimant on 7 April 2020.
7. The claimant commenced the Early Conciliation process with ACAS on 2 July 2020 (Day A). The Early Conciliation Certificate was issued on 2 July 2020 (Day B). The claim form was presented on 2 July 2020.
8. In her witness evidence to this hearing today, the claimant has addressed the reason for the delay very briefly. Paragraph 6 of the claimant's witness statement records as follows: "I have been unfairly dismissed, causing me financial loss, with little opportunity to find employment. Wendy Walker has destroyed me with her untruths to remove me from the business. I could not face doing anything until after three months, as I was not functioning at all at these times. I was suffering from anxiety and depression and subsequently prescribed antidepressants which allowed me to somewhat function. I was also informed by the government that I was clinically extremely vulnerable and had to shield. For the first three months I was not nearly well enough to function or to proceed with the appeal."
9. The claimant has not adduced any medical evidence today. There is no medical evidence before me to confirm that she was precluded by any illness from presenting these proceedings within three months, nor why she was well enough to do so on 2 July 2020, but not well enough to do so immediately prior to that date.
10. The claimant was questioned on her evidence this morning. Whereas I readily accept that the claimant was unwell and upset following her dismissal, and that exact recollection of dates might prove difficult, nonetheless the claimant was unfortunately rather vague and contradictory in her evidence. What is clear is that at some stage after her dismissal, and before the limitation period expired, the claimant was aware of her right to bring a tribunal claim having consulted the ACAS website. The claimant concedes that she made a mistake as to the time limit which was explained on that website, and that she mistakenly thought that it was three months plus one day rather than three months less a day. The claimant accepted that she had taken advice from a solicitor, albeit briefly, but was vague as to when, and then subsequently suggested that this might have been after she had issued proceedings. She had initially decided against issuing these proceedings, but either on 1 July 2020 or 2 July 2020 she discussed the matter with a family friend who persuaded her that she had been badly treated and that she should bring a claim. She then telephoned ACAS, either on 1 July 2020 or 2 July 2020, and the ACAS Early Conciliation Certificate was obtained on 2 July 2020, and she issued these proceedings on that day.

11. The proceedings were not complicated in that the details of the claim include a short summary of the grounds of unfairness which the claimant had previously raised during her appeal against dismissal.
12. Mr Wheeler's evidence was to the effect that he was available to support the claimant during this difficult time but did not wish to put her through any unnecessary or additional pressure.
13. Whereas I sympathise with the claimant's illness and accept that she must have been upset as a result of her dismissal, the following conclusions can be drawn from the evidence which I have heard: (i) the claimant was aware of the right to bring a claim to this tribunal and aware of the ACAS Early Conciliation procedure as a necessary starting point; (ii) the claimant was aware that there was an impending time limit within which to bring a claim; (iii) the claimant had made a mistake as to whether the time limit was three months plus a day or three months less a day; (iv) the claimant had decided against a claim until persuaded by a family friend to present a claim at the end of the limitation period; (v) the claimant's husband was available to assist her to present a claim throughout the limitation period had the claimant chosen to proceed; and (vi) there is no medical evidence to suggest that the claimant was precluded by her illness from issuing these proceedings either during or immediately before the expiry of the limitation period.
14. Having established the above facts, I now apply the law.
15. One of the relevant statutes is the Employment Rights Act 1996 ("the Act"). Section 111(2) of the Act provides that an employment tribunal shall not consider a complaint of unfair dismissal unless it is presented before the end of the period of three months beginning with the effective date of termination, or 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.
16. With effect from 6 May 2014 a prospective claimant must obtain an early conciliation certificate from ACAS, or have a valid exemption, before issuing employment tribunal proceedings.
17. Section 207B of the Act provides: (1) This section applies where this Act provides for it to apply for the purposes of a provision of this Act (a "relevant provision"). But it does not apply to a dispute that is (or so much of a dispute as is) a relevant dispute for the purposes of section 207A. (2) In this section - (a) Day A is the day on which the complainant or applicant concerned complies with the requirement in subsection (1) of section 18A of the Employment Tribunals Act 1996 (requirement to contact ACAS before instituting proceedings) in relation to the matter in respect of which the proceedings are brought, and (b) Day B is the day on which the complainant or applicant concerned receives or, if earlier, is treated as receiving (by virtue of regulations made under subsection (11) of that section) the certificate issued under subsection (4) of that section. (3) In working out when a time limit set by a relevant provision expires the period beginning with the day after Day A and ending with Day B is not to be counted. (4) 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. (5) Where an employment tribunal has power under this Act to extend a time limit set by a relevant provision, the power is exercisable in relation to the time limit as extended by this section.
18. I have considered the following cases, namely: Palmer and Saunders v Southend-on-Sea BC [1984] ICR 372; Porter v Bandridge Ltd [1978] IRLR 271 CA; Wall's Meat Co v Khan [1978] IRLR 499; London Underground Ltd v Noel [1999] IRLR 621; Dedman v British Building and Engineering Appliances [1974] 1 All ER 520; Cullinane v Balfour Beattie Engineering Services Ltd UKEAT/0537/10; Wolverhampton University v Elbeltagi [2007] All E R (D) 303 EAT.
19. In this case the claimant's effective date of termination of employment was 2 April 2020. The normal three months' time limit for issuing proceedings from that date expired on 1 July 2020. The claimant commenced the Early Conciliation process with ACAS on 2 July 2020 (Day A). The Early Conciliation Certificate was issued on 2 July 2020 (Day B). The claim form was presented on 2 July 2020. This was before the Early Conciliation process

- was commenced. Accordingly, the claimant does not enjoy any extension of time under the Early Conciliation provisions. The claim was therefore presented one day out of time.
20. The grounds relied upon by the claimant for suggesting that it was not reasonably practicable to have issued proceedings within the relevant time limit relate to her illness. The claimant had earlier responded to the respondent's Grounds of Resistance, and in reply to the respondent's assertion that the claim was out of time by one day, the claimant suggested: "This was due to the stress and anxiety that I am suffering due to being unfairly selected and subsequently losing my job at this difficult time with being notified as extremely vulnerable by the government and being forced into lockdown for 12 weeks, and subsequently being prescribed with antidepressants." This is consistent with paragraph 6 of her witness statement for today's hearing as noted above, which suggests: "I could not face doing anything until after three months, as I was not functioning at all at these times. I was suffering from anxiety and depression and subsequently prescribed antidepressants which allowed me to somewhat function. I was also informed by the government that I was clinically extremely vulnerable and had to shield. For the first three months I was not nearly well enough to function or to proceed with the appeal".
21. The question of whether or not it was reasonably practicable for the claimant to have presented his claim in time is to be considered having regard to the following authorities. In Wall's Meat Co v Khan Lord Denning, (quoting himself in Dedman v British Building and Engineering Appliances) stated "it is simply to ask this question: has the man just cause or excuse for not presenting his complaint within the prescribed time?" The burden of proof is on the claimant, see Porter v Bandridge Ltd. In addition, the Tribunal must have regard to the entire period of the time limit (Elbeltagi).
22. In Palmer and Saunders v Southend-on-Sea BC the headnote suggests: "As the authorities also make clear, the answer to that question is pre-eminently an issue of fact for the Industrial Tribunal taking all the circumstances of the given case into account, and it is seldom that an appeal from its decision will lie. Dependent upon the circumstances of the particular case, in determining whether or not it was reasonably practicable to present the complaint in time, an Industrial Tribunal may wish to consider the substantial cause of the employee's failure to comply with the statutory time limit; whether he had been physically prevented from complying with the limitation period, for instance by illness or a postal strike, or something similar. It may be relevant for the Tribunal to investigate whether, at the time of dismissal, and if not when thereafter, the employee knew that he had the right to complain of unfair dismissal; in some cases the Tribunal may have to consider whether there was any misrepresentation about any relevant matter by the employer to the employee. It will frequently be necessary for the Tribunal to know whether the employee was being advised at any material time and, if so, by whom; the extent of the advisor's knowledge of the facts of the employee's case; and of the nature of any advice which they may have given him. It will probably be relevant in most cases for the Industrial Tribunal to ask itself whether there was any substantial failure on the part of the employee or his adviser which led to the failure to comply with the time limit. The Industrial Tribunal may also wish to consider the manner in which and the reason for which the employee was dismissed, including the extent to which, if at all, the employer's conciliatory appeals machinery had been used. Contrary to the argument advanced on behalf of the appellants in the present case and the obiter dictum of Kilner Brown J in Crown Agents for Overseas Governments and Administrations v Lawal [1978] IRLR542, however, the mere fact that an employee was pursuing an appeal through the internal machinery does not mean that it was not reasonably practicable for the unfair dismissal application to be made in time. The views expressed by the EAT in Bodha v Hampshire Area Health Authority on this point were preferred to those expressed in Lawal:-
23. To this end the Tribunal should consider: (1) the substantial cause of the claimant's failure to comply with the time limit; (2) whether there was any physical impediment preventing compliance, such as illness, or a postal strike; (3) whether, and if so when, the claimant knew of his rights; (4) whether the employer had misrepresented any relevant matter to the employee; and (5) whether the claimant had been advised by anyone, and the nature of

- any advice given; and whether there was any substantial fault on the part of the claimant or his adviser which led to the failure to present the complaint in time.
24. In addition, in Palmer and Saunders v Southend-on-Sea BC, and following its general review of the authorities, the Court of Appeal (per May LJ) concluded that "reasonably practicable" does not mean reasonable (which would be too favourable to employees), and does not mean physically possible (which would be too favourable to employers) but means something like "reasonably feasible".
 25. Subsequently in London Underground Ltd v Noel, Judge LJ stated at paragraph 24 "The power to disapply the statutory period is therefore very restricted. In particular it is not available to be exercised, for example, "in all the circumstances", nor when it is "just and reasonable", nor even where the Tribunal "considers that there is a good reason" for doing so. As Browne Wilkinson J (as he then was) observed: "The statutory test remains one of practicability ... the statutory test is not satisfied just because it was reasonable not to do what could be done" (Bodha v Hampshire Area Health Authority [1982] ICR 200 at p 204).
 26. Underhill P as he then was considered the period after the expiry of the primary time limit in Cullinane v Balfour Beattie Engineering Services Ltd. However, in this case the claimant issued these proceedings the day after the primary time limit expired and this is not therefore a case where it can be argued that if it was not reasonably practicable to have issued within the primary time limit, the claim was not then issued within such further period as was reasonable.
 27. In conclusion therefore: (1) the substantial cause of the claimant's failure to comply with the time limit was a combination of her mistaken understanding of the exact time limit and her initial decision not to proceed; (2) there was no physical impediment preventing compliance, such as her illness, or a postal strike; (3) the claimant knew of her rights within the three month limitation period, and the need to make contact with ACAS in order to proceed; (4) it cannot be said that the respondent had in any way misrepresented any relevant matter to the claimant; and (5) it cannot be said that there was any substantial fault on the part of any adviser which led to the failure to present the complaint in time.
 28. In my judgment it was reasonably practicable, in the sense that it was reasonably feasible, for the claimant to have presented these proceedings within the limitation period, with the help of her husband if necessary. The burden of proof is on the claimant, and she has given no adequate explanation as to why it was possible for the claimant to present these proceedings on 2 July 2020, being one day out of time, rather than say the day before on 1 July 2020, or earlier, which would have been within time. Accordingly, I conclude that the claimant's remaining claim of unfair dismissal was presented out of time, and it is hereby dismissed.
 29. For the purposes of Rule 62(5) of the Employment Tribunals Rules of Procedure 2013, the issues which the tribunal determined are at paragraph 1; the findings of fact made in relation to those issues are at paragraphs 4 to 13; a concise identification of the relevant law is at paragraphs 15 to 26; how that law has been applied to those findings in order to decide the issues is at paragraphs 27 and 28.

Employment Judge N J Roper
Date: 8 April 2021

Judgment sent to Parties: 21 April 2021

FOR THE TRIBUNAL